

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/STOP PRESS: CHILD MAINTENANCE AND OTHER PAYMENTS ACT 2008

## **SOCIAL SECURITY AND PENSIONS (**

### **STOP PRESS:**

The Child Maintenance and Other Payments Act 2008 establishes the Child Maintenance and Enforcement Commission, amends the law relating to child support, and makes provision about lump sum payments to or in respect of persons with diffuse mesothelioma. The Act received the royal assent on 5 June 2008 and the following provisions came into force on that day: ss 55, 59 (in part), 61-63. Section 35 came into force on 6 June 2008. The following provisions came into force on 10 June 2008: ss 56, 57 (in part), 59, 60 (in part) (SI 2008/1476). Further provisions came into force on 10 June 2008 for certain purposes only: ss 1, 46 (in part), 47 (in part), 48 (in part), 49 (in part), 50 (in part), 53, 54, Sch 1 (SI 2008/1476). The following provisions came into force on 14 July 2008: ss 15, 45, Sch 7 (in part), Sch 8 (in part) (SI 2008/1476). Further provisions came into force on 24 July 2008: ss 1, 2, 3 (in part), 4-12 (SI 2008/2033). Section 43 came into force on 5 August 2008: SI 2008/2033. Further provisions came into force on 1 October 2008: ss 46-54 (SI 2008/1476). Further provisions came into force on 6 April 2010: s 24, Sch 7 para 3 (SI 2010/697). The remaining provisions come into force on a day or days to be appointed. For details of commencement, see the COMMENCEMENT OF STATUTES table in the Current Service Noter-up booklet.

### ***Part 1 (ss 1-12) The Child Maintenance and Enforcement Commission***

Section 1, Sch 1 provide that there will be a new body corporate called the Child Maintenance and Enforcement Commission and set out how the Commission will be structured. Section 2 sets out the main objective of the Commission, which is to maximise the number of effective child maintenance arrangements in place, and also sets out two subsidiary objectives, which are to encourage and support parents to make and keep their own maintenance arrangements, and to support the making of applications for child support maintenance under the Child Support Act 1991 and to enforce maintenance arrangements made under that Act where appropriate. The 2008 Act s 3 sets out that the Commission has functions relating to child support transferred to it from the Secretary of State, and any other functions conferred under this Act or other legislation. By virtue of s 4, the Commission is under a duty to take such steps as it considers appropriate to raise awareness among parents of the importance of taking responsibility for the maintenance of their children and if they live apart, making appropriate maintenance arrangements. Section 5 places a duty on the Commission to provide relevant information and guidance to help establish effective and appropriate maintenance arrangements for children who live apart from one or both of their parents. Under s 6, the Secretary of State has regulation-making powers to enable the Commission to charge fees in connection with the exercise of its functions. The Commission may make arrangements with a government department or prescribed public body, for the functions of one of them to be exercised on their behalf by the other, or for one to provide administrative, professional or technical services to the other: s 7. By virtue of s 8, the Commission may contract out any of its functions to another person or organisation. Section 9 requires the Commission to produce a report for each financial year, which must deal with the activities of the Commission in the financial year for which it is prepared, and include the report prepared by the non-executive functions committee. Under s 10, the Secretary of State may give written guidance and

directions to the Commission regarding the exercise of its functions. Section 11 sets out that the Secretary of State must review the status of the Commission as a Crown body, as soon as is reasonably practicable after the end of an initial three-year period, and may review any other time after that if he considers it appropriate. Section 12 sets out the definition of 'child' for these purposes and makes provision for the Secretary of State to make regulations about when a child is to be regarded as living apart from a parent.

### ***Part 2 (ss 13, 14) Transfer of child support functions etc to the Commission***

Section 13, Schs 2, 3 transfer most of the functions under the Child Support Act 1991 from the Secretary of State to the Commission, including functions relating to calculation, collection and enforcement. By virtue of the 2008 Act s 14, the Secretary of State may make one or more schemes to transfer property, rights and liabilities which he is entitled or subject, in connection with the transferred functions, or under arrangements entered into in preparation for the coming into force of the Commission's functions.

### ***Part 3 (ss 15-45) Child support etc***

Section 15 repeals the Child Support Act 1991 ss 6, 46. The 2008 Act s 16, Sch 4 amend legislation regarding how maintenance calculations are performed. Section 17 provides a regulation-making power to the Secretary of State in relation to the supersession of decisions. By virtue of s 18, the Commission must, on receipt of an application from a person with care to vary a maintenance calculation, consider any information or evidence that is available to it or take steps to obtain further information or evidence, if it appears that further information would affect a decision to vary a maintenance calculation. Section 19, Sch 5 make provision for the movement of existing cases onto the new calculation rules and provide that the Commission may require the parties in existing cases to choose whether to remain in the statutory scheme under the new calculation rules or to leave the scheme as far as future liability is concerned. Section 20 makes it clear that regulations as to the method by which payments of child support maintenance are to be made can include deduction from earnings orders as an initial method of collection. What will be considered as 'earnings' for the purpose of deduction from earnings orders is defined by s 21. Section 22 enables the Commission to deduct child support maintenance from the non-resident parent's account. Provision made by s 23 relates to lump sum deduction orders, which enable the Commission to collect payments from a non-resident parent's account held with a deposit-taker, or from money due or accruing to them from a third party; such orders may be used only to collect arrears and not ongoing maintenance. By virtue of s 24, the Commission may apply to a court to prevent a non-resident parent who has failed to pay maintenance from disposing of or transferring property, if it is being done to avoid paying child support maintenance. Section 25 introduces a new liability order which will be made administratively by the Commission and which will certify the amount owed by the non-resident parent, and will be the first step to enforcement action. Section 26 removes the requirement that an order from a county court needs to be obtained before an application for a charging order or a third party debt order can be made; such an application can now be made where an administrative liability order has been made. Under s 27, the Commission has the power to apply to a court to disqualify a non-resident parent for holding or obtaining a travel authorisation. The Commission also has the power to apply to a magistrates' court for a curfew order to be made against a non-resident parent who fails to pay maintenance: s 28. By virtue of s 29, the Commission may make a separate application to a magistrates' court to commit a non-resident parent to prison for failure to pay child support maintenance. Section 30 enables the Commission to make a separate application to a magistrates' court to disqualify a non-resident parent for holding or obtaining a driving licence if they fail to pay child support maintenance. Section 31 provides the Secretary of State with regulation-making powers enabling the Commission to offset liabilities to pay child support maintenance, including

arrears, in prescribed circumstances. Under ss 32, 33, the Commission may accept partial payments of maintenance arrears from a non-resident parent in final settlement of the whole arrears, and may write off arrears in certain circumstances. Section 34 provides regulation-making power to the Secretary of State, to enable the Commission to enter into arrangements with other persons or organisations under which liability in respect of arrears of child support maintenance becomes debt due to such a person or organisation. Section 35 applies in relation to Scotland and relates to registered maintenance agreements. Provision dealing with offences relating to the provision of information is made by s 36. Section 37 allows for the offset of maintenance liabilities where two parents of the same children each have care for one or more of those children. By virtue of s 38, the Secretary of State has the power to make regulations to enable arrears of child support maintenance to be recovered from the estate of a deceased non-resident parent. Section 39 enables a party to family proceedings to disclose information relating to those proceedings to the Commission or to a person providing services to the Commission without such a disclosure being a contempt of court, unless a court dealing with the proceedings directs that the section does not apply. Provision made by s 40 relates to the disclosure of information to credit reference agencies. Section 41 enables the power to pilot any regulation-making power under the 1991 Act. The definition of 'child' in the 1991 Act is substituted by the 2008 Act s 42. Section 43 provides for the write off of outstanding liability in respect of interest and fees. Information sharing gateways are set out by s 44, Sch 6. Section 45 amends the provisions concerning liable relatives and the exclusion of the parental duty to maintain contained in the Social Security Administration Act 1992.

#### ***Part 4 (ss 46-54) Lump sum payments: mesothelioma etc***

Section 46 provides for the Secretary of State to make a lump sum payment to either a person with diffuse mesothelioma, or to their dependant if the person with diffuse mesothelioma is deceased. The conditions that must be satisfied by persons with mesothelioma, and by a dependant of a person who, immediately before their death, suffered from mesothelioma in order for a lump sum payment to be made are set out by s 47. Section 48 sets out how a claim for a lump sum payment is to be made. By virtue of s 49, the Secretary of State may reconsider a decision not to make a lump sum payment where there is a change in circumstances that may affect the claim since the decision was taken, or a decision to make or not to make a lump sum payment if the original decision was made in ignorance or based on error about the facts of the case. A person who has made a claim for a payment under s 46, will have a right of appeal to an appeal tribunal against a decision made by the Secretary of State on the claim, or a decision made following a reconsideration: s 50. Section 51 provides a right of appeal to a Social Security Commissioner against any decision of an appeal tribunal under s 50, on the ground that the decision was wrong in law. Section 52 concerns how lump sum payments are to be made to a person under the age of 18, or a person who lacks capacity within the meaning of the Mental Capacity Act 2005 in relation to financial matters. By virtue of the 2008 Act s 53, the Secretary of State has the power to make regulations by statutory instrument, which includes power to make such incidental, supplementary or transitional power as the Secretary of State thinks fit. The Social Security (Recovery of Benefits) Act 1997 is amended by the 2008 Act s 54 so as to provide the Secretary of State with powers to make regulations providing for the recovery of lump sum payments made under the Pneumoconiosis etc (Workers' Compensation) Act 1979, the new scheme or those made on an extra-statutory basis following the rejection of a claim made under that Act.

#### ***Part 5 (ss 55-63) General***

Section 55 provides that, where the Secretary of State is empowered to make regulations, these are to be made by statutory instrument. Section 56 deals with interpretation, and s 57, Sch 7 contain minor and consequential amendments. Repeals are dealt with by s 58, Sch 8, and

s 59 makes transitional provision. Financial provision is made by s 60. Section 61 deals with extent, s 62 makes provision for commencement, and s 63 specifies the short title.

***Amendments, repeals and revocations***

Subscribers should note that the list below mentions repeals and amendments which are or will be effective when the Act is fully in force. Please refer to the top of this summary for details of the in-force dates of the provisions of the Act. Please also note that this list is not exhaustive.

Specific provisions of the Child Support Act 1991 are repealed: ss 4(9), (11), 6, 11(3)-(5), 33, 34, 37, 39A, 46, 47, 50(5), Sch 2. The following provisions are added to the 1991 Act: ss 32A-32N, 39B-39Q, 41C-41E, 43A, 49A, 49B-49D, 51A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/STOP PRESS: PENSIONS ACT 2008

## **STOP PRESS:**

The Pensions Act 2008 makes provision relating to pensions. The Act received the royal assent on 26 November 2008 and the following provisions came into force on that day: ss 67-73, 78-86, 124 (in part), 125, 131, 133, 134, 140-147, 148 (in part), 149-151, Schs 9 (in part), 11 (in part). Section 124 (in part) came into force on 19 December 2008: SI 2008/3241. The 2008 Act ss 62-64, 132, 138 came into force on 26 January 2009: SI 2009/82. The 2008 Act ss 100, 101 (in part), 105, 130, 135, 136, 139, 148 (in part), Schs 2 (in part), 11 (in part) came into force on 6 April 2009: SI 2009/82. The 2008 Act s 122 (in part), Schs 8 (in part) and 14 (in part) came into force on 1 April 2009: SI 2009/809. The 2008 Act s 101 (in part) and Sch 2 (in part) came into force on 6 April 2009: SI 2009/809. The 2008 Act s 126 (in part), Sch 9 (in part) came into force on 29 June 2009: SI 2009/1566. The 2008 Act s 74 came into force on 1 July 2009: SI 2009/1566. The 2008 Act Sch 10 (in part) came into force on 26 February 2010: SI 2010/467. The 2008 Act s 103 (in part) came into force on 8 April 2010: SI 2010/1221. The 2008 Act Sch 10 (in part) came into force on 26 February 2010: SI 2010/467. The 2008 Act s 124 (in part, so far as not already in force) came into force on 31 March 2010: SI 2010/1145. The 2008 Act s 103 (in part) came into force on 8 April 2010: SI 2010/1221. The 2008 Act ss 75 (so far as not already in force), 76, 99, Sch 1 (so far as not already in force) comes into force on 5 July 2010: SI 2010/10. For details of commencement, see the COMMENCEMENT OF STATUTES table in the *Current Service* Noter-up booklet.

### ***Part 1 (ss 1-99) Pension scheme membership for jobholders***

#### *Chapter 1 (ss 1-33) Employers' duties*

Section 1 defines 'jobholder'. If a jobholder is an active member of a qualifying scheme, the employer must not take any action, or make any omission, by which the jobholder ceases to be an active member of the scheme, or the scheme ceases to be a qualifying scheme: s 2. Under s 3, the employer must make prescribed arrangements by which the jobholder becomes an active member of an automatic enrolment scheme with effect from the automatic enrolment date, which is the first day on which s 3 applies to any person as a jobholder of the employer. Section 4 provides that the Secretary of State may by regulations provide that in prescribed cases the automatic enrolment date is a later date. The employer must make prescribed arrangements by which the jobholder becomes an active member of an automatic enrolment scheme with effect from the automatic re-enrolment date: s 5. Section 6 deals with the timing of automatic re-enrolment. A jobholder who is not an active member of a qualifying scheme, may by notice require the employer to arrange for the jobholder to become an active member of an automatic enrolment scheme: s 7. If the jobholder gives notice under s 8, the jobholder is to be treated for all purposes as not having become an active member of the scheme on that occasion and any contributions paid by the jobholder, or by the employer on behalf or in respect of the jobholder, on the basis that the jobholder has become an active member of the scheme on that occasion must be refunded in accordance with prescribed requirements: s 8. Section 9 provides that a worker without qualifying earnings may by notice require the employer to arrange for the worker to become an active member of a pension scheme that satisfies the requirements of s 9. Under s 10, the Secretary of State must make provision by regulations for all jobholders to be given information about the effect of these provisions. Section 11 specifies the information to be given to the Pensions Regulator. The Secretary of State may by regulations provide that ss 2-9 do not apply in the case of an employer of any description until such date after the commencement of ss 2-9 as is prescribed in relation to

employers of that description: s 12. A person's qualifying earnings in a pay reference period of 12 months are the part of the gross earnings payable to that person in that period that is more than £5,035 and not more than £33,540: s 13. Section 14 provides that the Secretary of state must in each tax year undertake a review of the qualifying earnings band. The Secretary of State may by regulations make provision for determining a person's earnings in any pay reference period and make provision for determining the first date of each pay reference period in relation to a person: s 15. Section 16 defines what a qualifying scheme is in relation to a jobholder. Section 17 specifies what an automatic enrolment scheme is in relation to a jobholder. An occupational pension scheme is defined, for the purposes of Pt 1, by s 18. For the purposes of Pt 1, a personal pension scheme is a pension scheme that is not an occupational pension scheme: s 19. A money purchase scheme that has its main administration in the United Kingdom satisfies the quality requirement in relation to a jobholder if under the scheme certain conditions are met: see s 20. Subject to specified conditions, a defined benefits scheme that has its main administration in the United Kingdom satisfies the quality requirement in relation to a jobholder if the jobholder is in contracted-out employment: s 21. A scheme satisfies the test scheme standard in relation to a jobholder if the pensions to be provided for the relevant members of the scheme are broadly equivalent to or better than the pensions which would be provided for them under a test scheme: s 22. Section 23 provides that a test scheme is an occupational pension scheme which satisfies certain requirements. A hybrid scheme that has its main administration in the United Kingdom satisfies the quality requirement in relation to a jobholder if it satisfies either the requirements for a money purchase scheme under s 20, subject to any prescribed modifications or the requirements for a defined benefits scheme under ss 21-23, subject to any prescribed modifications: s 24. The Secretary of State may by regulations make provision as to the quality requirement to be satisfied in the case of certain occupational pension schemes: s 25. Section 26 provides the conditions which are to be met for the scheme to satisfy the quality requirement in relation to a jobholder. The Secretary of State may by regulations make provision as to the quality requirement to be satisfied in the case of a personal pension scheme to which s 26 does not apply: s 27. Section 28 provides for certification that the quality requirement is satisfied. Section 29 provides for transitional periods for money purchase and personal pension schemes. A transitional period for defined benefits and hybrid schemes is prescribed by s 30. Where a jobholder is an active member of a qualifying scheme and a freezing event occurs in relation to the scheme, the jobholder does not, for the purposes of ss 1-33, cease to be an active member of the scheme, and the scheme does not, for those purposes, cease to be a qualifying scheme, by virtue of any relevant provision: s 31. The trustees of an occupational pension scheme may by resolution modify the scheme: s 32. Section 33 deals with the deduction of contributions to a scheme from a person's remuneration.

### *Chapter 2 (ss 34-49) Compliance*

Contravention of any of the employer duty provisions does not give rise to a right of action for breach of statutory duty: s 34. Under s 35, the Regulator may issue a compliance notice to a person if the Regulator is of the opinion that the person has contravened one or more of the employer duty provisions. The Regulator may issue a third party compliance notice if it is of the opinion that a person has contravened one or more of the employer duty provisions, the contravention is or was, wholly or partly, a result of a failure of another person to do any thing, and that failure is not itself a contravention of any of the employer duty provisions: s 36. The Regulator may issue an unpaid contributions notice to an employer if it is of the opinion that relevant contributions have not been paid on or before the due date: s 37. Section 38 makes provision as to the calculation and payment of contributions in relation to a compliance notice issued to an employer in respect of a contravention with regard to continuity of scheme membership, a failure to comply with an enrolment duty or an unpaid contributions notice. Section 39 defines 'relevant contributions'. Section 40 specifies the circumstances under which the Regulator may issue a fixed penalty notice to a person. Further, in specified circumstances, the Regulator may issue an escalating penalty notice to a person: s 41. Any penalty payable

under s 40 or s 41 is recoverable by the Regulator: s 42. Under s 43, the Regulator may review a notice to which s 43 applies on the written application of the person to whom the notice was issued or if the Regulator otherwise considers it appropriate. A person to whom a notice is issued under s 40 or s 41 may, if certain conditions are satisfied, make a reference to the Pensions Regulator Tribunal in respect of the issue of the notice or the amount of the penalty payable under the notice: s 44. Section 45 provides for offences of failing to comply. Section 46 deals with offences by bodies corporate. Proceedings for an offence under s 45 alleged to have been committed by a partnership or an unincorporated association may be brought in the name of the partnership or association: s 47. Section 48 provides for offences of providing false or misleading information. In relation to the monitoring of employers' payments to personal pension schemes, see s 49.

### *Chapter 3 (ss 50-59) Safeguards: employment and pre-employment*

An employer contravenes s 50 if any statement made or question asked by or on behalf of the employer for the purposes of recruitment indicates that an application for employment with the employer may be determined by reference to whether an applicant might opt out of automatic enrolment: s 50. The Regulator may issue a compliance notice to an employer if the Regulator is of the opinion that the employer has contravened s 50: s 51. Under s 52, the Regulator may issue a penalty notice to an employer if the Regulator is of the opinion that the employer has contravened s 50, or has failed to comply with a compliance notice under s 51. As to the review of notices and references to the Pensions Regulator Tribunal see s 53. An employer contravenes s 54 if the employer takes any action for the sole or main purpose of inducing a worker to give up membership of a relevant scheme without becoming an active member of another relevant scheme within the prescribed period or inducing a jobholder to give a notice under s 8 without becoming an active member of a qualifying scheme within the prescribed period: s 54. Section 55 provides for the right not to suffer detriment. A worker may present a complaint to an employment tribunal that the worker has been subjected to a detriment in contravention of s 55: s 56. The right of an employee not to be unfairly dismissed is provided: s 57. Under s 58, any provision in any agreement is void in so far as it purports to exclude or limit the operation of any provision of Pt 1, or to preclude a person from bringing proceedings under s 56 before an employment tribunal. Section 59 makes provision as to the jurisdiction of the Employment Appeal Tribunal.

### *Chapter 4 (ss 60-66) Supplementary provision about compliance and information-sharing*

Section 60 provides the requirement to keep records. Under s 61, the Regulator has powers to require information and to enter premises. Section 62 substitutes the Pensions Act 2004 s 88 so as to provide for the disclosure of tax information. As to information for private pensions policy and retirement planning, see the 2008 Act s 63. Section 64 provides a penalty for disclosure. Section 65 makes provision in relation to the Regulator's objectives to maximise compliance with duties, and s 66 deals with the functions of the Pensions Ombudsman.

### *Chapter 5 (ss 67-78) Duty to establish a pension scheme*

The Secretary of State is required by s 67 to establish a pension scheme and to make provision for its administration and management. An order under s 67 establishing a scheme must provide for the trustee corporation to be a trustee on the coming into force of the scheme: s 68. Section 69 provides that if an order under s 67 establishes a scheme, the Secretary of State must by order under s 67 require the trustees to make and maintain arrangements for consulting the members of the scheme and participating employers about the operation, development and amendment of the scheme. An order under s 67 must prescribe the maximum amount of contributions that may be made by or in respect of a member in any tax year: s 70. The Secretary of State may not make any order under s 67 relating to a scheme, except the order establishing the scheme and an order taking effect at the same time as that order, without the consent of the trustees: s 71. Under s 72, a person who proposes to make rules under s 67 must publish a draft of the rules and invite comments. The Interpretation Act

1978 applies in relation to rules under the 2008 Act s 67 as if they were contained in a deed not made under an enactment: s 73. Section 74 provides that the Secretary of State must appoint a person to review, in relation to a scheme established under s 67, the effect of provision made under s 70, the effect of any restrictions on rights to transfer into the scheme or transfer out to another pension scheme and such other matters as the Secretary of State may direct. Section 75, Sch 1 establish the body corporate known as the trustee corporation. The functions of the trustee corporation are to act as a trustee of any scheme established under s 67 and any other functions it is given by or under an enactment in connection with the scheme: s 76. The Secretary of State may by regulations provide that legislation applying in relation to a person as trustee of a pension scheme, or as director of a company which is a trustee of a pension scheme, applies in relation to the trustee corporation, or its members, with any modifications prescribed in the regulations: s 77. Section 78 provides interpretation for ss 67-78.

#### *Chapter 6 (ss 79-86) Personal Accounts Delivery Authority*

Section 79 specifies the functions of the Personal Accounts Delivery Authority. The Authority must have regard to certain principles including that participation in qualifying schemes should be encouraged and facilitated, the burdens imposed on employers as a result of Pt 1 should be minimised and the cost of membership of a scheme established under s 67 should be minimised: s 80. The Secretary of State may give the Authority guidance or directions about the discharge of its functions: s 81. Section 82 amends the Pensions Act 2007 Sch 6 in order to provide that the Secretary of State may, with the consent of the Treasury, give financial assistance to the Authority. The 2008 Act s 83 makes provision as to the disclosure of information by the Regulator. Section 84 makes provision in relation to the non-executive committee of the Authority. The 2007 Act Sch 6 is amended in relation to executive members: 2008 Act s 85. Section 86 provides that the Secretary of State may by order provide for the winding up and dissolution of the Authority.

#### *Chapter 7 (s 87) Stakeholder pension schemes*

Section 87 makes provision in relation to stakeholder pension schemes.

#### *Chapter 8 (ss 88-99) Application and interpretation*

Section 88 interprets 'employer', 'worker' and related expressions for the purposes of Pt 1. Section 89 makes provision as to agency workers. A person who holds office as a director of a company is not, by virtue of that office or of any employment by the company, a worker for the purposes of Pt 1, unless the person is employed by the company under a contract of employment and there is at least one other person who is employed by the company under a contract of employment: s 90. Section 91 makes provision with regard to crown employment. A person serving as a member of the naval, military or air forces of the Crown is not, by virtue of anything done in assisting those activities, a worker for the purposes of Pt 1: s 92. Section 93 provides that Pt 1 has effect in relation to employment as a relevant member of the House of Lords staff as it has effect in relation to other employment. Part 1 has effect in relation to employment as a relevant member of the House of Commons staff as it has effect in relation to other employment (s 94) and in relation to a person who holds the office of constable or an appointment as a police cadet, and does not hold that office or appointment under a contract of employment, as if the person were employed by the relevant police authority under a worker's contract (s 95). Subject to regulations under s 96, a person employed or engaged in any capacity on board a ship is not, by virtue of that employment or engagement, a worker for the purposes of Pt 1: s 96. Her Majesty may by Order in Council provide that, to the extent and for the specified purposes, the relevant provisions apply, with or without modification, in relation to a person in offshore employment: s 97. Section 98 provides for the extension of the definition of worker, and s 99 provides for the interpretation of Pt 1.

### ***Part 2 (ss 100-106) Simplification etc***

Safeguarded rights are abolished: s 100. Section 101, Sch 2 make provision as to the revaluation of accrued benefits. Section 102, Sch 3 make provision as to the consolidation of additional pension. Section 103 deals with the effect of entitlement to guaranteed minimum pensions. Section 104, Sch 4 make minor and consequential amendments in relation to additional pension. Section 105 provides for the extension of the assessed income period for those aged 75 or over in relation to state pension credit. As from the contracting-out abolition date, pension schemes are not required to make special provision in relation to the protected rights of members: s 106.

### ***Part 3 (ss 107-123) Pension compensation***

#### ***Chapter 1 (ss 107-120) Pension compensation on divorce etc***

Pension compensation sharing is available under ss 107-120 in relation to a person's shareable rights to PPF compensation: s 107. Section 108 provides the interpretation for ss 107-120; in particular, 'PPF compensation' means compensation payable under the pension compensation provisions. Section 109 deals with the activation of pension compensation sharing. For the purposes of ss 107-120, a qualifying agreement is an agreement which has been entered into in such circumstances as the Secretary of State may prescribe by regulations, and is registered in the Books of Council and Session: s 110. Section 111 provides for the creation of pension compensation debits and credits. The Secretary of State may by regulations make provision about the calculation and verification of cash equivalents for the purposes of s 111: s 112. Where any of a person's shareable rights to PPF compensation are subject to a pension compensation debit, each payment or future payment to which the person is entitled under the pension compensation provisions by virtue of those rights and which is a qualifying payment is reduced by the appropriate percentage: s 113. Under s 114, where the Board is subject to a liability in respect of a pension compensation credit, it must discharge the liability before the end of the implementation period for the credit. Section 115 defines 'implementation period'. Where the Board is subject to a liability in respect of a pension compensation credit, it must discharge the liability by sending a notice to the transferee: s 116, Sch 5. The Secretary of State may by regulations make provision for the purpose of enabling the Board to recover from the parties to pension compensation sharing prescribed charges in respect of prescribed descriptions of pension compensation sharing activity: s 117. Section 118 concerns the supply of information about pension compensation in relation to divorce. The Secretary of State may by regulations require the Board to supply, to such persons as the Secretary of State may specify in the regulations, such information relating to anything which follows from the application of s 111 as the Secretary of State may so specify: s 119. Section 120, Schs 6, 7 make provision as to pension compensation sharing and attachment on divorce.

#### ***Chapter 2 (ss 121-123) Other provision about pension compensation***

Section 121 makes provision with regard to charges in respect of pension sharing. Section 122, Sch 8 amend the 2004 Act Sch 7, and the 2008 Act s 123 makes consequential amendments.

### ***Part 4 (ss 124, 125) Financial assistance scheme***

Section 124 amends the financial assistance scheme for members of certain pension schemes, and s 125 places a restriction on the purchase of annuities.

### ***Part 5 (ss 126-142) Miscellaneous***

Section 126, Sch 9 make amendments to provisions relating to contribution notices or financial support directions. Section 127 provides for the review of the initial operation of the 2004 Act

ss 38A, 38B. The 2008 Act s 128 applies to Scotland. Section 129, Sch 10 make provision about the payment of interest on the late payment of levies. Section 130 concerns payments to employers. Section 131 makes provision as to the appointment of trustees. Under s 132, there may be intervention by the Regulator where a scheme's technical provisions are improperly determined. Section 133 makes provision as to the delegation of powers by the Regulator. Section 134 provides for the exclusion of transfers out in certain cases. Provision is made by s 135 for the right to pay additional Class 3 contributions in certain cases. Section 136 applies to Northern Ireland. Section 137 provides for the adjustment of increases in survivors' pension in relation to official pensions. Section 138 makes provision as to the effect of later marriage or civil partnership in relation to war pensions. With regard to the Polish Resettlement Act 1947, the 2008 Act s 139 makes provision as to the effect of residence in Poland. Sections 140, 141 deal with pre-1948 insurance affecting German pension entitlement. The Secretary of State may by regulations make provision authorising the Secretary of State, or a person providing services to the Secretary of State, to supply relevant persons with social security information about persons in receipt of state pension credit: s 142.

### ***Part 6 (ss 143-151) General***

Any power conferred on the Secretary of State to make an order or regulations under the 2008 Act is exercisable by statutory instrument: s 143. An order or regulations may include any such incidental, supplemental, consequential or transitional provision as appears to the Secretary of State to be expedient, or provision conferring a discretion on any person: s 144. Section 145 provides the power to make further provision. Under s 146, the Secretary of State may by order make pre-consolidation amendments of certain enactments. Section 147 deals with general financial provisions. Section 148, Sch 11 provide for repeals. Section 149 deals with commencement, s 150 with extent and s 151 with short title.

### ***Amendments, repeals and revocations***

Subscribers should note that the list below mentions repeals and amendments which are or will be effective when the Act is fully in force. Please refer to the top of this summary for details of the in-force dates of the provisions of the Act. Please also note that the list is not exhaustive.

Specific provisions of a number of Acts are added, amended or repealed. These include: Polish Resettlement Act 1947 s 1; Matrimonial Causes Act 1973 ss 21B, 21C, 24E-25A, 25E-25G, 31, 40B; Matrimonial and Family Proceedings Act 1984 ss 17, 18, 21; Social Security Contributions and Benefits Act 1992 ss 13A, 21, 39, 39C, 45, 47; Trade Union and Labour Relations (Consolidation) Act 1992 ss 237, 238; Social Security Administration Act 1992 s 148AB. Pension Schemes Act 1993 ss 46-48, 93, 146, 164, 165, 167, 175A, Sch 3; Pensions Act 1995 ss 7, 168; Employment Rights Act 1996 ss 104D, 105, 108; Employment Tribunals Act 1996 s 21; Social Security Act 1998 s 3; State Pension Credit Act 2002 s 9; Pensions Act 2004 ss 5, 38, 39A, 43A, 72, 74-76, 82, 88, 168A, 173, 286, 286A, 316, 323, Schs 1, 2, 7, 10; Civil Partnership Act 2004 Sch 5; Pensions Act 2007 s 23.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/STOP PRESS: SAVING GATEWAY ACCOUNTS ACT 2009

## **STOP PRESS:**

The Saving Gateway Accounts Act 2009 makes provision relating to Saving Gateway accounts. The Act received the royal assent on 2 July 2009 and the following provisions came into force on that day: ss 29, 31-33. Sections 4(1), 5(1), 18, 23(1)(a), 24 (in part), 25 (in part) came into force on 1 January 2010: SI 2009/3332. Sections 1, 2(1) (in part), 2(2), (3), 3, 4(2)-(5), 5(2), 6-17, 19-22, 23(1)(b)-(e), (2)-(4), 24 (in remainder), 25 (in remainder), 26, 28, 30 came into force on 1 July 2010: SI 2010/921. Section 2(1) (in remainder) came into force on 1 March 2011: SI 2010/921.

Section 1 defines 'Saving Gateway account'. Section 2 provides that the Commissioners for Her Majesty's Revenue and Customs must issue a notice of eligibility to each eligible person. Section 3 provides that an 'eligible person' is a person entitled to one or more of the following benefits or tax credits and who has a connection with the United Kingdom of a kind prescribed by regulations: (1) income support; (2) employment and support allowance; (3) jobseeker's allowance; (4) incapacity benefit; (5) severe disablement allowance; (6) a carer's allowance under the Social Security Contributions and Benefits Act 1992 s 70; (7) child tax credit; and (8) working tax credit. A Saving Gateway account may be held only with a person (an 'approved account provider') who has been approved by the Commissioners in accordance with regulations: 2009 Act s 4. Regulations under s 4 may include provision enabling the Commissioners to impose conditions on an approved account provider and to withdraw approval of an account provider: s 5. Under s 6, a person who receives a notice of eligibility may apply to open a Saving Gateway account with an approved account provider. Regulations may make provision about the circumstances in which a Saving Gateway account held with one account provider may be transferred to another and the procedure to be followed on a transfer: s 7. Section 8 provides that the maturity payment in relation to a Saving Gateway account is to be calculated by multiplying A by B where A is the number of whole pounds in the qualifying balance of the account and B is an amount of money, in pence, specified in regulations. Regulations may make provision requiring an account provider to send statements of account to the holder of a Saving Gateway account, specify the form and content of a statement and specify how often a statement is to be sent: s 9. By virtue of s 10 an account may cease to be a Saving Gateway account. Under s 11 a person who is or was an approved account provider may be required to submit returns of information relating Saving Gateway accounts, or former Saving Gateway accounts, to the Commissioners. Section 12 deals with the recovery of payments by the Commissioners. Regulations may provide for interest to be payable, in prescribed circumstances, on any amount payable to the Commissioners under or by virtue of the 2009 Act: s 13. Section 14 makes provision for relief from income tax and capital gains tax. A Saving Gateway account to which s 15 applies is to be treated as an alternative finance arrangement. Section 16 deals with the transfer of funds on an account ceasing to be a Saving Gateway account. Section 17 makes provision for information to be supplied by relevant persons. Section 18 enables information held by the Department of Work and Pensions to be supplied to the Commissioners for the purposes of the Saving Gateway. Section 19 concerns penalties for giving incorrect information. Section 20 specifies penalties for the failure to submit a return. Section 21 makes provision for penalties incurred for non-compliance by an account provider. Section 22 concerns decisions and notices regarding penalties. A person may appeal against a decision by the Commissioners (a) not to approve the person as an approved account provider; (b) to withdraw the person's approval; (c) not to pay to the person an amount claimed; (d) not to issue a notice of eligibility to the person; (e) that an account held by the person is not a Saving Gateway account: s 23. Notice of an appeal under s 23 must be given to

the Commissioners within 30 days after the date on which notice of the decision was given: s 24. Section 25 concerns jurisdiction and powers of the relevant tribunal on appeals. The Commissioners must make arrangements for an independent review of the effect of Saving Gateway accounts: s 26. Section 27 concerns Northern Ireland. Any power to make an order or regulations under the 2009 Act is exercisable by the Treasury by statutory instrument: s 28. Section 29 provides that any expenditure incurred by the Commissioners by virtue of the 2009 Act is to be paid out of money provided by Parliament. Section 30 provides for interpretation. Section 31 deals with commencement, s 32 with extent and s 33 with short title.

### ***Amendments, repeals and revocations***

Subscribers should note that the list below mentions repeals and amendments which are or will be effective when the Act is fully in force. Please refer to the top of this summary for details of the in-force dates of the provisions of the Act. Please also note that the list is not exhaustive.

Specific provisions of a number of Acts are added, amended or repealed. These include: Social Security Administration Act 1992 s 121F; Social Security Administration (Northern Ireland) Act 1992 s 115E; Northern Ireland Act 1998 Sch 2 para 9B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/STOP PRESS: WELFARE REFORM ACT 2009

## **STOP PRESS:**

The Welfare Reform Act 2009 amends the law relating to social security, enables disabled people to be given greater control over the way in which certain public services are provided for them, amends the law relating to child support, and makes provision regarding the registration of births. The Act received the royal assent on 12 November 2009 and the following provisions came into force on that day: ss 11, 2, 8, 11, 23, 27, 29, 37, 57, 59-62, Sch 3. Sections 15, 24 (for certain purposes), 34, 38-50, 58(2), (3), Sch 4 (for certain purposes) and Sch 7 Pt 2 (in part) came into force on 12 January 2010: s 61; SI 2010/45. The following provisions came into force on 14 January 2010: s 55(1) (for certain purposes), s 55(3) (SI 2010/45). The following provisions came into force on 10 February 2010: ss 10, 33 (for certain purposes) and 35 (SI 2010/293). The following provisions came into force on 22 March 2010: s 26 and Sch 7 Pt 3 (in part) (SI 2010/293). The following provisions came into force on 1 April 2010: s 24 (so far as not already in force), Sch 4 (so far as not already in force), Sch 7 Pt 3 (SI 2010/45; SI 2010/293). The following provisions came into force on 6 April 2010: s 33 (SI 2010/293). The following provisions came into force on 11 April 2010: s 14 (for certain purposes) (SI 2010/293). The following provisions come into force on 15 October 2010: s 14 (for certain purposes) (SI 2010/293). The following provisions come into force on 11 April 2011: s 14 (for remaining purposes) (SI 2010/293). The remaining provisions come into force on a day or days to be appointed. For details of commencement, see the COMMENCEMENT OF STATUTES table in the Current Service Noter-up booklet.

### ***Part 1 (ss 1-37) Social security***

Section 1 enables the Secretary of State to impose a requirement on claimants of jobseeker's allowance to participate in schemes designed to assist them to obtain employment, and in particular to require claimants to undertake work as part of a 'work for your benefit' scheme. Under s 2, the Secretary of State may require lone parents in receipt of income support to undertake work-related activity in certain circumstances as a condition of continuing to receive the full amount of benefit. Section 2 also requires the Secretary of State to provide persons in receipt of specified benefits who are required to attend work-focused interviews with an action plan. Section 3 makes provision exempting specified categories of lone parents from the requirement to attend work-focused interviews and undertake work-related activity. Section 4, Sch 1 deal with the entitlement of certain claimants to jobseeker's allowance without seeking employment, and s 5 removes entitlement to income support and income-related employment and support allowance for couples where one member is capable of work. Section 6 enables the Secretary of State to permit persons in receipt of statutory sick pay to claim income-related employment and support allowance instead of income support. Section 7 makes transitional provision and s 8 deals with the Parliamentary procedure for regulations imposing work-related activity requirements on lone parents of children under seven. Provision is made for income support to be abolished when there are no longer any groups of people that require it: s 9, Sch 2. By virtue of s 10, the Secretary of State may specify a work-related activity which a claimant of employment and support allowance in the work-related activity group must undertake as a condition of continuing to be entitled to the full amount of his allowance. Section 11, Sch 3 provide for claimants of jobseeker's allowance and employment support allowance who are dependent on drugs, and ss 12, 13 amend the contribution conditions for jobseeker's allowance and contributory employment and support allowance. The entitlement conditions for the higher rate mobility component of disability living allowance are amended by s 14 so as to entitle

persons with a prescribed severe visual impairment, and s 15 abolishes the payment of adult dependency increases for all new claims for maternity allowance and carer's allowance. Under s 16, the Secretary of State may make arrangements with external providers to make loans to individuals who are receiving prescribed benefits or have prescribed needs ('external provider social loans'), and under s 17 he has power to restrict the availability of social fund loans in areas where external provider social loans are available. Section 18 deals with the supply of information in connection with external provider social loans. Sections 19, 20 provide that where goods and services covered by a community care grant are provided under arrangements that the Secretary of State has made with a supplier, he may require the grant to relate to specified goods or services and the payment of the grant to be made to that supplier. Section 21 provides for Parliamentary control of regulations relating to unauthorised disclosure of information in relation to external provider social loans or community care grants. By virtue of s 22, the Secretary of State may extend the range of situations in which payments of benefits on account can be made, and s 23 enables him to up-rate benefits for the tax year 2009-2010 even if the general level of prices has not increased. Section 24, Sch 4 extend the provisions relating to the loss of benefit where a claimant is convicted of benefit fraud, and s 25 introduces new benefit sanctions against claimants of jobseeker's allowance who are convicted of violent conduct in connection with their claim. A pilot scheme under which benefit sanctions have been applied to certain offenders who are in breach of specified community orders is brought to an end by s 26, and provision is made by s 27 for new pilot schemes for the calculation and payment of state pension credit to increase the number of eligible persons receiving the benefit. Section 28 extends the time limits for certain pilot schemes relating to working-age benefits, and s 29 provides for the exemption of victims of domestic violence from the jobseeking conditions of jobseeker's allowance for a prescribed period. Section 30 provides that where regulation-making powers in specified provisions enable circumstances to be prescribed that constitute good cause for failing to undertake mandatory activities, the regulations must always include the availability of childcare and the claimant's physical or mental health in the list of circumstances that must be taken into account. The well-being of children must be taken into account when agreeing the activities that a parent will undertake as part of a jobseeker's agreement or action plan for recipients of employment and support allowance: s 31. By virtue of s 32, specified functions of the Secretary of State under the Jobseeker's Act 1995 may be contracted out. Section 33 provides for the continuation of entitlement to jobseeker's allowance where a claimant fails to attend a mandatory interview without showing good cause for the failure to attend, subject to a delay in payment for a fixed period. Section 34 expands the scope of the sharing of social security and employment training information, and s 35 makes provision regarding the age at which persons will be required to attend work-focused interviews to reflect the equalisation of the state pension age for men and women. Section 36 requires the renaming of council tax benefit as council tax rebate, and s 37 makes minor legislative amendments.

### ***Part 2 (ss 38-50) Disabled people: right to control provision of services***

Section 38 states the purpose of the 2009 Act Pt 2 as being to enable disabled people to have a greater choice and control over the way in which relevant services are provided for them by defined public authorities. 'Relevant services' are defined in s 39 and public authorities are defined in s 40. Section 41 provides a general power for an appropriate authority to make regulations for the purpose of Pt 2, while s 45 defines 'appropriate authority' for these purposes, s 46 makes supplementary provision, and s 47 requires consultation on any proposed regulations. Section 42 sets out the provisions that may be included in regulations dealing with direct payments to disabled people. Section 43 provides for the making of regulations for the exercise of the rights to control the provision of services on behalf of persons who lack capacity within the meaning of the Mental Capacity Act 2005. Section 44 deals with the establishment of pilot schemes, and s 48 empowers the Secretary of State to repeal the exclusion of community care services from the definition of relevant services.

Section 49 deals with the control of regulations and orders by Parliament, and s 50 deals with interpretation.

### ***Part 3 (ss 51-55) Child maintenance***

Section 51, Sch 5 permit the Child Maintenance and Enforcement Commission ('the Commission') to order the disqualification of a person who has arrears of child maintenance from holding a driving licence or travel authorisation without applying to the court, and makes provision for appeals to the court against such disqualification orders. Sections 52, 53 provide for the Commission to pilot the powers of disqualification for two years and require the Secretary of State to report to Parliament on the operation of the pilot schemes. By virtue of s 54, the Commission may specify the intervals at which child support maintenance payments are made, having regard to the preferences indicated by the parent who does not reside with the children concerned. Section 55 extends the scope of offences relating to the provision of information.

### ***Part 4 (s 56) Birth registration***

Section 56, Sch 6 make provision for the joint registration of births where the parents of a child are neither married to each other nor civil partners of each other so as to increase the ways in which an unmarried father may register jointly with the child's mother, and confer additional rights and duties on both unmarried parents to enable unmarried fathers' details to be entered on the birth register in as many cases as possible.

### ***Part 5 (ss 57-62) General***

Section 57 empowers the Secretary of State to make consequential amendments and revocations of subordinate legislation, and repeals and revocations are made by s 58, Sch 7. Sections 59-62 deal with financial provisions, extent, commencement and short title.

### ***Amendments, repeals and revocations***

The list below, which is not exhaustive, mentions amendments which are or will be effective when the Act is fully in force.

Specific provisions of a number of Acts are substituted, added or repealed. These include: Births and Deaths Registration Act 1953 ss 1, 2, 2A-2E, 6, 10, 10A-10C, 39A; Child Support Act 1991 ss 39B, 39CA, 39CB, 39DA, 39F, 39G, 40B; Social Security Administration Act 1992 ss 2B, 2D-2H, 78A, 108, 122G, 122H; Social Security Contributions and Benefits Act 1992 ss 124, 126, 127, 140ZA-140ZC; Jobseeker's Act 1995 ss 1A, 1B, 11A-11C, 15B, 17A-17C, 18A-18D, 19, 20, 20A-20E, Sch A1; Welfare Reform and Pensions Act 1999 s 60; Child Support, Pensions and Social Security Act 2000 ss 62-66; Social Security Fraud Act 2001 ss 6A-6C; State Pension Credit Act 2002 s 18A; Welfare Reform Act 2007 s 15A, Sch 1A; Child Maintenance and Other Payments Act 2008 s 30.

**Notes** on the Finance Acts 1998-2009 have been contributed by David R Harris, LL.M., of Lincoln's Inn, Barrister.

### **Commissioners for Her Majesty's Revenue and Customs**

The Commissioners for Her Majesty's Revenue and Customs integrate the former Inland Revenue and Her Majesty's Customs and Excise. References in this title to the Commissioners of Customs and Excise, to customs and excise or to the Commissioners of Inland Revenue

(however expressed) are to be taken as a reference to the Commissioners for Her Majesty's Revenue and Customs: see the Commissioners for Revenue and Customs Act 2005 s 50; and see generally CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 900 et seq.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(1) HISTORICAL BACKGROUND/1. Early legislation.

## **1. INTRODUCTION TO SOCIAL SECURITY**

### **(1) HISTORICAL BACKGROUND**

#### **1. Early legislation.**

Compulsory insurance against unemployment and sickness was first introduced in 1912<sup>1</sup> and for contributory pensions in 1926<sup>2</sup>. Voluntary insurance for sickness and pensions was also permitted for persons on ceasing to be compulsorily insured and, conditionally, for certain other classes<sup>3</sup>.

The unemployment insurance scheme was originally administered by the Board of Trade<sup>4</sup> and later by the then Minister of Labour<sup>5</sup> while the administration of the health insurance scheme was mainly by former approved societies<sup>6</sup> under the supervision originally of the Insurance Commissioners<sup>7</sup> and later of the Minister of Health<sup>8</sup> who was also charged with the duty of administering the contributory pensions scheme<sup>9</sup>.

In 1945 all these functions were transferred to the Minister of National Insurance, now the Secretary of State for Social Security<sup>10</sup>. In 1948 the functions of the Minister of National Insurance under the old schemes were absorbed into the national insurance scheme<sup>11</sup>.

1    le by the National Insurance Act 1911 (repealed).

2    le by the Widows', Orphans' and Old Age Contributory Pensions Act 1925 (repealed).

3    See the Widows', Orphans' and Old Age Contributory Pensions (Voluntary Contributors) Act 1937 (repealed).

4    As to the Board of Trade see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 505; TRADE AND INDUSTRY vol 97 (2010) PARA 802.

5    The Ministry of Labour was dissolved in 1968: see TRADE AND INDUSTRY vol 97 (2010) PARA 802.

6    As to the constitution of former approved societies see the National Health Insurance Act 1936 s 73 (repealed).

7    See the National Insurance Act 1911 ss 54-58 (repealed).

8    See the Ministry of Health Act 1919 s 3(1)(b) (repealed). As to the current responsibilities of the Secretary of State for Health see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 463-465.

9    See the Widows', Orphans' and Old Age Contributory Pensions Act 1925 ss 28-30, 44(1) (repealed). In addition to the payment of benefits in money, the health insurance scheme contained provision for free medical attention for contributors which was known as medical benefit: see the National Insurance Act 1911 s 8(1)(a) (repealed).

10   The Department of Social Security was created in 1988, when the former Department of Health and Social Security was divided into two departments, each with its own Secretary of State: see the Transfer of Functions (Health and Social Security) Order 1988, SI 1988/1843; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 502. As to the Secretary of State and the organisation of the department see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 503-504. The Department of Social Security now has the greatest expenditure in the government: see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 504.

11   See PARA 2 post. The provision of medical benefit became absorbed in the National Health Service: see generally HEALTH SERVICES.



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(1) HISTORICAL BACKGROUND/2. The 1945 and 1946 legislation.

## **2. The 1945 and 1946 legislation.**

The outline of the modern social security system was broadly established between 1946 and 1948 when three major Acts came into force, namely the Family Allowances Act 1945, the National Insurance Act 1946 and the National Insurance (Industrial Injuries) Act 1946<sup>1</sup>. The Family Allowances Act 1945 provided for weekly allowances payable to families which included more than one child. The National Insurance Act 1946 made provision for compulsory insurance against unemployment, sickness, retirement and loss of earnings through pregnancy, widowhood, orphanhood and death. The National Insurance (Industrial Injuries) Act 1946 provided a system of compulsory insurance against personal injury caused by accident arising out of and in the course of employment and against prescribed diseases due to the nature of a person's employment; in doing so, it repealed the workmen's compensation legislation and so removed the direct liability for compensation placed on employers by that legislation<sup>2</sup>.

The principal area not covered by the 1945 and 1946 legislation was that covered by what are now referred to as income-related benefits, that is residuary, means-tested benefits for the relief of poverty. For more than 300 years such public provision was made, on a local basis, through the poor law<sup>3</sup>; this was finally repealed by the National Assistance Act 1948 which created the national assistance scheme and so completed the social security system established following the Beveridge Report<sup>4</sup>.

1 All three Acts have been repealed and replaced.

2 This was however subject to the saving that the former workmen's compensation legislation continued to apply where the right to compensation arose in respect of employment before 5 July 1948; this saving is now contained in the Social Security Contributions and Benefits Act 1992 s 111, Sch 8 (as amended) ('Old Cases'): see PARA 167 post.

3 The poor law had been established, on the basis of earlier legislation, by 39 Eliz I c 3 (Poor) (1597) (repealed), re-enacted in the Poor Relief Act 1601 (repealed; amended (in particular) by the Poor Law Amendment Act 1834 (repealed) and finally consolidated in the Poor Law Acts 1927 and 1930 (repealed)).

4 See the *Report on Social Insurance and Allied Services* (Cmd 6404) (1943).

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### **3. The 1965 and 1975 consolidations.**

The 1945 and 1946 legislation was considerably amended, and was first consolidated in 1965. This was done in three statutes (since repealed), namely the National Insurance Act 1965, the National Insurance (Industrial Injuries) Act 1965 and the Family Allowances Act 1965.

The period after 1965 saw further amendments and the creation of new benefits, mainly non-contributory benefits designed to compensate for illness or disability not arising out of employment; these included what became attendance allowance and non-contributory retirement pension. Invalidity pension was introduced as a contributory benefit. A further development, in the National Insurance Act 1966, was the introduction of earnings-related supplements to unemployment and sickness benefit, and to widow's allowance. National assistance was abolished and replaced by supplementary benefit in the Supplementary Benefit Act 1966.

The Social Security Act 1973 was intended to consolidate the amended legislation but in the event most of its provisions were repealed either on, or without ever, coming into force. This was because it was superseded by the 1975 consolidations which were effected by the Social Security Act 1975, the Social Security Pensions Act 1975, the Industrial Injuries and Diseases (Old Cases) Act 1975 and the Child Benefit Act 1975<sup>1</sup>. The law relating to supplementary benefit was consolidated in the Supplementary Benefits Act 1976.

<sup>1</sup> The Child Benefit Act 1975 (repealed) was more than a consolidation Act, since it replaced the old system of family allowances with the present system of child benefit (including for the first child): see PARA 237 et seq post.

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#### **4. Developments from 1975 to 1992.**

Major changes in the social security system were made after 1979 in a long series of statutes aimed principally at controlling the social security budget, partly on political and partly on demographic grounds<sup>1</sup>. Efficiencies were sought in the administration of sickness benefit by the inception of statutory sick pay, whereby what would have been state sickness benefit for an employee incapable of work is paid out by the employer; originally, this was for a maximum period of eight weeks and was fully recouped by the employer<sup>2</sup>, but then it was extended to a maximum of 28 weeks<sup>3</sup> and the recoupment was withdrawn so that it now only applies when the employer's liability exceeds a set limit in any month<sup>4</sup>. This model of payment through the employer was then extended to statutory maternity pay<sup>5</sup>.

The adjudication of social security claims, especially appeals, was subject to major reform in 1984 with the abolition of the old system of local insurance tribunals and supplementary benefit appeal tribunals, and their replacement with social security appeal tribunals, administered through a Presidential system (now the Independent Tribunal Service), chaired by lawyers, and with appeal on a point of law to a social security commissioner<sup>6</sup>.

The present system of means-tested benefits was put into place by the Social Security Act 1986 which abolished supplementary benefit, family income supplement and the old system of 'single payments' to cover specific needs of those on supplementary benefit, and replaced them with income support<sup>7</sup> (the basic safety net benefit), family credit<sup>8</sup> (a progressive benefit for those in work with family responsibilities, aimed at lessening the 'poverty trap' of loss of benefit outweighing the financial advantages of taking up employment) and the social fund<sup>9</sup> (a system of state loans, separately administered, for those on means-tested benefits, and grants for maternity or funeral expenses)<sup>10</sup>.

The relationship between the receipt of social security benefits by an accident victim and the later receipt by that person of tort damages for the accident was subject to radical reform in 1989, with the imposition of a system of 'civil recoupment' of the total benefit received from the eventual damages, operated by the Compensation Recovery Unit<sup>11</sup>.

Benefits for people with disabilities were subject to fundamental review and reform. The old attendance allowance and mobility allowance were abolished (except for attendance allowance for those over the age of 65) and replaced by a disability living allowance which has a care component and a mobility component, the lowest levels of which are designed to apply to lesser degrees of disablement than the previous allowances<sup>12</sup>. In addition, disability working allowance is available to a disabled person taking on employment on a low wage; it is based largely on family credit<sup>13</sup>.

1 An early and significant example of this was the abolition of earnings-related supplements to certain benefits in the Social Security (No 2) Act 1980 (repealed).

2 Social Security and Housing Benefits Act 1982 (repealed). This necessitated the abolition of industrial injury benefit (which had been a weekly income-maintenance benefit, higher than ordinary sickness benefit, for those unable to work due to an industrial accident) so that employers did not have to administer, in effect, two levels of benefit.

3 Repealed by the Social Security Act 1985 (repealed).

4 See generally the Statutory Sick Pay Acts 1991 and 1994; and EMPLOYMENT vol 39 (2009) PARA 498 et seq.

- 5 As to statutory maternity pay see generally EMPLOYMENT vol 39 (2009) PARA 365 et seq.
- 6 See the Health and Social Services and Social Security Adjudications Act 1983 s 25, Sch 8 (largely repealed).
- 7 As to income support see PARA 176 et seq post.
- 8 As to family credit see PARA 202 et seq post.
- 9 As to the social fund see PARAS 11, 228 post.
- 10 The system is completed by two further means-tested benefits (administered by local authorities), ie housing benefit and what is now council tax benefit: see generally HOUSING vol 22 (2006 Reissue) PARA 140 et seq; RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq.
- 11 See the Social Security Act 1989 (repealed). As to the recovery of benefits see now the Social Security (Recovery of Benefits) Act 1997; para 6 post; and DAMAGES.
- 12 See the Disability Living Allowance and Disability Working Allowance Act 1991 (repealed). As to disability living allowance see now the Social Security Contributions and Benefits Act 1992 ss 71-76; and PARA 102 post.
- 13 See the Disability Living Allowance and Disability Working Allowance Act 1991 (repealed). As to disability working allowance see now the Social Security Contributions and Benefits Act 1992 s 129 (as amended); and PARA 218 et seq post. The allowance is subject to a separate, specialised form of adjudication, with an appeal lying to a disability appeal tribunal: see PARA 378 post.

## **UPDATE**

### **4 Developments from 1975 to 1992**

TEXT AND NOTES 8, 13--Subject to savings (SI 2003/962) Social Security Contributions and Benefits Act 1992 s 129 repealed: Tax Credits Act 2002 Sch 6. As to tax credits see PARA 227A.

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## 5. The 1992 consolidations.

In 1992 the law relating to social security was consolidated into two Acts. The substantive law relating to contributions and the various benefits is now contained in the Social Security Contributions and Benefits Act 1992 which covers contributions<sup>1</sup>; contributory benefits<sup>2</sup>; non-contributory benefits<sup>3</sup>; increases for dependants<sup>4</sup>; benefits for industrial injuries<sup>5</sup>; miscellaneous provisions relating to the above matters<sup>6</sup>; income-related benefits<sup>7</sup>; the social fund<sup>8</sup>; child benefit<sup>9</sup>; Christmas bonus for pensioners and recipients of certain other benefits<sup>10</sup>; statutory sick pay<sup>11</sup>; statutory maternity pay<sup>12</sup>; incapacity for work<sup>13</sup>; and certain general matters<sup>14</sup>.

The law relating to administration of, and adjudication in respect of, the above benefits is now contained in the Social Security Administration Act 1992<sup>15</sup>.

1 See the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19) (as amended); and PARA 31 et seq post.

2 See ibid Pt II (ss 20-61) (as amended); and PARA 54 et seq, 561 et seq post. Sickness benefit was replaced by incapacity benefit, and unemployment benefit by contribution-based jobseeker's allowance: see PARA 6 post.

3 See ibid Pt III (ss 63-79) (as amended); and PARA 91 et seq, 579 et seq post.

4 See ibid Pt IV (ss 80-93) (as amended); and PARA 121 et seq post.

5 See ibid Pt V (ss 94-111) (as amended); and PARA 126 et seq post.

6 See ibid Pt VI (ss 112-122) (as amended); and PARA 21 et seq post.

7 See ibid Pt VII (ss 123-137) (as amended); para 173 et seq post; and HOUSING vol 22 (2006 Reissue) PARAS 141-148; RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq.

8 See ibid Pt VIII (ss 138-140); and PARA 228 et seq post.

9 See ibid Pt IX (ss 141-147) (as amended); and PARA 237 et seq post.

10 See ibid Pt X (ss 148-150) (as amended); and PARA 29 post.

11 See ibid Pt XI (ss 151-163) (as amended); and see generally EMPLOYMENT vol 39 (2009) PARA 498 et seq.

12 See ibid Pt XII (ss 164-171) (as amended); and see generally EMPLOYMENT vol 39 (2009) PARA 365 et seq.

13 See ibid Pt XIII (ss 171A-171G) (as added); and PARAS 6, 65 et seq post.

14 See ibid Pt XIII (ss 171-177) (as amended); and PARAS 15, 19, 27, 30 post.

15 See PARA 330 et seq post.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(1) HISTORICAL BACKGROUND/6. Developments since the 1992 consolidations.

## **6. Developments since the 1992 consolidations.**

Since the 1992 consolidations, four principal areas of social security law have been subject to fundamental change<sup>1</sup>. The first was sickness benefit, where concern had been caused by the trebling of the cost of invalidity benefit in two decades; sickness benefit and invalidity benefit were abolished from April 1995 and replaced by short-term and long-term incapacity benefit<sup>2</sup>. As part of this change, new statutory rules were introduced defining incapacity for work<sup>3</sup>; whereas for the first six months the test remains whether the claimant is fit for his own normal occupation, after that period the new 'all work' test applies which assigns points for various 'descriptors', that is, work-related activities, rather than looking more broadly and factually (as invalidity benefit had done) at whether there was work which the claimant could reasonably be expected to do<sup>4</sup>.

The second change was contained in the Jobseekers Act 1995 which, from October 1996, (1) abolished unemployment benefit and replaced it with contribution-based jobseeker's allowance<sup>5</sup>; and (2) in the case of claimants required to be available for work, replaced income support with income-based jobseeker's allowance<sup>6</sup>, so that income support became the residual benefit, restricted to those not required to be available for work<sup>7</sup>. Unlike the previous changes, these are contained in the Jobseekers Act 1995 itself, rather than operating by way of amendments to the Social Security Contributions and Benefits Act 1992; this means that, for a full picture of the applicable benefits, these two statutes must be considered together.

The third set of changes is contained in the Social Security Administration (Fraud) Act 1997 which makes amendments to the Social Security Contributions and Benefits Act 1992 and the Social Security Administration Act 1992, mainly in relation to the administration of housing benefit and council tax benefit<sup>8</sup>.

Lastly, the Social Security (Recovery of Benefits) Act 1997 abolishes the compensation recovery scheme introduced in 1990<sup>9</sup> and introduces a new system designed (a) to ensure that damages paid to a victim to compensate for pain and suffering can no longer be reduced to take account of benefit recovery; and (b) to make compensators liable for their own negligence by requiring them to repay in full benefits which have been paid in respect of an accident, injury or disease<sup>10</sup>.

At the date at which this volume states the law, a Social Security Bill had been committed to a standing committee in the House of Commons<sup>11</sup>. The explanatory and financial memorandum accompanying the Bill states that it makes provision for simplification of decision-making and appeals in social security, child support and vaccine damage payments; changes National Insurance provision to improve compliance, reduce avoidance and increase revenue; simplifies the award and review of social fund budgeting loans; permits the removal of the lone parent element of child benefit; and restricts entitlement in respect of the period before a claim<sup>12</sup>. With regard to the administration of the social security system, a number of outsourcing projects were under review at that date<sup>13</sup>.

1 In addition, the legal regime governing occupational pension schemes has been subject to fundamental reform by the Pension Schemes Act 1993 and the Pensions Act 1995: see PARA 551 et seq post.

2 Ie by the Social Security (Incapacity for Work) Act 1994, which made amendments to the Social Security Contributions and Benefits Act 1992, principally by adding ss 30A-30E and Pt XIIA (ss 171A-171G): see PARA 59 et seq post.

3 See PARA 65 et seq post.

4 See PARAS 68-75 post.

5 See PARAS 258-259 post. The maximum entitlement to the contribution-based jobseeker's allowance is six months, whereas the former unemployment benefit lasted for a year. After six months, continued entitlement becomes means-tested; moreover, during that first six months some of the rules of entitlement are now more akin to means-tested income support than to the old (rights-based) rules on unemployment benefit.

6 See PARAS 258-259 post. Many of the rules on income-based jobseeker's allowance (eg in relation to calculation of income and capital) are taken directly from income support law: see PARA 271 post.

7 See PARAS 176-177 post.

8 As to housing benefit and council tax benefit see generally HOUSING vol 22 (2006 Reissue) PARA 140 et seq; RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq. Other amendments made by the Social Security Administration (Fraud) Act 1997 relate to such matters as offences, penalties and overpayments (see ss 13-15; and PARAS 404-405 post); reviews and medical examinations (see ss 17, 18; and PARAS 375-376 post); national insurance numbers (see s 19; and PARA 337 post); and redirection of post (see s 20; and PARA 400 post).

9 See PARA 4 ante.

10 See Department of Social Security Press Release 97/193, 6 October 1997. As to the new regime for recovery of benefits see the Social Security (Recovery of Benefits) Act 1997 ss 1-34; the Social Security (Recovery of Benefits) Regulations 1997, SI 1997/2205; and the Social Security (Recovery of Benefits) (Appeals) Regulations 1997, SI 1997/2237. The details of this regime fall outside the scope of this title: see generally DAMAGES.

11 See the Social Security Bill (HC Bill 42 (1997-98)), committed to Standing Committee B on 22 July 1997.

12 See the Social Security Bill (HC Bill 42 (1997-98)), explanatory and financial memorandum.

13 See 299 HC Official Report (6th series), 31 July 1997, written answers cols 591-594.

## **UPDATE**

### **6 Developments since the 1992 consolidations**

NOTE 10--SI 1997/2237 replaced by Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991: see PARA 356A.13.

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## **(2) OUTLINE OF THE SOCIAL SECURITY SYSTEM**

### **(i) In general**

#### **7. The benefits.**

Benefits under the social security system have traditionally fallen into five categories:

- 1 (1) contributory benefits: these now comprise incapacity benefit<sup>1</sup>, state maternity allowance<sup>2</sup>, benefits for widows and widowers<sup>3</sup> and Category A and B retirement pensions<sup>4</sup>;
- 2 (2) non-contributory benefits: these now comprise attendance allowance<sup>5</sup>, severe disablement allowance<sup>6</sup>, invalid care allowance<sup>7</sup>, disability living allowance<sup>8</sup>, guardian's allowance<sup>9</sup> and Category C and D retirement pensions<sup>10</sup>;
- 3 (3) industrial injury benefit: this now comprises the disablement pension in relation to industrial accidents and diseases<sup>11</sup>;
- 4 (4) income-related benefits: these now comprise income support<sup>12</sup>, family credit<sup>13</sup>, disability working allowance<sup>14</sup>, housing benefit<sup>15</sup>, council tax benefit<sup>16</sup> and social fund payments<sup>17</sup>;
- 5 (5) child benefit<sup>18</sup>.

In addition, the social security legislation governs statutory sick pay and statutory maternity pay, though these are administered through the employer<sup>19</sup>. Jobseeker's allowance, contained in separate legislation, straddles categories (1) and (4) above, being partly contributory (the contribution-based jobseeker's allowance, payable for a maximum of six months) but in its residual form income-related and based on the income support model (income-based jobseeker's allowance)<sup>20</sup>.

Payments of certain benefits<sup>21</sup> are charged to income tax under Schedule E<sup>22</sup> whereas other payments<sup>23</sup> are not treated as income for any purpose of the Income Tax Acts<sup>24</sup>.

Social security benefits are not compensatory in nature and accordingly the payment of interest on arrears of benefits, when the delay in payment of the benefit was the result of unlawful discrimination, is not an essential component of the right under EC law to obtain the benefits to which a person is entitled<sup>25</sup>.

1 See PARA 59 et seq post.

2 See PARA 76 et seq post.

3 See PARA 80 et seq post.

4 See PARA 568 et seq post.

5 See PARA 112 et seq post.

6 See PARA 92 et seq post.

7 See PARAS 100-101 post.

- 8 See PARA 102 et seq post
- 9 See PARAS 117-120 et seq post.
- 10 See PARA 579 et seq post.
- 11 See PARA 141 et seq post.
- 12 See PARA 176 et seq post.
- 13 See PARA 202 et seq post.
- 14 See PARA 218 et seq post.
- 15 See generally HOUSING vol 22 (2006 Reissue) PARA 140 et seq.
- 16 See generally RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq.
- 17 See PARA 228 et seq post.
- 18 See PARA 237 et seq post.
- 19 As to statutory sick pay and statutory maternity pay see EMPLOYMENT vol 39 (2009) PARAS 498 et seq, 365 et seq respectively.
- 20 See PARA 258 et seq post.
- 21 In payments of benefit under the Social Security Contributions and Benefits Act 1992 Pts II-IV (ss 20-93) (as amended) (see PARA 54 et seq, 561 et seq post) except (1) short-term incapacity benefit, whether at the higher or the lower rate, or long-term incapacity benefit (see PARA 59 et seq post), attendance allowance (see PARA 112 et seq post), disability living allowance (see PARA 102 et seq post), severe disablement allowance (see PARA 92 et seq post), maternity allowance (see PARA 76 et seq post), widow's payments (see PARA 80 et seq post), child's special allowance (see PARA 54 post) and guardian's allowance (see PARA 117 et seq post); and (2) so much of any benefit as is attributable to an increase in respect of a child: see the Income and Corporation Taxes Act 1988 s 617(1) (as amended; modified by virtue of the Social Security (Incapacity for Work) Act 1994 s 13(2)); and INCOME TAXATION vol 23(1) (Reissue) PARA 626.
- 22 As to the charge to tax under Schedule E see INCOME TAXATION vol 23(1) (Reissue) PARA 605 et seq.
- 23 In (1) payments of income support (see PARA 176 et seq post), family credit (see PARA 202 et seq post), disability working allowance (see PARA 218 et seq post) or housing benefit (see generally HOUSING vol 22 (2006 Reissue) PARA 140 et seq), other than payments of income support which are taxable by virtue of the Income and Corporation Taxes Act 1988 s 151 (trade disputes etc: see INCOME TAXATION vol 23(1) (Reissue) PARA 669); (2) payments by way of an allowance under the Social Security Contributions and Benefits Act 1992 s 106, Sch 7 para 18 (see PARA 166 post); payments of a jobseeker's allowance (see PARA 259 et seq post) other than payments which are taxable by virtue of the Income and Corporation Taxes Act 1988 s 151A (as added: provisions for taxation of jobseeker's allowance in certain circumstances); (3) payments of a back to work bonus (see PARAS 311-313 post); (4) payments of a child maintenance bonus; (5) compensation payments made under regulations under the Child Support Act 1995 s 24; (6) payments of child benefit (see PARA 237 et seq post); and (7) payments excepted by the Income and Corporation Taxes Act 1988 s 617(1) (as amended) from the charge to tax imposed by that provision (see note 21 supra): see s 617(2) (as amended); and INCOME TAXATION vol 23(1) (Reissue) PARA 626; INCOME TAXATION vol 23(2) (Reissue) PARA 1240.
- 24 See *ibid* s 617(1), (2) (as amended).
- 25 See Case C-66/95 *R v Secretary of State for Social Security, ex p Sutton* [1997] All ER (EC) 497, [1997] 2 CMLR 382, ECJ. As to EC social security law see further PARA 451 et seq post.

## UPDATE

### 7 The benefits

TEXT AND NOTES--Income and Corporation Taxes Act 1988 s 617(1), (2) replaced by provisions of the Income Tax (Earnings and Pensions) Act 2003. For destination of replaced provisions, see table, INCOME TAXATION vol 23(2) (Reissue) PARA 1900A. As to provision for the making of age-related payments see PARA 228A.

NOTE 21--In head (1) for 'widow's payments' read 'bereavement payments' (see PARA 84); and reference to 'severe disablement allowance' omitted: Income Tax (Earnings and Pensions) Act 2003 s 677(1). Head (2) repealed: Tax Credits Act 2002 Sch 6.

NOTE 23--Reference to 'family credit' (working families' tax credit) and 'disability working allowance' (disabled person's tax credit) omitted: Tax Credits Act 2002 Sch 6. Payments of a tax credit, within the meaning of the Tax Credits Act 2002 (see PARA 227A), income-related employment and support allowance, in-work credit, in-work emergency fund payments and return to work credit under the Employment and Training Act 1973 s 2 (see EMPLOYMENT vol 40 (2009) PARA 563) are not treated as income for any purpose of the Income Tax Acts: Income Tax (Earnings and Pensions) Act 2003 s 677(1) (see INCOME TAXATION vol 23(1) (Reissue) PARA 672).

Also, head (8) payments made under regulations under the Welfare Reform and Pensions Act 1999 s 79: Income Tax (Earnings and Pensions) Act 2003 s 677(1).

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## **(ii) Finance**

### **8. The National Insurance Fund.**

The National Insurance Fund continues to be maintained under the control and management of the Secretary of State<sup>1</sup>. Accounts of the National Insurance Fund must be prepared in such form, and in such manner and at such times, as the Treasury may direct, and the Comptroller and Auditor General<sup>2</sup> must examine and certify every such account and must lay copies of it, together with his report on it, before Parliament<sup>3</sup>.

Any money in the National Insurance Fund may from time to time be paid over to the National Debt Commissioners<sup>4</sup> and be invested by them, in accordance with such directions as may be given by the Treasury, in any such permitted manner<sup>5</sup> as the Treasury may specify by an order of which a draft has been laid before Parliament<sup>6</sup>.

The National Debt Commissioners must present to Parliament annually an account of the securities in which money in the National Insurance Fund is for the time being invested<sup>7</sup>.

If, before the beginning of any tax year<sup>8</sup>, the Secretary of State with the consent of the Treasury by order provides that this provision is to have effect with respect to that tax year, there must be paid into the National Insurance Fund during that tax year, out of money provided by Parliament, such amounts as the Secretary of State may from time to time determine, not exceeding in aggregate the prescribed percentage<sup>9</sup> of estimated benefit expenditure<sup>10</sup> for the financial year ending with 31 March in that tax year<sup>11</sup>.

1 Social Security Administration Act 1992 s 161(1). As to the Secretary of State see PARA 1 ante.

2 As to the Comptroller and Auditor General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 724-726.

3 Social Security Administration Act 1992 s 161(2). As to laying documents before Parliament see generally PARLIAMENT vol 34 (Reissue) PARA 941.

4 As to the National Debt Commissioners see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1332 et seq.

5 In any manner for the time being specified in the Trustee Investments Act 1961 s 1(1), (4), Sch 1 Pt II (paras 1-24) (as amended): see TRUSTS vol 48 (2007 Reissue) PARA 1023.

6 Social Security Administration Act 1992 s 161(3).

7 Ibid s 161(4).

8 'Tax year' means the 12 months beginning with 6 April in any year: see the Social Security Act 1993 s 4(1).

9 'The prescribed percentage' means such percentage, not exceeding 17%, as may be specified in the order: ibid s 2(3). With respect to the tax year 1997-98 the prescribed percentage is 4%: see the Social Security (Contributions) (Re-rating and National Insurance Fund Payments) Order 1997, SI 1997/544, art 6.

10 'Estimated benefit expenditure' in relation to a financial year means the amount estimated by the Government Actuary or the Deputy Government Actuary, before the beginning of that financial year, to be the aggregate of the amounts that may be expected to be paid out of the National Insurance Fund in that financial year under the Social Security Contributions and Benefits Act 1992 s 163(1)(a)-(d) (see PARA 10 post); and under the Employment Rights Act 1996 ss 167(1), 182 (see EMPLOYMENT vol 39 (2009) PARA 557; EMPLOYMENT vol 40

(2009) PARA 839); and under the Pension Schemes Act 1993 s 124(1) (see PARA 853 post): Social Security Act 1993 s 2(4) (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 45; the Employment Rights Act 1996 s 240, Sch 1 para 58).

11 Social Security Act 1993 s 2(2). As to the exercise of this power see note 9 supra. The Secretary of State may exercise this power only if he thinks it expedient to do so with a view to adjusting the level at which the National Insurance Fund stands for the time being and having regard to estimated benefit expenditure for the financial year ending with 31 March in the tax year to which the determination or order is to relate; and he must consult the Treasury before making any such determination: s 2(5), (6). Any such order must be made by statutory instrument and may not be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House: s 2(8). Amounts payable under these provisions must be paid at such times and in such manner as the Treasury may direct: s 2(7).

Corresponding provision is made with regard to Northern Ireland: see s 3.

## **UPDATE**

### **8-14 Finance**

The Secretary of State and the Commissioners of Inland Revenue (see INCOME TAXATION vol 23(1) (Reissue) PARA 29) may incur expenditure in doing anything which in his or their opinion is appropriate for the purpose of facilitating either the transfer to them of such of the functions of the Secretary of State as are exercisable by the Contributions Agency (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 504) and the exercise by them of those functions: Social Security Act 1998 s 78.

## **8 The National Insurance Fund**

TEXT AND NOTE 1--The National Insurance Fund is now maintained under the control and management of the Commissioners for Her Majesty's Revenue and Customs: Social Security Administration Act 1992 s 161(1) (substituted by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 51; and amended by Commissioners for Revenue and Customs Act 2005 Sch 4 para 47).

TEXT AND NOTE 2--Refers to accounts prepared by the Inland Revenue: Social Security Administration Act 1992 s 161(2) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 51).

TEXT AND NOTE 5--Words 'in accordance ... by the Treasury' omitted: Social Security Administration Act 1992 s 161(3) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 51, Sch 10).

TEXT AND NOTE 9--For 'the Secretary of State ... provides' read 'the Treasury by order provides', and for 'Secretary of State' (second place) read 'Treasury': Social Security Act 1993 s 2(2) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 60).

NOTE 9--With respect to the tax year 2007-08 the prescribed percentage is 2%: Social Security (Contributions) (Re-rating and National Insurance Funds Payments) Order 2007, SI 2007/1052.

NOTE 11--Social Security Act 1993 s 2(5) amended, s 2(6), (7) repealed: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 60, Sch 10.

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## 9. Destination of contributions.

Contributions<sup>1</sup> received by the Secretary of State<sup>2</sup> and the additions paid out of money provided by Parliament<sup>3</sup> must be paid by him into the National Insurance Fund<sup>4</sup> after deducting from contributions of any class<sup>5</sup> the appropriate national health service allocation<sup>6</sup> in the case of contributions of that class<sup>7</sup>. From the national health service allocation in respect of contributions of any class there must be deducted such amount as the Secretary of State may estimate, in accordance with any directions given by the Treasury, to be the portion of the total expenses incurred by him or any other government department in collecting contributions of that class which is fairly attributable to that allocation, and the remainder must, in the hands of the Secretary of State, be taken as paid towards the cost (1) of the national health service in England; (2) of that service in Wales; and (3) of that service in Scotland, in such shares as the Treasury may determine<sup>8</sup>. The Secretary of State must pay any amounts so deducted into the Consolidated Fund<sup>9</sup>.

The sums paid to the Secretary of State by the Commissioners of Inland Revenue in respect of interest and penalties recovered by them in connection with contributions of any class<sup>10</sup> must also be paid, in accordance with any directions given by the Treasury, into the National Insurance Fund<sup>11</sup>.

The Secretary of State may make regulations modifying these provisions, in such manner as he thinks appropriate, in relation to the contributions of (a) members of Her Majesty's forces<sup>12</sup>; (b) mariners, airmen and certain other persons<sup>13</sup>; and (c) continental shelf workers<sup>14</sup> and in relation to any contributions which are reduced<sup>15</sup> because of the disapplication of certain statutory provisions<sup>16</sup> relating to redundancy payments<sup>17</sup>.

1 'Contribution' means a contribution under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19) (as amended) (see PARA 31 et seq post): Social Security Administration Act 1992 s 191 (definition added by the Social Security Administration (Fraud) Act 1997 s 22, Sch 1 para 12).

2 The contributions referred to include those paid over to the Secretary of State by the Inland Revenue under the Social Security Contributions and Benefits Act 1992 s 16(4) (see PARA 51 post) and s 1(4), Sch 1 para 6(8) (see PARA 49 post), subject, as respects contributions from Northern Ireland, to s 16(5): s 162(2). As to the Secretary of State see PARA 1 ante.

3 ie under ibid s 1(5): see PARA 31 post. This is subject to any directions given by the Treasury: see s 1(5).

4 As to the National Insurance Fund see PARA 8 ante.

5 As to the classes of contributions see PARA 34 et seq post.

6 'The appropriate national health service allocation' means: (1) in the case of primary Class 1 contributions (see PARA 36 post), 1.05% of the amount estimated to be that of so much of the earnings in respect of which those contributions were paid as exceeded the lower earnings limit but did not exceed the upper earnings limit; (2) in the case of secondary Class 1 contributions (see PARA 37 post), 0.9% of the amount estimated to be that of the earnings in respect of which those contributions were paid; (3) in the case of Class 1A contributions (see PARA 38 post), 0.9% of the amount estimated to be the aggregate of the cash equivalents of the benefits of the cars and car fuel used in calculating those contributions; (4) in the case of Class 2 contributions (see PARA 40 post), 15.5% of the amount estimated to be the total of those contributions; (5) in the case of Class 3 contributions (see PARA 42 post), 15.5% of the amount estimated to be the total of those contributions; and (6) in the case of Class 4 contributions (see PARA 43 post), 1.15% of the amount estimated to be that of the earnings in respect of which those contributions were paid; and 'estimated' means estimated by the Secretary of State in any manner which after consulting the Government Actuary or the Deputy Government Actuary he considers to be appropriate and which the Treasury has approved: Social Security Administration Act 1992 s

162(5), (6) (amended by the Social Security (Contributions) Act 1994 s 2(1), (2)). In the case of earners paid other than weekly, the reference in head (1) supra to the lower or upper earnings limit must be taken as a reference to the equivalent of that limit prescribed under the Social Security Contributions and Benefits Act 1992 s 8(3) (see PARA 36 post); Social Security Administration Act 1992 s 162(6A) (added by the Social Security (Contributions) Act 1994 s 2(1), (2)). The Secretary of State may, with the consent of the Treasury, by order amend any of heads (1)-(6) supra in relation to any tax year, by substituting for the percentage for the time being specified in that head a different percentage; but no such order may substitute a figure which represents an increase or decrease in the appropriate national health service allocation of more than: (a) 0.1% of the relevant earnings, in the case of heads (1) or (2) supra; (b) 0.1% of the relevant aggregate, in the case of head (3) supra; (c) 4% of the relevant contributions, in the case of heads (4) or (5) supra; or (d) 0.2% of the relevant earnings, in the case of head (6) supra: Social Security Administration Act 1992 s 162(7), (8). 'Tax year' means the 12 months beginning with 6 April in any year: s 191; and see the Social Security Contributions and Benefits Act 1992 s 122(1) which contains an identical definition, and additionally defines the expression '1978-79' as meaning the tax year beginning with 6 April 1978, and provides that any correspondingly framed reference to a pair of successive years is to be construed as a reference to the tax year beginning with 6 April in the earlier of them. By virtue of the Social Security Administration Act 1992 s 192(2), for the meaning of 'earner' and 'earnings' see PARA 32 post; and for the meaning of 'upper earnings limit' and 'lower earnings limit' see PARA 34 post.

7 Ibid s 162(1) (amended by the Social Security Administration (Fraud) Act 1997 s 22, Sch 2).

8 Social Security Administration Act 1992 s 162(9), (11).

9 Ibid s 162(10). As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711; PARLIAMENT vol 78 (2010) PARA 1028 et seq.

10 Ie under the Social Security Contributions and Benefits Act 1992 s 16(4)(b) (see PARA 51 post) and Sch 1 paras 6(8)(b), 7(7) (see PARA 49 post).

11 Social Security Administration Act 1992 s 162(4). This is subject to the Social Security Contributions and Benefits Act 1992 s 16(5): see PARA 51 post.

12 Ie the contributions of persons referred to in ibid s 116(2) (as amended): see PARA 22 post.

13 Ie the contributions of persons referred to in ibid s 117(1): see PARA 23 post.

14 Ie the contributions of persons referred to in ibid s 120(1): see PARA 24 post.

15 Ie under ibid s 6(5) (as amended): see PARA 35 post.

16 Ie because the Employment Rights Act 1996 Pt XI (ss 135-181) does not apply by virtue of s 199(2) or s 209: see generally EMPLOYMENT.

17 Social Security Administration Act 1992 s 162(12). At the date at which this volume states the law, no such regulations had been made but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 134, has effect as if so made.

## UPDATE

### 8-14 Finance

The Secretary of State and the Commissioners of Inland Revenue (see INCOME TAXATION vol 23(1) (Reissue) PARA 29) may incur expenditure in doing anything which in his or their opinion is appropriate for the purpose of facilitating either the transfer to them of such of the functions of the Secretary of State as are exercisable by the Contributions Agency (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 504) and the exercise by them of those functions: Social Security Act 1998 s 78.

### 9 Destination of contributions

TEXT AND NOTES 1-7--In the Social Security Administration Act 1992 s 162(1), for 'Secretary of State' read 'the Treasury' and for 'him' read 'it': s 162(1) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 52). The

reference to contributions in the Social Security Administration Act 1992 s 162(1) includes references to payments on account of contributions made in accordance with regulations under the Social Security Contributions and Benefits Act 1992 s 3(5) (see PARA 33); Social Security Administration Act 1992 s 162(2A) (added by the Social Security Act 1998 Sch 7 para 99(1); and amended by the National Insurance Contributions Act 2002 Sch 1 para 19(2)).

NOTE 2--Social Security Administration Act 1992 s 162(2) repealed: National Insurance Contributions Act 2002 Sch 2.

TEXT AND NOTES 5-7--Words 'from contributions of any class' and 'in the case of contributions of that class' omitted: Social Security Administration Act 1992 s 162(1) (amended by the National Insurance Contributions Act 2002 Sch 2).

NOTE 6--'The appropriate national health service allocation' now means 100 per cent of the product of the additional rate together with the amounts set out in heads (1)-(7); and in head (1) for '1.05%' read '2.05%' and for 'the lower earnings limit' read 'the primary threshold'; in head (2) for '0.9%' read '1.9%' and for 'earnings' read 'total earnings'; in head (3) for '0.9%' read '1.9%' and for 'cash equivalents ... car fuel' read 'emoluments'; and in head (6) for '1.15% of the amount estimated ... were paid' read '2.15% of the amount estimated to be that of so much of the profits or gains, or earnings, in respect of which those contributions were paid as exceeded the lower limit specified in the Social Security Contributions and Benefits Act 1992 s 15(3)(a) (see PARA 43), and in s 18(1A)(a) (see PARA 44) but did not exceed the upper limit specified in those provisions': Social Security Administration Act 1992 s 162(5) (amended by the Welfare Reform and Pensions Act 1999 Sch 9 para 9(2); the Child Support, Pensions and Social Security Act 2000 s 74(7); and the National Insurance Contributions Act 2002 s 4(2)). 'The appropriate national health service allocation' also means (7) in the case of Class 1B contributions (see PARA 39A), 1.9% of the amount estimated to be the aggregate of the emoluments and the amounts of income tax in respect of which those contributions were paid: Social Security Administration Act 1992 s 162(5) (amended by the Social Security Act 1998 s 65(2), Sch 7 para 99(3); and the National Insurance Contributions Act 2002 s 4(2)(c)). The revised amounts have effect in relation to the tax year 2003-04 and subsequent tax years: s 8(2).

'The product of the additional rate' means the amount estimated to be the aggregate of (a) so much of the total of primary Class 1 contributions as is attributable to the Social Security Contributions and Benefits Act 1992 s 8(1)(b) (additional primary percentage: see PARA 36); (b) so much of the total of Class 4 contributions under s 15 (see s 43) as is attributable to s 15(3)(b) (additional Class 4 percentage); and (c) so much of the total of Class 4 contributions payable by virtue of s 18 (see PARA 44) as is attributable to s 18(1A)(b) (additional Class 4 percentage): Social Security Administration Act 1992 s 162(5A) (added by the National Insurance Contributions Act 2002 s 4(3)).

In the Social Security Administration Act 1992 s 162(6) (as amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 52), for 'Secretary of State' read 'Inland Revenue' and for 'he considers' read 'it considers'.

The Social Security Administration Act 1992 s 162(6A) (as amended by the Welfare Reform and Pensions Act 1999 Sch 9 para 9(3)), now provides that in the case of earners paid other than weekly, the reference in head (1) to the primary threshold or the upper earnings limit must be taken as a reference to the equivalent of that threshold or limit prescribed under the Social Security Contributions and Benefits Act 1992 s 5(4).

In the Social Security Administration Act 1992 s 162(7) (as amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 52), for 'The Secretary of State may, with the consent of the Treasury' read 'The Treasury may'.

Head (b) applies also in the case of head (7): Social Security Administration Act 1992 s 162(8) (amended by the Social Security Act 1998 Sch 7 para 99(4)).

TEXT AND NOTE 8--Replaced. From the national health service allocation in respect of contributions of any class there must be deducted such amount as the Inland Revenue may estimate to be the portion of the total expenses incurred by it or any other government department in collecting contributions of that class which is fairly attributable to that allocation, and the remainder must be paid by the Inland Revenue to the Secretary of State towards the cost (1) of the national health service in England; (2) of that service in Wales; and (3) of that service in Scotland, in such shares as the Treasury may determine: Social Security Administration Act 1992 s 162(9) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 52). Social Security Administration Act 1992 s 162(11) repealed: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 10.

TEXT AND NOTE 9--For 'Secretary of State' read 'Inland Revenue': Social Security Administration Act 1992 s 162(10) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 52).

TEXT AND NOTES 10, 11--Replaced. There must be paid into the National Insurance Fund (1) so much of any interest recovered by the Inland Revenue by virtue of the Social Security Contributions and Benefits Act 1992 Sch 1 para 6 or from persons in Great Britain by virtue of Sch 2 para 6 as remains after the deduction by it of any administrative costs attributable to its recovery, (2) the amounts apportioned to the contributions under Sch 1 para 7(6) in respect of the penalties mentioned in Sch 1 para 7(6), and (3) so much of any penalty otherwise imposed by virtue of Sch 1 para 7(6) and recovered by the Inland Revenue as remains after the deduction by it of any administrative costs attributable to its recovery: Social Security Administration Act 1992 s 162(4) (substituted by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 28, Sch 3 para 52; and amended by the National Insurance Contributions Act 2002 Sch 1 para 19(3)). 'Inland Revenue' means the Commissioners of Inland Revenue: Social Security Administration Act 1992 s 191 (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 32).

TEXT AND NOTE 12--For 'Secretary of State' read 'Inland Revenue' and for 'he thinks' read 'it thinks': Social Security Administration Act 1992 s 162(12) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 52).

NOTE 17--SI 1979/591 consolidated in the Social Security (Contributions) Regulations 2001, SI 2001/1004 (see PARA 33). SI 1979/591 reg 134 not reproduced.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(2) OUTLINE OF THE SOCIAL SECURITY SYSTEM/(ii) Finance/10. General financial arrangements.

## **10. General financial arrangements.**

The following are to be paid out of the National Insurance Fund<sup>1</sup>:

- 6 (1) contributory benefit<sup>2</sup>;
- 7 (2) guardian's allowance<sup>3</sup>;
- 8 (3) Christmas bonus<sup>4</sup>, if the relevant qualifying benefit<sup>5</sup> is payable out of that fund<sup>6</sup>;
- 9 (4) any sum falling to be paid by or on behalf of the Secretary of State<sup>7</sup> under regulations relating to statutory sick pay or statutory maternity pay<sup>8</sup>;
- 10 (5) any expenses of the Secretary of State in making payments under the compensation recovery scheme<sup>9</sup>, and any sums paid to him under that scheme, to the extent that he estimates that those payments relate to sums paid out of that fund<sup>10</sup>.

The following are to be paid out of money provided by Parliament<sup>11</sup>:

- 11 (a) any administrative expenses of the Secretary of State or other government department in carrying into effect the Social Security Contributions and Benefits Act 1992 or the Social Security Administration Act 1992<sup>12</sup>;
- 12 (b) non-contributory benefits<sup>13</sup> (other than guardian's allowance)<sup>14</sup>;
- 13 (c) industrial injuries benefit<sup>15</sup>;
- 14 (d) any sums payable by way of income support<sup>16</sup>, family credit<sup>17</sup>, disability working allowance<sup>18</sup>, rate rebate subsidy<sup>19</sup>, rent rebate subsidy<sup>20</sup>, rent allowance subsidy<sup>21</sup> or council tax benefit subsidy<sup>22</sup>;
- 15 (e) payments by the Secretary of State into the social fund<sup>23</sup>;
- 16 (f) child benefit<sup>24</sup>;
- 17 (g) Christmas bonus if the relevant qualifying benefit is payable out of such money<sup>25</sup>;
- 18 (h) any sums falling to be paid by the Secretary of State as travelling expenses<sup>26</sup>;
- 19 (i) any expenses of the Secretary of State in making payments under the compensation recovery scheme<sup>27</sup>, to the extent that he estimates that those payments relate to sums paid out of the Consolidated Fund<sup>28</sup>, and any other expenses of his incurred in consequence of the Social Security (Recovery of Benefits) Act 1997 and not paid out of the National Insurance Fund<sup>29</sup>,

except, in the case of heads (a) to (h) above, in so far as they may be required by any enactment to be paid or borne in some other way<sup>30</sup>.

Any sums required by a secondary contributor for the purpose of paying any secondary Class 1 contributions<sup>31</sup> which are payable by him in respect of an earner<sup>32</sup> in consequence of the earner's employment<sup>33</sup> in an office of which the emoluments are payable out of the Consolidated Fund must be paid out of that fund<sup>34</sup>, while any expenditure in respect of the payment of interest or repayment supplements<sup>35</sup> must be defrayed out of the National Insurance Fund in accordance with any directions given by the Treasury<sup>36</sup>.

Any sums paid by the Secretary of State by way of jobseeker's allowance<sup>37</sup> and any expenditure incurred by him<sup>38</sup> under or by virtue of the Jobseekers Act 1995 must be paid out of money

provided by Parliament<sup>39</sup>. Sums estimated by the Secretary of State to balance payments made by him by way of contribution-based jobseeker's allowance<sup>40</sup> must be paid out of the National Insurance Fund and into the Consolidated Fund<sup>41</sup>, while sums estimated by him to balance sums recovered by him in connection with payments of contribution-based jobseeker's allowance must be paid into the National Insurance Fund<sup>42</sup>. The Secretary of State must pay into the National Insurance Fund sums estimated by him to be equal to the aggregate of the amounts deducted by employers<sup>43</sup> and must pay into the Consolidated Fund sums estimated by him to balance sums recovered by him in connection with payments made by way of income-based jobseeker's allowance<sup>44</sup>.

1 Social Security Administration Act 1992 s 163(1) (s 163(1), (2) amended by the Social Security (Recovery of Benefits) Act 1997 s 33(1), Sch 3 para 6). As to the National Insurance Fund see PARA 8 ante.

2 Social Security Administration Act 1992 s 163(1)(a). The benefit referred to is benefit under the Social Security Contributions and Benefits Act 1992 Pt II (ss 20-62) (as amended): see PARA 54 et seq, 561 et seq post.

3 Social Security Administration Act 1992 s 163(1)(b). As to guardian's allowance see PARAS 117-120 post.

4 As to Christmas bonus see PARA 29 post.

5 For the meaning of 'qualifying benefit' see the Social Security Contributions and Benefits Act 1992 s 150 (as amended); and PARA 29 post.

6 Social Security Administration Act 1992 s 163(1)(c).

7 As to the Secretary of State see PARA 1 ante.

8 Social Security Administration Act 1992 s 163(1)(d). As to statutory maternity pay and statutory sick pay see EMPLOYMENT vol 39 (2009) PARAS 365 et seq, 498 et seq respectively.

9 Ie under the Social Security (Recovery of Benefits) Act 1997 s 14 or s 20: see PARA 6 ante; and see generally DAMAGES.

10 Ibid s 31(1).

11 Social Security Administration Act 1992 s 163(2) (as amended: see note 1 supra).

12 Ibid s 163(2)(a). The administrative expenses referred to include those in connection with any inquiry undertaken on behalf of the Secretary of State with a view to obtaining statistics relating to the operation of the Social Security Contributions and Benefits Act 1992 Pts I-VI (ss 1-122) (as amended) (see PARA 31 et seq post) and Pt XI (ss 151-163) (statutory sick pay: see EMPLOYMENT vol 39 (2009) PARA 498 et seq): Social Security Administration Act 1992 s 163(3).

13 Ie benefits under the Social Security Contributions and Benefits Act 1992 Pt III (ss 63-79) (as amended): see PARA 91 et seq post.

14 Social Security Administration Act 1992 s 163(2)(b); and see note 3 supra.

15 Ibid s 163(2)(c). As to industrial injuries benefit see the Social Security Contributions and Benefits Act 1992 Pt V (ss 94-111) (as amended); and PARA 126 et seq post.

16 As to income support see PARA 176 et seq post.

17 As to family credit see PARA 202 et seq post.

18 As to disability working allowance see PARA 218 et seq post.

19 As to rate rebate subsidy see the Social Security Administration Act 1992 s 135 (repealed, subject to transitional provisions).

20 As to rent rebate subsidy see ibid s 140D (as added); and HOUSING vol 22 (2006 Reissue) PARA 183.

21 As to rent allowance subsidy see ibid s 135 (repealed, subject to transitional provisions).

22 Ibid s 163(2)(d) (amended by the Local Government Finance Act 1992 s 103, Sch 9 para 22). As to council tax benefit subsidy see the Social Security Administration Act 1992 ss 140A-140C (as added and amended); and HOUSING vol 22 (2006 Reissue) PARAS 180-182.

23 Ibid s 163(2)(e). The payments referred to are payments under s 167(3): see PARA 11 post.

24 Ibid s 163(2)(f). As to child benefit see PARA 237 et seq post.

25 Ibid s 163(3)(g).

26 Ibid s 163(3)(h). The sums referred to are sums falling to be paid under or by virtue of the Social Security Administration Act 1992.

27 Ie under the Social Security (Recovery of Benefits) Act 1997 s 14 or s 20: see PARA 6 ante; and see generally DAMAGES.

28 As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711; PARLIAMENT vol 78 (2010) PARA 1028 et seq.

29 Social Security (Recovery of Benefits) Act 1997 s 31(2).

30 Social Security Administration Act 1992 s 163(2) (as amended: see note 1 supra).

31 For the meaning of 'secondary contributor' and 'secondary Class 1 contributions' see PARA 35 note 9 post.

32 For the meaning of 'earner' see PARA 32 post.

33 For the meaning of 'employment' see PARA 32 post.

34 Social Security Administration Act 1992 s 163(4).

35 Ie under or by virtue of the Social Security Contributions and Benefits Act 1992 s 1(4), Sch 1 para 6 (see PARA 49 post) or s 16(3), Sch 2 para 6 (see PARA 43 post).

36 Social Security Administration Act 1992 s 163(5).

37 As to jobseeker's allowance see PARA 258 et seq post.

38 The expenditure mentioned includes expenditure incurred in connection with any inquiry undertaken on behalf of the Secretary of State with a view to obtaining statistics relating to the operation of any provision of the Jobseekers Act 1995 relating to a jobseeker's allowance: s 38(2).

39 Ibid s 38(1). Payments which are required to be made by s 38 must be made at such times and in such manner as the Secretary of State considers appropriate and the Treasury has approved: s 38(8).

40 Estimates under ibid s 38 must be made by the Secretary of State (1) in any manner which, after consulting the Government Actuary or the Deputy Government Actuary, he considers appropriate and the Treasury has approved; and (2) at such times as he considers appropriate and the Treasury has approved: s 38(7). As to contribution-based jobseeker's allowance see PARA 266 et seq post.

41 See ibid s 38(3).

42 See ibid s 38(4).

43 Ibid s 38(5). The amounts referred to are amounts deducted in accordance with regulations made under s 27: see PARAS 314-316 post.

44 Ibid s 38(6).

## **UPDATE**

### **8-14 Finance**

The Secretary of State and the Commissioners of Inland Revenue (see INCOME TAXATION vol 23(1) (Reissue) PARA 29) may incur expenditure in doing anything which in his or their opinion is appropriate for the purpose of facilitating either the transfer to them of such of the functions of the Secretary of State as are exercisable by the Contributions Agency (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 504) and the exercise by them of those functions: Social Security Act 1998 s 78.

## **10 General financial arrangements**

TEXT AND NOTES 7, 8--Now, head (4) any sum which, under regulations relating to statutory sick pay, statutory maternity pay, statutory adoption pay, ordinary statutory paternity pay or additional statutory paternity pay, falls to be paid by or on behalf of the Inland Revenue or to be set off against sums payable to the Inland Revenue otherwise than on account of contributions: Social Security Administration Act 1992 s 163(1)(d) (substituted by the Employment Act 2002 s 6(1); amended by Work and Families Act 2006 Sch 1 para 27.

TEXT AND NOTES 11-30--Also, head (j) any administrative expenses of the Secretary of State in supplying information about benefits under the Social Security Contributions and Benefits Act 1992 Pt II (ss 20-62) in accordance with regulations under the Welfare Reform and Pensions Act 1999 s 23 (amended by Civil Partnership Act 2004 Sch 27 para 157, Sch 30): Social Security Administration Act 1992 s 163(2) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 23, 26).

NOTE 12--In the Social Security Administration Act 1992 s 163(3) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 53), for 'undertaken ... (ss 151-163)' read 'undertaken (1) on behalf of the Inland Revenue with a view to obtaining statistics relating to the operation of Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19), and (2) on behalf of the Secretary of State with a

view to obtaining statistics relating to the operation of Pts II-VI (ss 20-122) and XI (ss 151-163)'.

TEXT AND NOTES 17, 18--Subject to savings (SI 2003/962) the references to family credit (working families' tax credit) and disability working allowance (disabled person's tax credit) in the Social Security Administration Act 1992 s 163(2)(d) are repealed: Tax Credits Act 2002 Sch 6.

NOTE 25--For 's 163(3)(g)' read 's 163(2)(g)'.

TEXT AND NOTE 26--For 's 163(3)(g)' read 's 163(2)(h)'. Head (h) now refers to the Secretary of State or the Inland Revenue: s 163(2)(h) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 29).

TEXT AND NOTE 31--For 'a secondary contributor' read 'any person' and for 'Class 1 contributions' read 'Class 1 contributions or Class 1A contributions (deemed always to have had effect thus) or Class 1B contributions (see PARA 39A)': Social Security Administration Act 1992 s 163(4) (amended by the Social Security Act 1998 s 66(1), Sch 7 para 100(1)).

TEXT AND NOTE 37--Now refers to the Secretary of State or the Commissioners of Inland Revenue: 1995 Act s 38(1)(b) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 66).

NOTE 38--In 1995 Act s 38(2) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 64) after 'Secretary of State' read 'or the Commissioners of Inland Revenue'.

NOTE 39--For 'Secretary of State' read 'the relevant authority': 1995 Act s 38(8) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 66(5)). The 'relevant authority' means (1) the Secretary of State, in relation to any estimate or payment to be made by him, or (2) the Commissioners of Inland Revenue, in relation to any estimate or payment to be made by them: 1995 Act s 38(9) (added by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 66(6)).

NOTE 40--In heads (1) and (2) for 'Secretary of State' read 'relevant authority' and for 'he' read 'it': 1995 Act s 38(7) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 66(4)). For the meaning of 'relevant authority' see NOTE 39.

TEXT AND NOTE 43--For 'Secretary of State' read 'Commissioners of Inland Revenue' and for 'him' read 'them': 1995 Act s 38(5) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 64(3)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(2) OUTLINE OF THE SOCIAL SECURITY SYSTEM/(ii) Finance/11. The social fund.

## **11. The social fund.**

The fund known as the social fund continues in being by that name<sup>1</sup> and continues to be maintained under the control and management of the Secretary of State<sup>2</sup>. Payments out of it must be made by him<sup>3</sup>.

The Secretary of State must make payments into the social fund of such amounts, at such times and in such manner as he may with the approval of the Treasury determine<sup>4</sup>.

Accounts of the social fund must be prepared in such form, and in such manner and at such times, as the Treasury may direct, and the Comptroller and Auditor General<sup>5</sup> must examine and certify every such account and must lay copies of it, together with his report, before Parliament<sup>6</sup>. The Secretary of State must prepare an annual report on the social fund, a copy of which must be laid before each House of Parliament<sup>7</sup>.

The Secretary of State must allocate amounts for payments<sup>8</sup> from the social fund in a financial year<sup>9</sup> and may specify the amounts either as sums of money or by reference to money falling into the social fund on the repayment or partial repayment of loans, or partly in the former and partly in the latter manner<sup>10</sup>. Allocations may be:

- 20 (1) for payments by a particular social fund officer<sup>11</sup> or group of social fund officers;
- 21 (2) of different amounts for different purposes;
- 22 (3) made at such time or times as the Secretary of State considers appropriate; and
- 23 (4) in addition to any other allocation to the same officer or group of officers or for the same purpose<sup>12</sup>,

and the Secretary of State may at any time reallocate amounts previously allocated<sup>13</sup>.

The Secretary of State may give general directions to social fund officers or groups of social fund officers, or to any class of social fund officers, with respect to the control and management by social fund officers or groups of social fund officers of the amounts allocated to them under these provisions<sup>14</sup>.

1 Social Security Administration Act 1992 s 167(1).

2 Ibid s 167(2). As to the Secretary of State see PARA 1 ante.

3 Ibid s 167(2).

4 Ibid s 167(3).

5 As to the Comptroller and Auditor General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 724-726.

6 Social Security Administration Act 1992 s 167(4). As to laying documents before Parliament see generally PARLIAMENT vol 34 (Reissue) PARA 941.

7 See ibid s 167(5), (6).

8 le payments such as are mentioned in the Social Security Contributions and Benefits Act 1992 s 138(1)(b): see PARA 228 post.

9 Social Security Administration Act 1992 s 168(1). For these purposes, 'financial year' has the same meaning as in the Local Government Finance Act 1992 (ie any period of 12 months beginning with 1 April: see s 116(1)): Social Security Administration Act 1992 s 191 (definition added by the Local Government Finance Act 1992 s 103, Sch 9 para 25).

10 Social Security Administration Act 1992 s 168(2).

11 As to social fund officers see PARA 383 post.

12 Social Security Administration Act 1992 s 168(3).

13 Ibid s 168(4). Section 168(2), (3) has effect in relation to a reallocation as it has effect in relation to an allocation: s 168(4).

14 Ibid s 168(5).

## **UPDATE**

### **8-14 Finance**

The Secretary of State and the Commissioners of Inland Revenue (see INCOME TAXATION vol 23(1) (Reissue) PARA 29) may incur expenditure in doing anything which in his or their opinion is appropriate for the purpose of facilitating either the transfer to them of such of the functions of the Secretary of State as are exercisable by the Contributions Agency (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 504) and the exercise by them of those functions: Social Security Act 1998 s 78.

### **11 The social fund**

TEXT AND NOTES 8, 9--The payments are referred to in the 1992 Act s 168 as 'section 138(1)(b) payments': s 168(1) (amended by Welfare Reform Act 2007 s 55(2)).

TEXT AND NOTES 11, 12--Now head (1) for all section 138(1)(b) payments or for any description of such payments; in head (2) for 'different purposes' read 'payments of different descriptions'; and in head (4) omit the words from 'to the same officer' to 'the same purpose': 1992 Act s 168(3) (amended by 2007 Act s 55(3), Sch 8)). Without prejudice to the generality of head (1), descriptions of section 138(1)(b) payments may, in particular, be framed by reference to (a) the purposes for which payments are made; (b) the persons by whom payments are made (including where such persons are located); (c) the persons to whom payments are made (including where such persons are located): 1992 Act s 168(3A) (added by 2007 Act s 55(4)).

TEXT AND NOTE 14--Now for 'the amounts allocated to them' read 'any amounts allocated to them': 1992 Act s 168(5) (amended by 2007 Act Sch 7 para 3(4)).

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## 12. Destination of repayments etc.

Subject as follows<sup>1</sup>, any sum recovered by the Secretary of State<sup>2</sup> under or by virtue of the Social Security Administration Act 1992 is to be paid into the Consolidated Fund<sup>3</sup>. So far as any such sum relates to a payment out of the National Insurance Fund<sup>4</sup> or the social fund<sup>5</sup>, it must be paid into that fund as appropriate<sup>6</sup>.

Any sums paid to the Secretary of State under the compensation recovery scheme<sup>7</sup> are to be paid into the Consolidated Fund, to the extent that he estimates that the sums relate to payments out of money provided by Parliament, and into the National Insurance Fund to the extent that he estimates that they relate to payments out of that fund<sup>8</sup>.

All penalties recovered by the Secretary of State as an alternative to prosecution<sup>9</sup> must be paid into the Consolidated Fund<sup>10</sup>.

1    Ie subject to the Social Security Administration Act 1992 s 164(2)-(7) (as amended): see the text and notes 2-6 infra. Section 164(1) (as amended) is also subject to the Jobseekers Act 1995 s 38: see PARA 10 ante.

2    As to the Secretary of State see PARA 1 ante.

3    Social Security Administration Act 1992 s 164(1) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 65). Sums repaid by virtue of the Social Security Administration Act 1992 s 185, Sch 9 para 1(4)(e) as it has effect for the purposes of schemes under the Social Security Contributions and Benefits Act 1992 s 111, Sch 8 (industrial injuries; old cases: see PARA 167 post) must be paid into the Consolidated Fund: Social Security Administration Act 1992 s 164(3). As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711; PARLIAMENT vol 78 (2010) PARA 1028 et seq.

4    As to the National Insurance Fund see PARA 8 ante.

5    As to the social fund see PARA 11 ante.

6    See the Social Security Administration Act 1992 s 164(2), (3). There must be paid into the National Insurance Fund: (1) fees so payable under regulations made by virtue of s 62(2)(b) (see PARA 335 post); and (2) sums recovered by the Secretary of State by virtue of a scheme under the Social Security Contributions and Benefits Act 1992 Sch 8 para 2 or Sch 8 para 4 making provision by virtue of the Social Security Administration Act 1992 Sch 9 para 4: s 164(5). Any sums recovered by the Secretary of State under s 15A (as added) (see PARA 352 post) must be paid (a) into the Consolidated Fund, to the extent that the Secretary of State estimates that those sums relate to payments out of money provided by Parliament; and (b) into the National Insurance Fund, to the extent that he estimates that they relate to payments out of that Fund; and any sums received by the Secretary of State under regulations made by virtue of s 15A(2)(b) (as added) must be paid into the Consolidated Fund: s 164(6), (7) (respectively amended and added by the Social Security (Mortgage Interest Payments) Act 1992 s 1(2), Schedule para 2; further amended by the Social Security (Recovery of Benefits) Act 1997 s 33(1), Sch 3 para 7). For a transitory modification to the Social Security Administration Act 1992 s 164 (as amended) see the Social Security (Consequential Provisions) Act 1992 s 6, Sch 4 paras 1(1), 19; and 40 Halsbury's Statutes (1997 Reissue) 716-717.

7    Ie under the Social Security (Recovery of Benefits) Act 1997 s 6 or 14: see PARA 6 ante; and see generally DAMAGES.

8    Ibid s 31(3).

9    Ie under the Social Security Administration Act 1992 s 115A (as added): see PARA 405 post.

10   Ibid s 164(8) (added by the Social Security Administration (Fraud) Act 1997 s 22, Sch 1 para 8).

## UPDATE

## **8-14 Finance**

The Secretary of State and the Commissioners of Inland Revenue (see INCOME TAXATION vol 23(1) (Reissue) PARA 29) may incur expenditure in doing anything which in his or their opinion is appropriate for the purpose of facilitating either the transfer to them of such of the functions of the Secretary of State as are exercisable by the Contributions Agency (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 504) and the exercise by them of those functions: Social Security Act 1998 s 78.

## **12 Destination of repayments etc**

NOTE 1--Also subject to the Welfare Reform Act 2007 s 27: 1992 Act s 164(1) (amended by 2007 Act Sch 3 para 10(25)).

NOTE 6--Head (1) omitted: Social Security Administration Act 1992 s 164(5) (amended by the Social Security Act 1998 Sch 7 para 101, Sch 8).

NOTE 10--1992 Act s 164(8) amended: Social Security Fraud Act 2001 s 15(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(2) OUTLINE OF THE SOCIAL SECURITY SYSTEM/(ii) Finance/13. Financial adjustments.

### **13. Financial adjustments.**

There must be made out of the National Insurance Fund<sup>1</sup> into the Consolidated Fund<sup>2</sup>, or out of money provided by Parliament into the National Insurance Fund, such payments by way of adjustment as the Secretary of State<sup>3</sup> determines (in accordance with any directions of the Treasury) to be appropriate in consequence of the operation of any enactment or regulations relating to:

- 24 (1) family credit<sup>4</sup>;
- 25 (2) disability working allowance<sup>5</sup>;
- 26 (3) statutory sick pay<sup>6</sup>;
- 27 (4) statutory maternity pay<sup>7</sup>; or
- 28 (5) the repayment or offsetting of benefit<sup>8</sup> or other payments<sup>9</sup>.

Where any specified payments fall to be made by way of adjustment, then the amount of the payments to be made must be taken to be such, and payments on account of them must be made at such times and in such manner, as may be determined by the Secretary of State in accordance with any directions given by the Treasury<sup>10</sup>. The specified payments are the following, that is to say:

- 29 (a) any payments falling to be made by way of adjustment by virtue of heads (1) to (4) above<sup>11</sup>;
- 30 (b) any payments falling to be made by way of adjustment in consequence of the operation of any enactment or regulations relating to child benefit<sup>12</sup> out of the National Insurance Fund into the Consolidated Fund, or into the National Insurance Fund out of money provided by Parliament<sup>13</sup>; and
- 31 (c) any payments falling to be made by way of adjustment in circumstances other than those mentioned in heads (1) to (5) or head (b) above out of the National Insurance Fund either to the Secretary of State or another government department or into the Consolidated Fund or into the National Insurance Fund out of money provided by Parliament<sup>14</sup>.

There must be paid out of the National Insurance Fund into the Consolidated Fund, at such times and in such manner as the Treasury may direct, such sums as the Secretary of State may estimate (in accordance with any directions given by the Treasury) to be the amount of certain administrative expenses<sup>15</sup>, excluding:

- 32 (i) Expenses attributable to the carrying into effect of provisions of the Social Security Contributions and Benefits Act 1992 or the Social Security Administration Act 1992 relating to the benefits which are payable<sup>16</sup> out of money provided by Parliament; and
- 33 (ii) any other category of expenses which the Treasury may direct, or any enactment may require, to be excluded from the Secretary of State's estimate,

but not excluding any of the administrative expenses of the Christmas bonus<sup>17</sup>.

There must be made out of the social fund<sup>18</sup> into the Consolidated Fund or the National Insurance Fund and into the social fund out of money provided by Parliament or the National Insurance Fund, such payments by way of adjustment as the Secretary of State determines (in accordance with any directions of the Treasury) to be appropriate in consequence of any enactment or regulations relating to the repayment or offsetting of a benefit or other payment under the Social Security Contributions and Benefits Act 1992<sup>19</sup>. Where in any other circumstances payments fall to be made by way of adjustment out of the social fund into the Consolidated Fund or the National Insurance Fund, or into the social fund out of money provided by Parliament or the National Insurance Fund, then, in such cases or classes of case as may be specified by the Secretary of State by order, the amount of the payments to be made must be taken to be such, and payments on account of it must be made at such times and in such manner, as may be determined by the Secretary of State in accordance with any direction given by the Treasury<sup>20</sup>.

1 As to the National Insurance Fund see PARA 8 ante.

2 As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711; PARLIAMENT vol 78 (2010) PARA 1028 et seq.

3 As to the Secretary of State see PARA 1 ante.

4 As to family credit see PARA 202 et seq post.

5 As to disability working allowance see PARA 218 et seq post.

6 As to statutory sick pay see EMPLOYMENT vol 39 (2009) PARA 498 et seq.

7 As to statutory maternity pay EMPLOYMENT vol 39 (2009) PARA 365 et seq.

8 I.e. as defined in the Social Security Contributions and Benefits Act 1992 s 122 (as amended): Social Security Administration Act 1992 s 165(1)(e). For these purposes, 'benefit' means (1) benefit under the Social Security Contributions and Benefits Act 1992 Pts II-V (ss 20-111) (as amended) (see PARA 54 et seq post) other than Old Cases payments; (2) as respects any period before 1 July 1992 but not before 6 April 1975, benefit under the Social Security Act 1975 Pt II (repealed); or (3) as respects any period before 6 April 1975, benefit under the National Insurance Act 1946 or the National Insurance Act 1965 (both repealed) or under the National Insurance (Industrial Injuries) Act 1946 or the National Insurance (Industrial Injuries) Act 1965 (both repealed): Social Security Contributions and Benefits Act 1992 s 122(1). 'Old Cases payments' means payments under s 111, Sch 8 Pt I or Pt II (old industrial injuries cases: see PARA 167 post): s 122(1).

9 Social Security Administration Act 1992 s 165(1).

10 Ibid s 165(2).

11 Ibid s 165(3)(a). In relation to payments falling within heads (a) or (c) in the text, s 165(2) only applies in such cases or classes of case as may be specified by the Secretary of State by order: s 165(4). At the date at which this volume states the law, no such order had been made, but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Financial Adjustments) Order 1988, SI 1988/529, partly has effect as if so made.

12 As to child benefit see PARA 237 post.

13 Social Security Administration Act 1992 s 165(3)(b).

14 Ibid s 165(3)(c); and see note 11 supra.

15 I.e. administrative expenses incurred as mentioned in ibid s 163(2)(a): see PARA 10 ante.

16 I.e. by virtue of ibid s 163(2) (as amended): see PARA 10 ante.

17 See ibid s 165(5). As to the Christmas bonus see PARA 29 post.

18 As to the social fund see PARA 11 ante.

19 Social Security Administration Act 1992 s 169(1).

20 Ibid s 169(2). At the date at which this volume states the law, no such order had been made, but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Financial Adjustments) Order 1988, SI 1988/529, partly has effect as if so made.

## **UPDATE**

### **8-14 Finance**

The Secretary of State and the Commissioners of Inland Revenue (see INCOME TAXATION vol 23(1) (Reissue) PARA 29) may incur expenditure in doing anything which in his or their opinion is appropriate for the purpose of facilitating either the transfer to them of such of the functions of the Secretary of State as are exercisable by the Contributions Agency (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 504) and the exercise by them of those functions: Social Security Act 1998 s 78.

### **13 Financial adjustments**

TEXT AND NOTES 1-9--Replaced. There must be made out of the National Insurance Fund into the Consolidated Fund, or by the Secretary of State out of money provided by Parliament to the Inland Revenue for payment into the National Insurance Fund (1) such payments by way of adjustment as the Secretary of State determines (in accordance with any directions of the Treasury) to be appropriate in consequence of the operation of any enactment or regulations relating to the repayment or offsetting of benefit as defined in the Social Security Contributions and Benefits Act s 122 or other payments; and (2) such payments by way of adjustment as the Inland Revenue determines to be appropriate in consequence of the operation of any enactment or regulations relating to statutory sick pay, statutory maternity pay, ordinary statutory paternity pay, additional statutory paternity pay and statutory adoption pay: Social Security Administration Act 1992 s 165(1) (substituted by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 30, Sch 3 para 53; and amended by Tax Credits Act 1999 Sch 2 para 26, Sch 6; and Work and Families Act 2006 Sch 1 para 28(2), Sch 2).

TEXT AND NOTE 10--For 'by the Secretary of State ... Treasury' read 'by the appropriate authority': Social Security Administration Act 1992 s 165(2) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 30). 'The appropriate authority' means (1) the Secretary of State, in relation to payments falling to be made by him, or (2) the Inland Revenue, in relation to payments falling to be made by it: Social Security Administration Act 1992 s 165(2A) (added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 30).

TEXT AND NOTE 11--Head (a) now refers to payments falling to be made by way of adjustment by virtue of the Social Security Administration Act 1992 s 165(1): s 165(3) (a) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 30).

NOTE 11--In the Social Security Administration Act 1992 s 165(4) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 54), for 'specified ... by order' read 'specified (i) in relation to payments falling to be made by the Secretary of State, by the Secretary of State by order made with the concurrence of the Inland Revenue, or (ii) in relation to payments falling to be made by the Inland Revenue, by the Inland Revenue by order'.

TEXT AND NOTES 15-17--Replaced. There must be paid out of the National Insurance Fund into the Consolidated Fund, at such times and in such manner as the Treasury may

direct (1) such sums as the Inland Revenue may estimate to be the amount of the administrative expenses incurred by it as mentioned in the Social Security Administration Act 1992 s 163(2)(a), or in carrying into effect any other legislation relating to ordinary statutory paternity pay, additional statutory paternity pay or statutory adoption pay, excluding any expenses which the Treasury may direct, or any enactment may require, to be excluded from the Inland Revenue's estimate under s 165(5)(a), and (2) such sums as the Secretary of State may estimate (in accordance with any directions given by the Treasury) to be the amount of the administrative expenses incurred as mentioned in s 163(2)(a) or (aa) by any government department other than the Inland Revenue, excluding specified expenses: s 165(5)(a), (b) (substituted by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 30; and amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 23, 27; the Employment Act 2002 s 6(2); and the Work and Families Act 2006 Sch 1 para 28(3)).

The specified expenses are (a) expenses attributable to the carrying into effect of provisions of the Social Security Contributions and Benefits Act 1992 or the Social Security Administration Act 1992 relating to the benefits which by virtue of s 163(2), the State Pension Credit Act 2002 s 20 or the Welfare Reform Act 2007 s 27 are payable out of money provided by Parliament; and (b) any other category of expenses which the Treasury may direct, or any enactment may require, to be excluded from the Secretary of State's estimate under the Social Security Administration Act 1992 s 165(5)(b), but none of the administrative expenses of the Christmas bonus may be excluded from that estimate by virtue of head (a) or (b): s 165(6) (added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 30; and amended by Welfare Reform Act 2007 Sch 3 para 10(26)).

There is excluded from the estimate under the Social Security Administration Act 1992 s 165(5)(a) any expenses attributable to the carrying into effect of provisions of the Act so far as relating to state pension credit: s 165(5A) (added by State Pension Credit Act 2002 Sch 2 para 18).

TEXT AND NOTE 19--Refers also to a benefit or other payment under the State Pension Credit Act 2002: Social Security Administration Act 1992 s 169(1) (amended by State Pension Credit Act 2002 Sch 2 para 19).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(2) OUTLINE OF THE SOCIAL SECURITY SYSTEM/(ii) Finance/14. Financial review and report.

#### **14. Financial review and report.**

As from the end of each review period, the Government Actuary or Deputy Government Actuary must review the operation during that period of:

- 34 (1) Parts I to VI of the Social Security Contributions and Benefits Act 1992<sup>1</sup> except certain provisions relating to industrial injuries benefit old cases<sup>2</sup>;
- 35 (2) the provisions of the Jobseekers Act 1995 relating to a contribution-based jobseeker's allowance<sup>3</sup>; and
- 36 (3) the Social Security Administration Act 1992 so far as it relates to the provisions specified in heads (1) and (2) above<sup>4</sup>,

and for these purposes, a review period is either the period of five tax years<sup>5</sup>, or such shorter period as the Secretary of State<sup>6</sup> may direct in respect of any review, from the end of the last period to be subject to a review under these provisions<sup>7</sup>.

It must be the object of such a review to determine the extent to which the level at which the National Insurance Fund<sup>8</sup> stands from year to year may be expected in the longer term to bear a proper relation to demands in respect of payments of benefit<sup>9</sup>; and for this purpose the actuary must take into account:

- 37 (a) current rates of contributions<sup>10</sup>;
- 38 (b) the yield to be expected from contributions in the longer term; and
- 39 (c) such other matters as he considers to be relevant as affecting the present and future level of the fund<sup>11</sup>.

After completing his review, the Government Actuary or Deputy Government Actuary must report to the Secretary of State his opinion on the question referred to above<sup>12</sup>; and the Secretary of State must lay a copy of the report before Parliament<sup>13</sup>.

1    Ie the Social Security Contributions and Benefits Act 1992 Pts I-VI (ss 1-111) (as amended); see PARA 54 et seq post.

2    Ie *ibid* s 111, Sch 8 Pt I: see PARA 167 post.

3    For the meaning of 'contribution-based jobseeker's allowance' see, by virtue of the Social Security Administration Act 1992 s 191 (as amended) PARA 266 note 1 post.

4    *Ibid* s 166(2) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 66). The first such review had to take place within five years from 6 April 1990: see the Social Security Administration Act 1992 s 166(1) (as so amended).

5    For the meaning of 'tax year' see PARA 9 note 6 ante.

6    As to the Secretary of State see PARA 1 ante.

7    Social Security Administration Act 1992 s 166(3).

8    As to the National Insurance Fund see PARA 8 ante.

9 For these purposes, 'benefit' means benefit under the Social Security Contributions and Benefits Act 1992 and includes a jobseeker's allowance: Social Security Administration Act 1992 s 191 (definition amended by the Jobseekers Act 1995 Sch 2 para 73).

10 For the meaning of 'contribution' see PARA 9 note 1 ante.

11 Social Security Administration Act 1992 s 166(4).

12 See the text to notes 8-9 supra.

13 Social Security Administration Act 1992 s 166(5). As to laying documents before Parliament see generally PARLIAMENT vol 34 (Reissue) PARA 941.

## **UPDATE**

### **8-14 Finance**

The Secretary of State and the Commissioners of Inland Revenue (see INCOME TAXATION vol 23(1) (Reissue) PARA 29) may incur expenditure in doing anything which in his or their opinion is appropriate for the purpose of facilitating either the transfer to them of such of the functions of the Secretary of State as are exercisable by the Contributions Agency (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 504) and the exercise by them of those functions: Social Security Act 1998 s 78.

### **14 Financial review and report**

TEXT AND NOTES--The Government Actuary or the Deputy Government Actuary must report to the Secretary of State his opinion on the effect on the level of the National Insurance Fund, and the effect which might be expected on the rates of contributions, in each year up to and including 2005/2006 of annual increases in the basic pension by the percentage increase in the general level of earnings; and the Secretary of State must lay a copy of the report before Parliament: Child Support, Pensions and Social Security Act 2000 s 36.

TEXT AND NOTE 4--Head (3) now includes the Social Security Contributions (Transfer of Functions, etc) Act 1999 Pt II (ss 8-19) and the provisions of the Welfare Reform Act 2007 Pt 1 (ss 1-29) (see PARA 75A) relating to contributory employment and support allowance: Social Security Administration Act 1992 s 166(1), (2) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 14; and the Welfare Reform Act 2007 Sch 3 para 10(27)).

NOTE 4--Social Security Administration Act 1992 s 166(1), (2) further amended: Social Security Act 1998 Sch 7 para 102.

TEXT AND NOTE 6--Reference to the Secretary of State is now to the Treasury: Social Security Administration Act 1992 s 166(3)(b) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 55).

NOTE 9--Definition of 'benefit' in 1992 Act s 191 further amended to include an employment and support allowance: Welfare Reform Act 2007 Sch 3 para 10(32)(a).

TEXT AND NOTE 12--Must now report to the Secretary of State and the Treasury: Social Security Administration Act 1992 s 166(5) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 55).

TEXT AND NOTE 13--Reference to the Secretary of State is now to the Treasury: Social Security Administration Act 1992 s 166(5) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 55).



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(3) SETTING THE RATES OF CONTRIBUTIONS AND BENEFITS/15. Annual review of contributions.

### **(3) SETTING THE RATES OF CONTRIBUTIONS AND BENEFITS**

#### **15. Annual review of contributions.**

In each tax year<sup>1</sup> the Secretary of State<sup>2</sup> must carry out a review of the general level of earnings<sup>3</sup> in Great Britain<sup>4</sup>, taking into account changes in that level which have taken place since his last such review, with a view to determining whether, in respect of Class 2, Class 3 or Class 4 contributions<sup>5</sup>, an order should be made amending Part I of the Social Security Contributions and Benefits Act 1992<sup>6</sup> to have effect in relation to the next following tax year<sup>7</sup>. For the purposes of any such review, the Secretary of State:

- 40 (1) must estimate the general level of earnings in such manner as he thinks fit; and
- 41 (2) must take into account any other matters appearing to him to be relevant to his determination whether or not such an order should be made, including the current operation of the Social Security Contributions and Benefits Act 1992<sup>8</sup>.

If the Secretary of State determines, as a result of such a review, that having regard to changes in the general level of earnings which have taken place, and to any other matters taken into account on the review, an order should be made for the amendment of Part I of the Social Security Contributions and Benefits Act 1992, he must prepare and lay before each House of Parliament a draft of such an order framed so as to give effect to his conclusions on the review<sup>9</sup>. If, however, he determines as a result of such a review that, having regard to his conclusions in respect of the general level of earnings and otherwise, no such amendments are called for as can be made by such an order, and he determines accordingly not to lay any such draft before Parliament, he must instead prepare and lay before each House of Parliament a report explaining his reasons for that determination<sup>10</sup>.

An order under these provisions must be made so as to be in force from the beginning of the tax year following that in which it receives Parliamentary approval<sup>11</sup>, and to have effect for that year and any subsequent tax year<sup>12</sup>.

Provision is also made for annual reviews of earnings to establish whether the earnings factors relevant for certain purposes should be revalued<sup>13</sup>.

1 For the meaning of 'tax year' see PARA 9 note 6 ante.

2 As to the Secretary of State see PARA 1 ante.

3 For the meaning of 'earnings' see, by virtue of the Social Security Administration Act 1992 s 192(2) PARA 33 post.

4 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). For the purposes of the Social Security Contributions and Benefits Act 1992, any reference to Great Britain includes a reference to the territorial waters of the United Kingdom adjacent to Great Britain and any reference to the United Kingdom includes a reference to the territorial waters of the United Kingdom: s 172 (applied by virtue of the Social Security Administration Act 1992 s 192(2)). Similarly, for the purposes of the Jobseekers Act 1995 (see PARA 258 et seq post), 'Great Britain' includes the territorial waters of the United Kingdom adjacent to Great Britain: s 35(1). 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. Neither the Channel Islands nor the Isle of Man are within the United Kingdom. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 3.

5 As to Class 1, Class 2, Class 3 and Class 4 contributions see, by virtue of the Social Security Administration Act 1992 s 192(2) PARA 34 et seq post.

6 le the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19) (as amended): see PARA 31 et seq post.

7 Social Security Administration Act 1992 s 141(1). As to the application of this provision in relation to the tax year 1992-93 see s 141(7). An order made under s 141 may amend the Social Security Contributions and Benefits Act 1992 Pt I (as amended) by altering any one or more of the following figures: (1) the figure specified in s 11(1) (as amended) (see PARA 40 post) as the weekly rate of Class 2 contributions; (2) the figure specified in s 11(4) (as amended) (see PARA 40 post) as the amount of earnings below which regulations under that subsection may except an earner from liability for Class 2 contributions; (3) the figure specified in s 13(1) (as amended) (see PARA 42 post) as the amount of a Class 3 contribution; (4) the figures specified in s 15(3) (as amended) (see PARA 43 post) as the lower and upper limits of profits or gains which are to be taken into account for the purposes of Class 4 contributions; and if such an order contains an amendment altering either of the figures specified in s 15(3) (as amended) it must make the same alteration of the corresponding figure specified in s 18(1) (as amended) (see PARA 44 post): Social Security Administration Act 1992 s 141(4), (5).

8 Ibid s 141(2).

9 Ibid s 141(3). Where the Secretary of State lays before Parliament a draft of an order under s 141, he must lay with it a copy of a report by the Government Actuary or the Deputy Government Actuary on the effect which, in that actuary's opinion, the making of such an order may be expected to have on the National Insurance Fund: s 142(1). Where the Secretary of State lays before Parliament a draft of such an order, then if the draft is approved by a resolution of each House, the Secretary of State must make an order in the form of the draft: s 142(1). As to laying documents before Parliament see generally PARLIAMENT vol 34 (Reissue) PARA 941.

10 Ibid s 141(6). Where the Secretary of State determines not to lay a draft order, he must with the report laid before Parliament lay a copy of a report by the Government Actuary or the Deputy Government Actuary on the consequences for the fund which may, in that actuary's opinion, follow from that determination: s 142(1).

11 For this purpose, the order is to be taken as receiving Parliamentary approval on the date on which the draft of it is approved by the second House to approve it: ibid s 142(3).

12 Ibid s 142(3). This is subject to the effect of any subsequent order under Pt IX (ss 141-148) (as amended): see PARA 16 et seq, 56 post.

As to the exercise of the powers under ss 141, 142 see eg the Social Security (Contributions) (Re-rating and National Insurance Fund Payments) Order 1997, SI 1997/544.

13 See the Social Security Administration Act 1992 s 148 (as amended); and PARA 56 post.

## UPDATE

### 15 Annual review of contributions

TEXT AND NOTES--Functions of Secretary of State under Social Security Administration Act 1992 ss 141, 142 transferred to the Treasury, ss 141(1)-(3), (6), 142(1), (2) amended accordingly: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 paras 44, 45.

NOTE 7--In head (4) for 'as the lower ... Class 4 contributions' read 'as the upper limit of profits or gains to be taken into account for the purposes of Class 4 contributions under s 15 and as the lower limit of profits or gains to be taken into account for those purposes under s 15(3)(a)': Social Security Administration Act 1992 s 141(4) (amended by the National Insurance Contributions Act 2002 Sch 1 para 16(2), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2)). For 'specified in s 15(3)' read 'referred to in head (4)' and the reference to s 18(1) is now to s 18: Social Security Administration Act 1992 s 141(5) (amended by the National Insurance Contributions Act 2002 Sch 1 para 16(3), with effect in relation to tax year 2003-04 and subsequent tax years (s 8(2)).



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(3) SETTING THE RATES OF CONTRIBUTIONS AND BENEFITS/16. Other powers to alter contributions.

## **16. Other powers to alter contributions.**

Without prejudice to the provision for annual review<sup>1</sup>, the Secretary of State<sup>2</sup> may at any time, if he thinks it expedient to do so with a view to adjusting the level at which the National Insurance Fund<sup>3</sup> stands for the time being and having regard to the sums which may be expected to be paid from the fund in any future period, make an order amending Part I of the Social Security Contributions and Benefits Act 1992<sup>4</sup> by altering any one or more of certain specified<sup>5</sup> figures<sup>6</sup>. This power is subject to statutory restrictions<sup>7</sup>.

Such an order must be made so as to be in force from the beginning of the tax year following that in which it received Parliamentary approval<sup>8</sup>, and to have effect for that year and any subsequent tax year<sup>9</sup>.

The Secretary of State also has power to make an order at any time for the purpose of adjusting amounts payable by way of primary Class 1 contributions<sup>10</sup> or secondary Class 1 contributions<sup>11</sup>; and he may by order alter the number of secondary earnings brackets below the highest bracket specified<sup>12</sup> in relation to secondary Class 1 contributions<sup>13</sup>.

1    Ie the Social Security Administration Act 1992 s 141: see PARA 15 ante.

2    As to the Secretary of State see PARA 1 ante.

3    As to the National Insurance Fund see PARA 8 ante.

4    Ie the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19) (as amended): see PARA 36 et seq post.

5    The specified figures are: (1) the percentage rate specified (a) as the initial primary percentage in *ibid* s 8(2)(a) (see PARA 36 post); (b) as the main primary percentage in s 8(2)(b) (as amended); (2) the percentage rate for secondary Class 1 contributions specified as the appropriate rate for Bracket 4 in s 9(3) (as amended) (see PARA 37 post); (3) the figure specified in s 11(1) (as amended) as the weekly rate of Class 2 contributions (see PARA 40 post); (4) the figure specified in s 13(1) (as amended) as the amount of a Class 3 contribution (see PARA 42 post); (5) the percentage rate for Class 4 contributions specified in s 15(3) (as amended) (see PARA 43 post); and if such an order contains an amendment altering the percentage rate for Class 4 contributions specified in s 15(3) (as amended), it must make the same alteration of the percentage rate specified in s 18(1) (as amended) (see PARA 44 post): Social Security Administration Act 1992 s 143(2), (3). Such an order may, if it contains an amendment altering the figure specified in the Social Security Contributions and Benefits Act 1992 s 11(1) (as amended) as the weekly rate of Class 2 contributions and the Secretary of State thinks it expedient in consequence of that amendment, amend s 11(4) (as amended) by altering the figure there specified as the amount of earnings below which regulations under s 11(4) (as amended) may exempt an earner from liability for Class 2 contributions: Social Security Administration Act 1992 s 143(3).

6    *Ibid* s 143(1). Where (in accordance with s 190: see PARA 30 post) the Secretary of State lays before Parliament a draft of an order under s 143, he must lay with it a copy of a report by the Government Actuary or the Deputy Government Actuary on the effect which, in that actuary's opinion, the making of such an order may be expected to have on the National Insurance Fund: s 144(1). As to laying documents before Parliament see generally PARLIAMENT vol 34 (Reissue) PARA 941.

7    No order may be made under *ibid* s 143 so as (1) to increase for any tax year (a) the percentage rate of the initial or main primary percentage; or (b) the percentage rate for secondary Class 1 contributions, to a percentage rate more than 0.25% higher than the percentage rate applicable at the end of the preceding tax year for the primary percentage or secondary Class 1 contribution in question; or (2) to increase the percentage rate for Class 4 contributions to more than 8.25%: s 143(4). For the meaning of 'tax year' see PARA 9 note 6 ante.

8 The order is to be taken as receiving Parliamentary approval on the date on which the draft of it is approved by the second House to approve it: *ibid* s 144(2).

9 *Ibid* s 144(2). As to the exercise of the powers under ss 143, 144 see eg the Social Security (Contributions) (Re-rating and National Insurance Fund Payments) Order 1997, SI 1997/544.

10 See the Social Security Administration Act 1992 s 145(1). The order may alter the percentage rates specified in note 5 head (1) *supra*, but not to a percentage rate more than 0.25% higher than applicable at the end of the preceding tax year for the primary percentage in question: see s 145(1), (3)(a). Without prejudice to s 141 or s 143, the Secretary of State may make such order (1) amending the Social Security Contributions and Benefits Act 1992 s 11(1) (as amended) by altering the figure specified in that subsection as the weekly rate of Class 2 contributions; (2) amending s 13(1) (as amended) by altering the figure specified in that subsection as the amount of a Class 3 contribution, as he thinks fit in consequence of the coming into force of an order made or proposed to be made under the Social Security Administration Act 1992 s 145(1): s 145(4).

An order under s 145 or s 146 (see the text and notes 11-13 *infra*) may make such amendments of any enactment as appear to the Secretary of State to be necessary or expedient in consequence of any alteration made by it: s 147(1). Where (in accordance with s 190) the Secretary of State lays before Parliament a draft of such an order, he must lay with it a copy of a report by the Government Actuary or the Deputy Government Actuary on the effect which, in that Actuary's opinion, the making of such an order may be expected to have on the National Insurance Fund: s 147(1). An order under s 145 or s 146 must be made so as to come into force (a) on a date in the tax year in which it receives Parliamentary approval; or (b) on a date in the next tax year; and is taken as receiving Parliamentary approval on the date on which the draft of it is approved by the second House to approve it: s 147(3), (5). Such an order has effect for the remainder of the tax year in which it comes into force and for any subsequent tax year (subject to the effect of any subsequent order under Pt IX (ss 141-148) (as amended)): s 147(4).

11 See *ibid* s 145(2). The order may amend the Social Security Contributions and Benefits Act 1992 s 9(3) (as amended) by altering any one or more of the following (1) the upper weekly earnings figure specified in respect of Bracket 1; (2) the weekly earnings figures specified in respect of Brackets 2-4; and (3) the percentage rates specified as the appropriate rates for Brackets 1-3; but no such order may be made to alter any of the percentage rates specified as the appropriate rates for Brackets 1-3 in s 9(3) (as amended) to a rate higher than the percentage rate which at the time the order comes into force is specified as the appropriate rate for Bracket 4: see the Social Security Administration Act 1992 s 145(2), (3)(b). As to the exercise of the power under s 145(2) see eg the Social Security (Contributions) (Re-rating and National Insurance Fund Payments) Order 1996, SI 1996/597.

12 *Ie* in the Social Security Contributions and Benefits Act 1992 s 9(3) (as amended): see PARA 37 *post*.

13 Social Security Administration Act 1992 s 146.

## UPDATE

### 16 Other powers to alter contributions

TEXT AND NOTES--Functions of Secretary of State under Social Security Administration Act 1992 ss 143, 144, 145, 147 transferred to the Treasury, ss 143(1), (3), 144(1), 145, 147 amended accordingly: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 paras 46, 48-50.

NOTE 5--Now, heads (1) the percentage rate specified as the main primary percentage in the Social Security Contributions and Benefits Act 1992 s 8(2)(a); (2) the percentage rate specified as the secondary percentage in s 9(2); and in head (5) for 'for Class 4 contributions specified in s 15(3)' read 'specified as the main Class 4 percentage in the Social Security Contributions and Benefits Act 1992 s 15(3ZA)(a) (see PARA 43)': Social Security Administration Act 1992 s 143(1) (amended by the Social Security Act 1998 Sch 7 para 90(1); and the National Insurance Contributions Act 2002 Sch 1 para 17(2), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2)).

Social Security Administration Act 1992 s 143(2) (which required an order containing an amendment altering the percentage rate for Class 4 contributions specified in Social Security Contributions and Benefits Act 1992 s 15(3) to make same alteration of rate specified in s 18(1)) repealed: National Insurance Contributions Act 2002 Sch 2.

NOTE 7--Now, head (1) to increase for any tax year the main primary percentage, or the secondary percentage, to a percentage rate more than 0·25 per cent higher than that applicable at the end of the preceding tax year; and in head (2) for 'percentage rate for Class 4 contributions' read 'main Class 4 percentage': Social Security Administration Act 1992 s 143(4) (amended by the Social Security Act 1998 Sch 7 para 90(2); and the National Insurance Contributions Act 2002 Sch 1 para 17(3), with effect in relation to tax year 2003-04 and subsequent tax years (s 8(2)).

TEXT AND NOTES 10, 11--Social Security Administration Act 1992 s 145(1)-(3) now as substituted by the Social Security Act 1998 Sch 7 para 92.

NOTE 10--Reference to the primary percentage in question is now to the main primary percentage in the Social Security Contributions and Benefits Act 1992 s 8(2)(a) (see PARA 36); Social Security Administration Act 1992 s 145(1), (3) (as substituted (see TEXT AND NOTES 10, 11); amended by the National Insurance Contributions Act 2002 Sch 1 para 18(2), (3), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2)). Reference to the Social Security Administration Act 1992 s 146 (repealed) omitted: s 147(1)-(3) (amended by the Social Security Act 1998 Sch 7 para 94, Sch 8).

TEXT AND NOTES 12, 13--Social Security Administration Act 1992 s 146 repealed: Social Security Act 1998 Sch 8.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(3) SETTING THE RATES OF CONTRIBUTIONS AND BENEFITS/17. Annual up-rating of benefits.

## **17. Annual up-rating of benefits.**

The Secretary of State<sup>1</sup> must in each tax year<sup>2</sup> review the sums payable by way of the principal benefits<sup>3</sup>, in order to determine whether they have retained their value in relation to the general level of prices obtaining in Great Britain<sup>4</sup> (estimated in such manner as the Secretary of State thinks fit)<sup>5</sup>. If it appears to him that the general level of prices is greater at the end of the period under review than it was at the beginning of that period, he must lay before Parliament the draft of an up-rating order:

- 42 (1) which increases each of certain specified sums<sup>6</sup> by a percentage not less than the percentage by which the general level of prices is greater at the end of the period than it was at the beginning<sup>7</sup>; and
- 43 (2) if he considers it appropriate, having regard to the national economic situation and any other matters which he considers relevant, which also increases by such a percentage or percentages as he thinks fit any of the sums payable by way of the principal benefits which are not specified sums for the purposes of head (1) above<sup>8</sup>; and
- 44 (3) stating the amount of any sums payable by way of the principal benefits but which the order does not increase<sup>9</sup>.

An order under these provisions must be framed so as to bring the alterations to which it relates into force in the week beginning with the first Monday in the tax year or on such earlier date in April as may be specified in the order<sup>10</sup>. It may make such transitional provision as the Secretary of State considers expedient in respect of periods of entitlement to family credit, to disability working allowance or to statutory sick pay running at the date when the alterations come into force<sup>11</sup>.

Where a member of an appropriate personal pension scheme<sup>12</sup> or a money purchase contracted-out scheme<sup>13</sup> continues in employment after attaining pensionable age<sup>14</sup> and the commencement of his pension under the scheme is postponed, the above provisions have effect as if the guaranteed minimum pension<sup>15</sup> to which he is treated as entitled<sup>16</sup> were subject to increases in accordance with the relevant provisions of the Pension Schemes Act 1993<sup>17</sup> and as if the amounts of any such notional increases were subject to annual up-rating in the same way as if they were sums<sup>18</sup> payable to a person who is also entitled to a Category A or Category B retirement pension<sup>19</sup>.

If the Secretary of State is satisfied that a mistake (whether in computation or otherwise) has occurred in the preparation of the previous order under the above provisions, he may by order vary the amount of any one or more of the sums payable by way of certain principal benefits<sup>20</sup> by increasing or reducing it to the level at which it would have stood had the mistake not occurred<sup>21</sup>. Where the amount of any such sum is so varied, then for the purposes of the next annual review and up-rating order, the amount of the sum must be taken to be, and throughout the period under review to have been, its amount as so varied<sup>22</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 For the meaning of 'tax year' see PARA 9 note 6 ante.

3 le the sums mentioned in the Social Security Administration Act 1992 s 150(1) (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 28; the Social Security (Incapacity for Work) Act 1994 s 2(3); and the Jobseekers Act 1995 s 41(4), Sch 2 para 64). Those sums are the sums: (1) specified in the Social Security Contributions and Benefits Act 1992 Sch 4 (as amended) (rate of benefits etc); s 44(4) (as amended) (see PARA 569 post); and s 111, Sch 8 paras 2(6)(c), 6(2)(b) (see PARA 167 post); (2) specified in regulations under s 30B(7) (as added) (see PARA 62 post); (3) specified in regulations under s 72(3) or 73(10) (see PARA 109 post); (4) which are the additional pensions in the long-term benefits; (5) which are the increases in the rates of retirement pensions under Sch 5 (as amended) (see PARA 585 post); (6) which are payable (a) by virtue of the Pension Schemes Act 1993 s 15(1) (see PARA 892 post) to a person who is also entitled to a Category A or Category B retirement pension, including sums payable by virtue of s 17(2) (see PARA 893 post); or (b) payable to such a person as part of his Category A or Category B retirement pension by virtue of an order made under these provisions or made under corresponding previous legislation; (7) specified in the Social Security Contributions and Benefits Act 1992 s 80(4) (as amended) (see PARA 590 post); (8) falling to be calculated under Sch 7 para 13(4) (see PARA 165 post); (9) prescribed for the purposes of s 128(5) (see PARA 204 post) or s 129(8) (see PARA 220 post) or specified in regulations under s 135(1) (see PARA 174 post); (10) specified by virtue of s 145(1) (see PARA 255 post); (11) specified in s 157(1) or in regulations under s 166(3) (statutory sick pay and statutory maternity pay: see EMPLOYMENT vol 39 (2009) PARAS 498 et seq, 365 et seq respectively); (12) specified in regulations under the Jobseekers Act 1995 s 4(2) or (5) (see PARAS 268, 272 post): see the Social Security Administration Act 1992 s 150(1)(a)-(k) (as so amended).

Any increase under s 150 (as amended) of the sums mentioned in head (4) supra must take the form of a direction that those sums must be increased by a specified percentage of their amount apart from the order and must apply, subject to s 156 (as substituted: see PARA 578 post) and only in relation to additional pensions calculated under the Social Security Contributions and Benefits Act 1992 s 45 (as amended) (see PARA 569 post) by reference to final relevant years which are earlier than the tax year preceding that in which the order comes into force, or, if the order comes into force on or after 6 May in any tax year, earlier than that year: Social Security Administration Act 1992 s 151(1) (amended by the Pensions Act 1995 s 130(2)). Any increase of the sums mentioned in heads (5) or (6) supra must take the form of a direction that those sums must be increased by a specified percentage of their amount apart from the order and must apply only in relation to sums calculated under the Social Security Contributions and Benefits Act 1992 Sch 5 (as amended) by reference to periods of deferment which have ended before the coming into force of the order: Social Security Administration Act 1992 s 151(2). An increase in a sum such as is specified in head (6)(b) supra must form part of the Category A or Category B retirement pension of the person to whom it is paid and an increase in a sum such as is specified in head (6)(a) supra must be added to and form part of that pension but does not form part of the sum increased: s 151(3). As to Category A and Category B retirement pensions see PARA 568 et seq post.

4 For the meaning of 'Great Britain' see PARA 15 note 4 ante.

5 Social Security Administration Act 1992 s 150(1).

6 le the sums to which *ibid* s 150(3) (as amended) applies. Those sums are sums (1) specified in the Social Security Contributions and Benefits Act 1992 Sch 4 Pt I, Pt III paras 1-6, Pt IV or Pt V (all as amended); or (2) mentioned in note 3 head (1) supra (excluding sums specified in Sch 4 (as amended)) or in note 3 heads (2)-(6) or head (8) supra: Social Security Administration Act 1992 s 150(3) (amended by the Social Security (Incapacity for Work) Act 1994 ss 2(3), 9(4)).

7 Social Security Administration Act 1992 s 150(2)(a)

8 See *ibid* s 150(2)(b).

9 *Ibid* s 150(2)(c). Section 150(2) does not require the Secretary of State to provide for an increase in any case in which it appears to him that the amount of the increase would be inconsiderable; and he may, in providing for an increase in pursuance of s 150(2), adjust the amount of the increase so as to round any sum up or down to such extent as he thinks appropriate: s 150(4), (5). Where s 150(2) requires the Secretary of State to lay before Parliament the draft of an order increasing any sum that could be reduced under section 154(1) (see PARA 18 post), the order may make such alteration to that sum as reflects the combined effect of that increase and of any reduction that could be made under s 154(1): s 150(6).

If the Secretary of State considers it appropriate to do so, he may include in the draft of an up-rating order, in addition to any other provisions, provisions increasing any of the sums for the time being specified in regulations under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended) (see PARA 173 et seq post) or under the Jobseekers Act 1995 (see PARA 258 et seq post) or which are additions to income support under regulations made under the Social Security Act 1986 s 89 (repealed): Social Security Contributions and Benefits Act 1992 s 150(7) (amended by the Jobseekers Act 1995 Sch 2 para 64). Any increase under the Social Security Administration Act 1992 s 150 (as amended) of any of the sums which are additions to income support mentioned in s 150(7) (as amended) must take the form of a direction that any such sum must be increased by a specified percentage of its amount apart from the order: s 151(6).

The Secretary of State must lay with any draft order under s 150 (as amended) a copy of a report by the Government Actuary or the Deputy Government Actuary giving that actuary's opinion on the likely effect on the National Insurance Fund of such parts of the order as relate to sums payable out of that fund: s 150(8). If a draft order laid before Parliament in pursuance of s 150 (as amended) is approved by a resolution of each House, the Secretary of State must make the order in the form of the draft: s 150(9). As to the exercise of these powers see eg the Social Security Benefits Up-rating Order 1997, SI 1997/543.

10 Social Security Administration Act 1992 s 150(10)(a).

11 Ibid s 150(10)(b). As to family credit and disability working allowance see PARA 202 et seq post; and as to statutory sick pay see EMPLOYMENT vol 39 (2009) PARA 498 et seq.

12 For the meaning of 'appropriate personal pension scheme' see PARA 741 post.

13 For the meaning of 'money purchase contracted-out scheme' see PARA 878 post.

14 For the meaning of 'pensionable age' see PARA 562 post.

15 For the meaning of 'guaranteed minimum pension' see PARA 878 post.

16 Ie by virtue of the Pension Schemes Act 1993 s 48(2)(a) (repealed).

17 Ie in accordance with ibid s 15(1): see PARA 892 post.

18 Ie sums to which note 3 head (6)(a) supra applied.

19 See the Social Security Administration Act 1992 s 150(10A) (added by the Pension Schemes Act 1993 Sch 8 para 28). Provision may also be made for applying the Social Security Administration Act 1992 s 150 (as amended) in relation to graduated retirement pension (as to which see PARA 583 post): see s 150(11) (amended by the Pensions Act 1995 s 131(2)).

20 Ie the sums specified in an enactment mentioned in the Social Security Administration Act 1992 s 150(1) (a): see note 3 head (1) supra.

21 Ibid s 152(1).

22 Ibid s 152(2).

## UPDATE

### 17 Annual up-rating of benefits

TEXT AND NOTES--Social Security Administration Act 1992 ss 150, 151 further amended: Pensions Act 2004 Sch 11 paras 20-22. 1992 Act s 150 further amended: Pensions Act 2007 s 6(1)-(4) (partly in force: see ss 6(7), (8), 30(1)(a)). See also Social Security Administration Act 1992 s 150A; and PARA 17A.

For a temporary modification of Social Security Administration Act 1992 s 150 see Welfare Reform Act 2009 s 23 (power to up-rate benefits following review in tax year 2009-2010).

NOTES 3, 9--1992 Act s 150(1), (7) further amended: Welfare Reform Act 2007 Sch 3 para 10(21), Sch 8.

NOTE 3--Social Security Contributions and Benefits Act 1992 Sch 4 further amended: Welfare Reform Act 2009 Sch 7 Pt 2; SI 2008/632. Head (7) repealed, head (9) amended: Tax Credits Act 2002 Sch 3 para 35, Sch 6. Social Security Contributions and Benefits Act 1992 s 157(1) amended: SI 2008/632.

Also, heads (13) which are shared additional pensions (see PARA 582A); (14) which are the increases in the rates of shared additional pensions under s 55C; (15) specified in regulations under the State Pension Credit Act 2002 s 2 or 3: Social Security Administration Act 1992 s 150(1) (amended by the Welfare Reform and Pensions Act

1999 Sch 12 para 24; the State Pension Credit Act 2002 Sch 2 para 16; and SI 2005/2053.

TEXT AND NOTE 5--1992 Act s 150(1) amended: Employment Act 2002 Sch 7 para 14; Work and Families Act 2006 Sch 1 para 26.

NOTE 6--Social Security Contributions and Benefits Act 1992 Sch 4 Pt III further amended: SI 2008/632, SI 2008/798, SI 2009/797. Social Security Contributions and Benefits Act 1992 Sch 4 Pt V further amended: Child Benefit Act 2005 Sch 1 para 15, Sch 2 Pt 1; SI 2008/632.

NOTE 9--Now also under the State Pension Credit Act 2002: 1992 Act s 150(7) (amended by State Pension Credit Act 2002 Sch 2 para 16). SI 1997/543 now replaced by Social Security Benefits Up-rating Order 2009, SI 2009/497. 1992 Act s 150 modified to enable the Secretary of State, in respect of each of the tax years beginning with 2009-10 and ending with 2013-14, to include in the draft of an up-rating order a reduction in certain amounts: SI 2008/3270.

TEXT AND NOTE 10--1992 Act s 150(10)(a) amended: Pensions Act 2007 Sch 1 para 21 (partly in force: see ss 5(3)-(7), 30(1)(a)).

TEXT AND NOTE 11--References to 'family credit' (working families' tax credit) and 'disability working allowance' (disabled person's tax credit) in Social Security Administration Act 1992 s 150(10)(b) repealed: Tax Credits Act 2002 Sch 6. See further PARA 227A.

TEXT AND NOTE 19--See further Social Security Administration Act 1992 s 150(12), (13) (added by SI 2006/2839).

TEXT AND NOTES 21, 22--If the Secretary of State is satisfied that such a mistake has occurred in the preparation of the previous order under the Social Security Administration Act 1992 s 150A (see PARA 17A), he may by order vary the amount of any one or more of the amounts referred to in s 150A(1) by increasing or reducing it to the level at which it would have stood had the mistake not occurred: s 152(1A) (added by Pensions Act 2007 Sch 1 para 22) (partly in force: see ss 5(3)-(7), 30(1)(a)).

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### **17A. Annual up-rating of basic pension etc and standard minimum guarantee.**

As to commencement of the following provisions see Pensions Act 2007 s 30(1)(a); and NOTE 10.

The Secretary of State must in each tax year review the following amounts in order to determine whether they have retained their value in relation to the general level of earnings obtaining in Great Britain (1) the amount of the basic pension<sup>1</sup>; (2) the specified amounts in the case of Category B, C or D retirement pensions<sup>2</sup>; (3) the specified amounts in the case of industrial death benefit<sup>3</sup>; and (4) the amounts of the standard minimum guarantee for the time being prescribed<sup>4</sup>. Where it appears to the Secretary of State that the general level of earnings is greater at the end of the period under review than it was at the beginning of that period, he must lay before Parliament the draft of an order which increases each of the amounts referred to above<sup>5</sup> by a percentage not less than the percentage by which the general level of earnings is greater at the end of the period than it was at the beginning<sup>6</sup>. The Secretary of State must lay with a draft order under these provisions a copy of a report by the Government Actuary or the Deputy Government Actuary giving that Actuary's opinion on the likely effect on the National Insurance Fund of any parts of the order relating to sums payable out of that Fund<sup>7</sup>. If a draft order laid before Parliament under these provisions is approved by a resolution of each House, the Secretary of State must make the order in the form of the draft<sup>8</sup>. An order under these provisions must be framed so as to bring the increase in question into force in the week beginning with the first Monday in the tax year following that in which the order is made<sup>9</sup>.

Consequential and related amendments are made<sup>10</sup>.

1 In the Social Security Administration Act 1992 s 150A 'the amount of the basic pension' means the first amount specified in the Social Security Contributions and Benefits Act 1992 s 44(4) (weekly rate of Category A retirement pension): Social Security Administration Act 1992 s 150A(10) (s 150A added by Pensions Act 2007 s 5(1)).

2 In the Social Security Administration Act 1992 s 150A 'the specified amounts in the case of Category B, C or D retirement pensions' means (1) the amount specified in the Social Security Contributions and Benefits Act 1992 Sch 4 Pt 1 para 5, and (2) the amounts specified in Sch 4 Pt 3 paras 6 and 7: Social Security Administration Act 1992 s 150A(10).

3 In *ibid* s 150A 'the specified amounts in the case of industrial death benefit' means (1) the amounts specified in the Social Security Contributions and Benefits Act 1992 Sch 4 Pt 5 para 10 (apart from the amount of the initial rate), and (2) the amount specified in Sch 4 Pt 5 para 11: Social Security Administration Act 1992 s 150A(10).

4 *Ibid* s 150A(1), referring to the standard minimum guarantee for the time being prescribed under the State Pension Credit Act 2002 s 2(4), (5)(a), (b). For the purposes of any review under the Social Security Administration Act 1992 s 150A(1) the Secretary of State must estimate the general level of earnings in such manner as he thinks fit: s 150A(8). See further NOTE 10.

5 *Ie* referred to in *ibid* s 150A(1).

6 *Ibid* s 150A(2). This does not require the Secretary of State to provide for an increase in any case if it appears to him that the amount of the increase would be inconsiderable: s 150A(3). The Secretary of State may, in providing for an increase in pursuance of s 150A(2), adjust the amount of the increase so as to round the sum in question up or down to such extent as he thinks appropriate: s 150A(4).

7 Ibid s 150A(5). If a draft order under s 150A is combined with a draft up-rating order under s 150 (see PARA 17), the report required by virtue of s 150A(5) may be combined with that required by virtue of s 150(8): s 150A(9).

8 Ibid s 150A(6).

9 Ibid s 150A(7).

10 See Pensions Act 2007 s 5(2), Sch 1 Pt 5.

The Social Security Administration Act 1992 s 150A and the amendments made by the Pensions Act 2007 Sch 1 Pt 5 (paras 19-32), so far as relating to the amounts referred to in heads (1)-(3) in the text, have effect in relation to the designated tax year and subsequent tax years (with the result that the first review to be carried out under the Social Security Administration Act 1992 s 150A(1) in relation to those amounts is to be carried out in the designated tax year): 2007 Act s 5(3). 'The designated tax year' means such tax year as the Secretary of State may designate by an order made before 1 April 2011: s 5(4). The Secretary of State must exercise his power under s 5(4) in such a way as to secure that the tax year immediately following the designated tax year is one that begins before the relevant dissolution date: s 5(5). 'The relevant dissolution date' means the latest date on which, having regard to the maximum period for which a Parliament may exist, the Parliament in existence at the time of exercise of the power could be dissolved: s 5(6).

The Social Security Administration Act 1992 s 150A and the amendments made by the 2007 Act Sch 1 Pt 5, so far as relating to the amounts mentioned in head (4) in the text, have effect in relation to the tax year in which the Pensions Act 2007 is passed and subsequent tax years: s 5(7).

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## **18. Annual review of, and effect of increases in, child benefit.**

The Secretary of State<sup>1</sup> is to be under an additional duty to review the level of child benefit<sup>2</sup> in April of each year, taking account of increases in the Retail Price Index and other relevant external factors<sup>3</sup>.

Regulations may, with effect from any day on or after that on which there is an increase in the rate or any of the rates of child benefit, reduce any specified sum<sup>4</sup> in relation to child's special allowance<sup>5</sup>, guardian's allowance<sup>6</sup>, the increase for child dependants<sup>7</sup>, the increase of the weekly rate of disablement pension in respect of child dependants<sup>8</sup> and the allowance in respect of the deceased's children<sup>9</sup> to such extent as the Secretary of State thinks appropriate having regard to that increase<sup>10</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 As to child benefit see PARA 237 et seq post.

3 See the Social Security Administration Act 1992 s 153 (omitted, by the Social Security (Consequential Provisions) Act 1992 s 6, Sch 4 paras 1(1), (16), until a day to be appointed under Sch 4 para 1(3)). At the date at which this volume states the law, no such day had been appointed. The powers in the Social Security Administration Act 1992 s 153 appear to add nothing to those conferred in relation to child benefit under s 150 (as amended): see PARA 17 ante.

4 Ie any sum specified in any of the provisions mentioned in ibid s 154(2): see notes 5-9 infra.

5 Ie any sum specified in the Social Security Contributions and Benefits Act 1992 Sch 4 Pt I para 6 (as amended).

6 Ie any sum specified in ibid Sch 4 Pt III para 5 (as amended).

7 Ie any sum specified in ibid Sch 4 Pt IV col (2) (as amended).

8 Ie any sum specified in ibid Sch 4 Pt V para 7 (as amended).

9 Ie any sum specified in ibid Sch 4 Pt V para 12 (as amended).

10 Social Security Administration Act 1992 s 154(1), (2).

### **UPDATE**

## **18 Annual review of, and effect of increases in, child benefit**

TEXT AND NOTES--The functions of the Secretary of State under the Social Security Administration Act 1992 Pt X (ss 150-154) so far as relating to child benefit and guardian's allowance are transferred to the Treasury: Tax Credits Act 2002 s 49(3). See further PARA 257A.1.

TEXT AND NOTES 6, 7--References to guardian's allowance and increase for child dependants in the Social Security Administration Act 1992 s 154(2) omitted: Tax Credits Act 2002 Sch 6.

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## **(4) COMPUTATION OF BENEFITS AND EARNINGS**

### **19. Effect of alteration of rates of benefit; in general.**

Where the rate of any benefit under Parts II to V of the Social Security Contributions and Benefits Act 1992<sup>1</sup> is altered<sup>2</sup>, then, subject to such exceptions or conditions as may be prescribed<sup>3</sup>, where:

- 45 (1) the weekly rate of such a benefit is altered to a fixed amount higher or lower than the previous amount; and
- 46 (2) before the commencing date<sup>4</sup> an award of that benefit has been made (whether before or after the passing of the relevant Act or the making of the relevant order),

except as respects any period falling before the commencing date, the benefit becomes payable at the altered rate without any claim<sup>5</sup> being made for it in the case of an increase in the rate of benefit or any review of the award in the case of a decrease, and the award has effect accordingly<sup>6</sup>. Where the weekly rate of such a benefit is altered and before the commencing date (but after that date is fixed) an award is made of the benefit, the award either may provide for the benefit to be paid as from the commencing date at the altered rate or may be expressed in terms of the rate appropriate at the date of the award<sup>7</sup>.

Where in consequence of the passing of an Act, or the making of an order, altering the rate of disablement pension<sup>8</sup>, regulations are made varying the scale of disablement gratuities<sup>9</sup>, the regulations may provide that the scale as varied is to apply only in cases where the period taken into account by the assessment of the extent of the disablement in respect of which the gratuity is awarded begins or began after such day as may be prescribed<sup>10</sup>.

Subject to such exceptions or conditions as may be prescribed, where:

- 47 (a) for any purpose of any Act or regulations, the weekly rate at which a person contributes to the cost of providing for a child<sup>11</sup>, or to the maintenance of an adult dependant<sup>12</sup>, is to be calculated for a period beginning on or after the commencing date for an increase in the weekly rate of benefit; but
- 48 (b) account is to be taken of amounts referable to the period before the commencing date,

those amounts must be treated as increased in proportion to the increase in the weekly rate of benefit<sup>13</sup>.

Regulations may be made applying the above provisions for the purposes of graduated retirement benefit<sup>14</sup>.

Special provision is made in relation to the alteration of the rates of certain pensions<sup>15</sup>, of child benefit<sup>16</sup>, of income support<sup>17</sup> and of jobseeker's allowance<sup>18</sup>.

<sup>1</sup> ie under the Social Security Contributions and Benefits Act 1992 Pts II-V (ss 20-111) (as amended): see PARA 54 et seq post.

2 le altered (1) by an Act subsequent to the Social Security Administration Act 1992; (2) by an order under s 150 (as amended) or s 152 (see PARA 18 ante); or (3) in consequence of any such Act or order altering any maximum rate of benefit: s 155(1).

3 'Prescribe' means prescribe by regulations: *ibid* s 191; and see the Social Security Contributions and Benefits Act 1992 s 122(1), containing an identical definition for the purposes of Pts I-VI (ss 1-122) (as amended). As to the making of regulations generally see PARA 30 post.

4 For these purposes, 'the commencing date' means the date fixed for payment of benefit at an altered rate to commence: Social Security Administration Act 1992 s 155(1).

5 'Claim' is to be construed in accordance with 'claimant': *ibid* s 191; and see the Social Security Contributions and Benefits Act 1992 s 122(1). 'Claimant', in relation to contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19) (as amended) (see PARA 31 et seq post) and to benefit under Pts II-IV (ss 20-93) (as amended) means (1) a person whose right to be excepted from liability to pay, or to have his liability deferred for, or to be credited with, a contribution, is in question; (2) a person who has claimed benefit; and includes, in relation to an award or decision, a beneficiary under the award or affected by the decision: Social Security Administration Act 1992 s 191. In relation to industrial injuries benefit (ie benefit under the Social Security Contributions and Benefits Act 1992 Pt V (ss 94-111) (as amended) (see PARA 126 et seq post) other than under Sch 8 (as amended) (see PARA 167 post)), 'claimant' means a person who has claimed such a benefit and includes (a) an applicant for a declaration under the Social Security Administration Act 1992 s 44 (see PARA 129 post) that an accident was or was not an industrial accident; and (b) in relation to an award or decision, a beneficiary under the award or affected by the decision: s 191. For the purposes of the Social Security Contributions and Benefits Act 1992 Pts I-VI (as amended), however, 'claimant', in relation to benefit other than industrial injuries benefit, means a person who has claimed benefit; and in relation to industrial injuries benefit (ie benefit under Pt V (as amended) other than under Sch 8 (as amended)), means a person who has claimed that benefit: s 122(1).

6 Social Security Administration Act 1992 s 155(1)-(3).

7 *Ibid* s 155(4).

8 As to disablement pension see PARA 141 et seq post.

9 As to disablement gratuities see PARA 161 post.

10 Social Security Administration Act 1992 s 155(5).

11 There is no statutory definition of 'child' for these purposes; but for the purposes of the Social Security Contributions and Benefits Act 1992 Pts I-VI (as amended), 'child' means a person under the age of 19 who would be treated as a child for the purposes of Pt IX (ss 141-147) (as amended) (see PARA 237 et seq post) or such other person under that age as may be prescribed: s 122(1). For the purposes of the Social Security Contributions and Benefits Act 1992, a person is over or under a particular age if he has or, as the case may be, has not attained that age and is between two particular ages if he has attained the first but not the second; and the time at which a person attains a particular age expressed in years is the commencement of the relevant anniversary of the date of his birth: s 173.

12 As to when a person is treated as a dependant see PARA 121 post.

13 Social Security Administration Act 1992 s 155(6).

14 See *ibid* s 155(7) (amended by the Pensions Act 1995 s 131(3)).

15 See the Social Security Administration Act 1992 s 156 (as substituted); and PARA 578 post.

16 See *ibid* ss 157, 158; and PARAS 256-257 post.

17 See *ibid* ss 159, 160; and PARA 183 post.

18 See *ibid* ss 159A, 160A (as added); and PARAS 327-328 post.

## **UPDATE**

### **19 Effect of alteration of rates of benefit; in general**

TEXT AND NOTES--Rates of awards of retirement pension or graduated retirement benefit may be increased in anticipation of a pensions up-rating order: Social Security Administration Act 1992 s 155A (added by Social Security Act 1998 s 76; and amended by Welfare Reform and Pensions Act 1999 Sch 12 para 25; and Pensions Act 2007 Sch 1 para 24 (in force in part: see ss 5(3)-(7), 30(1)(a)).

For the effect of alteration of rates of an employment and support allowance (see PARA 75A) see Social Security Administration Act 1992 s 159C (added by Welfare Reform Act 2007 Sch 3 para 10(23)). Social Security Administration Act 1992 s 159C amended: Pensions Act 2007 Sch 1 para 28 (partly in force: see ss 5(3)-(7), 30(1)(a)). See also Social Security Act 1998 Sch 2 para 6(b)(iv) (added by Welfare Reform Act 2007 Sch 3 para 17(8)).

NOTE 2--Social Security Administration Act 1992 s 155(1) amended: Pensions Act 2007 Sch 1 para 23 (partly in force: see ss 5(3)-(7), 30(1)(a)).

NOTE 6--The Social Security Administration Act 1992 s 155(3) does not apply if a question arises as to (1) either the weekly rate at which the benefit is payable by virtue of the Social Security Benefits Up-rating Order 2009, SI 2009/497, or whether the conditions for receipt of the benefit at the altered rate are satisfied, until that question has been determined in accordance with the provisions of the Social Security Act 1998 s 8 (see PARA 356A.1) (Social Security Benefits Up-rating Regulations 2009, SI 2009/607, reg 2); (2) either the weekly rate at which guardian's allowance is payable by virtue of the Guardian's Allowance Up-rating Order 2009, SI 2009/797, or whether the conditions for receipt of that allowance at the altered rate are satisfied, until that question has been determined in accordance with the provisions of the 1998 Act s 8 (Guardian's Allowance Up-rating Regulations 2009, SI 2009/810, reg 2).

NOTE 11--'Child' now has the same meaning as in the Social Security Contributions and Benefits Act 1992 Pt 9 (see PARA 239): s 122(1) (definition substituted by Child Benefit Act 2005 Sch 1 para 8(2)).

TEXT AND NOTE 13--Social Security Administration Act 1992 s 155(6) amended: 2005 Act Sch 1 para 23.

NOTE 14--Social Security Administration Act 1992 s 155(7) further amended: SI 2005/2053.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(4) COMPUTATION OF BENEFITS AND EARNINGS/20. Computation of earnings; in general.

## **20. Computation of earnings; in general.**

The computation of earnings is relevant for many purposes of social security legislation and earnings may be computed differently for different purposes. For the purposes of Parts II to V of the Social Security Contributions and Benefits Act 1992<sup>1</sup> and any associated regulations, the earnings of a claimant are to be calculated by determining the weekly amount of his earnings in accordance with regulations<sup>2</sup>. A claimant may be deemed to have notional income in two cases:

- 49 (1) where a claimant's earnings are not ascertainable at the date of determination of the claim or any subsequent review, the adjudicating authority is to treat him as possessing such earnings as is reasonable in the circumstances of the case, having regard to the number of hours worked and the earnings paid for comparable employment in the area<sup>3</sup>;
- 50 (2) where a claimant performs a service for another person and that person either makes no payment of earnings or pays less than that paid for a comparable employment in the area, the adjudicating authority is to treat the claimant as possessing such earnings (if any) as is reasonable for that employment unless the claimant satisfies the authority that the means of that person are insufficient for him to pay or to pay more for the service<sup>4</sup>.

1 See the Social Security Contributions and Benefits Act 1992 Pt II (ss 20-62) (as amended) (contributory benefits); Pt III (ss 63-79) (as amended) (non-contributory benefits); Pt IV (ss 80-93) (as amended) (increases for dependants); Pt V (ss 94-111) (as amended) (benefit for industrial injuries, though in the case of the latter there are excluded industrial injuries and diseases (old cases)); and PARA 54 et seq post.

2 See the Social Security Benefit (Computation of Earnings) Regulations 1996, SI 1996/2745, reg 3(1). The whole of the claimant's earnings are to be counted (including any notional earnings) except any sums which are to be disregarded or deducted: reg 3(2).

The 1996 Regulations replace the Social Security Benefit (Computation of Earnings) Regulations 1978, SI 1978/1698 (revoked). Whereas the previous regulations were cast in general terms, the 1996 Regulations are more specific in relation to the methods of calculation and are in line with the modern rules on calculating income for the purposes of the income-related benefits, in particular those relating to income support: see the Income Support (General) Regulations 1987, SI 1987/1967 (as amended); and PARA 176 et seq post.

3 See the Social Security Benefit (Computation of Earnings) Regulations 1996, SI 1996/2745, reg 4(1).

4 See *ibid* reg 4(2). This does not apply to a claimant who is engaged by a charitable or voluntary organisation or who is a volunteer if the authority is satisfied that it is reasonable for him to provide his services free of charge: reg 4(2). This provision mirrors that applying for income support purposes under the Income Support (General) Regulations 1987, SI 1987/1967, reg 42(6) (as amended): see PARA 192 post.

### **UPDATE**

## **20 Computation of earnings; in general**

NOTE 2--As to the computation of earnings in respect of a claim for incapacity benefit, see *Doyle v Secretary of State for Work and Pensions* [2006] EWCA Civ 466, (2006) Independent, 2 May.

NOTE 4--This does not now apply to a claimant (1) who is engaged by a charitable or voluntary organisation or is a volunteer if the Secretary of State is satisfied in any of those cases that it is reasonable for him to provide his services free of charge; or (2) who is participating in an employment or training programme for which a training allowance is not payable or, where such an allowance is payable, it is payable for the sole purpose of reimbursement of travelling or meal expenses to the person participating in that programme; for this purpose, 'employment or training programme' has the meaning given in the Jobseeker's Allowance Regulations 1996, SI 1996/207 (see PARA 286) and 'training allowance' has the meaning given in reg 1(3): SI 1996/2745 reg 4(2) (amended by SI 2000/678).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(5) SPECIAL PROVISIONS/21. Disqualifications and adjustments.

## (5) SPECIAL PROVISIONS

### 21. Disqualifications and adjustments.

Except where regulations otherwise provide, a person is disqualified for receiving any benefit under Parts II to V of the Social Security Contributions and Benefits Act 1992<sup>1</sup>, and an increase of such benefit is not payable in respect of any person as the beneficiary's<sup>2</sup> wife or husband, for any period during which the person:

- 51 (1) is absent from Great Britain<sup>3</sup>; or
- 52 (2) is undergoing imprisonment or detention in legal custody<sup>4</sup>.

However, in the case of absence from Great Britain, the disqualification is materially qualified by regulations applying to claims by persons abroad<sup>5</sup> and by reciprocal agreements with countries outside the United Kingdom<sup>6</sup> as well as by European Community law<sup>7</sup>.

Regulations may provide:

- 53 (a) for suspending payment of such benefit to a person during any period in which he is undergoing medical or other treatment as an in-patient in a hospital or similar institution<sup>8</sup>;
- 54 (b) for a person who would be entitled<sup>9</sup> to any such benefit but for the operation of any provision of the Social Security Contributions and Benefits Act 1992 or the Social Security Administration Act 1992 to be treated as if entitled to it for the purposes of any rights or obligations (whether his own or another's) which depend on his entitlement, other than the right to payment of the benefit<sup>10</sup>.

In relation to jobseeker's allowance<sup>11</sup>, regulations may provide that in prescribed circumstances<sup>12</sup> a claimant who is not in Great Britain may nevertheless be entitled to a contribution-based jobseeker's allowance, and may make provision as to the circumstances in which a person is to be treated as being or not being in Great Britain<sup>13</sup>.

1    Ie under the Social Security Contributions and Benefits Act 1992 Pt II (ss 20-111) (as amended): see PARA 54 et seq post. For the meaning of 'benefit' see PARA 13 note 8 ante.

2    'Beneficiary', in relation to any benefit, means the person entitled to that benefit: *ibid* s 122(1).

3    *Ibid* s 113(1)(a). For the meaning of 'Great Britain' see PARA 15 note 4 ante.

4    *Ibid* s 113(1)(b). This means imprisonment as a result of criminal proceedings: Decision R(S)8/79. It applies to such imprisonment or detention anywhere in the world: *R v National Insurance Comr, ex p Warry* [1981] 1 All ER 229, sub nom *R v National Insurance Comr, ex p Insurance Officers* [1981] ICR 90, DC. There are exceptions to the general rule in the Social Security (General Benefit) Regulations 1982, SI 1982/1408, reg 2 (as amended), reg 3.

5    The Secretary of State may make regulations modifying the Social Security Contributions and Benefits Act 1992 Pts I-V (as amended), and any provision of the Social Security Administration Act 1992 Pt II (ss 17-70) (as amended) which replaces provisions of the Social Security Act 1975 Pt III (repealed), in such manner as he thinks proper, in their application to persons who are or have been outside Great Britain at any prescribed time or in any prescribed circumstances: Social Security Contributions and Benefits Act 1992 s 119. For the meaning

of 'prescribed' see PARA 19 note 3 ante. The Social Security Benefit (Computation of Earnings) Regulations 1996, SI 1996/2745, are partly made in the exercise of this power. See also, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security Benefit (Persons Abroad) Regulations 1975, SI 1975/563 (as amended), which contain modifications in relation to (1) incapacity benefit, severe disablement allowance, unemployability supplement and maternity allowance; (2) widow's benefit, child's special allowance, guardian's allowance and retirement pension; (3) up-rating of benefits; (4) disablement benefit and industrial death benefit; (5) attendance allowance; (6) invalid care allowance; (7) accidents happening or prescribed diseases contracted outside Great Britain; (8) employment on the continental shelf; (9) the Channel Islands; (10) an adult dependant; and (11) child dependants. As to amending and other regulations which partly have effect under the Social Security Contributions and Benefits Act 1992 s 119 see 40 Halsbury's Statutes (1997 Reissue) 395-396.

6 Such reciprocal agreements are made under the Social Security Administration Act 1992 s 179 (as amended): see PARA 28 post.

7 See eg Case C-215/90 *Chief Adjudication Officer v Twomey* [1992] ECR I-1823, [1992] 2 CMLR 571, ECJ; and as to EC social security law see PARA 45 et seq post.

8 See the Social Security Contributions and Benefits Act 1992 s 113(2); and the Social Security (Hospital In-Patients) Regulations 1975, SI 1975/555, regs 3-6 (as amended), which provide for an initial downward adjustment of personal benefits after six weeks, then a further adjustment after 52 weeks in hospital. 'Personal benefit' means that benefit, pension or allowance which, apart from regulations, is payable to a person, otherwise than in respect of another person who is a child or an adult dependant: reg 2(1). There are adjustments in relation to dependency benefits where the beneficiary or dependent spouse has been in hospital for more than six weeks, or where a child dependant has been in hospital for more than 12 weeks: see regs 8-13 (as amended). 'Dependency benefit' means that benefit, pension or allowance which apart from regulations is payable to a person in respect of another person who is a child or an adult dependant, including child's special allowance (see PARA 54 post): reg 2(1).

9 'Entitled', in relation to any benefit, is to be construed in accordance with (1) the provisions specifically relating to that benefit; (2) in the case of a benefit specified in the Social Security Contributions and Benefits Act 1992 s 20(1) (as amended) (see PARA 54 post), s 21 (as amended) (see PARA 55 post); and (3) the Social Security Administration Act 1992 ss 1-3, 68 (as amended) (see PARAS 337, 347, 371 post): Social Security Contributions and Benefits Act 1992 s 122(1).

10 Ibid s 113(3).

11 As to jobseeker's allowance see PARA 258 et seq post.

12 For these purposes, 'prescribed' means specified in or determined in accordance with regulations made by the Secretary of State: Jobseekers Act 1995 s 35(1). For the prescribed circumstances see the Jobseeker's Allowance Regulations 1996, SI 1996/207, regs 165-167 (as amended).

13 Jobseekers Act 1995 s 21, Sch 1 para 11.

## UPDATE

### 21 Disqualifications and adjustments

NOTE 1--EC Council Regulation 881/2002 art 2(2), by virtue of which no funds may be made available to, or for the benefit of, a natural or legal person group or entity designated by the United Nations Sanctions Committee, does not apply to the payment of social security or social assistance benefits: Case C-340/08 *R (on the application of M) v HM Treasury* [2010] All ER (D) 232 (Apr), ECJ.

TEXT AND NOTE 3--Reference to wife or husband now includes civil partner: Social Security Contributions and Benefits Act 1992 s 113(1) (amended by Civil Partnership Act 2004 Sch 24 para 38).

NOTES 3, 5--No appeal lies against a decision whether to certify, in accordance with regulations made under the Social Security Contributions and Benefits Act 1992 s 113(1) or 119, that it is consistent with the proper administration of that Act to treat a person as though he were present in Great Britain: Social Security Act 1998 s 12(1), Sch 2 para 5.

NOTE 3--See *Yates v Secretary of State for Work and Pensions* [2009] EWCA Civ 479, [2010] PTSR 493, [2009] All ER (D) 98 (Jun) (widow, who had never entered the United Kingdom, not entitled to take advantage of increases in pension rates while her husband had been abroad).

NOTE 4--SI 1982/1408 reg 2 further amended: SI 2000/1483, SI 2005/1551, SI 2005/2878, SI 2005/3360, SI 2009/2054, SI 2010/442. See *R (on the application of DM) v Secretary of State for Work and Pensions*; *R (on the application of EM) v Secretary of State for Work and Pensions* [2010] EWCA Civ 18, [2010] All ER (D) 172 (Jan).

NOTE 5--In the Social Security Contributions and Benefits Act 1992 s 119, for 'The Secretary of State may' read 'The Treasury may with the concurrence of the Secretary of State' and for 'he thinks' read 'the Treasury thinks': 1992 Act s 119, amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 25. Any provision of Pt II (ss 8-19) and provisions of the Social Security Act 1998 Pt I Ch II (ss 8-39) which correspond to the Social Security Act 1975 Pt III may also be modified by regulations: Social Security Contributions and Benefits Act 1992 s 119 (amended by the Social Security Act 1998 Sch 7 para 69; and the 1999 Act Sch 7 para 7).

SI 1975/563 further amended: SI 2000/2876, SI 2001/2618, SI 2005/1551, SI 2005/2877, SI 2010/788. SI 1996/2745 amended: SI 2002/2469, SI 2002/2823, SI 2004/3168 (England), SI 2005/2919, SI 2005/2929 (Wales), SI 2007/2613, SI 2009/2678.

NOTE 8--SI 1975/555 replaced: Social Security (Hospital In-Patients) Regulations 2005, SI 2005/3360 (amended by SI 2006/588). Now, except in specified cases, a person's benefits will no longer be adjusted when the person has been receiving free medical treatment as a hospital in-patient for 52 weeks: SI 2005/3360 (as amended). Where a beneficiary is entitled to an increase in benefit for an adult or child dependent under the Social Security Contributions and Benefits Act 1992 Pt IV (ss 82-93), and the beneficiary, or both the beneficiary and the dependant, has received free in-patient treatment for more than 52 weeks, the increase will not be payable unless the beneficiary applies to the Secretary of State to pay the increase on behalf of the beneficiary to the dependant or some other person who is approved by the Secretary of State and who satisfies him that he will apply the increase on behalf of the beneficiary: reg 2(2), (3).

NOTE 9--In head (3), the reference to the Social Security Administration Act 1992 s 68 is replaced by a reference to the Social Security Act 1998 s 27: Social Security Contributions and Benefits Act 1992 s 122(1) (amended by the Social Security Act 1998 Sch 7 para 71(a)).

TEXT AND NOTE 10--Head (b) refers also to the Social Security Act 1998 Pt I Ch II (ss 8-39): Social Security Contributions and Benefits Act 1992 s 113(3) (amended by the Social Security Act 1998 Sch 7 para 66).

NOTE 12--Definition of 'prescribed' in 1995 Act s 35(1) does not, however, apply in relation to s 27 (see PARA 314), or s 36 (see PARA 30) so far as relating to regulations under s 27: s 35(1), amended by 1999 Act Sch 3 para 62.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(5) SPECIAL PROVISIONS/22. Crown employment and persons serving in Her Majesty's forces.

## **22. Crown employment and persons serving in Her Majesty's forces.**

Parts I to VI of the Social Security Contributions and Benefits Act 1992<sup>1</sup> apply to persons employed by or under the Crown in like manner as if they were employed by a private person<sup>2</sup>, but excluding persons serving as members of Her Majesty's forces in their capacity as such<sup>3</sup>. Employment as a member of Her Majesty's forces and any other prescribed employment<sup>4</sup> under the Crown are not, and are not to be treated as, employed earner's employment<sup>5</sup> for any of the purposes of the provisions relating to industrial injuries<sup>6</sup>. Subject to that, and to the following provisions, a person who is serving as a member of Her Majesty's forces must, while he is so serving, be treated as an employed earner, in respect of his membership of those forces, for the purposes of Parts I to VI of the Social Security Contributions and Benefits Act 1992 and of any provision of the Social Security Administration Act 1992 in its application to him as an employed earner<sup>7</sup>. Her Majesty's forces are taken for these purposes to consist of such establishments and organisations as may be prescribed, being establishments and organisations in which persons serve under the control of the Defence Council<sup>8</sup>.

The Secretary of State may make regulations modifying the relevant statutory provisions<sup>9</sup> in such manner as he thinks proper, in their application to persons who are or have been members of Her Majesty's forces; and such regulations may in particular provide, in the case of persons who are employed earners in respect of their membership of those forces, for reducing the rate of the contributions<sup>10</sup> payable in respect of their employment and for determining the amounts payable on account of those contributions by the Secretary of State<sup>11</sup> and the time and manner of payment and the deduction (if any) to be made on account of those contributions from the pay of those persons<sup>12</sup>.

Regulations may modify any provision of the Jobseekers Act 1995, in such manner as the Secretary of State thinks proper, in its application to persons who are or have been members of Her Majesty's forces<sup>13</sup> and the regulations may, in particular, provide for jobseeker's allowance to be payable<sup>14</sup> in relation to a person who is discharged from those forces at his own request<sup>15</sup>.

1   Ie the Social Security Contributions and Benefits Act 1992 Pts I-VI (ss 1-122) (as amended) (see PARA 54 et seq post), excluding s 111 (workmen's compensation: see PARA 167 post): s 115(4).

2   Ibid s 115(1).

3   Ibid s 115(2).

4   For the meaning of 'prescribed' see PARA 19 note 3 ante.

5   For the meaning of 'employed earner's employment' see PARA 32 post.

6   See the Social Security Contributions and Benefits Act 1992 s 115(3).

7   Ibid s 116(1).

8   Ibid s 116(3).

9   Ie ibid Pts I-VI (as amended) and any provision of the Social Security Administration Act 1992 Pt II (ss 17-70) (as amended) (see PARA 356 et seq post) which replaces provisions of the Social Security Act 1975 Pt III (repealed): Social Security Contributions and Benefits Act 1992 s 116(2).

10   As to contributions generally see PARA 31 et seq post.

11 As to the Secretary of State see PARA 1 ante.

12 Social Security Contributions and Benefits Act 1992 s 116(2) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 28). At the date at which this volume states the law, no such regulations had been made but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Contributions) Regulations 1979, SI 1979/591 (as amended); the Social Security (Benefit) (Members of the Forces) Regulations 1975, SI 1975/493 (as amended); and the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303 (as amended); partly have effect as if made in the exercise of this power.

13 For these purposes, Her Majesty's forces are taken to consist of such establishments and organisations in which persons serve under the control of the Defence Council as may be prescribed: Jobseekers Act 1995 s 22(3).

14 Ie provide that *ibid* s 19(6)(b) (see PARA 305 post) is not to apply: see s 22(2).

15 See *ibid* s 22(1), (2). For the meaning of 'prescribed' see PARA 21 note 12. See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 168.

## UPDATE

### 22 Crown Employment and persons serving in Her Majesty's forces

TEXT AND NOTE 8--For 'prescribed' read 'prescribed by regulations made by the Treasury with the concurrence of the Secretary of State': Social Security Contributions and Benefits Act 1992 s 116(3), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 22.

TEXT AND NOTES 9, 10--For 'The Secretary of State may' read 'The Treasury may with the concurrence of the Secretary of State' and for 'he thinks' read 'the Treasury thinks': 1992 Act s 116(2) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 22).

NOTE 9--The relevant statutory provisions now include the Social Security Contributions (Transfer of Functions, etc) Act 1999 Pt II (ss 8-19) and provisions of the Social Security Act 1998 Pt I Ch II (ss 8-39) which correspond to the Social Security Act 1975 Pt III: Social Security Contributions and Benefits Act 1992 s 116(2) (amended by the Social Security Act 1998 Sch 7 para 67; and the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 5).

NOTE 12--1979 Regulations consolidated in the Social Security (Contributions) Regulations 2001, SI 2001/1004 (see PARA 33). SI 1984/1303 amended: SI 2003/937.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(5) SPECIAL PROVISIONS/23. Mariners, airmen etc.

### **23. Mariners, airmen etc.**

The Secretary of State<sup>1</sup> may make regulations modifying provisions of Parts I to VI of the Social Security Contributions and Benefits Act 1992<sup>2</sup> and relevant provisions of the Social Security Administration Act 1992<sup>3</sup>, in such manner as he thinks proper, in their application to persons who are or have been, or are to be, employed<sup>4</sup> on board any ship, vessel, hovercraft or aircraft<sup>5</sup>. Such regulations may in particular provide:

- 55 (1) for any such provision to apply to such persons, notwithstanding that it would not otherwise apply;
- 56 (2) for excepting such persons from the application of any such provision where they neither are domiciled nor have a place of residence in any part of Great Britain<sup>6</sup>;
- 57 (3) for requiring the payment of secondary Class 1 contributions<sup>7</sup> in respect of such persons, whether or not they are employed earners<sup>8</sup> within the statutory definition of that term;
- 58 (4) for the taking of evidence, for the purposes of any claim<sup>9</sup> to benefit<sup>10</sup>, in a country or territory outside Great Britain, by a British consular official or such other person as may be prescribed<sup>11</sup>;
- 59 (5) for enabling persons who are or have been so employed to authorise the payment of the whole or any part of any benefit to which they are or may become entitled to such of their dependants as may be prescribed<sup>12</sup>.

Regulations may modify any provision of the Jobseekers Act 1995 in its application to any person who is, or has been, or is to be:

- 60 (a) Employed on board any ship, vessel, hovercraft or aircraft;
- 61 (b) outside Great Britain at any prescribed time or in any prescribed circumstances; or
- 62 (c) in prescribed employment in connection with continental shelf operations,

so far as that provision relates to a contribution-based jobseeker's allowance<sup>13</sup>. The regulations may in particular provide:

- 63 (i) for any such provision to apply even though it would not otherwise apply;
- 64 (ii) for any such provision not to apply even though it would otherwise apply;
- 65 (iii) for the taking of evidence, in a country or territory outside Great Britain, by a British consular official or other prescribed person;
- 66 (iv) for enabling payment of the whole, or any part of a contribution-based jobseeker's allowance to be paid to such of the claimant's dependants as may be prescribed<sup>14</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 I.e. the Social Security Contributions and Benefits Act 1992 Pts I-VI (ss 1-122) (as amended): see PARA 54 et seq post.

3     le any provision of the Social Security Administration Act 1992 Pt II (ss 17-70) (as amended) which replaces provisions of the Social Security Act 1975 Pt III (repealed): Social Security Contributions and Benefits Act 1992 s 118(1).

4     For the meaning of 'employed' see PARA 32 post.

5     Social Security Contributions and Benefits Act 1992 s 118(1).

6     For the meaning of 'Great Britain' see PARA 15 note 4 ante. As to domicile see further CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq; and as to residence in the context of taxation see INCOME TAXATION vol 23(2) (Reissue) PARA 1260.

7     As to secondary Class 1 contributions see PARA 37 post.

8     For the meaning of 'employed earner' see PARA 32 post.

9     For the meaning of 'claim' see PARA 19 note 5 ante.

10    For the meaning of 'benefit' see PARA 13 note 8 ante.

11    For the meaning of 'prescribed' see PARA 19 note 3 ante.

12    Social Security Contributions and Benefits Act 1992 s 118(2). At the date at which this volume states the law, no such regulations had been made but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), see in particular the Social Security (Mariner's Benefits) Regulations 1975, SI 1975/529 (as amended); the Social Security (Industrial Injuries) (Mariner's Benefits) Regulations 1975, SI 1975/470 (as amended); the Social Security (Airmen's Benefits) Regulations 1975, SI 1975/494 (as amended); and the Social Security (Industrial Injuries) (Airmen's Benefits) Regulations 1975, SI 1975/469 (as amended).

13    Jobseekers Act 1995 s 21, Sch 1 para 16(1).

14    Ibid Sch 1 para 16(2). As to jobseeker's allowance see PARA 258 et seq post.

## UPDATE

### 23 Mariners, airmen etc

TEXT AND NOTES--References to the Social Security Contributions and Benefits Act 1992 s 118 should read as references to s 117.

TEXT AND NOTES 1-4--For 'The Secretary of State may' read 'The Treasury may with the concurrence of the Secretary of State' and for 'he thinks' read 'the Treasury thinks': 1992 Act s 117(1), amended by 1999 Act Sch 3 para 23.

TEXT AND NOTE 3--The relevant statutory provisions now include the Social Security Contributions (Transfer of Functions, etc) Act 1999 Pt II (ss 8-19) and provisions of the Social Security Act 1998 Pt I Ch II (ss 8-39) which correspond to the Social Security Act 1975 Pt III: Social Security Contributions and Benefits Act 1992 s 117(1) (amended by the Social Security Act 1998 Sch 7 para 68; and the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 6).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(5) SPECIAL PROVISIONS/24. Employment in connection with continental shelf operations.

## **24. Employment in connection with continental shelf operations.**

The Secretary of State<sup>1</sup> may make regulations modifying provisions of Parts I to VI of the Social Security Contributions and Benefits Act 1992<sup>2</sup> and relevant provisions of the Social Security Administration Act 1992<sup>3</sup>, in such manner as he thinks proper, in their application to persons in any prescribed employment<sup>4</sup> (whether under a contract of service<sup>5</sup> or not) in connection with continental shelf operations<sup>6</sup>. In particular, but without prejudice to the generality of this power, the regulations may provide for any prescribed provision of Parts I to VI of the Social Security Contributions and Benefits Act 1992 to apply to any such person notwithstanding that he does not fall within the description of an employed or self-employed earner<sup>7</sup>, or does not fulfil the prescribed conditions<sup>8</sup> as to residence or presence in Great Britain<sup>9</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 I.e. the Social Security Contributions and Benefits Act 1992 Pts I-VI (ss 1-122) (as amended): see PARA 54 et seq post.

3 I.e. any provision of the Social Security Administration Act 1992 Pt II (ss 17-70) (as amended) which replaces provisions of the Social Security Act 1975 Pt III (repealed): Social Security Contributions and Benefits Act 1992 s 120(1).

4 For the meaning of 'prescribed' see PARA 19 note 3 ante.

5 For the meaning of 'contract of service' see PARA 32 note 4 post.

6 Social Security Contributions and Benefits Act 1992 s 120(1). 'Continental shelf operations' means any activities which, if the Oil and Gas (Enterprise) Act 1982 s 23(6)(a), (d) (application of civil law to certain offshore activities: see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1679) were omitted, would nevertheless fall within s 23(2): Social Security Contributions and Benefits Act 1992 s 120(2).

7 For the meaning of 'employed earner' and 'self-employed earner' see PARA 32 post.

8 I.e. the conditions prescribed under the Social Security Contributions and Benefits Act 1992 s 1(6): see PARA 31 post.

9 Ibid s 120(2). For the meaning of 'Great Britain' see PARA 15 note 4 ante. At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Employed Earners' Employments for Industrial Injuries Purposes) Regulations 1975, SI 1975/467 (as amended); the Social Security (Persons Abroad) Regulations 1975, SI 1975/563 (as amended); and the Social Security (Contributions) Regulations 1979, SI 1979/591 (as amended) partly have effect as if so made.

As to jobseeker's allowance see PARA 23 text and notes 13-14 ante; and PARA 258 et seq post.

### **UPDATE**

## **24 Employment in connection with continental shelf operations**

TEXT AND NOTES 1-4--For 'The Secretary of State may' read 'The Treasury may with the concurrence of the Secretary of State' and for 'he thinks' read 'the Treasury think': 1992 Act s 120(1), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 26.

TEXT AND NOTE 3--The relevant statutory provisions now include the Social Security Contributions (Transfer of Functions, etc) Act 1999 Pt II (ss 8-19) and provisions of the Social Security Act 1998 Pt I Ch II (ss 8-39) which correspond to the Social Security Act 1975 Pt III: Social Security Contributions and Benefits Act 1992 s 120(1) (amended by the Social Security Act 1998 Sch 7 para 70; and the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 8).

NOTE 9--SI 1975/467 further amended: SI 2005/2877.

1979 Regulations consolidated in the Social Security (Contributions) Regulations 2001, SI 2001/1004 (see PARA 33).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(5) SPECIAL PROVISIONS/25. Modifications relating to married women and widows.

## **25. Modifications relating to married women and widows.**

The Secretary of State<sup>1</sup> may make regulations modifying any of the provisions of Parts I to IV of the Social Security Contributions and Benefits Act 1992<sup>2</sup>, except for the provisions relating to complete or partial failure to satisfy contribution conditions<sup>3</sup>, in such manner as he thinks proper, in their application to women who are or have been married<sup>4</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 Ie the Social Security Contributions and Benefits Act 1992 Pts I-IV (ss 1-93) (as amended): see PARA 54 et seq post.

3 Ie ibid s 60 (as amended): see PARA 565 post.

4 Social Security Contributions and Benefits Act 1992 s 118. At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Benefit) (Married Women and Widows Special Provisions) Regulations 1974/2010 (as amended), partly have effect as if so made. Most of the provisions of these regulations have been revoked; the remaining provisions relate to modifications of certain qualifying conditions for widows and credits for women who are or have been widows.

### **UPDATE**

## **25 Modifications relating to married women and widows**

TEXT AND NOTES--For 'The Secretary of State may' read 'The Treasury may with the concurrence of the Secretary of State' and for 'he thinks' read 'the Treasury thinks': 1992 Act s 118 (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 24).

NOTE 4--SI 1974/2010 further amended: SI 2005/2877, SI 2008/1554.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(5) SPECIAL PROVISIONS/26. Treatment of certain marriages.

## **26. Treatment of certain marriages.**

Regulations may provide (1) for a voidable marriage which has been annulled at any time to be treated<sup>1</sup> as if it had been a valid marriage which was terminated by divorce at the date of annulment<sup>2</sup>; and (2) as to the circumstances in which a marriage during the subsistence of which a party to it is at any time married to more than one person is to be treated<sup>3</sup> as having, or as not having, the same consequences as any other marriage<sup>4</sup>.

1     Ie for the purposes of any enactment contained in the Social Security Contributions and Benefits Act 1992 Pts I-V (ss 1-111) (as amended) (see PARA 54 et seq post) and of regulations under any such enactment: s 121(2).

2     Ibid s 121(1)(a); and see, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Child's Special Allowance) Regulations 1975, 1975/497, reg 3; the Social Security (Guardian's Allowance) Regulations 1975, SI 1975/515, reg 4(3). As to the effect of annulment of voidable marriages in other circumstances see Decision R(G)1/73.

3     Ie for the purposes of any enactment contained in the Social Security Contributions and Benefits Act 1992 Pts I-V (as amended): s 121(1)(b).

4     Ibid s 121(1)(b) (amended by the Private International Law (Miscellaneous Provisions) Act 1995 s 8(2), Schedule para 4(1), (2)); and see, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975, SI 1975/561 (as amended). The general rule is that a polygamous marriage is treated as having the same consequences as a monogamous marriage for any day, but only for any day, throughout which the polygamous marriage is in fact monogamous: reg 2(1). There are special rules in reg 3 (as amended) relating to retirement pensions for women. See also *Bibi v Chief Adjudication Officer* (1997) Times, 10 July, CA (where a man who had paid national insurance contributions died having married polygamously no wife was entitled to a widowed mother's allowance). As to widowed mother's allowance see PARA 85 post.

The Social Security Contributions and Benefits Act 1992 s 121 (as amended) is applied in relation to certain provisions of the Pension Schemes Act 1993: see s 167(1), (6).

### **UPDATE**

## **26 Treatment of certain marriages**

TEXT AND NOTES--Any regulations made under the Social Security Contributions and Benefits Act 1992 s 121(1) must be made by the Treasury with the concurrence of the Secretary of State: s 121(1) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 27).

See also Social Security Contributions and Benefits Act 1992 s 121(1)(aa) (added by Civil Partnership Act 2004 Sch 24 para 40).

NOTE 2--SI 1975/515 replaced by the Guardian's Allowance (General) Regulations 2003, SI 2003/495 (see PARAS 117-120).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(5) SPECIAL PROVISIONS/27. Provisions relating to Northern Ireland.

## **27. Provisions relating to Northern Ireland.**

Specified provisions only of the Social Security Administration Act 1992<sup>1</sup> extend to Northern Ireland<sup>2</sup> but provision is made for joint arrangements for co-ordinating the operation of social security legislation in Great Britain<sup>3</sup> and Northern Ireland<sup>4</sup>. The following benefits are, however, excluded from such arrangements: income support<sup>5</sup>; income-based jobseeker's allowance<sup>6</sup>; family credit<sup>7</sup>; disability working allowance<sup>8</sup>; housing benefit<sup>9</sup>; child benefit<sup>10</sup>; Christmas bonus<sup>11</sup>; statutory sick pay<sup>12</sup>; and statutory maternity pay<sup>13</sup>.

The Secretary of State<sup>14</sup> may with the consent of the Treasury make reciprocal arrangements with the authority administering any scheme in force in Northern Ireland and appearing to him to correspond substantially with a scheme contained in the Social Security Contributions and Benefits Act 1992, the Jobseekers Act 1995 and the Social Security Administration Act 1992 concerning any of the specified benefits for co-ordinating the operation of those schemes, and such arrangements may include provision for making any necessary financial adjustments<sup>15</sup>. The specified benefits are: income support; income-based jobseeker's allowance; family credit; disability working allowance; housing benefit; or child benefit<sup>16</sup>. Regulations may make provision for giving effect to any such arrangements; and such regulations may in particular provide:

- 67 (1) for modifying any provision of those Acts concerning any of the specified benefits or any regulations made under such a provision;
- 68 (2) without prejudice to head (1) above, for securing that acts, omissions and events having any effect for the purposes of the scheme in force in Northern Ireland are to have a corresponding effect for the purposes of those Acts (but not so as to confer any double benefit);
- 69 (3) for determining, in cases where rights accrue both under that scheme and under those Acts, which of those rights are to be available to the person concerned<sup>17</sup>.

1 See the Social Security Administration Act 1992 s 24 (see PARA 365 post); s 170, Sch 5 (as amended) (see PARA 407 post); s 177, Sch 8 (constitution of joint authority); and s 192 (short title, commencement and extent); the Social Security Contributions and Benefits Act 1992 s 16, Sch 2 (as amended) (see PARA 51 post); s 116(2) (as amended) (see PARA 22 ante); and s 177 (short title, commencement and extent).

2 Ibid s 177(5), (6); Social Security Administration Act 1992 s 192(5), (6) (amended by the Social Security (Recovery of Benefits) Act 1997 s 33(1), Sch 3 para 13).

3 For the meaning of 'Great Britain' see PARA 15 note 4 ante.

4 See the Social Security Administration Act 1992 s 177 (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 68). As to provision for Northern Ireland see also the Jobseekers Act 1995 s 39. References in the Social Security Administration Act 1992 s 177 (as amended) to that Act include references to certain provisions of the Pension Schemes Act 1993: see s 167(1), (2).

5 As to income support see PARA 176 et seq post.

6 As to jobseeker's allowance see PARA 258 et seq post.

7 As to family credit see PARA 202 et seq post.

8 As to disability working allowance see PARA 218 et seq post.

- 9 As to housing benefit see HOUSING vol 22 (2006 Reissue) PARA 140 et seq.
- 10 As to child benefit see PARA 237 et seq post.
- 11 As to Christmas bonus see PARA 29 post.
- 12 As to statutory sick pay see EMPLOYMENT vol 39 (2009) PARA 498 et seq.
- 13 See the Social Security Administration Act 1992 s 177(5) (as amended: see note 4 supra). As to statutory maternity pay see EMPLOYMENT vol 39 (2009) PARA 365 et seq.
- 14 As to the Secretary of State see PARA 1 ante.
- 15 Social Security Administration Act 1992 s 178(1) (s 178 amended by the Jobseekers Act 1995 Sch 2 para 69).
- 16 Social Security Administration Act 1992 s 178(2) (as amended: see note 15 supra).
- 17 Ibid s 178(3) (as amended: see note 15 supra).

## **UPDATE**

### **27 Provisions relating to Northern Ireland**

NOTES 1, 4--Social Security Administration Act 1992 s 177 further amended: Social Security Act 1998 Sch 7 para 105; and the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 56.

TEXT AND NOTES 7, 8--For provision as to tax credits under the Tax Credits Act 2002 see PARA 227A.

NOTE 15--Social Security Administration Act 1992 s 178 further amended: Social Security Act 1998 Sch 7 para 106.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(5) SPECIAL PROVISIONS/28. Reciprocal agreements with countries outside the United Kingdom.

## **28. Reciprocal agreements with countries outside the United Kingdom.**

For the purpose of giving effect:

- 70 (1) to any agreement with the government of a country outside the United Kingdom<sup>1</sup> providing for reciprocity in matters relating to payments for purposes similar or comparable to the purposes of the Social Security Contributions and Benefits Act 1992, the Jobseekers Act 1995 and the Social Security Administration Act 1992, except in relation to certain excluded benefits<sup>2</sup>; or
- 71 (2) to any such agreement as it would be if it were altered in accordance with proposals to alter it which, in consequence of any change in the law of Great Britain<sup>3</sup>, the government of the United Kingdom has made to the other government in question,

Her Majesty may by Order in Council make provision for modifying or adapting that legislation in its application to cases affected by the agreement or proposed alterations<sup>4</sup>. An order so made may, instead of or in addition to making specific modifications or adaptations, provide generally that the legislation mentioned in head (1) above is to be modified to such extent as may be required to give effect to the provisions contained in the agreement or, as the case may be, alterations in question<sup>5</sup>.

The modifications which may be made include provisions:

- 72 (a) for securing that acts, omissions and events having any effect for the purposes of the law of the country in respect of which the agreement is made have a corresponding effect for the purposes of those Acts (but not so as to confer a right to double benefit);
- 73 (b) for determining, in cases where rights accrue both under that legislation and under the law of that country, which of those rights is to be available to the person concerned;
- 74 (c) for making any necessary financial adjustments<sup>6</sup>;

and the power conferred by heads (1) and (2) above is also exercisable in relation to regulations made under the Social Security Contributions and Benefits Act 1992 or the Social Security Administration Act 1992 and concerning income support<sup>7</sup>, jobseeker's allowance<sup>8</sup>, family credit<sup>9</sup>, disability working allowance<sup>10</sup>, housing benefit<sup>11</sup> or child benefit<sup>12</sup>.

These powers have been exercised on numerous occasions<sup>13</sup>.

1 For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

2 I.e. except in relation to (1) community charge benefits (replaced by council tax benefits: see generally RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq); (2) payments out of the social fund (see PARA 228 et seq post); (3) Christmas bonus (see PARA 29 post); (4) statutory sick pay and statutory maternity pay (see EMPLOYMENT vol 39 (2009) PARAS 498 et seq, 365 et seq respectively): Social Security Administration Act 1992 s 179(4)(i)-(v).

3 For the meaning of 'Great Britain' see PARA 15 note 4 ante.

- 4 Social Security Administration Act 1992 s 179(1), (4) (s 179(3)-(5) amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 70).
- 5 Social Security Administration Act 1992 s 179(2).
- 6 Ibid s 179(3) (as amended: see note 4 supra).
- 7 As to income support see PARA 176 et seq post.
- 8 As to jobseeker's allowance see PARA 258 et seq post.
- 9 As to family credit see PARA 202 et seq post.
- 10 As to disability working allowance see PARA 218 et seq post.
- 11 As to housing benefit see generally HOUSING vol 22 (2006 Reissue) PARA 140 et seq.
- 12 Social Security Administration Act 1992 s 179(5) (as amended: see note 4 supra). As to child benefit see PARA 237 et seq post.
- 13 See eg the Social Security (Jamaica) Order 1997, SI 1997/871; the Social Security (United States of America) Order 1997, SI 1997/1778; and see 40 Halsbury's Statutes (1997 Reissue) 731-732.

## UPDATE

### 28 Reciprocal agreements with countries outside the United Kingdom

TEXT AND NOTES--As to the exchange of information with overseas authorities to facilitate the carrying out of social security functions see PARA 28A.

See also Pensions Act 2004 s 299 (claims for certain benefits following termination of reciprocal agreement with Australia).

TEXT AND NOTES 1-4--Also, head (3) to the Social Security Contributions (Transfer of Functions, etc) Act 1999 Pt II (ss 8-19): Social Security Administration Act 1992 s 179(4) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 15(3)).

NOTE 2--Now also the State Pension Credit Act 2002 and the Welfare Reform Act 2007 Pt 1 (ss 1-29): Social Security Administration Act 1992 s 179(4) (amended by the State Pension Act 2002 Sch 2 para 21; and the Welfare Reform Act 2007 Sch 3 para 10(29)(b)).

NOTE 4--Social Security Administration Act 1992 s 179(3), (4) further amended: Social Security Act 1998 Sch 7 para 107.

NOTE 6--Now also the State Pension Credit Act 2002 and the Welfare Reform Act 2007: Social Security Administration Act 1992 s 179(3) (amended by the 2002 Act Sch 2 para 21; and the Welfare Reform Act 2007 Sch 3 para 10(29)(a)).

TEXT AND NOTES 7-12--Now also state pension credit and an employment and support allowance: 1992 Act s 179(5) (amended by the 2002 Act Sch 2 para 21; and the Welfare Reform Act 2007 Sch 3 para 10(29)(c)).

TEXT AND NOTES 9, 10--References to family credit (working families' tax credit) and disability working allowance (disabled person's tax credit) in 1992 Act s 179(5) omitted: Tax Credits Act 2002 Sch 6.

NOTE 13--SI 1997/871 modified: SI 2001/407, SI 2005/2765. SI 1997/1778 modified: SI 2001/407. See also Social Security (Contributions and Industrial Injuries) (Canada) Order 1998, SI 1998/263; Social Security (Contributions) (Republic of Korea) Order 2000, SI 2000/1823; Social Security (Contributions) (Japan) Order 2000, SI 2000/3063; Social Security (Netherlands) Order 2007, SI 2007/631.



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## **28A. Exchange of information with overseas territories.**

Where it appears to the Secretary of State that there are arrangements in force<sup>1</sup> for the exchange of relevant information<sup>2</sup> between him and any authorities in a country outside the United Kingdom ('the overseas country'), and that the arrangements and the law in force in the overseas country are such as to ensure that there are adequate safeguards in place against any improper use of information disclosed by the Secretary of State under the following provisions, then, for the purpose of facilitating the carrying out by authorities in the overseas country of any function relating to anything corresponding to, or in the nature of, a social security benefit, the Secretary of State may make any such disclosure of relevant information to authorities in the overseas country as he considers necessary to give effect to the arrangements<sup>3</sup>. It is the duty of the Secretary of State to take all such steps as may be reasonable for securing that relevant information disclosed to him in accordance with the arrangements is not used for any purpose for which its use is not expressly or impliedly authorised by or under the arrangements<sup>4</sup>.

1 These provisions do not apply where provision is in force under the Social Security (Administration) Act 1992 s 179 (see PARA 28) for giving effect to the arrangements in question: s 179A(4) (s 179A added by the Social Security Fraud Act 2001 s 5(1)).

2 'Relevant information' means any information held by the Secretary of State or any authorities in a country outside the United Kingdom for the purposes of any functions relating to, or to anything corresponding to or in the nature of, a social security benefit: Social Security (Administration) Act 1992 s 179A(6).

3 Ibid s 179A(1), (2).

4 Ibid s 179A(3).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/1. INTRODUCTION TO SOCIAL SECURITY/(5) SPECIAL PROVISIONS/29. Christmas bonus.

## **29. Christmas bonus.**

Any person who in any year:

- 75 (1) is present or ordinarily resident<sup>1</sup> in the United Kingdom<sup>2</sup> or any other member state at any time during the relevant week<sup>3</sup>; and
- 76 (2) is entitled to a payment of a qualifying benefit<sup>4</sup> in respect of a period which includes a day in that week or is to be treated as entitled<sup>5</sup> to a payment of a qualifying benefit in respect of such a period,

is entitled<sup>6</sup> to payment in respect of that year of the sum of £10 or such larger sum as the Secretary of State may by order specify<sup>7</sup>. Any person who is a member of a couple and is entitled to such a payment in respect of a year is also entitled to an additional payment<sup>8</sup> in respect of that year if:

- 77 (a) both members have attained pensionable age not later than the end of the relevant week; and
- 78 (b) the other member satisfies the condition mentioned in head (1) above; and
- 79 (c) Either he is entitled or treated as entitled<sup>9</sup>, in respect of the other member, to an increase in the payment of the qualifying benefit or the only qualifying benefit to which he is entitled is income support<sup>10</sup>.

Any such payment is to be made by the Secretary of State<sup>11</sup> and only one sum is payable in respect of any person<sup>12</sup>.

Where the only qualifying benefit to which a person is entitled is income support, he is not entitled to a payment under heads (1) and (2) above unless he has attained pensionable age not later than the end of the relevant week<sup>13</sup>.

A sum so payable is not treated as benefit for the purposes of any enactment or instrument under which entitlement to the relevant qualifying benefit arises or is to be treated as arising<sup>14</sup>. A payment and the right to receive a payment:

- 80 (i) under these provisions or any corresponding enactment in Northern Ireland; or
- 81 (ii) under regulations relating to widows which are made by the Secretary of State under any enactment relating to police and which contain a statement that the regulations provide for payments corresponding to payments under these provisions,

must be disregarded for all purposes of income tax and for the purposes of any enactment or instrument under which regard is had to a person's means<sup>15</sup>.

A determination by the competent authority<sup>16</sup> that a person is entitled or not entitled to payment of a qualifying benefit in respect of a period which includes a day in the relevant week is conclusive for these purposes<sup>17</sup>. Any other question arising under these provisions must be determined by the Secretary of State whose decision is final, except that he may reverse the decision on new facts being brought to his notice or if he is satisfied that the decision was given in ignorance of, or was based on a mistake as to, some material fact<sup>18</sup>.

1 As to ordinary residence see INCOME TAXATION vol 23(2) (Reissue) PARA 1260.

2 For these purposes the Channel Islands, the Isle of Man and Gibraltar are to be treated as though they were part of the United Kingdom: Social Security Contributions and Benefits Act 1992 s 149(1). For the meaning of 'United Kingdom' generally see PARA 15 note 4 ante.

3 'The relevant week', in relation to any year, means the week beginning with the first Monday in December or such other week as may be specified in an order made by the Secretary of State: *ibid* s 150(4). As to the Secretary of State see PARA 1 ante.

4 'Qualifying benefit' means: a retirement pension (see PARA 561 et seq post); long-term incapacity benefit (see PARA 59 et seq post); a widowed mother's allowance or widow's pension (see pars 85-86 post); a severe disablement allowance (see PARA 92 et seq post); an invalid care allowance (see PARAS 100-101 post); industrial death benefit (see PARA 166 post); an attendance allowance; an unemployability supplement or allowance; a war disablement pension; a war widow's pension; income support (see PARA 176 et seq post) or a mobility supplement; and for these purposes: (1) 'attendance allowance' means (a) an attendance allowance (see PARAS 112-116 post); (b) a disability living allowance (see PARA 102 et seq post); (c) an increase of disablement pension under *ibid* s 104 or s 105 (see PARAS 147, 149 post); (d) a payment under regulations made in exercise of the powers in the Social Security Act 1975 s 159(3)(b) (repealed) or the Social Security Contributions and Benefits Act 1992 s 111, Sch 8 para 7(2) (see PARA 167 post); (e) an increase of allowance under the Pneumoconiosis, Byssinosis and Miscellaneous Diseases Benefit Scheme 1983, SI 1983/136, art 8 (constant attendance allowance for certain persons to whom that scheme applies) or under the corresponding provision of any scheme which may replace that scheme; (f) an allowance in respect of constant attendance on account of disablement for which a person is in receipt of war disablement pension, including an allowance in respect of exceptionally severe disablement; (2) 'mobility supplement' means a supplement awarded in respect of disablement which affects a person's ability to walk and for which the person is in receipt of war disablement pension; (3) 'pensionable age' has the meaning given by the rules in the Pensions Act 1995 s 126, Sch 4 para 1 (see PARA 562 post); (4) 'retirement pension' includes graduated retirement benefit (see PARA 583 post); (5) 'unemployability supplement or allowance' means (a) an unemployability supplement payable under the Social Security Administration Act 1992 s 106, Sch 7 Pt I (as amended) (see PARA 162 post); or (b) any corresponding allowance payable by Sch 8 para 6(4)(a), by way of supplement to retired pay or pension exempt from income tax under the Income and Corporation Taxes Act 1988 s 315(1), under the Personal Injuries (Emergency Provisions) Act 1939 or by way of supplement to retired pay or pension under the Polish Resettlement Act 1947 or under the Pensions (Navy, Army, Air Force and Mercantile Marine) Act 1939; (6) 'war disablement pension' means (a) any retired pay, pension or allowance granted in respect of disablement under powers conferred by or under the Air Force (Constitution) Act 1917, the Personal Injuries (Emergency Provisions) Act 1939, the Pensions (Navy, Army, Air Force and Mercantile Marine) Act 1939, the Polish Resettlement Act 1947, or certain statutory provisions relating to reserve forces in Northern Ireland; (b) without prejudice to head (a) *supra*, any retired pay or pension to which the Income and Corporation Taxes Act 1988 s 315(1) applies; and (7) 'war widow's pension' means any widow's pension or allowance granted in respect of a death due to service or war injury and payable by virtue of any enactment mentioned in head (6)(a) *supra* or a pension or allowance for a widow granted under any scheme mentioned in s 315(2)(e); and each of the following expressions, ie 'attendance allowance', 'unemployability supplement or allowance', 'war disablement pension' and 'war widow's pension' includes any payment which the Secretary of State accepts as being analogous to it: Social Security Contributions and Benefits Act 1992 s 150(1), (2) (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 33; the Pensions Act 1995 ss 126(c), 132, Sch 4 para 13(b)).

A person is not taken to be entitled to a payment of a war disablement pension for these purposes unless not later than the end of the relevant week he has attained the age of 65: Social Security Contributions and Benefits Act 1992 s 149(4) (amended by the Pensions Act 1995 Sch 4 para 8). As to when a person attains a particular age see PARA 19 note 11 ante.

5 A person is treated for these purposes as entitled to a payment of a qualifying benefit if he would be so entitled: (1) in the case of a qualifying benefit other than income support, but for the fact that he or, if he is a member of a couple, the other member is entitled to receive some other payment out of public funds; (2) in the case of income support, but for the fact that his income or, if he is a member of a couple, the income of the other member was exceptionally of an amount which resulted in his having ceased to be entitled to income support: Social Security Contributions and Benefits Act 1992 s 149(2). References for these purposes to a 'couple' are references to a married or unmarried couple; and for this purpose 'married couple' and 'unmarried couple' are to be construed in accordance with Pt VII (ss 123-137) (as amended) (see PARA 175 note 1 post) and any regulations made under it: s 150(3).

6 *le* subject to *ibid* ss 148(2)-150 (as amended) and to the Social Security Administration Act 1992 s 1 (as amended): see PARA 337 post.

7 Social Security Contributions and Benefits Act 1992 s 148(1), (3)(b).

8 le of £10 or such larger sum as the Secretary of State may by order specify: *ibid* s 148(3)(b).

9 A person is treated for these purposes as entitled in respect of the other member of the couple to an increase in a payment of a qualifying benefit if he would be so entitled (1) but for the fact that he or the other member is entitled to receive some other payment out of public funds; (2) but for the operation of any provision of *ibid* s 83(2) or (3) (see *PARA 591 post*) or Sch 7 para 6(4) or any regulations made under Sch 7 para 6(3) whereby entitlement to benefit is affected by the amount of a person's earnings in a given period: s 149(3) (prospectively amended, as from 6 April 2010, by the Pensions Act 1995 Sch 4 paras 18, 20).

10 Social Security Contributions and Benefits Act 1992 s 148(2).

11 *Ibid* s 148(3)(a).

12 *Ibid* s 148(5).

13 *Ibid* s 148(4).

14 *Ibid* s 148(5).

15 *Ibid* s 148(6).

16 'Competent authority' means, in relation to a payment of any description of a qualifying benefit, an authority that ordinarily determines whether a person is entitled to such a payment: Social Security Administration Act 1992 s 67(1), (4).

17 *Ibid* s 67(1).

18 *Ibid* s 67(2), (3).

## UPDATE

### 29 Christmas bonus

TEXT AND NOTES 1-15--A decision by the Secretary of State that a person is entitled or not entitled to payment of a qualifying benefit in respect of a period which includes a day in the relevant week is conclusive for the purposes of the Social Security Contributions and Benefits Act 1992 s 148: Social Security Act 1998 s 33. No appeal lies against a decision whether a person is entitled to payment under the Social Security Contributions and Benefits Act 1992 s 148: Social Security Act 1998 s 12(1), Sch 2 para 2. For further provision relating to the effect of the Social Security Contributions and Benefits Act 1992 s 148, see the Child Support, Pensions and Social Security Act 2000 s 33(2), (3).

NOTE 3--The relevant week in relation to the year 2008 is the week beginning Monday 22 December: see the Christmas Bonus (Relevant Week) Order 2008, SI 2008/3064.

NOTE 4--'Qualifying benefit' now includes widowed parent's allowance (see *PARA 87A*) but no longer includes severe disablement allowance: Social Security Contributions and Benefits Act 1992 s 150(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 8 para 12, Sch 13 Pt IV (subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958)). In heads (4)(b), (6)(b), 1988 Act s 315(1) replaced by Income Tax (Earnings and Pensions) Act 2003 s 641(1).

'Qualifying benefit' also includes a qualifying employment and support allowance: Social Security Contributions and Benefits Act 1992 s 150(1) (amended by Welfare Reform Act 2007 Sch 3 para 9(11)(a)). 'Qualifying employment and support allowance' means a contributory allowance under the Welfare Reform Act 2007 Pt 1 (ss 1-29) (see *PARA 75A*) the calculation of the amount of which includes an addition in respect of the support component or the work-related activity component: Social Security Contributions and Benefits Act 1992 s 150(2) (amended by 2007 Act Sch 3 para 9(11)(b); and the Welfare Reform Act 2009 s 37(3)).

Definition of 'war widow's pension' in Social Security Contributions and Benefits Act 1992 s 150(2) further amended: Civil Partnership Act 2004 Sch 24 para 49(2).

In Social Security Contributions and Benefits Act 1992 s 149(4) for 'the age of 65' read 'pensionable age': Pensions Act 2007 Sch 1 para 43 (this amendment has effect as from 6 April 2024: see s 13(3)).

NOTE 5--In the Social Security Contributions and Benefits Act 1992 Pt 10 'couple' has the meaning given by s 137(1) (see PARA 175): s 150(3) (substituted by Civil Partnership Act 2004 Sch 24 para 49(3)).

NOTE 8--For the year 2008 the sum of £70 is specified: Christmas Bonus (Specified Sum) Order 2008, SI 2008/3255.

NOTE 9--1992 Act s 149(3) further amended: Pensions Act 2007 Sch 1 para 17, Sch 7 Pt 2: 2007 Act s 4(4); but see s 4(5)-(8)).

Pensions Act 1995 Sch 4 para 18 repealed, Sch 4 para 20 repealed with effect from 6 April 2010 (except in relation to a qualifying person at any time falling on or after that date but before the appropriate date): Pensions Act 2007 s 27(3), (4), Sch 7 Pt 2.

TEXT AND NOTE 13--1992 Act s 148(4) repealed: State Pension Credit Act 2002 Sch 3.

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## **(6) REGULATIONS AND ORDERS; IN GENERAL**

### **30. In general.**

Subject as follows, regulations, orders and schemes under the Social Security Contributions and Benefits Act 1992 and regulations and orders under the Social Security Administration Act 1992 must be made by the Secretary of State<sup>1</sup> and the powers to make them are exercisable by statutory instrument<sup>2</sup>. However, regulations with respect to proceedings before the commissioners (whether for the determination of any matter or for leave to appeal to or from the commissioners) must be made by the Lord Chancellor<sup>3</sup>. With certain exceptions<sup>4</sup>, any power conferred by those Acts to make an Order in Council, regulations or an order may be exercised:

- 82 (1) Either in relation to all cases to which the power extends, or in relation to those cases subject to specified exceptions, or in relation to any specified cases or classes of case;
- 83 (2) so as to make, as respects the cases in relation to which it is exercised:
  1. (a) the full provision to which the power extends or any less provision (whether by way of exception or otherwise);
  2. (b) the same provision for all cases in relation to which the power is exercised, or different provision for different cases or different classes of case or different provision as respects the same case or class of case for different statutory purposes;
  3. (c) any such provision either unconditionally or subject to any specified condition;

and where such a power is expressed to be exercisable for alternative purposes it may be exercised in relation to the same case for any or all of those purposes; and powers to make an Order in Council, regulations or an order for the purposes of any one provision of the Act in question are without prejudice to powers to make regulations or an order for the purposes of any other provision<sup>5</sup>.

Without prejudice to any specific provision in those Acts and subject to certain exceptions<sup>6</sup>, a power conferred by either of those Acts to make an Order in Council, regulations or an order includes power to make thereby such incidental, supplementary, consequential or transitional provision as appears to Her Majesty, or the authority making the regulations or order, as the case may be, to be expedient for the purposes of the Order in Council, regulations or order<sup>7</sup> and also includes power to provide for a person to exercise a discretion in dealing with any matter<sup>8</sup>.

A statutory instrument containing, whether alone or with other provisions, regulations made under or by virtue of certain specified statutory provisions<sup>9</sup>, regulations prescribing payments for certain purposes<sup>10</sup>, or an order under certain provisions<sup>11</sup> may not be made unless a draft of the instrument has been laid before Parliament and been approved by a resolution of each House<sup>12</sup>. A statutory instrument not subject to this requirement and containing any order, regulations or scheme made under the Social Security Contributions and Benefits Act 1992 by the Secretary of State<sup>13</sup>, or any regulations or order made under the Social Security Administration Act 1992 by him, or order made thereunder by the Lord Chancellor, is subject to annulment in pursuance of a resolution of either House of Parliament<sup>14</sup>.

Subject to certain exceptions<sup>15</sup>, any power under the Jobseekers Act 1995 to make regulations or orders is exercisable by statutory instrument<sup>16</sup> and may be exercised:

- 84 (i) Either in relation to all cases to which it extends, or in relation to those cases subject to specified exceptions, or in relation to any specified cases or classes of case;
  - 85 (ii) so as to make, as respects the cases in relation to which it is exercised:
- 3
- 4. (A) the full provision to which the power extends or any less provision (whether by way of exception or otherwise);
  - 5. (B) the same provision for all cases in relation to which it is exercised, or different provision for different cases or different classes of case or different provision as respects the same case or class of case for different purposes of that Act;
  - 6. (C) any such provision either unconditionally or subject to any specified condition<sup>17</sup>.
- 4

Where any such power is expressed to be exercisable for alternative purposes it may be exercised in relation to the same case for any or all of those purposes<sup>18</sup>. Any such power includes power to make such incidental, supplemental, consequential or transitional provision as appears to the Secretary of State to be expedient; and to provide for a person to exercise a discretion in dealing with any matter<sup>19</sup>. Any power to make regulations or an order for the purposes of any provision of that Act is without prejudice to any power to make regulations or an order for the purposes of any other provision<sup>20</sup>.

Certain regulations<sup>21</sup> under the Jobseekers Act 1995 may not be made unless a draft of the statutory instrument containing them has been laid before Parliament and approved by a resolution of each House<sup>22</sup>. Any other statutory instrument made under that Act<sup>23</sup> is subject to annulment in pursuance of a resolution of either House of Parliament<sup>24</sup>.

1 Social Security Contributions and Benefits Act 1992 s 175(1) (which is subject to s 145(5): see PARA 255 post); Social Security Administration Act 1992 s 189(1). As to the Secretary of State see PARA 1 ante. Any power of the Secretary of State under any provision of the Social Security Contributions and Benefits Act 1992, except the provisions mentioned in s 175(5)(a), (b) (see note 8 infra) and Pt IX (ss 141-147) (see PARA 237 et seq post), to make any regulations or order, where the power is not expressed to be exercisable with the consent of the Treasury, is if the Treasury so directs exercisable only in conjunction with the Treasury: s 175(7). Any power under any of ss 116-120 (as amended) (see PARAS 22-25 ante) to modify provisions of the Social Security Contributions and Benefits Act 1992 or the Social Security Administration Act 1992 extends also to modifying so much of any other provision of the Act in question as re-enacts provisions of the Social Security Act 1975 (repealed) which replaced provisions of the National Insurance (Industrial Injuries) Acts 1965 to 1974 (repealed): Social Security Contributions and Benefits Act 1992 s 175(8). A power to make regulations under any of ss 116-120 (as amended) is exercisable in relation to any enactment passed after the Social Security Contributions and Benefits Act 1992 which is directed to be construed as one with that Act; but this applies only so far as a contrary intention is not expressed in the enactment so passed, and is without prejudice to the generality of any such direction: s 175(9). Any reference in s 175 (as amended) or s 176 (as amended) to an order or regulations under that Act includes a reference to an order or regulations made under any provision of an enactment passed after that Act and directed to be construed as one with that Act; but this applies only so far as a contrary intention is not expressed in the enactment so passed, and without prejudice to the generality of any such direction: s 175(10).

An order under the Social Security Administration Act 1992 ss 140B, 140C (as added) (see HOUSING vol 22 (2006 Reissue) PARAS 181-182) or under ss 150, 152 (as amended) (see PARA 17 ante) or ss 165(4) or 169 may not be made without the consent of the Treasury: s 189(8) (amended by the Housing Act 1996 s 123, Sch 13 para 3; and the Social Security (Recovery of Benefits) Act 1997 s 33, Sch 3 para 10, Sch 4). Any power of the Secretary of State under any provision of the Social Security Administration Act 1992, except under ss 80, 154, 175 and 178, to make any regulations or order, where the power is not expressed to be exercisable with the consent of the Treasury, is, if the Treasury so directs, exercisable only in conjunction with the Treasury: s 189(9). Where the Lord Chancellor proposes to make regulations under that Act, other than under s 24, it is his duty to consult the Lord Advocate with respect to the proposal: s 189(10). A power under any of ss 177-179 (as amended) (see PARAS 27-28 ante) to make provision by regulations or Order in Council for modifications or adaptations of the

Social Security Contributions and Benefits Act 1992 or the Social Security Administration Act 1992 is exercisable in relation to any enactment passed after the Social Security Administration Act 1992 which is directed to be construed as one with them, except in so far as any such enactment relates to a benefit in relation to which the power is not exercisable; but this applies only so far as a contrary intention is not expressed in the enactment so passed, and is without prejudice to the generality of any such direction: s 189(11). Any reference in s 189 (as amended) or s 190 (as amended) to an Order in Council, or an order or regulations, under the Social Security Administration Act 1992 includes a reference to an Order in Council, an order or regulations made under any provision of an enactment passed after that Act and directed to be construed as one with that Act; but this applies only so far as a contrary intention is not expressed in the enactment so passed, and without prejudice to the generality of any such direction: s 189(12).

2 Social Security Contributions and Benefits Act 1992 s 175(2); Social Security Administration Act 1992 s 189(3).

3 Ibid s 189(2). 'Commissioner' means the Chief Social Security Commissioner or any other Social Security Commissioner and includes a tribunal of three commissioners constituted under s 57 (see PARA 362 post): s 191.

4 Ie except in the case of regulations under ibid s 24 (see PARA 365 post) or s 175 (see PARA 410 post) or an order under the Social Security Contributions and Benefits Act 1992 s 145(3) (see PARA 255 post).

5 See ibid s 175(3) (which contains no reference to Orders in Council); and the Social Security Administration Act 1992 s 189(4).

6 Ie except the power conferred by ibid s 24 or by the Social Security Contributions and Benefits Act 1992 s 145(3).

7 See ibid s 175(4); and the Social Security Administration Act 1992 s 189(5).

8 See ibid s 189(6), which excludes a power conferred by ss 14, 24, 130, 175; and the Social Security Contributions and Benefits Act 1992 s 175(5), which excludes a power under ss 30, 47(6), 145(3), Sch 7 para 3(9), a power conferred under s 122(1) in relation to the definition of 'payments by way of occupational or personal pension' and a power conferred by Pt XI (ss 151-171) (as amended) (statutory maternity pay and statutory sick pay: see EMPLOYMENT vol 39 (2009) PARAS 365 et seq, 498 et seq respectively).

9 Ie regulations made by virtue of ibid s 11(3) (see PARA 40 post); s 18 (as amended) (see PARA 44 post); s 19(4)-(6) (see PARA 46 post); s 104(3) (see PARA 147 post); s 117 (see PARA 23 ante); s 118 (see PARA 25 ante); s 145 (see PARA 255 post); or regulations under the Social Security Administration Act 1992 s 122B(1)(b) (as added) (see PARA 402 post) or s 154 (see PARA 18 ante).

10 Ie regulations prescribing payments for the purposes of the definition of 'payments by way of occupational or personal pension' in the Social Security Contributions and Benefits Act 1992 s 122(1) (as amended): see PARA 122 note 11 post.

11 Ie an order under ibid s 148(3)(b) (see PARA 29 ante); s 157(2) or s 159A(1) (as added) (statutory sick pay); or an order under the Social Security Administration Act 1992 s 141 (see PARA 15 ante); s 143, s 145 or s 146 (see PARA 16 ante); s 150 (as amended) or s 152 (see PARA 17 ante); or s 162(7) (see PARA 9 ante).

12 See ibid s 190(1) (amended by the Social Security (Recovery of Benefits) Act 1997 s 33(1), Sch 3 para 11, Sch 4; and the Social Security Administration (Fraud) Act 1997 s 22, Sch 1 para 11); and the Social Security Contributions and Benefits Act 1992 s 176(1) (s 176 amended by the Social Security (Incapacity for Work) Act 1994 s 11, Sch 1 para 37, Sch 2; the Statutory Sick Pay Act 1994 s 3(2); and by the Statutory Sick Pay Percentage Threshold Order 1995, SI 1995/512, art 6(1)(a)). This requirement does not apply to a statutory instrument by reason only that it contains regulations under the Social Security Administration Act 1992 s 154 which are to be made for the purpose of consolidating regulations to be revoked in the instrument: s 190(1). Nor does it apply to a statutory instrument by reason only that it contains (1) regulations under the Social Security Contributions and Benefits Act 1992 s 117 which the instrument states are made for the purpose of making provision consequential on the making of an order under the Social Security Administration Act 1992 s 141; s 143; s 145; s 146 or 162; (2) regulations under powers conferred by any provision of the Social Security Contributions and Benefits Act 1992 mentioned in note 9 supra which are to be made for the purpose of consolidating regulations to be revoked in the instrument; (3) regulations which, in so far as they are made under powers conferred by such any provision mentioned in note 9 supra other than s 145 only replace provisions of previous regulations with new provisions to the same effect: s 176(2) (as so amended).

13 Ie except an order under ibid s 145(3).

14 Ibid s 176(3); Social Security Administration Act 1992 s 190(3), (4).

15 Ie except orders under the Jobseekers Act 1995 s 9(13) or s 19(10)(a): see PARAS 295, 304 post.

16 Ibid s 36(1).

17 Ibid s 36(2).

18 Ibid s 36(3).

19 Ibid s 36(4).

20 Ibid s 36(5).

21 The requirement in the text applies in relation to the following regulations (whether made alone or with other regulations): (1) regulations made under, or by virtue of, any provision of the Jobseekers Act 1995 other than ss 6, 7, 26, 29 or 40; head (b) of the definition of 'pension payments' in s 35(1); or Sch 1 para 17, before the date on which jobseeker's allowances first became payable; (2) the first regulations to be made under s 26; (3) regulations made under ss 6, 7, 29, head (b) of the definition of 'pension payments' in s 35(1) or Sch 1 para 17: s 37(1).

22 Ibid s 37(2).

23 Ie except one made under ibid s 41(2) (commencement provisions).

24 Ibid s 37(3).

## UPDATE

### 30 In general

TEXT AND NOTES 1-8--The Social Security Contributions and Benefits Act 1992 s 175 and the Social Security Administration Act 1992 s 189 are to be construed, in relation to tax credit, as if references to the Secretary of State were to the Treasury or, as the case may be, the Commissioners of Inland Revenue: Tax Credits Act 1999 Sch 2 para 20(a), (c) (repealed subject to savings (see SI 2003/962) by Tax Credits Act 2002 Sch 6). For provision as to tax credits under the Tax Credits Act 2002 see PARA 227A.

TEXT AND NOTE 1--Power of Secretary of State to make regulations and orders under Social Security Contributions and Benefits Act 1992 s 175(1) also has effect subject to any provision providing for regulations or an order to be made by the Treasury or by the Commissioners of Inland Revenue: s 175(1), (1A) (s 75(1) amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 29(2); Social Security Contributions and Benefits Act 1992 s 175(1A) added by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 29(3); and amended by the Tax Credits Act 2000 Sch 6).

Power of Secretary of State to make regulations and orders under Social Security Administration Act 1992 now also subject to any provision providing for an order or regulations to be made by the Treasury or the Inland Revenue: 1992 Act s 189(1) (amended by the Social Security Act 1998 Sch 7 para 109(a); the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 57(2); and the Tax Credits Act 2002 Sch 6).

NOTE 1--In Social Security Administration Act 1992 s 189(8), for 's 165(4)' read 's 165(4) (a): s 189(8) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 57). The Social Security Administration Act 1992 s 189(8) (amended by the Tax Credits Act 2002 Sch 4 para 3) refers to an order made by the Secretary of State. Social Security Administration Act 1992 s 189(10) repealed: 1998 Act Sch 7 para 109(f), Sch 8.

1992 Act s 189(8) further amended: Pensions Act 2007 Sch 1 para 29 (partly in force: see ss 5(3)-(7), 30(1)(a)).

TEXT AND NOTE 3--Social Security Administration Act 1992 s 189(2) repealed: 1998 Act Sch 7 para 109(b), Sch 8.

NOTE 5--Social Security Administration Act 1992 s 189(4) amended: 1998 Act Sch 7 para 109(c).

NOTE 7--Social Security Contributions and Benefits Act 1992 s 175(4) amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 29. Social Security Administration Act 1992 s 189(5) amended: 1998 Act Sch 7 para 109(d).

NOTE 8--Reference to the Social Security Administration Act 1992 s 24 omitted: s 189(6) (amended by the 1998 Act Sch 7 para 109(e), Sch 8).

NOTES 9, 12--Reference to regulations made by virtue of the Social Security Contributions and Benefits Act 1992 s 30DD(5)(b) or (c) (see PARA 62 heads (b), (c)) and ss 171ZE(1), 171ZN(1) added: s 176(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 8 paras 20, 25, and the Employment Act 2002 Sch 7 para 7).

Social Security Contributions and Benefits Act 1992 s 176(1) further amended: Pensions Act 2004 Sch 11 para 19; National Insurance Contributions Act 2006 s 1(2); Work and Families Act 2006 Sch 1 para 22 (Sch 1 para 22 in force 3 March 2010: SI 2010/495); Welfare Reform Act 2007 s 31(2); Pensions Act 2007 s 7(5), Sch 1 paras 10, 35(a).

NOTES 11, 12--Social Security Contributions and Benefits Act 1992 s 176(1) further amended: Welfare Reform and Pensions Act 1999 Sch 8 para 32, National Insurance Contributions Act 2008 s 1(2), Sch 2.

NOTE 12--Social Security Administration Act 1992 s 190(1) further amended: 1998 Act Sch 7 para 110(1), Sch 8; Welfare Reform and Pensions Act 1999 Sch 12 para 83, Sch 13 Pt VI; Employment Act 2002 Sch 7 para 15; 2006 Act s 7(1), (3).

1992 Act s 190(1) further amended: Pensions Act 2007 Sch 1 para 30 (partly in force: see ss 5(3)-(7), 30(1)(a)).

TEXT AND NOTE 13--Now refers to the Secretary of State, the Treasury or the Commissioners of Inland Revenue: Social Security Contributions and Benefits Act 1992 s 176(3)(a) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 30); Social Security Administration Act 1992 s 190(3) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 58).

TEXT AND NOTE 14--Social Security Administration Act 1992 s 190(4) repealed: 1998 Act Sch 7 para 110, Sch 8.

NOTE 14--The Social Security Contributions and Benefits Act 1992 s 176(3) does not apply to a statutory instrument by reason only that it contains an order appointing the first or second appointed year or designating the flat rate introduction year (within the meanings given by s 122(1)): s 176(4) (added by the Child Support, Pensions and Social Security Act 2000 s 35(1), (15); amended by Pensions Act 2007 Sch 1 para 35(b)). 'First appointed year' means such tax year, no earlier than 2002/2003, as may be appointed by order; and 'second appointed year' means such subsequent tax year as may be so appointed: Social Security Contributions and Benefits Act 1992 s 122(1) (amended by the Child Support, Pensions and Social Security Act 2000 s 35(1), (14)).

NOTES 15, 16--Orders under the Jobseekers Act 1995 s 8(3) also now excepted: s 36(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 8 para 29(1), (6)).

TEXT AND NOTE 19--In the case of regulations made by the Treasury, the reference is to the Treasury instead of to the Secretary of State: Jobseekers Act 1995 s 36(4)

(amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 63).

See also Jobseekers Act 1995 s 36(4A) (added by Welfare Reform Act 2009 s 1(3); amended by Welfare Reform Act 2009 Sch 3 para 3(2)).

NOTE 21--Jobseekers Act 1995 s 37(1) amended: Welfare Reform Act 2009 Sch 3 para 3(3).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(1) IN GENERAL/31. Outline of the contributory system.

## 2. CONTRIBUTIONS

### (1) IN GENERAL

#### 31. Outline of the contributory system.

The funds required for paying benefits<sup>1</sup> which are to be paid out of the National Insurance Fund<sup>2</sup> and for making the national health service allocation<sup>3</sup> are to be provided by means of contributions payable to the Secretary of State<sup>4</sup> by earners<sup>5</sup>, employers<sup>6</sup> and others, together with (1) additions<sup>7</sup> paid for each financial year<sup>8</sup> out of money provided by Parliament<sup>9</sup> which must equal in total the aggregate of all statutory sick pay<sup>10</sup> and statutory maternity pay<sup>11</sup> recovered by employers and others in that year<sup>12</sup>; and (2) amounts payable out of money provided by Parliament in respect of estimated benefit expenditure for the following tax year<sup>13</sup>. Such contributions fall into five classes:

- 86 (a) Class 1, earnings-related<sup>14</sup>, being:
  - 5 7. (i) primary Class 1 contributions from employed earners<sup>15</sup>; and
  - 8. (ii) secondary Class 1 contributions from employers and other persons paying earnings<sup>16</sup>;
- 6 87 (b) Class 1A, payable in respect of cars made available for private use<sup>17</sup> and car fuel by persons liable to pay secondary Class 1 contributions and certain other persons<sup>18</sup>;
- 88 (c) Class 2, flat-rate, payable weekly<sup>19</sup> by self-employed earners<sup>20</sup>;
- 89 (d) Class 3, payable by earners and others voluntarily<sup>21</sup> with a view to providing entitlement to benefit, or making up entitlement<sup>22</sup>; and
- 90 (e) Class 4, payable in respect of the profits or gains of a trade, profession or vocation<sup>23</sup>, or payable<sup>24</sup> in respect of equivalent earnings<sup>25</sup>.

The amount and rates of contributions and other statutory figures<sup>26</sup> which affect the liability of contributors are subject to regulations<sup>27</sup> and to alteration by orders made by the Secretary of State<sup>28</sup> from year to year<sup>29</sup>.

No person is liable to pay Class 1, Class 1A or Class 2 contributions unless he fulfils prescribed conditions<sup>30</sup> as to residence or presence in Great Britain<sup>31</sup> or entitled to pay Class 3 contributions unless he fulfils such conditions<sup>32</sup>. Nor is any person entitled to pay Class 1, Class 1A or Class 2 contributions other than those which he is liable to pay, except so far as he is permitted by regulations to pay them<sup>33</sup>.

Where a person is in receipt of a pension or allowance payable by the Secretary of State by virtue of any prescribed enactment or instrument, the Secretary of State may with the consent of that person pay any contributions other than Class 1 or Class 4 contributions payable by him and deduct the amount so paid from the pension or allowance<sup>34</sup>.

1 For the meaning of 'benefit' see PARA 13 note 8 ante.

2 See PARA 8 ante.

- 3    le under the Social Security Administration Act 1992 s 162 (as amended): see PARA 9 ante.
- 4    As to the Secretary of State see PARA 1 ante.
- 5    For the meaning of 'earner' see PARAS 32-33 post.
- 6    There is no statutory definition of 'employer' for these purposes. For the meaning of 'employed' see PARA 32 note 2 post. As to contracts of employment generally see EMPLOYMENT vol 39 (2009) PARA 1 et seq.
- 7    le paid under the Social Security Contributions and Benefits Act 1992 s 1(5).
- 8    'Financial year' means the 12 months ending with 31 March: see the Interpretation Act 1978 s 5, Sch 1.
- 9    The additions so paid are to be paid, in accordance with any directions given by the Treasury, into the National Insurance Fund: see the Social Security Administration Act 1992 s 162(3).
- 10   As to statutory sick pay see EMPLOYMENT vol 39 (2009) PARA 498 et seq.
- 11   As to statutory maternity pay see EMPLOYMENT vol 39 (2009) PARA 365 et seq.
- 12   Social Security Contributions and Benefits Act 1992 s 1(1), (5). The total amount of the additions must be equal to the aggregate mentioned in the text as estimated by the Government Actuary or the Deputy Government Actuary: s 1(5).
- 13   Ibid s 1(1) (amended by the Social Security Act 1993 s 2(9)). The amounts referred to in head (2) in the text are payable under the Social Security Act 1993 s 2 (as amended): see PARA 8 ante. For the meaning of 'tax year' see PARA 9 note 6 ante.
- 14   For the meaning of 'earnings' see PARA 33 post.
- 15   For the meaning of 'employed earner' see PARA 32 post.
- 16   As to Class 1 contributions see PARAS 34-37 post.
- 17   le under the Social Security Contributions and Benefits Act 1992 s 10 (as amended): see PARAS 38-39 post.
- 18   As to Class 1A contributions see PARA 38 post.
- 19   le under the Social Security Contributions and Benefits Act 1992 s 11 (as amended): see PARA 40 post.
- 20   For the meaning of 'self-employed earner' see PARA 32 post. As to Class 2 contributions see PARA 40 post.
- 21   le under the Social Security Contributions and Benefits Act 1992 s 13 (as amended): see PARA 42 post.
- 22   As to Class 3 contributions see PARA 42 post.
- 23   le payable under the Social Security Contributions and Benefits Act 1992 s 15 (as amended): see PARA 43 post. As to the meaning of 'trade, profession or vocation' see INCOME TAXATION vol 23(1) (Reissue) PARAS 135-136.
- 24   le under ibid s 18 (as amended): see PARA 44 post.
- 25   Ibid s 1(2). As to Class 4 contributions see PARA 43 post.
- 26   le other figures in ibid Pt I (ss 1-19) (as amended): see PARA 32 et seq post.
- 27   le under ibid s 19(4) (see PARA 46 post) and ss 116-120 (as amended) (see PARAS 21-26 ante): s 1(3)(a).
- 28   le under the Social Security Administration Act 1992 Pt IX (ss 141-148) (as amended): see PARAS 15-16 ante.
- 29   Social Security Contributions and Benefits Act 1992 s 1(3). The provisions of Pt I (as amended) are subject to the provisions of the Pension Schemes Act 1993 Pt III Ch II (ss 40-49) (as amended) (reduction in state scheme contributions and benefits for members of certified schemes: see PARA 909 et seq post): Social Security Contributions and Benefits Act 1992 s 1(3) (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 32).
- 30   For the meaning of 'prescribe' see PARA 19 note 3 ante.

31 Social Security Contributions and Benefits Act 1992 s 1(6)(a). For the prescribed conditions see the Social Security (Contributions) Regulations 1979, SI 1979/591, regs 119-123 (as amended), having effect by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2)). For the meaning of 'Great Britain' see PARA 15 note 4 ante.

32 Social Security Contributions and Benefits Act 1992 s 1(6)(b). As to the prescribed conditions see note 31 supra.

33 Ibid s 1(6)(c). As to the prescribed conditions see note 31 supra.

34 Ibid s 1(4), Sch 1 para 10(1). This provision has effect notwithstanding anything in any Act, royal warrant, Order in Council, order or scheme: Sch 1 para 10(2). As to the prescribed enactments etc see the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 55.

## UPDATE

### 31-46 Contributions

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help

participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **31 Outline of the contributory system**

TEXT AND NOTE 4--Reference to the Secretary of State is now to the Inland Revenue: 1992 Act s 1(1) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 5).

TEXT AND NOTE 11--Reference to statutory maternity is now to statutory maternity pay, ordinary statutory paternity pay, additional statutory paternity pay and statutory adoption pay: Social Security Contributions and Benefits Act 1992 s 1(5) (amended by Employment Act 2002 s 6(3); and Work and Families Act 2006 Sch 1 para 3).

TEXT AND NOTES 14-25--Contributions now fall into six classes, which include (f) Class 1B, payable under the Social Security Contributions and Benefits Act 1992 s 10A (see PARA 39A) by persons who are accountable to the Inland Revenue in respect of income tax on emoluments in accordance with a PAYE settlement agreement (see PARA 39A): s 1(2) (amended by Social Security Act 1998 Sch 7 para 56(1)).

TEXT AND NOTES 17-25--In head (b) for 'payable in respect of ... car fuel' read 'payable under the Social Security Contributions and Benefits Act 1992 s 10': s 1(2) (amended by Child Support, Pensions and Social Security Act 2000 s 74(1), Sch 9 Pt VIII).

TEXT AND NOTE 25--Social Security Contributions and Benefits Act 1992 s 1(2) further amended: Pensions Act 2008 s 135(3).

TEXT AND NOTE 28--Reference to the Secretary of State is now to the Treasury: 1992 Act s 1(3) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 s 2, Sch 3 para 1).

TEXT AND NOTES 30-33--No person is liable to pay Class 1B contributions unless the prescribed conditions as to residence or presence in Great Britain are fulfilled; nor is he entitled to pay such contributions except so far as regulations permit: Social Security Contributions and Benefits Act 1992 s 1(6)(a), (c) (amended by Social Security Act 1998 Sch 7 para 56(3)). Regulations under the Social Security Contributions and Benefits Act 1992 s 1(6) must be made by the Treasury: s 1(7) (added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 1).

NOTE 31--1979 Regulations regs 119-122 now Social Security (Contributions) Regulations 2001, SI 2001/1004, regs 145-148. 1979 Regulations reg 123 not reproduced.

NOTE 34--1992 Act s 1(4) amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 5, Sch 10. 1979 Regulations reg 55 revoked: SI 2001/769.

For the purposes of the Social Security Contributions and Benefits Act 1992 Sch 1 para 10, the enactments and instruments are (1) Order in Council 19 December 1881; (2) the Royal Warrant 27 October 1884; (3) the Naval and Military War Pensions Act 1915 (repealed by the Statute Law (Repeals) Act 2008); (4) the War Pensions Act 1920; (5) the War Pensions Act 1921; (6) Order by His Majesty 14 January 1922; (7) the War Pensions (Coastguards) Scheme 1944; (8) the Royal Warrant 1964; (9) the Order by Her Majesty 1964; (10) the War Pensions (Naval Auxiliary Personnel) Scheme 1964; (11) the Pensions (Polish Forces) Scheme 1964; (12) the War Pensions (Mercantile Marine) Scheme 1964, SI 1964/2058 (as amended); (13) the Order by Her Majesty

(Ulster Defence Regiment) 1971 (amended by SI 2005/3189); (14) the Personal Injuries (Civilians) Scheme 1983; (15) the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 1983: Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001, SI 2001/769, reg 10.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(1) IN GENERAL/32. Meaning of 'employed earner' and 'self-employed earner'.

### 32. Meaning of 'employed earner' and 'self-employed earner'.

'Employed earner' means<sup>1</sup> a person who is gainfully employed<sup>2</sup> in Great Britain<sup>3</sup> either under a contract of service<sup>4</sup>, or in an office (including elective office) with emoluments chargeable to income tax under Schedule E<sup>5</sup>.

'Self-employed earner' means<sup>6</sup> a person who is gainfully employed<sup>7</sup> in Great Britain otherwise than in employed earner's employment (whether or not he is also employed in such employment)<sup>8</sup>.

Regulations may provide:

- 91 (1) for employment of any prescribed<sup>9</sup> description to be disregarded in relation to liability for contributions otherwise arising from employment of that description<sup>10</sup>;
- 92 (2) for a person in employment of any prescribed description to be treated, for the purposes of the Social Security Contributions and Benefits Act 1992, as falling within one or other of these categories of earner, notwithstanding that he would not otherwise fall within that category<sup>11</sup>.

Where a person is to be treated by reference to any employment of his as an employed earner, then he is to be so treated for all purposes of the 1992 Act and references throughout that Act to employed earner's employment are to be construed accordingly<sup>12</sup>.

1 le for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19) (as amended) (see PARAS 31 ante, 33 et seq post) and also in Pts II-V (ss 20-111) (as amended) (see PARA 54 et seq post).

2 'Employment' includes any trade, business, profession, office or vocation, and 'employed' has a corresponding meaning: Social Security Contributions and Benefits Act 1992 s 122(1). 'Gainful employment' connotes an obligation to pay by way of remuneration for services which the person is contractually bound to render under a contract of service: *Vandyk v Minister of Pensions and National Insurance* [1955] 1 QB 29, [1954] 2 All ER 723.

3 For the meaning of 'Great Britain' see PARA 15 note 4 ante.

4 'Contract of service' means any contract of service or apprenticeship whether written or oral and whether express or implied: Social Security Contributions and Benefits Act 1992 s 122(1). As to the interpretation of its meaning as a common law concept see EMPLOYMENT vol 39 (2009) PARAS 2, 4.

5 Ibid s 2(1)(a). For the circumstances in which the emoluments of an office are chargeable under Schedule E (PAYE) see INCOME TAXATION vol 23(1) (Reissue) PARA 605 et seq; and in particular, *Edwards (Inspector of Taxes) v Clinch* [1982] AC 845, [1981] 3 All ER 543, HL. The Social Security Contributions and Benefits Act 1992 s 2(1)-(3) is subject to the provision made by s 95 as to the employments which are to be treated, for the purposes of industrial injuries benefit, as employed earner's employments (see PARA 128 post): s 2(4).

6 See note 1 supra.

7 A person is treated as a self-employed earner as respects any week during any part of which he is such an earner (without prejudice to his being also treated as an employed earner as respects that week by reference to any other employment of his): Social Security Contributions and Benefits Act 1992 s 2(5). 'Week', except in relation to disability working allowance (see PARA 218 et seq post) means a period of seven days beginning with Sunday: s 122(1).

8 Ibid s 2(1)(b).

9 For the meaning of 'prescribed' see PARA 19 note 3 ante.

10 Social Security Contributions and Benefits Act 1992 s 2(2)(a); and see note 11 infra.

11 Ibid s 2(2)(b). At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Categorisation of Earners) Regulations 1978, SI 1978/1689 (as amended), partly have effect as if so made, and:

- 1 (1) deem office cleaners, certain agency workers, employees of a spouse, certain lecturers, teachers and instructors, and ministers of religion to be employed earners (see reg 2, Sch 1 Pt I (as amended));
- 2 (2) deem certain examiners, moderators and invigilators to be self-employed earners (see Sch 1 Pt II);
- 3 (c) disregard employment by a close relative in the home, employment by a spouse (other than for the purposes of the spouse's employment), any employment as a self-employed earner where that is not the person's ordinary employment, employment as an election returning officer, employment in or by visiting forces, employment as a member of a designated international headquarters or defence organisation and employment as a Queen's Gurkha officer or as any other member of the Brigade of Gurkhas of a person who was recruited in Nepal (see Sch 1 Pt III (as amended)).

In addition, reg 5, Sch 3 (as amended) provides for prescribed persons to be treated as the secondary Class 1 contributor in respect of persons in prescribed employments; these are largely the employments covered by Sch 1 (as amended), but with the addition of a barrister's clerk (deemed to be employed by the head of chambers) and employees of a foreign employer (deemed to be employed by the host employer to whom the personal service of the employee is made available). As to secondary Class 1 contributions see PARA 37 post.

12 Social Security Contributions and Benefits Act 1992 s 2(3).

## UPDATE

### 31-46 Contributions

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over

and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a

participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **32 Meaning of 'employed earner' and 'self-employed-earner'**

NOTE 2--See *St John's College School Cambridge v Secretary of State for Social Security* [2001] ELR 103 (visiting instrument teachers were employed earners).

NOTE 4--See *Synaptek Ltd v Young (HM Inspector of Taxes)* [2003] EWHC 645 (Ch), (2003) 75 TC 51 (taxpayer's computer software service company, providing individuals' services to clients, created contract between each individual and client: taxpayer liable to pay national security contributions); *Usetech Ltd v Young (Inspector of Taxes)* [2004] EWHC 2248 (Ch), (2004) 76 TC 811, [2004] STC 1671.

NOTE 7--Subject to savings (see SI 2003/962) 'week' now means a period of seven days beginning with Sunday: Social Security Contributions and Benefits Act 1992 s 122(1) (amended by Tax Credits Act 2002 Sch 6).

TEXT AND NOTES 9, 10--Regulations under the Social Security Contributions and Benefits Act 1992 s 2(2) must be made by the Treasury and, in the case of regulations under s 2(2)(b), with the concurrence of the Secretary of State: s 2(2A) (added by Welfare Reform and Pensions Act 1999 Sch 11 para 2).

NOTE 11--With respect to head (1) certain forms of employment as an entertainer are deemed to be employment as an employed earner: SI 1978/1689 Sch 1 Pt I (amended by SI 1998/1728, SI 1999/3). See the Social Security Contributions (Intermediaries) Regulations 2000, SI 2000/727 (amended by SI 2000/2084, SI 2003/2079, SI 2004/770, SI 2005/3131), which deem individuals who provide services through an intermediary to be employed earners. SI 1978/1689 Schs 1, 3 further amended: SI 2003/736, SI 2004/770, SI 2005/3133. SI 1978/1689 reg 5, Sch 3 further amended: SI 2003/2420. SI 1978/1689 Sch 1 further amended: SI 2005/1530.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(1) IN GENERAL/33. Calculation of earnings.

### 33. Calculation of earnings.

'Earnings' includes<sup>1</sup> any remuneration or profit derived from an employment<sup>2</sup> and 'earner' is to be construed accordingly<sup>3</sup>. The following are treated for these purposes as remuneration derived from employed earner's<sup>4</sup> employment:

- 93 (1) any sum paid to or for the benefit of a person in satisfaction (whether in whole or in part) of any entitlement of that person to statutory sick pay<sup>5</sup> or statutory maternity pay<sup>6</sup>; and
- 94 (2) any sickness payment<sup>7</sup> made to or for the benefit of the employed earner and in accordance with arrangements under which the person who is the secondary contributor<sup>8</sup> in relation to the employment concerned has made, or remains liable to make, payments towards the provision of that sickness payment (that is to say, contractual sickness pay)<sup>9</sup>;
- 95 (3) any sum paid to or for the benefit of an employed earner which is chargeable to tax<sup>10</sup> as consideration for certain restrictive undertakings<sup>11</sup>;
- 96 (4) any payment made by a body corporate to or for the benefit of any of its directors where that payment would, when made, not otherwise be earnings for the statutory purposes<sup>12</sup> but where regulations make provision for it to be so treated<sup>13</sup>.

The amount of a person's earnings for any period, or the amount of his earnings to be treated as comprised in any payment made to him or for his benefit, is to be calculated or estimated<sup>14</sup> in such manner and on such basis as is prescribed<sup>15</sup>. The basic principle is that the amount is to be calculated on the basis of the person's gross earnings from the employment<sup>16</sup> or, as the case may be, employments concerned<sup>17</sup>, less any amounts that are specifically stated to be disregarded<sup>18</sup>. For the purposes of Class 1 contributions, regulations may make provision as to the intervals at which payments of earnings are to be treated as made<sup>19</sup>.

With a view to securing that liability for the payment of earnings-related contributions is not avoided or reduced by a secondary contributor following (in the payment of earnings) any practice which is abnormal for the employment in question, the Secretary of State<sup>20</sup> may, if he thinks fit, determine any question relating to a person's earnings-related contributions where any such practice has been or is being followed, as if the secondary contributor concerned had not followed any abnormal pay practice, but had followed a practice or practices normal for that employment<sup>21</sup>. In addition, the Secretary of State may, where he is satisfied as to the existence of any practice in respect of the payment of earnings whereby the incidence of earnings-related contributions is avoided or reduced by means of irregular or unequal payments, give directions for securing that such contributions are payable as if that practice were not followed<sup>22</sup>.

Regulations may provide that any employment protection entitlement<sup>23</sup> is to be deemed for the purposes of Parts I to V of the Social Security Contributions and Benefits Act 1992<sup>24</sup> to be earnings payable by and to such persons as are prescribed and to be so payable in respect of such periods as are prescribed and that those periods, so far as they are not periods of employment, are to be deemed for those purposes to be periods of employment<sup>25</sup>.

1    le for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19) (as amended) (see PARAS 31-32 ante, 34 et seq post) and Pts II-V (ss 20-111) (as amended) (see PARA 54 et seq post): s 3(1).

2 For the meaning of 'employment' see PARA 32 note 2 ante.

3 Social Security Contributions and Benefits Act 1992 s 3(1).

4 For the meaning of 'employed earner' see PARA 32 ante.

5 As to statutory sick pay see EMPLOYMENT vol 39 (2009) PARA 498 et seq.

6 Social Security Contributions and Benefits Act 1992 s 4(1)(a). As to statutory maternity pay see EMPLOYMENT vol 39 (2009) PARA 365 et seq.

7 For these purposes, 'sickness payment' means any payment made in respect of absence from work due to incapacity for work: *ibid* s 4(3) (amended by the Social Security (Incapacity for Work) Act 1994 s 11, Sch 1 para 1, Sch 2).

8 For the meaning of 'secondary contributor' see PARA 35 note 9 post.

9 Social Security Contributions and Benefits Act 1992 s 4(1)(b). Where the funds for making sickness payments under arrangements of the kind mentioned in head (2) in the text are attributable in part to contributions to those funds made by the employed earner, regulations may make provision for disregarding, for those purposes, the prescribed part of any sum paid as a result of the arrangements: s 4(2). For the meaning of 'prescribed' see PARA 19 note 3 ante.

Regulations may make provision as to the manner in which, and the person through whom, any sickness payment which, by s 4(1), is to be treated as remuneration derived from employed earner's employment is to be made: s 1(4), Sch 1 para 11(1). In any case where regulations so made have the effect of requiring a registered friendly society (within the meaning of the Friendly Societies Act 1974) to make amendments to its rules, the amendments may, notwithstanding any provision of those rules, be made in accordance with the procedure prescribed by regulations made by the Chief Registrar of Friendly Societies for these purposes: Social Security Contributions and Benefits Act 1992 Sch 1 para 11(2).

10 *Ie* by virtue of the Income and Corporation Taxes Act 1988 s 313 (as amended): see INCOME TAXATION vol 23(1) (Reissue) PARA 685.

11 Social Security Contributions and Benefits Act 1992 s 4(4).

12 *Ie* for the purposes of the Social Security Contributions and Benefits Act 1992: s 4(5).

13 See *ibid* s 4(5); and the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 17A (added by SI 1983/10).

14 *Ie* for the purposes of the Social Security Contributions and Benefits Act 1992 Pts I-V (as amended) other than those of s 111, Sch 8 (old cases of industrial injury where workmen's compensation payable: see PARA 167 post).

15 *Ibid* s 3(2). Regulations made for these purposes above may prescribe that payments of a particular class or description made or falling to be made to or by a person must, to such extent as may be prescribed, be disregarded or, as the case may be, be deducted from the amount of that person's earnings: s 3(3). See generally the Social Security Benefit (Computation of Earnings) Regulations 1996, SI 1996/2745. See also, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Contributions) Regulations 1979, SI 1979/591 (which are subject to frequent amendment).

16 *Ibid* reg 18(1). Payments by way of any beneficial interest in any asset are governed by reg 18(2)-(9), Sch 1A (added by SI 1991/2505 and further amended).

17 Earnings from separate employed earner's employments (with one or more employers) in any one week may be aggregated and treated as a single payment, unless that is not reasonably practicable: see the Social Security Contributions and Benefits Act 1992 s 1(4), Sch 1 para 1 (as amended) and PARA 35 post; and the Social Security (Contributions) Regulations 1979, SI 1979/591, regs 10-12 (as amended). A single payment made in respect of two or more employed earner's employments under different secondary contributors may be apportioned between them: reg 13. Where there is a joint payment of earnings to a husband and wife, the share of each is to be determined on the same basis as that used for income tax purposes, or otherwise on such basis as may be approved by the Secretary of State: reg 16. Earnings paid after pensionable age are not to be aggregated: see reg 20A (as added). For the meaning of 'pensionable age' see PARA 562 post.

18 These are set out *in extenso* in *ibid* reg 19 (as amended); in addition, certain payments by trustees are to be disregarded under reg 19A (added by SI 1987/1590) and certain payments to directors are to be disregarded under the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 19B (added by SI 1987/2111 and further amended).

19 Social Security Contributions and Benefits Act 1992 s 1(4), Sch 1 para 2. See the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 2 (as amended) (earnings periods); reg 3 (as amended) (earnings periods for earnings normally paid or treated as paid at regular intervals); reg 4 (as amended) (earnings periods for earnings normally paid otherwise than at regular intervals and not treated as paid at regular intervals); reg 5 (as amended) (earnings periods for certain sums deemed to be earnings); reg 5A (as added and amended) (earnings periods for earnings to be aggregated where the earnings periods for those earnings otherwise would be of different lengths); reg 6 (as amended) (treatment of earnings paid otherwise than at regular intervals); reg 6A (as added) (earnings period for directors); and reg 6B (as added) (earnings period for statutory sick pay and statutory maternity pay paid by the Secretary of State). For the position where the earnings period changes see reg 14; and for the treatment of holiday pay see reg 15 (substituted by SI 1984/77).

20 As to the Secretary of State see PARA 1 ante.

21 See the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 21(2). The Secretary of State may determine any such question as if application had been made for such a determination: reg 21(3). However, these provisions do not apply for the purpose of any decision of the Secretary of State in so far as that decision relates to contributions based on payments made more than one year before the beginning of the year in which that decision is given: reg 21(1).

22 Ibid reg 22.

23 For these purposes, 'employment protection entitlement' means (1) any sum, or a prescribed part of any sum, (a) payable in respect of arrears of pay in pursuance of an order for reinstatement or re-engagement under the Employment Rights Act 1996; (b) payable by way of pay in pursuance of an order under that Act or under the Trade Union and Labour Relations (Consolidation) Act 1992 for the continuation of a contract of employment; (c) payable by way of remuneration in pursuance of a protective award under the Trade Union and Labour Relations (Consolidation) Act 1992; and (2) prescribed amounts which the regulations provide are to be treated as related to any of those sums: Social Security Contributions and Benefits Act 1992 s 112(2), (3) (s 112(3) amended by the Employment Rights Act 1996 s 240, Sch 1 para 51(1), (4)).

24 Ie the Social Security Contributions and Benefits Act 1992 Pts I-V (ss 1-111) (as amended): see PARAS 31-32 et seq ante, 34 et seq, 561 et seq post.

25 Ibid s 112(1). The Social Security Benefit (Computation of Earnings) Regulations 1996, SI 1996/2745, are partly made in the exercise of this power and the Social Security (Contributions) (Employment Protection) Regulations 1977, SI 1977/622, have effect as if so made by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2).

## UPDATE

### 31-46 Contributions

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as

participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed

to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **33 Calculation of earnings**

TEXT AND NOTES--Regulations may make provision for securing that where (1) an individual ('the worker') personally performs, or is under an obligation personally to perform, services for another person ('the client'); (2) the performance of those services by the worker is, within the meaning of the regulations, referable to arrangements involving a third person, and not referable to any contract between the client and the worker; and (3) the circumstances are such that, were the services to be performed by the worker under a contract between him and the client, he would be regarded for the purposes of the applicable provisions of this Social Security Contributions and Benefits Act 1992 as employed in employed earner's employment by the client, relevant payments or benefits are, to the specified extent, to be treated for those purposes as earnings paid to the worker in respect of an employed earner's employment of his: s 4A(1) (s 4A added by Welfare Reform and Pensions Act 1999 s 75; and modified by SI 2003/1874; and SI 2007/2071). As to the various matters which may be governed by such regulations see the Social Security Contributions and Benefits Act 1992 s 4A(2)-(9).

As to the power to make retrospective provision in relation to earnings in consequence of retrospective tax legislation see ss 4B, 4C; and PARA 33A.

TEXT AND NOTES 1-13--In addition, head (5) any amount on which the earner is, by virtue of the employment income parts of the Income Tax (Earnings and Pensions) Act 2003 (see INCOME TAXATION), chargeable to income tax: see the Social Security Contributions and Benefits Act 1992 s 4(6) (added by Social Security Act 1998 s 50(2); and amended by Income Tax (Earnings and Pensions) Act 2003 Sch 6 para 172(4)). Regulations under the Social Security Contributions and Benefits Act 1992 s 4 must be made by the Treasury with the concurrence of the Secretary of State: s 4(7) (added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 4). As to the

amounts to be treated as earnings in connection with the use of qualifying vehicles other than cycles, see SI 2001/1004 reg 22A (added by SI 2002/307; and amended by SI 2004/770).

NOTE 1--The Social Security Contributions and Benefits Act 1992 s 3 applies as if s 129 (see PARAS 218-221) was included in Pts I-V: s 129(2F) (added by Tax Credits Act 1999 s 14(4)). Social Security Contributions and Benefits Act 1992 s 129 and Tax Credits Act 1999 repealed: Tax Credits Act 2000 Sch 6.

TEXT AND NOTE 6--Social Security Contributions and Benefits Act 1992 s 4(1)(a) amended: Work and Families Act 2006 Sch 1 para 4.

NOTE 9--Social Security Contributions and Benefits Act 1992 s 1(4) amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 5, Sch 10.

In the Social Security Contributions and Benefits Act 1992 Sch 1 para 11(1) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 41), for 'Regulations may' read 'The Treasury may by regulations'.

Functions of chief registrar under Social Security Contributions and Benefits Act 1992 Sch 1 para 11(2) are transferred to the Treasury: Financial Services and Markets Act 2000 (Mutual Societies) Order 2001, SI 2001/2617.

TEXT AND NOTES 10, 11--Now, head (3) any gain on which the earner is chargeable to tax by virtue of the Income Tax (Earnings and Pensions) Act 2003 s 479 (see INCOME TAXATION) in respect of which an amount counts as employment income of the earner under s 476, reduced by any amounts deducted under s 480(1)-(6) in arriving at the amount counting as such employment income; and any sum paid (or treated as paid) to or for the benefit of the earner which is chargeable to tax by virtue of s 225 or 226 (see INCOME TAXATION): Social Security Contributions and Benefits Act 1992 s 4(4)(a), (b) (substituted by Social Security Act 1998 s 50(1), (3); and amended by Income Tax (Earnings and Pensions) Act 2003 Sch 6 para 172(2), (3); and the Finance Act 2003 Sch 22 para 48).

See *RCI Europe v Woods (Inspector of Taxes)* [2003] EWHC 3129 (Ch), (2003) 76 TC 390 ('earner' refers to status to which payment relates, not to individual's status at time of payment).

NOTES 13-21--SI 1979/591 consolidated in the Social Security (Contributions) Regulations 2001, SI 2001/1004 (amended by SI 2001/2412, SI 2001/3728, SI 2002/238, SI 2002/307, SI 2002/2366, SI 2002/2924, SI 2002/2929, SI 2003/193, SI 2003/964, SI 2003/1059, SI 2003/1337, SI 2003/2085, SI 2003/2958, SI 2004/173, SI 2004/770, SI 2004/944, SI 2004/1362, SI 2004/2096, SI 2004/2246, SI 2005/728, SI 2005/778 (amended by SI 2005/1086), SI 2005/915, SI 2005/3130, SI 2006/127, SI 2006/576, SI 2006/2003, SI 2006/2829, SI 2006/2924, SI 2007/1056, SI 2007/1057, SI 2007/1094, SI 2007/1175, SI 2007/2068, SI 2007/2070, SI 2007/2091, SI 2007/2401, SI 2007/2520, SI 2007/2905, SI 2008/133, SI 2008/607, SI 2008/636, SI 2008/1431, SI 2008/2624, SI 2008/2683, SI 2008/3099, SI 2009/111, SI 2009/591, SI 2009/600, SI 2009/696, SI 2009/2028, SI 2010/721).

NOTE 13--1979 Regulations reg 17A now SI 2001/1004 reg 22 (amended by SI 2002/307, SI 2003/2085).

TEXT AND NOTE 15--Ie prescribed by regulations made by the Treasury with the concurrence of the Secretary of State: Social Security Contributions and Benefits Act 1992 s 3(2) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 3).

NOTES 15, 25--SI 1996/2745 amended: SI 2002/2469, SI 2002/2823, SI 2004/3168 (England), SI 2005/2919, SI 2005/2929 (Wales), SI 2007/2613, SI 2009/2678.

NOTE 15--Regulations made for the purposes of the Social Security Contributions and Benefits Act 1992 s 3(2) may provide that, where a payment is made or a benefit provided to or for the benefit of two or more earners, a proportion (determined in such manner as may be prescribed) of the amount or value of the payment or benefit is to be attributed to each earner: s 3(2A) (added by Social Security Act 1998 s 48). Regulations made for the purposes of the Social Security Contributions and Benefits Act 1992 s 3(2) which make special provision with respect to the earnings periods of directors and former directors of companies may make provision for enabling companies, and directors and former directors of companies, to pay on account of any earnings-related contributions that may become payable by them such amounts as would be payable by way of such contributions if the special provision had not been made, and for requiring any payments made in accordance with the regulations to be treated, for prescribed purposes, as if they were the contributions on account of which they were made: s 3(4), (5) (added by Social Security Act 1998 s 49). See *Cotton v Secretary of State for Work and Pensions* [2009] EWCA Civ 1333, [2009] All ER (D) 132 (Dec).

NOTE 16--1979 Regulations reg 18, Sch 1A now SI 2001/1004 reg 24, Sch 3 Pt IV. Regulation 24 is subject to the provisions of Sch 2 (calculation of earnings for the purposes of earnings-related contributions in particular cases) and Sch 3 (amended by SI 2001/2412, SI 2002/307, SI 2002/2824, SI 2003/2085, SI 2003/2340, SI 2003/2958, SI 2004/770, SI 2004/2096, SI 2005/778, SI 2005/3130, SI 2006/576, SI 2006/883, SI 2006/2003, SI 2006/2829, SI 2006/2924, SI 2007/2091, SI 2007/2401, SI 2008/607, SI 2008/1431, SI 2009/600) (payments to be disregarded in calculation of earnings for purposes of earnings-related contributions).

NOTE 17--Social Security Contributions and Benefits Act 1992 s 1(4) amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 5, Sch 10. 1979 Regulations regs 10-12, 13, 16, 20A now SI 2001/1004 regs 13-15, 17, 20, 29.

NOTE 18--1979 Regulations regs 19-19B now SI 2001/1004 regs 25-27 (reg 27 amended by SI 2004/1770). SI 2001/1004 Sch 3 specifies payments to be disregarded in the calculation of earnings from employed earner's employment for the purpose of earnings-related contributions: reg 25.

The tax avoidance principles laid down in *WT Ramsay Ltd v IRC* (see INCOME TAXATION vol 23(1) (Reissue) PARA 22) have been applied to determine whether bonuses given to directors were payment of earnings for national insurance purposes: *NMB Holdings Ltd v Secretary of State for Social Security* (2000) 73 TC 85 (object of transaction as a whole was tax avoidance: cash receipts obtained by directors characterised as payments in cash, not in kind).

TEXT AND NOTE 19--Now refers to regulations made by the Inland Revenue: Social Security Contributions and Benefits Act 1992 Sch 1 para 2, amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 32.

NOTE 19--Social Security Contributions and Benefits Act 1992 s 1(4) amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 5, Sch 10. 1979 Regulations regs 2-6B, 14, 15 now SI 2001/1004 regs 2-9, 18, 19 (reg 3 amended by SI 2002/2366).

TEXT AND NOTE 21--1979 Regulations reg 21 now SI 2001/1004 reg 30 (substituted by SI 2002/2366). Now, if an officer of the Board is satisfied that a secondary contributor has followed or is following a practice in the payment of earnings which is abnormal for the employment in question ('an abnormal pay practice'), and, by reason of that practice the liability for earnings-related contributions is or has been avoided or reduced, the officer may, and if requested to do so by the earner or the secondary contributor must, decide any question relating to a person's earnings-related contributions as if the

secondary contributor had not followed an abnormal pay practice, but had followed a practice normal for the employment in question: SI 2001/1004 reg 30(1), (2). However, a decision under this provision does not apply to contributions based on payments made more than one year before the beginning of the year in which that decision is given: reg 30(3). 'The Board' means the Commissioners of Inland Revenue, and subject to the Inland Revenue Regulation Act 1890 s 4A (see INCOME TAXATION vol 23(1) (Reissue) PARA 31), includes any officer or servant of theirs: SI 2001/1004 reg 1(2).

TEXT AND NOTE 22--Now SI 2001/1004 reg 31 (substituted by SI 2002/2366). Now, in addition, if an officer of the Board is satisfied that a practice exists as to the making of irregular or unequal payments of earnings, and, by reason of the practice the liability for earnings-related contributions is avoided or reduced, he may, and if requested to do so by either the earner or the secondary contributor must, decide whether to issue a direction to secure that the same contributions are payable as would be payable if the practice were not followed: SI 2001/1004 reg 31(1). Such a direction (1) must specify the date from which it is to have effect, which must not be earlier than that on which it is given; (2) must have effect until the direction is superseded by the giving of a further direction, or an officer of the Board is satisfied that the practice has ceased, or has ceased to have the effect of avoiding or reducing liability for earnings related contributions; and (3) must be given to the earner and the secondary contributor concerned: reg 31(2). A direction need not be given to an earner if the officer of the Board is for any reason unable to ascertain his identity or whereabouts: reg 31(3).

TEXT AND NOTE 23--For 'Regulations may' read 'The Treasury may by regulations made with the concurrence of the Secretary of State': Social Security Contributions and Benefits Act 1992 s 112(1) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 21).

NOTE 23--Regulations under the Social Security Contributions and Benefits Act 1992 s 112(2) must be made by the Treasury with the concurrence of the Secretary of State: s 112(2A) (added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 21).

NOTE 24--The Social Security Contributions and Benefits Act 1992 s 112 applies as if s 129 (see PARAS 218-221) was included in Pts I-V: s 129(2F) (added by Tax Credits Act 1999 s 14(4)). Social Security Contributions and Benefits Act 1992 s 129 and Tax Credits Act 1999 repealed: Tax Credits Act 2000 Sch 6.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(1) IN GENERAL/33A. Earnings: power to make provision in consequence of retrospective tax legislation.

### **33A. Earnings: power to make provision in consequence of retrospective tax legislation.**

Where a provision of specified income tax legislation<sup>1</sup> which relates to income tax chargeable under the relevant employment income provisions<sup>2</sup> is passed or made so as to have retrospective effect ('the retrospective tax provision') and it appears to the Treasury to be appropriate to make regulations under a relevant power<sup>3</sup> for the purpose of reflecting the whole or part of the provision made by the retrospective tax provision, such regulations may be made so as to have retrospective effect if it appears to the Treasury to be expedient, in consequence of the retrospective tax provision, for the regulations to have that effect<sup>4</sup>.

Regulations made under a relevant power may affect, for the purposes of any contributions legislation<sup>5</sup> for the purposes of which the regulations are made, the earnings in respect of an employment paid to or for the benefit of an earner at a time before the regulations are made<sup>6</sup>. In such a case, references in any relevant contributions legislation<sup>7</sup>, or any provision made under such legislation, which relate to the earnings, in respect of the employment, paid to or for the benefit of the earner at the relevant time<sup>8</sup>, or the amount of such earnings so paid at that time, are to be read, in so far as they so relate, as references which relate to the revised earnings<sup>9</sup> or, as the case may be, the amount of those earnings<sup>10</sup>. Also, any matter which, at the time when the regulations are made, has been determined for the purposes of any relevant contributions legislation, or any provision made under any such legislation, wholly or partly by reference to the earnings, in respect of the employment, paid to or for the benefit of the earner at the relevant time, or the amount of such earnings so paid at that time, is to be redetermined as it would have been determined at the time of the original determination if it had been determined wholly or partly, as the case may be, by reference to the revised earnings or the amount of those earnings<sup>11</sup>.

The Treasury may by regulations made with the concurrence of the Secretary of State make such provision as appears to it to be expedient for specified purposes<sup>12</sup> in consequence of any provision made by or by virtue of regulations made so as to have retrospective effect<sup>13</sup>. Such regulations may, in particular, make provision modifying any provision of any enactment<sup>14</sup> or for any provision of any such enactment to apply in such cases, and with such modifications, if any, as the regulations may prescribe<sup>15</sup>. Such regulations may also be made so as to have retrospective effect, but must not have effect in relation to any time before 2 December 2004<sup>16</sup>. In such a case, where the matter has been determined before the time when the regulations are made, the regulations may provide for the matter to be redetermined accordingly<sup>17</sup>.

If, ignoring this provision, the operative provisions<sup>18</sup> would directly or indirectly have effect in any case so as to remove a person's entitlement<sup>19</sup> to a contributory benefit, contribution-based jobseeker's allowance or statutory payment, or to reduce the amount of any such benefit, allowance or payment to which a person has an entitlement, those provisions are to be read with such modifications as are necessary to ensure that they do not have that effect<sup>20</sup>.

1    Ie a provision of the Income Tax Acts (see INCOME TAXATION vol 23(1) (Reissue) PARA 21).

2    Ie under the Income Tax (Earnings and Pensions) Act 2003 Pts 2-7 (ss 2-554): see INCOME TAXATION.

3    A 'relevant power' means a power to make regulations under the Social Security Contributions and Benefits Act 1992 s 3, 4(6) or 4A: s 4B(3) (ss 4B, 4C added by National Insurance Contributions Act 2006 s 1(1)).

4 1992 Act s 4B(1), (2). It does not matter whether the retrospective tax provision in question in question was passed or made before 30 March 2006 (ie the day on which the 2006 Act came into force), but nothing in the 1992 Act s 4B(2) authorises regulations to be made which have effect in relation to any time before 2 December 2004: s 4B(4), (5). The power conferred by s 4B(2) is without prejudice to any powers conferred by or by virtue of any other provision of the 1992 Act or of any other enactment, including any instrument made under an Act: s 4B(12).

A statutory instrument containing, whether alone or with other provisions, regulations made by virtue of s 4B(2) or 4C (see TEXT AND NOTES 12-20) must not be made unless a draft of the instrument has been laid before Parliament and been approved by a resolution of each house: s 176(1) (amended by 2006 Act s 1(2)(a)). In the case of a statutory instrument containing, whether alone or with other provisions, regulations made by virtue of the 1992 Act s 4B(2), the draft of the instrument must be laid before Parliament before the end of the period of 12 months beginning with the appropriate date: s 176(2A) (s 176(2A)-(2C) added by 2006 Act s 1(2)(b)). The 'appropriate date' means, where the corresponding retrospective tax provision was passed or made before 30 March 2006, 30 March 2006, and in any other case, the date on which the corresponding retrospective tax provision was passed or made: 1992 Act s 176(2B). 'The corresponding retrospective tax provision', in relation to the regulations, means the retrospective tax provision mentioned in s 4B(1) in relation to which the regulations are to be made by virtue of s 4B(2), or, where there is more than one such tax provision, whichever of those provisions was the first to be passed or made: s 176(2C).

5 'Contributions legislation' means any Part of the 1992 Act or any provision of such a Part: s 4B(13).

6 Ibid s 4B(6).

7 'Relevant contributions legislation' means any contributions legislation for the purposes of which the regulations have the effect mentioned in ibid s 4B(6): s 4B(7).

8 'The relevant time' means the time, mentioned in ibid s 4B(6), before the regulations are made: s 4B(7).

9 'The revised earnings' means the earnings, in respect of the employment, paid to or for the benefit of the earner at the relevant time as determined after applying the regulations: ibid s 4B(7).

10 Ibid s 4B(7), (8).

11 Ibid s 4B(7), (9). The matters referred to may include whether Class 1 contributions are payable in respect of earnings paid to or for the benefit of the earner in a tax week and the amount of any such contribution: s 4B(10). As to Class 1 contributions see PARAS 34-37. Section 4B(7)-(10) are subject to any express provision to the contrary, including any such provision made by regulations under s 4C(1): s 4B(11).

12 Those purposes are (1) any purpose relating to any contributions; (2) any purpose relating to any contributory benefit or contribution-based jobseeker's allowance; (3) any purpose relating to any statutory payment; (4) any purpose relating to minimum payments, within the meaning of the Pension Schemes Act 1993 (see PARA 878), by employers to occupational pension schemes; (5) any purpose of Pt III Ch II (ss 40-49) (see PARAS 909-917); and (6) such other purposes as may be prescribed by regulations made by the Treasury with the concurrence of the Secretary of State: 1992 Act s 4C(2). As to contributory benefits see PARA 54 et seq. As to contribution-based jobseeker's allowance see PARA 266 et seq. 'Statutory payment' means statutory sick pay, statutory maternity pay, ordinary statutory paternity pay, additional statutory paternity pay or statutory adoption pay, or any other payment prescribed by regulations made by the Treasury with the concurrence of the Secretary of State: s 4C(11) (amended by Work and Families Act 2006 Sch 1 para 5). References in any relevant legislation, or any provision made under any such legislation, which relate to (a) the earnings in respect of the employment, paid to or for the benefit of the earner at the relevant time, or (b) the amount of such earnings so paid at that time, are to be read, to the extent they would not otherwise be and in so far as they so relate, as references which relate to the revised earnings or, as the case may be, the amount of those earnings: Social Security, Occupational Pension Schemes and Statutory Payments (Consequential Provisions) Regulations 2007, SI 2007/1154, reg 14(2). Any matter which, at the time when the relevant retrospective contributions regulations are made, has been determined for the purposes of any relevant legislation, or any provision made under any such legislation, wholly or partly by reference to (i) the earnings, in respect of the employment, paid to or for the benefit of the earner at the relevant time, or (ii) the amount of such earnings so paid at that time, is to be re-determined, to the extent it would not otherwise be, as it would have been determined at the time of the original determination if it had been determined wholly or partly, as the case may be, by reference to the revised earnings or the amount of those earnings: reg 14(3). 'Relevant legislation' means legislation relating to purposes mentioned in heads (2)-(5) above; 'retrospective contributions regulations' means regulations made by virtue of the 1992 Act s 4B(2), and, in relation to an amount retrospectively treated as earnings, 'the relevant retrospective contributions regulations' means the regulations which treated that amount as earnings; 'the relevant time' means the time before the relevant retrospective contributions regulations are made; and 'the revised earnings' means the earnings, in respect of the employment, paid to or for the benefit of the earner at the relevant time as determined after applying the relevant retrospective contributions regulations: SI 2007/1154 reg 14(1).

13 The regulations made in accordance with *ibid* s 4B(2) (see TEXT AND NOTE 4): s 4C(1). The powers conferred by s 4C are without prejudice to any powers conferred by or by virtue of any other provision of the 1992 Act or any other enactment and, in particular, any modification of any provision of an instrument by regulations made under s 4C(1) is without prejudice to any other power to amend or revoke the provisions of the instrument, including the modified provision: s 4C(9), (10). 'Enactment' includes an instrument made under an Act: s 4C(11).

14 'Any enactment' includes the 1992 Act and any enactment passed or made on or after 30 March 2006: s 4C(3)(a), (11).

15 *Ibid* s 4C(3)(b).

16 *Ibid* s 4C(4). In particular, regulations so made by virtue of s 4C(4) may affect any of (1) liability to pay contributions, including liability to pay Class 1 contributions at a reduced rate by virtue of the 1993 Act Pt III Ch II; (2) the amount of any contribution, including the amount of any such reduced rate contribution and of any related rebate under s 41(1D) (see PARA 911) or s 42A(2C) (see PARA 912); (3) entitlement to a contributory benefit or contribution-based jobseeker's allowance; (4) the amount of any such benefit or allowance; (5) entitlement to a statutory payment; (6) the amount of any such payment; (7) liability to make minimum payments within the meaning of the 1993 Act (see PARA 878) to occupational pension schemes; (8) the amount of any such payment; (9) liability to make payments under s 42A(3) (see PARA 912) or to pay minimum contributions under s 43 (see PARA 913); (10) the amount of any such payment or contribution: 1992 Act s 4C(5).

17 *Ibid* s 4C(6).

18 'The operative provisions' are *ibid* s 4B(7)-(10) (see TEXT AND NOTES 7-11 above) and any provision made by virtue of s 4B(2) (see TEXT AND NOTE 4 above) or under s 4C(1) (see TEXT AND NOTES 12, 13 above): s 4C(8)(a).

19 A person's entitlement includes any future entitlement which the person may have: *ibid* s 4C(8)(b).

20 *Ibid* s 4C(7).

## UPDATE

### 31-46 Contributions

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and

'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

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## **(2) THE CLASSES OF CONTRIBUTIONS**

### **(i) Class 1 Contributions**

#### **34. Earnings limits for Class 1 contributions.**

For the purposes of the Social Security Contributions and Benefits Act 1992 there must for every tax year<sup>1</sup> be:

- 97 (1) a lower earnings<sup>2</sup> limit for Class 1 contributions<sup>3</sup>, being the level of weekly<sup>4</sup> earnings at which employed earners<sup>5</sup> become liable for such contributions in respect of the earnings from their employments<sup>6</sup>; and
- 98 (2) an upper earnings limit for Class 1 contributions, being the maximum amount of weekly earnings in respect of which primary Class 1 contributions are payable<sup>7</sup>,

and those limits must be the amounts specified for that year by regulations made in accordance with the following provisions<sup>8</sup>. The amount specified as the lower earnings limit for any tax year must be an amount equal to or not more than 99 pence less than:

- 99 (a) the sum which at the beginning of that year is specified<sup>9</sup> as the weekly rate of the basic pension<sup>10</sup> in a Category A retirement pension<sup>11</sup>; or
- 100 (b) that sum as increased by any Act or order passed or made before the beginning of that year and taking effect before 6 May in that year<sup>12</sup>;

and the amount specified as the upper earnings limit for any tax year must be an amount which either:

- 101 (i) is equal to seven times the sum by reference to which the lower earnings limit for that year is so specified<sup>13</sup>; or
- 102 (ii) Exceeds or falls short of seven times that sum by an amount not exceeding half that sum<sup>14</sup>.

1 For the meaning of 'tax year' see PARA 9 note 6 ante.

2 For the meaning of 'earnings' see PARA 33 ante.

3 For the meaning of 'Class 1 contributions' see PARA 31 head (a) ante.

4 For the meaning of 'week' see PARA 32 note 7 ante.

5 For the meaning of 'employed earner' see PARA 32 ante.

6 Social Security Contributions and Benefits Act 1992 s 5(1)(a). For the meaning of 'employment' see PARA 32 note 2 ante.

7 Ibid s 5(1)(b).

8 Ibid s 5(1).

9 le in *ibid* s 44(4) (as amended): see PARA 569 post.

10 As to the basic pension see PARA 569 post.

11 Social Security Contributions and Benefits Act 1992 s 5(2)(a). As to the Category A retirement pension see PARA 568 et seq post.

12 *Ibid* s 5(2)(b).

13 *Ibid* s 5(3)(a).

14 *Ibid* s 5(3)(b). For the tax year 1997-98 the lower limit was £62 and the higher limit £465: see the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 7 (subject to frequent amendment).

## UPDATE

### 31-46 Contributions

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help

participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

### **34 Earnings limits for Class 1 contributions**

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 s 5 substituted by Welfare Reform and Pensions Act 1999 Sch 9 para 1; and amended by Pensions Act 2007 s 7(3), Sch 7 Pt 4 (in effect in relation to tax year following designated tax year and subsequent tax years) (see ss 7(4), 27(5)).

TEXT AND NOTES 1-8--For the purposes of the Social Security Contributions and Benefits Act 1992, there must for every tax year be (1) the following for primary Class 1 contributions (a) a lower earnings limit; (b) a primary threshold; and (c) an upper earnings limit; and (2) a secondary threshold for secondary Class 1 contributions, and those limits and thresholds must be the amounts specified for that year by regulations: s 5(1) (amended by National Insurance Contributions Act 2008 s 1(1)(a), Sch 2). Regulations may, in the case of each of the limits or thresholds mentioned in the Social Security Contributions and Benefits Act 1992 s 5(1), prescribe an equivalent of that limit or threshold in relation to earners paid otherwise than weekly, and references in the 1992 Act or any other Act to 'the prescribed equivalent', in the context of any of those limits or thresholds, are accordingly references to the equivalent prescribed under this provision in relation to such earners: s 5(4). The power conferred by s 5(4) to prescribe an equivalent of any of those limits or thresholds includes power to prescribe an amount which exceeds, by not more than £1, the amount which is the arithmetical equivalent of that limit or threshold: s 5(5). Regulations under s 5 must be made by the Treasury: s 5(6). 'Lower earnings limit', 'upper earnings limit', 'primary threshold' and 'secondary threshold' are to be construed in accordance with s 5(1), and references to the lower or upper earnings limit, or to the primary or secondary threshold, of a tax year are to whatever is, or was, for that year the limit or threshold in force under s 5(1): s 122(1) (amended by Welfare Reform and Pensions Act 1999 Sch 12 para 77(3)).

TEXT AND NOTES 9-14--Security Contributions and Benefits Act 1992 s 5(2) prospectively repealed by Pensions Act 2007 s 7(2), Sch 7 Pt 4). Security Contributions and Benefits Act 1992 s 5(3) repealed in relation to regulations specifying the upper earnings limit for the tax year 2009-10 or any subsequent tax year: National Insurance Contributions Act 2008 s 1(1)(b), (3), Sch 2.

NOTE 14--SI 1979/591 reg 7 now Social Security (Contributions) Regulations 2001, SI 2001/1004, reg 10 (amended by SI 2004/220, SI 2005/166, SI 2006/127, SI 2007/118, SI 2008/133), by virtue of which for the tax year 2007-08 the lower limit is £87 and the upper limit is £670.

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### **35. Liability for Class 1 contributions.**

Where in any tax week<sup>1</sup> earnings<sup>2</sup> are paid to or for the benefit of an earner<sup>3</sup> in respect of any one employment of his which is employed earner's employment<sup>4</sup> and:

- 103 (1) he is over the age of 16<sup>5</sup>; and
- 104 (2) the amount paid is equal to or exceeds the current lower earnings limit<sup>6</sup> for Class 1 contributions (or the prescribed equivalent in the case of earners paid otherwise than weekly<sup>7</sup>);

a primary and secondary Class 1 contribution is payable<sup>8</sup>. The primary contribution is the liability of the earner and the secondary contribution is the liability of the secondary contributor<sup>9</sup>.

Except as may be prescribed, no primary Class 1 contribution is payable in respect of earnings paid to or for the benefit of an employed earner after he attains pensionable age<sup>10</sup>, but without prejudice to any liability to pay secondary Class 1 contributions in respect of any such earnings<sup>11</sup>.

Except as provided by the Social Security Contributions and Benefits Act 1992, the primary and secondary Class 1 contributions in respect of earnings paid to or for the benefit of an earner in respect of any one employment of his are payable without regard to any other such payment of earnings in respect of any other employment of his<sup>12</sup>. Where earnings are aggregated<sup>13</sup>, liability (if any) for the secondary contribution must be apportioned, in such manner as may be prescribed, between the secondary contributors concerned<sup>14</sup>.

Regulations may provide for reducing primary or secondary Class 1 contributions which are payable in respect of persons to whom the statutory right to redundancy payments<sup>15</sup> does not apply<sup>16</sup>.

1 'Tax week' means one of the successive weeks in a tax year beginning with the first day of that year and every seventh day thereafter, the last day of a tax year (or, in the case of a tax year ending in a leap year, the last two days) to be treated accordingly as a separate tax week: Social Security Contributions and Benefits Act 1992 s 122(1). For the meaning of 'tax year' see PARA 9 note 6 ante.

2 For the meaning of 'earnings' see PARA 33 ante.

3 For the meaning of 'earner' see PARAS 32-33 ante.

4 For the meaning of 'employed earner's employment' see PARA 32 ante.

5 As to when a person attains a particular age see PARA 19 note 11 ante. Regulations may provide that for the purpose of determining whether a contribution is payable in respect of any person, or for determining the amount or rate of any contribution, he is to be treated as having attained at the beginning of a week, or as not having attained until the end of a week, any age which he attains during the course of that week: Social Security Contributions and Benefits Act 1992 s 1(4), Sch 1 para 9. For the meaning of 'week' see PARA 32 note 7 ante. At the date at which this volume states the law, no such regulations had been made and none had effect as if so made.

6 As to the lower earnings limit see PARA 34 ante.

7 The power so conferred to prescribe an equivalent of the lower earnings limit includes power to prescribe an amount which exceeds, by not more than £1, the amount which is the arithmetical equivalent of that limit:

Social Security Contributions and Benefits Act 1992 s 6(6). Equivalent amounts and equivalent earnings brackets are set out in the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 8 (as amended), reg 8A (added by SI 1985/1398 and further amended).

8 Social Security Contributions and Benefits Act 1992 s 6(1).

9 Ibid s 6(3). Nothing in s 6(3), however, prejudices the provisions of s 1(4), Sch 1 para 3: s 6(3). Where earnings are paid to an employed earner and in respect of that payment liability arises for primary and secondary Class 1 contributions, the secondary contributor is (except in prescribed circumstances), as well as being liable for his own secondary contribution, liable in the first instance to pay also the earner's primary contribution, on behalf of and to the exclusion of the earner; and contributions paid by the secondary contributor on behalf of the earner must be taken to be contributions paid by the earner: Sch 1 para 3(1). Notwithstanding any contract to the contrary, no secondary contributor is entitled to make, from earnings paid by him, any deduction in respect of his own or any other person's secondary Class 1 contributions, or otherwise to recover such contributions from any earner to whom he pays earnings: Sch 1 para 3(2). A secondary contributor is, however, entitled, subject to and in accordance with regulations, to recover from an earner the amount of any primary Class 1 contribution paid or to be paid by him on behalf of the earner; and notwithstanding anything in any enactment, regulations under this provision must provide for recovery to be made by deduction from the earner's earnings, and for it not to be made in any other way: Sch 1 para 3(3).

The 'secondary contributor' in relation to any payment of earnings to or for the benefit of an employed earner, is (1) in the case of an earner employed under a contract of service, his employer; (2) in the case of an earner employed in an office with emoluments, either such person as may be prescribed in relation to that office or, if no person is prescribed, the government department, public authority or body of persons responsible for paying the emoluments of the office (s 7(1)); but in relation to employed earners who are paid earnings in a tax week by more than one person in respect of different employments or work under the general control or management of a person other than their immediate employer, and in relation to any other case for which it appears to the Secretary of State that such provision is needed, regulations may provide that the prescribed person is to be treated as the secondary contributor in respect of earnings paid to or for the benefit of an earner (s 7(2)). Persons who are to be treated as secondary contributors in relation to certain employments are set out in the Social Security (Categorisation of Earners) Regulations 1978, SI 1978/1689, Sch 3 (as amended) (see PARA 32 note 11 ante). For the meaning of 'contract of service' see PARA 32 note 4 ante.

10 For the meaning of 'pensionable age' see PARA 562 post.

11 Social Security Contributions and Benefits Act 1992 s 6(2). Earnings paid before retirement age which would normally fall to be paid in a later year are exempt: Social Security (Contributions) Regulations 1979, SI 1979/591, reg 20 (substituted by SI 1985/399). However, earnings due to be paid before retirement age but actually paid after that age are not exempt: Social Security (Contributions) Regulations 1979, SI 1979/591, reg 20A (added by SI 1985/397).

12 Social Security Contributions and Benefits Act 1992 s 6(4). Total contributions in cases of more than one employment are subject to an annual maximum (including, where appropriate, any Class 2 liability) of an amount equal to 53 primary Class 1 contributions at the maximum standard rate (ie on earnings equal to the upper earnings limit): Social Security (Contributions) Regulations 1979, SI 1979/591, reg 17 (amended by SI 1985/398).

For the purposes of determining whether Class 1 contributions are payable in respect of earnings paid to an earner in a given week and, if so, the amount of the contributions, (1) all earnings paid to him or for his benefit in that week in respect of one or more employed earner's employments under the same employer must, except as may be provided by regulations, be aggregated and treated as a single payment of earnings in respect of one such employment; and (2) earnings paid to him or for his benefit in that week by different persons in respect of different employed earner's employments must in prescribed circumstances be aggregated and treated as a single payment of earnings in respect of one such employment; and regulations may provide that these provisions are to have effect in cases prescribed by the regulations as if for any reference to a week there were substituted a reference to a period prescribed by the regulations: Social Security Contributions and Benefits Act 1992 Sch 1 para 1(1). Where earnings in respect of employments which include any contracted-out employment (as to which see PARA 877 et seq post) and any employment which is not a contracted-out employment are so aggregated, and the aggregated earnings are not less than the current lower earnings limit, then, except as may be provided by regulations, the amount of the primary Class 1 contribution in respect of the aggregated earnings must be determined in accordance with Sch 1 para 1(3) (as substituted) and the amount of the secondary Class 1 contribution in respect of the aggregated earnings must be determined in accordance with Sch 1 para 1(6) (as substituted): Sch 1 para 1(2). The amount of the primary Class 1 contribution must be the aggregate of the amounts determined under the following heads (applying earlier heads before later ones):

- 4 (a) if the aggregated earnings are paid to or for the benefit of an earner in respect of whom minimum contributions are payable under the Pension Schemes Act 1993 s 43(1) (contributions to personal pension schemes: see PARA 913 post), the amount obtained by applying the rate of

primary Class 1 contributions that would apply if all the aggregated earnings were attributable to employments which are not contracted-out to such part of the aggregated earnings so attributable as does not exceed the current upper earnings limit (referred to as 'the APPS earnings');

- 5 (b) if some of the aggregated earnings are attributable to COMPS service (ie service in employment in respect of which minimum payments are made to a money purchase contracted-out scheme (Social Security Contributions and Benefits Act 1992 Sch 1 para 1(9) (added by the Pensions Act 1995 s 148)), the amount obtained by applying the rate of primary Class 1 contributions that would apply if all the aggregated earnings were attributable to COMPS service to such part of the aggregated earnings attributable to COMPS service as does not exceed the current upper earnings limit, or, if head (a) supra applies, to such part of the earnings attributable to COMPS service as, when added to the APPS earnings, does not exceed the current upper earnings limit;
- 6 (c) if some of the aggregated earnings are attributable to COSRS service (ie service in employment which qualifies the earner for a pension provided by a salary related contracted-out scheme (Social Security Contributions and Benefits Act 1992 Sch 1 para 1(9) (as so added)), the amount obtained by applying the rate of primary Class 1 contributions that would apply if all the aggregated earnings were attributable to COSRS service to such part of the aggregated earnings attributable to COSRS service as does not exceed the current upper earnings limit, or, if head (a) or (b) supra applies, to such part of the earnings attributable to COSRS service as, when added to the APPS earnings or the part attributable to COMPS service (or both), does not exceed the current upper earnings limit;
- 7 (d) the amount obtained by applying the rate of primary Class 1 contributions that would apply if all the aggregated earnings were attributable to employments which are not contracted-out to such part of the aggregated earnings as, when added to the part or parts attributable to COMPS or COSRS service, does not exceed the current upper earnings limit,

and in relation to earners paid otherwise than weekly, any reference to the lower or upper-earnings limit is to be construed as a reference to the prescribed equivalent of that limit: Sch 1 para 1(3), (4) (Sch 1 para 1(3) substituted by the Pensions Act 1995 s 148). This power to prescribe an equivalent of a limit includes power to prescribe an amount which exceeds, by not more than £1, the amount which is the arithmetical equivalent of that limit: Sch 1 para 1(5).

The amount of the secondary Class 1 contribution must be the aggregate of the amounts determined under the following heads (applying earlier heads before later ones):

- 8 (i) if the aggregated earnings are paid to or for the benefit of an earner in respect of whom minimum contributions are payable under the Pension Schemes Act 1993 s 43(1), the amount obtained by applying the rate of secondary Class 1 contributions that would apply if all the aggregated earnings were attributable to employments which are not contracted-out to the APPS earnings;
- 9 (ii) if some of the aggregated earnings are attributable to COMPS service, the amount obtained by applying the rate of secondary Class 1 contributions that would apply if all the aggregated earnings were attributable to COMPS service to the part of the aggregated earnings attributable to such service;
- 10 (iii) if some of the aggregated earnings are attributable to COSRS service, the amount obtained by applying the rate of secondary Class 1 contributions that would apply if all the aggregated earnings were attributable to COSRS service to the part of the aggregated earnings attributable to such service;
- 11 (iv) the amount obtained by applying the rate of secondary Class 1 contributions that would apply if all the aggregated earnings were attributable to employments which are not contracted-out to the remainder of the aggregated earnings;

and where any single payment of earnings is made in respect of two or more employed earner's employments under different employers, liability for Class 1 contributions must be determined by apportioning the payment to such one or more of the employers as may be prescribed, and treating a part apportioned to any employer as a separate payment of earnings by him: Social Security Contributions and Benefits Act 1992 Sch 1 para 1(6), (7) (Sch 1 para 1(6) substituted by the Pensions Act 1995 s 148).

13 le under the Social Security Contributions and Benefits Act 1992 Sch 1 para 1(1)(b): see note 12 head (2) supra.

14 Ibid Sch 1 para 1(8).

15 le under the Employment Rights Act 1996 Pt XI (ss 135-154): see EMPLOYMENT vol 40 (2009) PARA 790 et seq.

16 See the Social Security Contributions and Benefits Act 1992 s 6(5) (amended by the Employment Rights Act 1996 s 240, Sch 1 para 51(1), (2)); and PARA 46 post. See also PARA 53 post.

## UPDATE

### 31-46 Contributions

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person

during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### 34-45 The Classes of Contributions

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

### 35 Liability for Class 1 contributions

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 s 6 substituted by Welfare Reform and Pensions Act 1999 Sch 9 para 2. Regulations under the Social Security Contributions and Benefits Act 1992 s 6 must be made by the Treasury: s 6(7).

TEXT AND NOTES 1-8--Where in any tax week earnings are paid to or for the benefit of an earner over the age of 16 in respect of any one employment of his which is employed earner's employment (1) a primary Class 1 contribution is payable in accordance with the Social Security Contributions and Benefits Act 1992 ss 6, 8 (see PARA 36) if the amount paid exceeds the current primary threshold (or the prescribed equivalent); and (2) a secondary Class 1 contribution is payable in accordance with ss 6, 9 (see PARA 37) if the amount paid exceeds the current secondary threshold (or the prescribed equivalent): s 6(1). No primary or secondary Class 1 contribution is payable in respect of earnings if a Class 1B contribution (see PARA 39A) is payable in respect of them: s 6(2).

NOTES 5, 9, 11--Social Security Contributions and Benefits Act 1992 s 1(4) amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 5, Sch 10.

NOTE 5--In the Social Security Contributions and Benefits Act 1992 Sch 1 para 9 (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 40), for 'Regulations may' read 'The Treasury may by regulations'.

NOTE 7--Social Security Contributions and Benefits Act 1992 s 6(6) not reproduced in substituted s 6. SI 1979/591 reg 8 now Social Security (Contributions) Regulations 2001, SI 2001/1004, reg 11 (amended by SI 2002/238, SI 2005/166, SI 2006/127, SI 2007/118, SI 2008/133, SI 2009/111). SI 1979/591 reg 8A revoked: SI 1999/568.

NOTE 9--Social Security Contributions and Benefits Act 1992 s 6(3) now s 6(4). Reference to Sch 1 para 3 is now to Sch 1 paras 3-3B: s 6(4) (amended by Child Support, Pensions and Social Security Act 2000 s 77(3)). In the Social Security Contributions and Benefits Act 1992 Sch 1 para 3(1) (amended by Social Security Act 1998 Sch 7 para 77(5); and National Insurance Contributions Act 2002 Sch 1 para 13(3)) for 'his own secondary contribution' read 'any secondary contribution of his own' and for 'the earner's primary contribution' read 'the earner's primary contribution or a prescribed part of the earner's primary contribution'. Social Security Contributions and Benefits Act 1992 Sch 1 para 3(2) repealed: Child Support, Pensions and Social Security Act 2000 s 77(1), Sch 9 Pt VIII (but see the Social Security Contributions and Benefits Act 1992 Sch 1 para 3A). In Sch 1 para 3(3) (amended by Social Security Act 1998 s 55(a); and National Insurance Contributions and Statutory Payments Act 2004 s 1(2)), for 'and notwithstanding ... any enactment' read 'and, subject to the Social Security Contributions and Benefits Act 1992 Sch 1 para 3(3A)-(5) but notwithstanding any other provision in any enactment'. Schedule 1 para 3(3B) applies where a person ('the employee') who is employed by a particular employer ('the employer') receives earnings in a form other than money ('non-monetary earnings') from the employer in a tax year: Sch 1 para 3(3A) (Sch 1 para 3(3A), (3B) added by 2004 Act s 1(3)). If and to the extent that regulations so provide, the employer may recover from the employee, in the prescribed manner, any primary Class 1 contributions paid or to be paid by him on the employee's behalf in respect of those earnings: Social Security Contributions

and Benefits Act 1992 Sch 1 para 3(3B). Schedule 1 para 3(5) applies in a case where a person ('the employee') ceases in a particular tax year ('the cessation year') to be employed by a particular employer ('the employer'), and the employee receives from the employer in the cessation year, after the cessation of the employment, or in the next tax year non-monetary earnings: Sch 1 para 3(4) (added by Social Security Act 1998 s 55(b); and amended by 2004 Act s 1(4)). If and to the extent that regulations so provide, the employer may recover from the employee in such manner as may be prescribed any primary Class 1 contributions paid or to be paid by him on the employee's behalf in respect of the non-monetary earnings mentioned in the Social Security Contributions and Benefits Act 1992 Sch 1 para 3(4): Sch 1 para 3(5) (added by Social Security Act 1998 s 55(b); and amended by 2004 Act s 1(5), Sch 2 Pt 1). Regulations under any provision of the Social Security Contributions and Benefits Act 1992 Sch 1 para 3 must be made by the Inland Revenue: Sch 1 para 3(6) (added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 33).

Subject to the Social Security Contributions and Benefits Act 1992 Sch 1 para 3A(2), a person who is or has been liable to pay any secondary Class 1 or any Class 1A or Class 1B contributions must not (1) make, from earnings paid by him, any deduction in respect of any such contributions for which he or any other person is or has been liable; (2) otherwise recover any such contributions (directly or indirectly) from any person who is or has been a relevant earner; or (3) enter into any agreement with any person for the making of any such deduction or otherwise for the purpose of so recovering any such contributions: Sch 1 para 3A(1) (Sch 1 paras 3A, 3B added by Child Support, Pensions and Social Security Act 2000 s 77(2)). For these purposes, 'agreement' includes any arrangement or understanding whether or not legally enforceable; and 'relevant earner', in relation to a person who is or has been liable to pay any contributions, means an earner in respect of whom he is or has been so liable: Social Security Contributions and Benefits Act 1992 Sch 1 para 3A(4). Schedule 1 para 3A(1) does not apply to the extent that an agreement between (a) a secondary contributor; and (b) any person ('the earner') in relation to whom the secondary contributor is, was or will be, such a contributor in respect of the contributions to which the agreement relates, allows the secondary contributor to recover (whether by deduction or otherwise) the whole or any part of any secondary Class 1 contribution payable in respect of relevant employment income of that earner: Sch 1 para 3A(2) (amended by 2004 Act s 3(2)(a)). 'Relevant employment income', in relation to the earner, means an amount that counts as employment income of the earner under the Income Tax (Earnings and Pensions) Act 2003 s 426 (see INCOME TAXATION vol 23(1) (Reissue) PARA 674A.2) or s 438 (see INCOME TAXATION vol 23(1) (Reissue) PARA 674A.7), or a gain that is treated as remuneration derived from the earner's employment by virtue of the Social Security Contributions and Benefits Act 1992 s 4(4)(a) (see PARA 33): Sch 1 para 3A(2B) (Sch 1 para 3A(2A), (2B) added by the 2004 Act s 3(2); Social Security Contributions and Benefits Act 1992 Sch 1 para 3A(2A) amended, in relation to agreements and elections whether entered into or made before, or on or after, 30 March 2006, including those entered into or made before 2 December 2004, by the National Insurance Contributions Act 2006 s 5(1), (2), (4)). An agreement in respect of relevant employment income is to be disregarded for the purpose of the Social Security Contributions and Benefits Act 1992 Sch 1 para 3(2) to the extent that it relates to relevant employment income which is employment income of the earner by virtue of the Income Tax (Earnings and Pensions) Act 2003 Pt 7 Ch 3A (ss 446A-446J) (see INCOME TAXATION vol 23(1) (Reissue) PARA 674A.10) or to any contribution, or any part of any contribution, liability to which arises as a result of regulations being given retrospective effect by virtue of the Social Security Contributions and Benefits Act 1992 s 4B(2) (see PARA 33A): Sch 1 para 3A(2A) (Sch 1 para 3A as added; Sch 1 para 3A(2A) as so added and amended).

Where (i) an election is jointly made by (a) a secondary contributor, and (b) a person ('the earner') in relation to whom the secondary contributor is or will be such a contributor in respect of contributions on relevant employment income of the earner, for the whole or a part of any liability of the secondary contributor to contributions on any such income to be transferred to the earner; and (ii) the election is one in respect of which the Inland Revenue has, before it was made, given by notice to the secondary contributor its approval to both (a) the form of the election; and (b) the arrangements made in relation to the proposed election for securing that the liability transferred by the election will be met: Sch 1 para 3B(1) (Sch 1 para 3B as added; Sch 1 para 3B(1) amended by the 2004 Act s 3(3)(a)). For the purposes of the Social Security Contributions and Benefits Act 1992 Sch 1 para 3B, 'relevant employment income' has the same meaning given by Sch 1 para 3A(2B); and references to contributions on relevant employment income are references to any secondary Class 1 contributions payable in respect of the income: see Sch 1 para 3B(1A) (Sch 1 para 3B as added; Sch 1 para 3B(1A) added by the 2004 Act s 3(3)(b)). Any liability which arises while the election is in force and which is a liability to pay the contributions on relevant employment income of the earner, or the part of it, to which the election relates, must be treated for the purposes of the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992 and the Social Security Contributions (Transfer of Functions, etc) Act 1999 Pt II (ss 8-19) as a liability falling on the earner, instead of on the secondary contributor: Social Security Contributions and Benefits Act 1992 Sch 1 para 3B(2) (Sch 1 para 3B as added; Sch 1 para 3B(2) amended by the 2004 Act s 3(3)(c)). See further the Social Security Contributions and Benefits Act 1992 Sch 1 para 3B(3)-(12), (14) (Sch 1 para 3B as added; Sch 1 para 3B(3), (7) amended, Sch 1 para 3B(7A), (7B) added, Sch 1 para 3B(10) substituted, by the 2004 Act s 3(3)(d)-(g), Sch 2 Pt 1; Social Security Contributions and Benefits Act 1992 Sch 1 para 3B(7B) amended by the National Insurance Contributions Act 2006 s 5(1), (3), (4)).

In the Social Security Contributions and Benefits Act 1992 s 7(2) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 7) for 'Secretary of State' read 'Treasury'. Regulations under the Social Security Contributions and Benefits Act 1992 s 7 must be made by the Treasury: s 7(3) (added by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 7).

As to the payment of National Insurance Contributions in respect of share options and similar rights obtained by persons as directors or employees during the period beginning with 6 April 1999 and ending with 19 May 2000 see the Social Security Contributions (Share Options) Act 2001; and PARA 35B.

NOTE 11--Social Security Contributions and Benefits Act 1992 s 6(2) (as originally enacted) now s 6(3) (s 6 as substituted: see TEXT AND NOTES). 1979 Regulations regs 20, 20A now SI 2001/1004 (NOTE 7) regs 28, 29.

TEXT AND NOTES 12-14--Regulations under any provision of the Social Security Contributions and Benefits Act 1992 Sch 1 para 1 must be made by the Inland Revenue: Sch 1 para 1(8A) (added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 31).

NOTE 12--Social Security Contributions and Benefits Act 1992 s 6(4) now s 6(5) (s 6 as substituted: see TEXT AND NOTES). Annual maximum is now an amount equal to 53 primary Class 1 contributions at the primary percentage payable on earnings at the upper earnings limit for the year in question: SI 2001/1004 (NOTE 7) reg 21.

For 'in respect of the aggregated earnings' read 'in respect of the aggregated earnings attributable to the Social Security Contributions and Benefits Act 1992 s 8(1)(a) (see PARA 36): Sch 1 para 1(2) (amended by the National Insurance Contributions Act 2002 Sch 1 para 13(2)(a), with effect in relation to the tax year 2003-04 and subsequent tax

years (s 8(2)). Where earnings in respect of employments which include any contracted-out employment and any employment which is not a contracted-out employment are aggregated under the Social Security Contributions and Benefits Act 1992 Sch 1 para 1(1), then, except as may be provided by regulations, (1) if the aggregated earnings exceed the current primary threshold, the amount of the primary Class 1 contribution in respect of the aggregated earnings is to be determined in accordance with Sch 1 para 1(3), and (2) if the aggregated earnings exceed the current secondary threshold, the amount of the secondary Class 1 contribution in respect of the aggregated earnings is to be determined in accordance with Sch 1 para 1(6): Sch 1 para 1(2) (substituted by the 1998 Act Sch 7 para 77(2); and amended by the Welfare Reform and Pensions Act 1999 Sch 12 para 78(2), (3)). In relation to earners paid otherwise than weekly, any reference in the Social Security Contributions and Benefits Act 1992 Sch 1 para 1 to (a) the primary or the secondary threshold; or (b) the upper earnings limit, is to be construed as a reference to the equivalent of that threshold or limit prescribed under s 5(4) (see PARA 34): Sch 1 para 1(10) (added by the Welfare Reform and Pensions Act 1999 Sch 12 para 78(5)). The reference in the Social Security Contributions and Benefits Act 1992 Sch 1 para 1(3) to the amount of the primary Class 1 contribution is now to the amount of the primary Class 1 contribution attributable to s 8(1)(a) (see PARA 36); in heads (a)-(d) for 'rate of primary Class 1 contributions' read 'main primary percentage' and for 'does not exceed' read 'exceeds the current primary threshold and does not exceed': Social Security Contributions and Benefits Act 1992 Sch 1 para 1(3) (amended by the 1998 Act Sch 7 para 77(3); the Welfare Reform and Pensions Act 1999 Sch 12 para 78(3); and the National Insurance Contributions Act 2002 Sch 1 para 13(2)(b), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2)). In relation to 2009-10 and subsequent tax years, in heads (a)-(d) for 'the current upper earnings limit' read 'the upper accrual point'; add heads (ba) if head (b) applies the amount obtained by applying the main primary percentage referred to in head (d) to such part of the aggregated earnings attributable to COMPS service as, when added to the APPS earnings (if any), exceeds the upper accrual point and does not exceed the current upper earnings limit; (ca) if head (c) applies, the amount obtained by applying the main primary percentage referred to in head (d) to such part of the aggregated earnings attributable to COSRS service as, when added to the PPS earnings or the part attributable to COMPS service (or both), exceeds the upper accrual point and does not exceed the current upper earnings limit: Social Security Contributions and Benefits Act 1992 Sch 1 para 1(3) (amended by the National Insurance Contributions Act 2008 Sch 1 para 6(2), (5)). In relation to such earners, any reference in the 1992 Act Sch 1 para 1 to the upper accrual point is to be read as a reference to the prescribed equivalent: Sch 1 para 1(11) (added by the National Insurance Contributions Act 2008 Sch 1 para 6(4)). Social Security Contributions and Benefits Act 1992 Sch 1 para 1(4) repealed by Welfare Reform and Pensions Act 1999 Sch 12 para 78(4), Sch 13 Pt VI so that, after head (d) words 'in relation to earners paid ... prescribed equivalent of that limit' omitted. Social Security Contributions and Benefits Act 1992 Sch 1 para 1(5) repealed: Welfare Reform and Pensions Act 1999 Sch 12 paras 76, 78(1), (4), Sch 13 Pt VI. In head (i) for 'the APPS earnings' read 'such part of the APPS earnings as exceeds the secondary threshold', in heads (ii) and (iii) for 'the part of the aggregated earnings attributable to such service' read 'such part of the aggregated earnings attributable to such service as exceeds the secondary threshold', and in head (iv) for 'the remainder of the aggregated earnings' read 'such part of the remainder of the aggregated earnings as exceeds the secondary threshold': Social Security Contributions and Benefits Act 1992 Sch 1 para 1(6) (amended by the 1998 Act Sch 7 para 77(4); and the Welfare Reform and Pensions Act 1999 Sch 12 paras 76, 78(1), (2)).

NOTE 16--Social Security Contributions and Benefits Act 1992 s 6(5) (as originally enacted) now s 6(6) (s 6 as substituted: see TEXT AND NOTES).



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(i) Class 1 Contributions/35A. Notional payment of Class 1 contributions where earnings are not less than lower earnings limit.

**35A. Notional payment of Class 1 contributions where earnings are not less than lower earnings limit.**

The following rules apply where in any tax week<sup>1</sup> earnings<sup>2</sup> are paid to or for the benefit of an earner<sup>3</sup> over the age of 16 in respect of any one employment of his which is employed earner's employment<sup>4</sup> and the amount paid (1) is not less than the current lower earnings limit (or the prescribed equivalent); but (2) does not exceed the current primary threshold (or the prescribed equivalent)<sup>5</sup>. Subject to any prescribed exceptions or modifications<sup>6</sup> (a) the earner will be treated as having actually paid a primary Class 1 contribution in respect of that week, and (b) those earnings will be treated as earnings upon which such a contribution has been paid, for any of a number of specified purposes<sup>7</sup>.

Except as may be prescribed, nothing in these rules applies in relation to earnings paid to or for the benefit of an employed earner after he attains pensionable age<sup>8</sup>.

Except as provided for<sup>9</sup>, these rules apply in relation to earnings paid to or for the benefit of an earner in respect of any one employment of his irrespective of any other such payment of earnings in respect of any other employment of his<sup>10</sup>.

1 For the meaning of 'tax week' see PARA 35 NOTE 1.

2 For the meaning of 'earnings' see PARA 33.

3 For the meaning of 'earner' see PARA 32, 33.

4 For the meaning of 'employed earner's employment' see PARA 32.

5 Social Security Contributions and Benefits Act 1992 s 6A(1) (s 6A added by the Welfare Reform and Pensions Act 1999 Sch 9 para 3). As to the 'lower earnings limit', the 'primary threshold' and prescribed equivalents see PARA 34.

6 See the Social Security Contributions (Notional Payment of Primary Class 1 Contribution) Regulations 2000, SI 2000/747, regs 4-6.

7 Social Security Contributions and Benefits Act 1992 s 6A(2). The purposes referred to are (1) the purposes of s 14(1)(a) (see PARA 42 head (1)); (2) the purposes of the provisions mentioned in s 21(5A)(a)-(c) (see PARA 55); (3) any other purposes relating to contributory benefits; (4) any purposes relating to jobseeker's allowance; and (5) any purposes relating to employment and support allowance: s 6A(3) (amended by Welfare Reform Act 2007 Sch 3 para 9(2), Sch 8). Regulations may provide for any provision of the Social Security Contributions and Benefits Act 1992 which, in whatever terms, refers (a) to primary Class 1 contributions being payable by a person; or (b) otherwise to a person's liability to pay such contributions, to have effect for the purposes of s 6A with any prescribed modifications: s 6A(4) (s 6A as so added). Regulations under s 6A must be made by the Treasury: s 6A(7).

8 Ibid s 6A(5). For the meaning of 'pensionable age' see PARA 562.

9 Ie by the Social Security Contributions and Benefits Act 1992.

10 Ibid s 6A(6).

**UPDATE**

**31-46 Contributions**

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(i) Class 1 Contributions/35B. Share options and similar rights obtained between 6 April 1999 and 19 May 2000.

**35B. Share options and similar rights obtained between 6 April 1999 and 19 May 2000.**

Where (1) a right to acquire shares in a body corporate was obtained by any person in the period 6 April 1999 to 19 May 2000; (2) that right (a) was a gain to be realised after 11 May 2001 on the exercise, assignment or release of that right, and the gain would or (if circumstances changed) might be one falling<sup>1</sup> to be treated as remuneration derived from that person's employment; or (b) a gain that has been realised after 7 November 2000 and before 11 May 2001 on any exercise, assignment or release of that right has fallen<sup>2</sup> to be so treated; (3) a notice<sup>3</sup> in respect of that right is given to the Inland Revenue before the end of the period of 92 days beginning with 11 May 2001, then liability to contributions in respect of gains realised after 7 November 2000 on the exercise, assignment or release of that right is to be determined in accordance with the following provisions<sup>4</sup>.

The person who may give a notice under head (3) above in respect of any right falling under head (2)(a) above is (i) where neither head (ii) nor head (iii) below applies, the person who would be the secondary contributor in relation to any liability to pay secondary Class 1 contributions in respect of a gain realised on an exercise, assignment or release, of that right on the day of the notice; (ii) where an election<sup>5</sup> which is in force on the day of the notice, would relate to the whole of any such gain the person on whom (apart from these provisions) any such liability would fall by virtue of the election, or the secondary contributor on whom (apart from these provisions) any such liability would fall were no election in force; (iii) where an election<sup>6</sup> which is in force on the day of the notice would relate to only a part of any such gain, the persons mentioned in head (ii) above, acting jointly<sup>7</sup>. The person who may give a notice under head (3) above in respect of any right falling under head (2)(b) above is the person on whom (apart from these provisions) the liability for secondary Class 1 contributions payable in respect of the gain mentioned in head (2)(b) did fall, and, if different parts of that liability fell (apart from these provisions) on different persons, those persons acting jointly<sup>8</sup>. Where, in the case of any right to acquire shares, the person entitled or (if there is more than one) each of the persons entitled to give such a notice is a person whose liability by virtue of the giving of such a notice to pay a special contribution<sup>9</sup> in respect of that right would be nil, that person or, as the case may be, each of those persons acting jointly are deemed to have given such a notice immediately before the end of the 92-day period specified in head (3) above, to have accompanied that notice with a notification to the Inland Revenue that the liability arising by virtue of that notice was nil, and to have given that notification in the belief that the facts reasonably ascertainable by him at the time at which he is deemed to have given it were grounds for giving it<sup>10</sup>.

Where liability to contributions in respect of gains realised after 7 November 2000 on the exercise, assignment or release of any right<sup>11</sup> falls to be determined (A) no liability to pay any Class 1 contributions in respect of any gain realised after 11 May 2001 arises on the exercise, assignment or release of that right; (B) any liability to pay Class 1 contributions in respect of any gain realised after 7 November 2000 and before 11 May 2001 on any exercise, assignment or release of that right is deemed never to have arisen; and (C) the person who gave the notice under head (3) above becomes liable to pay a special contribution in respect of that right<sup>12</sup>. Neither head (1) nor head (2) above applies in relation to any liability to pay Class 1 contributions in respect of so much of any gain realised on the assignment or release of a right as is equal to the amount (if any) by which the first of the following amounts exceeds the second, that is to say, the amount of any valuable consideration given for the assignment or

release, and the amount which would have been taken<sup>13</sup> to be the amount of the gain realised by an exercise in full of that right immediately before the time of its assignment or release<sup>14</sup>. If it appears to the Inland Revenue that a person who has given a notice under head (3) above in respect of any right and who would be liable<sup>15</sup> by virtue of that notice to pay a special contribution did, within the aforementioned period of 92 days, make a payment in respect of that liability to the Inland Revenue of an amount which he had reasonable grounds for believing was the correct amount of his liability, or did, within that period, give notification to the Inland Revenue, in the belief on reasonable grounds that it was correct, that the liability arising by virtue of that notice was nil, or has a reasonable excuse for having failed to do either of those things within that period, the Inland Revenue may, if it thinks fit, direct that, in relation to that notice, certain provisions<sup>16</sup> are treated as having had effect with the period mentioned extended by such further period as it may determine<sup>17</sup>. A decision as to the giving or refusal of such a direction is to be made by an officer of the same description and be subject to the same rights of appeal as any decision, to which the giving of the direction is or would be relevant, as to whether a person is or has been liable to pay contributions of any particular class<sup>18</sup>. Where head (2) above applies in relation to any liability to pay Class 1 contributions and amounts have already been paid to the Inland Revenue in respect of that liability before 11 May 2001 all such repayments must be made as may be necessary, but any amount which it would otherwise be necessary to repay in respect of a secondary Class 1 contribution paid by a person who has become liable to pay a special contribution may be retained and set against any undischarged liability of his to pay that special contribution<sup>19</sup>.

Where a right to acquire shares in a body corporate was obtained by any person in the period 6 April 1999 to 19 May 2000 ('the original right'), and the original right is or has been assigned or released (whether before or after 11 May 2001) for a consideration that consists of or includes another right ('the replacement right') to acquire shares in that or any other body corporate, the following provisions apply<sup>20</sup>. If the replacement right or any subsequent replacement right was obtained on or before 7 November 2000, that right is treated<sup>21</sup> as a right obtained in the period 6 April 1999 to 19 May 2000<sup>22</sup>. Where the replacement right is or has been obtained after 7 November 2000 a notice may be given under head (3) above in respect of the original right, notwithstanding that the assignment or release of that right was before the giving of the notice<sup>23</sup>. The liability<sup>24</sup> to pay Class 1 contributions in respect of a gain realised on the assignment or release of the original right is to be determined as if<sup>25</sup> the replacement right were or, as the case may be, were part of the valuable consideration given for the assignment or release, and as if the value of so much of that consideration as is represented by the replacement right were equal to whichever is the smaller of the amount which<sup>26</sup> would have been taken to be the gain realised by an exercise in full of the original right immediately before the time of its assignment or release, or the amount which<sup>27</sup> would have been taken to be the amount of the gain realised by an exercise in full of the replacement right at that time which falls immediately after it is given in consideration of the assignment or release<sup>28</sup>. Heads (1) and (2) above do not prevent a liability to pay Class 1 contributions from arising after 11 May 2001 in respect of any gain realised on the exercise, assignment or release of the replacement right or of any subsequent replacement right, or have the effect of deeming any such liability not to have arisen on any such gain<sup>29</sup>.

Where the whole or any part of any consideration given for the assignment or release of the replacement right or of any subsequent replacement right does not (or did not) comprise a subsequent replacement right, and, as a consequence, a gain would<sup>30</sup> be taken<sup>31</sup> to be realised (or to have been realised) on that assignment or release, that gain is taken for the purposes of the determination to be (or, as the case may be, to have been) equal to the amount in respect of which liability to pay Class 1 contributions would have been preserved, on the following assumptions<sup>32</sup> or, if no such liability would have been so preserved, to nil<sup>33</sup>. Those assumptions are that the right assigned or released is a right to the liability to pay Class 1 contributions in respect of which is a liability to which head (A) or (B) above applied; that references<sup>34</sup> to the original right and to the replacement right are references, respectively, to the right that is

assigned or released and to the right comprised in the consideration for the assignment or release; and that so much of the right assigned or released as is a right to acquire additional shares is disregarded<sup>35</sup>.

Nothing in the provisions above<sup>36</sup> limits or removes, or is deemed to have limited or removed, any liability to pay Class 1 contributions in respect of a gain arising on the exercise, assignment or release of the replacement right, or of any subsequent replacement right, in any case in which the right in question or that gain derives (directly or indirectly) from a transaction the purpose, or one of the main purposes, of which was to make use of the provisions of the Social Security Contributions (Share Options) Act 2001 to avoid the payment of such contributions in respect of a benefit conferred after 19 May 2000<sup>37</sup>. Shares are additional shares, in relation to any right ('the new right') constituting or comprised in the consideration for the assignment or release of another right ('the old right'), to the extent that they are shares obtainable in exercise of the new right in addition to shares obtainable in exercise of the new right with a value that matches the value of the shares (other than any that were themselves additional shares) which were obtainable by the exercise of the old right<sup>38</sup>. Shares obtainable by the exercise of the new right are taken to have a value that matches the value of the shares obtainable in exercise of the old right to the extent, and to the extent only, that the following amounts are the same: (aa) the amount which<sup>39</sup> would be taken to be the amount of the gain realised by an exercise of the new right at the relevant time (assuming it to be exercisable at that time) for obtaining the shares; and (bb) the amount which would have been taken<sup>40</sup> to be the gain realised by a full exercise of the old right immediately before the time of its assignment or release<sup>41</sup>. 'The relevant time', in relation to the new right, means the time which falls immediately after it is given in consideration of the assignment or release of the old right<sup>42</sup>. Where any question arises<sup>43</sup> in relation to any partial exercise, assignment or release of any right, whether the shares obtainable under so much of the right as has been exercised, assigned or released were additional shares, it is assumed that the right in so far as it is a right to acquire additional shares must be exercised, assigned or released before the exercise, assignment or release of any part of that right that is a right to acquire shares that are not additional shares<sup>44</sup>. All such apportionments as may be necessary must be made in determining, in a case in which the number of additional shares cannot be a whole number, to what extent a liability to pay Class 1 contributions arises in relation to the exercise, assignment or release of a right to acquire any such shares<sup>45</sup>.

1    le by virtue of the Social Security Contributions and Benefits Act 1992 s 4(4)(a): see PARA 33.

2    le by virtue of *ibid* s 4(4)(a).

3    A notice must be given in writing or by such electronic means as may be authorised by regulations made by the Inland Revenue, must contain such matters and be in such form as may be required by any such regulations, and once given, is irrevocable: *ibid* s 1(5). As to such regulations see the Social Security Contributions (Share Options) Regulations 2001, SI 2001/1817, regs 3, 4 (reg 4 amended by SI 2003/2155).

A person who has given a notice must maintain the following records: (1) a copy of the notice; (2) evidence of the price at which each share may be acquired by exercise of the right in respect of which the notice is given; (3) evidence of the amount that a person might reasonably have expected to have obtained from a sale in the open market on 7 November 2000 of each share to which the right relates; (4) evidence that the special contribution was paid to the Inland Revenue before the end of the period of 92 days beginning with 11 May 2001; and (5) where applicable, evidence of the consent to the notice being given by a secondary contributor: reg 10(1). The records must be retained by the person required to maintain them for a period of not less than three years beginning with 6 April following the date on which a gain is realised on the exercise, assignment or release of the right in respect of which the notice is given: reg 10(2). Every person required to maintain records, whenever called on to do so by any authorised officer of the Inland Revenue, must produce those records to that officer for inspection, at such time as that officer may reasonably require, at the prescribed place: reg 11(2). The 'prescribed place' means such place in the United Kingdom as the person and the officer may agree on, or, in default of such agreement, the place in the United Kingdom at which the records are normally kept, or, in default of such agreement and if there is no such place, the person's principal place of business in the United Kingdom: reg 11(3).

4 Social Security Contributions (Share Options) Act 2001 s 1(1), (2). References to the assignment or release of a right to acquire shares, and to gains realised on such an assignment or release, are construed as if the Income Tax (Earnings and Pensions) Act 2003 s 477(6) (see INCOME TAXATION) applied for these purposes as it applied for those of Pt 7 Ch 5 (ss 471-484): Social Security Contributions (Share Options) Act 2001 s 5(2)(c) (amended by the Income Tax (Earnings and Pensions) Act 2003 Sch 6 para 262; and the Finance Act 2003 Sch 22 para 58).

5 le for the purposes of the Social Security Contributions and Benefits Act 1992 Sch 1 para 3B(1): see PARA 35.

6 See NOTE 4.

7 Social Security Contributions (Share Options) Act 2001 s 1(3).

8 Ibid s 1(4).

9 le under ibid s 2. The amount of the special contribution is 12•2 per cent of the amount (if any) in respect of which Class 1 contributions would have been payable by virtue of the Social Security Contributions and Benefits Act 1992 s 4(4)(a) if the right had been exercised in full on 7 November 2000 without the giving of any further consideration for the shares acquired by the exercise of that right, or, where there is no such amount, nil: Social Security Contributions (Share Options) Act 2001 s 2(2).

Any special contribution must be paid to the Inland Revenue before the end of the period of 92 days beginning with 11 May 2001 or before the end of that period as extended by any such further period determined by the Inland Revenue under s 2(5) infra: Social Security Contributions (Share Options) Regulations 2001, SI 2001/1817, reg 5(1). Where any payment to the Inland Revenue is made by cheque, and the cheque is paid on its first presentation to the banker on whom it is drawn, the payment is treated as made on the day on which the cheque was received by the Inland Revenue and cognate expressions are to be construed accordingly: reg 5(2).

Where a person becomes liable to pay to the Inland Revenue a special contribution, but that liability is not discharged before the end of the aforementioned period of 92 days, the Social Security Contributions and Benefits Act 1992 and the Social Security Contributions (Share Options) Act 2001 have effect as if no notice had been given under s 1 in respect of that right: s 2(4).

A special contribution which is not paid to the Inland Revenue before the end of the aforementioned period of 92 days carries interest at the rate applicable under the Social Security Contributions and Benefits Act 1992 Sch 1 para 6(3) from the end of that period until payment, and such interest is recoverable as if it were a Class 1A contribution: Social Security Contributions (Share Options) Regulations 2001, SI 2001/1817, reg 6(1), (2). A certificate of the Inland Revenue that any amount of interest so payable has not been paid to it, or, to the best of its knowledge and belief, to any person acting on its behalf, is sufficient evidence that a person is liable to pay to it the amount of interest shown on the certificate and that the sum is unpaid and due to be paid, and any document purporting to be such a certificate is deemed to be such a certificate until the contrary is proved: reg 6(3).

Where a special contribution is repaid to a person by the Inland Revenue, the repayment carries interest at the rate applicable under the Social Security Contributions and Benefits Act 1992 Sch 1 para 6(3) from the end of the aforementioned period of 92 days, or, if later, from the date on which the special contribution was paid to the Inland Revenue, until the order for repayment is issued: Social Security Contributions (Share Options) Regulations 2001, SI 2001/1817, reg 7. Where a person has paid interest in respect of a special contribution, the Inland Revenue must repay the interest to that person if the interest is found not to have been due to be paid, or the special contribution is returned, or repaid, to that person: reg 8.

Interest payable in respect of a special contribution must be remitted where the liability, or a part of the liability, to pay the interest arises as the result of an official error being made for the period commencing after the end of the aforementioned period of 92 days or, if later, the date on which the official error occurs, and ending 14 days after the date on which the official error is rectified and the person by whom the interest was payable is advised of its rectification: reg 9(1)-(3). 'Official error' means a mistake made, or something omitted to be done, by an officer of, or person employed in relation to, the Inland Revenue acting as such, where the person by whom the interest was payable, or any person acting on his behalf, does not cause, or materially contribute to, that error or omission: reg 9(3).

10 Ibid s 1(6).

11 See ibid s 1.

12 Ibid s 2(1).

13 le in accordance with the provisions of the Income Tax (Earnings and Pensions) Act 2003 s 479: see INCOME TAXATION.

14 Social Security Contributions (Share Options) Act 2001 s 2(3). The second amount referred to in the text is less any deductions under the Income Tax (Earnings and Pensions) Act 2003 s 480(1)-(6): Social Security Contributions (Share Options) Act 2001 s 2(3)(b) (amended by the Income Tax (Earnings and Pensions) Act 2003 Sch 6 para 261; and the Finance Act 2003 Sch 22 para 56).

15 Ie but for the Social Security Contributions (Share Options) Act 2001 s 2(4): see NOTE 9.

16 Ie ibid ss 1(1), 2(4).

17 Ibid s 2(5).

18 Ibid s 2(6).

19 Ibid s 2(7).

20 Ibid s 3(1).

21 Ie for the purposes of ibid ss 1, 2.

22 Ibid s 3(2).

23 Ibid s 3(3).

24 Ie under ibid s 2(3).

25 Ie notwithstanding anything in the Income Tax (Earnings and Pensions) Act 2003 s 483(1)-(4): see INCOME TAXATION.

26 Ie in accordance with the provisions of ibid s 479.

27 Ie in accordance with ibid s 479.

28 Social Security Contributions (Share Options) Act 2001 s 3(4) (amended by the Income Tax (Earnings and Pensions) Act 2003 Sch 6 para 261; and the Finance Act 2003 Sch 22 para 57).

29 Social Security Contributions (Share Options) Act 2001 s 3(5). Those provisions have effect (instead) as if they provided for the amount of any such liability to be determined, or to be deemed to have been determined in accordance with the following provisions: s 3(5). In relation to the replacement right or any subsequent right, the Income Tax (Earnings and Pensions) Act 2003 s 483(1)-(3) (see INCOME TAXATION) is deemed to have effect (or, as the case may be, to have had effect) for the purposes of such a determination as if (1) it had effect (or, as the case may be, had had effect) in relation to that right to the extent only that it is a right to acquire additional shares; and (2) as if the value of the additional right had been nil: Social Security Contributions (Share Options) Act 2001 s 3(6) (substituted by the Income Tax (Earnings and Pensions) Act 2003 Sch 6 para 261(4); and amended by the Finance Act 2003 Sch 22 para 57(3)).

30 Ie but for the Social Security Contributions (Share Options) Act 2001.

31 Ie for the purposes of the Income and Corporation Taxes Act 1988 s 135.

32 Ie by virtue of the Social Security Contributions (Share Options) Act 2001 ss 2(3), 3(4).

33 Ibid s 3(7).

34 Ie in ibid s 3(4).

35 Ibid s 3(8). It is disregarded for the purposes of both ss 2(3), 3(4): s 3(8).

36 Ie in ibid s 3(1)-(8).

37 Ibid s 3(9).

38 Ibid s 3(10).

39 Ie in accordance with the Income Tax (Earnings and Pensions) Act 2003 s 479. From the amount arrived at under head (aa) of the text must be made any deductions under s 480(1)-(6).

40 Ie in accordance with ibid s 479.

41 Social Security Contributions (Share Options) Act 2001 s 3(11) (amended by the Income Tax (Earnings and Pensions) Act 2003 Sch 6 para 261(6); and the Finance Act 2003 Sch 22 para 57(4)).

42 Social Security Contributions (Share Options) Act 2001 s 3(11).

43 le for the purposes of the Social Security Contributions (Share Options) Act 2001.

44 Ibid s 3(12).

45 Ibid s 3(13).

## UPDATE

### 31-46 Contributions

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a

person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member

of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(i) Class 1 Contributions/36. Calculation of primary Class 1 contributions.

### **36. Calculation of primary Class 1 contributions.**

Where a primary Class 1 contribution<sup>1</sup> is payable<sup>2</sup>, the amount of that contribution is the aggregate of:

- 105 (1) the initial primary percentage<sup>3</sup> of so much of the employed earner's earnings<sup>4</sup> paid in the tax week<sup>5</sup>, in respect of the employment<sup>6</sup> in question, as does not exceed the current lower earnings limit<sup>7</sup>; and
- 106 (2) the main primary percentage<sup>8</sup> of so much of those earnings as exceeds that limit but does not exceed the current upper earnings limit<sup>9</sup>.

Regulations may, in relation to Class 1 contributions, make provision:

- 107 (a) for calculating the amounts payable according to a scale prepared from time to time by the Secretary of State<sup>10</sup> or otherwise adjusting them so as to avoid fractional amounts or otherwise facilitate computation;
- 108 (b) for requiring that the liability in respect of a payment made in a tax week, in so far as the liability depends on any conditions as to a person's age or retirement, must be determined as at the beginning of the week or as at the end of it;
- 109 (c) for securing that liability is not avoided or reduced by a person following in the payment of earnings any practice which is abnormal for the employment in respect of which the earnings are paid; and
- 110 (d) without prejudice to head (c) above, for enabling the Secretary of State, where he is satisfied as to the existence of any practice in respect of the payment of earnings whereby the incidence of Class 1 contributions is avoided or reduced by means of irregular or unequal payments, to give directions for securing that such contributions are payable as if that practice were not followed<sup>11</sup>.

Where the earnings paid to or for the benefit of an earner in any tax week are in respect of employment which is contracted-out employment<sup>12</sup> at the time of the payment, the amount of a primary Class 1 contribution in respect of so much of the earnings paid in that week as exceeds the current lower earnings limit but not the current upper earnings limit for that week is to be reduced by an amount equal to 1.6 per cent of that part of those earnings<sup>13</sup>.

1 As to primary Class 1 contributions see PARA 34 ante.

2 As to liability for primary Class 1 contributions see PARA 35 ante.

3 At the date at which this volume states the law, the initial primary percentage is 2%; but the rate of that percentage is subject to alteration under the Social Security Administration Act 1992 ss 143, 145 (see PARA 16 ante); Social Security Contributions and Benefits Act 1992 s 8(2)(a).

4 For the meaning of 'employed earner' and 'earnings' see PARAS 32-33 ante.

5 For the meaning of 'tax week' see PARA 35 note 1 ante.

6 For the meaning of 'employment' see PARA 32 note 2 ante.

7 As to the lower earnings limit see PARA 34 ante.

8 At the date at which this volume states the law, the main primary percentage is 10%; but the rate of that percentage is subject to alteration under the Social Security Administration Act 1992 ss 143, 145 (see PARA 16 ante); Social Security Contributions and Benefits Act 1992 s 8(2)(b) (amended by the Social Security (Contributions) Act 1994 s 1(1)).

9 Social Security Contributions and Benefits Act 1992 s 8(1). Section 8(1) is, however, subject to regulations under s 6(5) (as amended) (see PARA 46 post) and ss 116-120 (see PARAS 21-26 ante); and to the Pension Schemes Act 1993 s 41 (as amended) (reduced rates of Class 1 contributions for earners in contracted out employment: see the text and notes 12-13 infra; and PARA 911 post); Social Security Contributions and Benefits Act 1992 s 8(1) (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 33).

10 As to the Secretary of State see PARA 1 ante.

11 Social Security Contributions and Benefits Act 1992 s 1(4), Sch 1 para 4.

12 For the meaning of 'contracted-out employment' see the Pension Schemes Act 1993 s 8(1) (as amended); and PARA 878 post.

13 See *ibid* s 41(1) (as substituted and amended); and PARA 911 post. There is provision for the return of contributions paid at the normal rate which should have been paid at the contracted-out rate: see the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 33.

## **UPDATE**

### **31-46 Contributions**

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related

training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of

participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

### **36 Calculation of primary class 1 contributions**

TEXT AND NOTES 1-9--Replaced. Where a primary Class 1 contribution is payable (see PARA 35), the amount of that contribution is the aggregate of (1) the main primary percentage of so much of the earner's earnings paid in the tax week, in respect of the employment in question, as (a) exceeds the current primary threshold (or the prescribed equivalent); but (b) does not exceed the current upper earnings limit (or the prescribed equivalent); and (2) the additional primary percentage of so much of those earnings as exceeds the current upper earnings limit (or the prescribed equivalent): Social Security Contributions and Benefits Act 1992 s 8(1) (s 8 substituted by the National Insurance Contributions Act 2002 s 4(1), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2)). For the purposes of the Social Security Contributions and Benefits Act 1992 (i) the main primary percentage is 11 per cent; and (ii) the additional primary percentage is 1 per cent; but the main primary percentage is subject to alteration under the Social Security Administration Act 1992 ss 143, 145 (see PARA 16): Social Security Contributions and Benefits Act 1992 s 8(2) (s 8 as so substituted). Section 8(1) is subject to regulations under ss 6(6) (see PARA 35), 116-120 (see PARAS 22-24), and to the Pension Schemes Act 1993 ss 41 (see PARA 911), 42A (see PARA 912): Social Security Contributions and Benefits Act 1992 s 8(3) (s 8 as so substituted).

TEXT AND NOTES 10, 11--In head (a), for 'Secretary of State' read 'Inland Revenue', and in head (d) for 'Secretary of State' read 'Inland Revenue' and for 'he' read 'it': Social Security Contributions and Benefits Act 1992 Sch 1 para 4(a), (d) (both amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 16).

Regulations under the Social Security Contributions and Benefits Act 1992 Sch 1 para 4 must be made by the Inland Revenue: Sch 1 para 4 (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 34).

NOTE 13--1979 Regulations reg 33 now Social Security (Contributions) Regulations 2001, SI 2001/1004, reg 54 (amended by SI 2002/2366).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(i) Class 1 Contributions/37. Calculation of secondary Class 1 contributions.

### **37. Calculation of secondary Class 1 contributions.**

Where a secondary Class 1 contribution<sup>1</sup> is payable<sup>2</sup>, the amount of that contribution is the appropriate secondary percentage<sup>3</sup> of the earnings paid in the week<sup>4</sup> in respect of the employment<sup>5</sup> in question<sup>6</sup>. The percentage is set out in a table with four brackets of income, each with a stated percentage, subject to periodic amendment<sup>7</sup>.

Where the earnings paid to or for the benefit of an earner in any tax week<sup>8</sup> are in respect of employment which is contracted-out employment<sup>9</sup> at the time of the payment, the amount of a secondary Class 1 contribution in respect of so much of the earnings paid in that week as exceeds the current lower earnings limit but not the current upper earnings limit for that week is to be reduced by an amount equal to 3 per cent of that part of those earnings<sup>10</sup>.

1 For the meaning of 'secondary Class 1 contribution' see PARA 31 head (a) ante.

2 As to when a secondary Class 1 contribution is payable see PARA 35 ante.

3 For these purposes, the 'appropriate secondary percentage', in relation to the earner's earnings, is the percentage specified in the Social Security Contributions and Benefits Act 1992 s 9(3) (subject to frequent amendment) as appropriate to the secondary earnings bracket (or the prescribed equivalent in the case of earners paid otherwise than weekly) into which those earnings fall: s 9(2). The power so conferred to prescribe an equivalent of a bracket includes power to prescribe an amount which exceeds, by not more than £1, the amount which is the arithmetical equivalent of that bracket: s 9(5). For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante.

4 For the meaning of 'week' see PARA 32 note 7 ante.

5 For the meaning of 'employment' see PARA 32 note 2 ante.

6 Social Security Contributions and Benefits Act 1992 s 9(1). Section 9(1) is subject to the Pension Schemes Act 1993 s 41 (as amended) (see the text and notes 8-10 infra; and PARA 911 post) and to regulations under the Social Security Contributions and Benefits Act 1992 s 6(5) (as amended) (see PARA 46 post) and under ss 116-120 (see PARAS 21-26 ante): s 9(4) (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 34).

7 See the Social Security Contributions and Benefits Act 1992 s 9(3), (4)(b).

8 For the meaning of 'tax week' see PARA 35 note 1 ante.

9 For the meaning of 'contracted-out employment' see PARA 878 post.

10 See the Pension Schemes Act 1993 s 41(1) (as substituted and amended); and PARA 911 post. There is provision for the return of contributions paid at the normal rate which should have been paid at the contracted-out rate: see the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 33.

## **UPDATE**

### **31-46 Contributions**

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training

allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

### **37 Calculation of secondary Class 1 contributions**

TEXT AND NOTES 1-7--Replaced. Where a secondary Class 1 contribution is payable (see PARA 35), the amount of that contribution is the secondary percentage of so much of the earnings paid in the tax week, in respect of the employment in question, as exceeds the current earnings threshold (or the prescribed equivalent): Social Security Contributions and Benefits Act 1992 s 9(1) (substituted by the Welfare Reform and Pensions Act 1999 Sch 9 para 5). For the purposes of the Social Security Contributions and Benefits Act 1992 the secondary percentage is 12.8 per cent, but that percentage

is subject to alteration under the Social Security Administration Act 1992 ss 143, 145 (see PARA 16): Social Security Contributions and Benefits Act 1992 s 9(2) (s 9(2), (3) substituted by the National Insurance Contributions Act 2002 s 2(1), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2))). The Social Security Contributions and Benefits Act 1992 s 9(1) is subject to regulations under ss 6(6) (see PARA 35), 116-120 (see PARAS 22-24) and to the Pension Schemes Act 1993 ss 41 (see PARA 911), 42A (see PARA 912): Social Security Contributions and Benefits Act 1992 s 9(3) (as so substituted).

NOTE 10--1979 Regulations reg 33 now Social Security (Contributions) Regulations 2001, SI 2001/1004, reg 54 (amended by SI 2002/2366).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(ii) Class 1A Contributions/38. Liability to pay Class 1A contributions.

## **(ii) Class 1A Contributions**

### **38. Liability to pay Class 1A contributions.**

Where for any tax year<sup>1</sup> an amount in respect of a car is chargeable<sup>2</sup> on an earner<sup>3</sup> to income tax under Schedule E<sup>4</sup>, and the employment<sup>5</sup> by reason of which the car is made available is employed earner's employment<sup>6</sup>, a Class 1A contribution is payable for that tax year in respect of the earner and the car in question<sup>7</sup>. That contribution is payable by:

- 111 (1) the person who is liable to pay the secondary Class 1 contribution<sup>8</sup> relating to the last (or only) relevant payment of earnings<sup>9</sup> in the tax year in relation to which there is a liability to pay such a contribution; or
- 112 (2) if no such contribution is payable in relation to a relevant payment of earnings in the tax year, the person who would be liable, but for the lower earnings limit<sup>10</sup>, to pay a secondary Class 1 contribution relating to the last (or only) relevant payment of earnings in the tax year<sup>11</sup>.

A person is liable to pay different Class 1A contributions in respect of different earners, different cars and different tax years<sup>12</sup>.

Regulations may provide for persons to be excepted in prescribed circumstances<sup>13</sup> from liability to pay Class 1A contributions and for reducing Class 1A contributions in prescribed circumstances<sup>14</sup>. Regulations may also modify these provisions in relation to cases where a car is made available by reason of two or more employed earner's employments under different employers<sup>15</sup>.

1 For the meaning of 'tax year' see PARA 9 note 6 ante.

2 Ie under the Income and Corporation Taxes Act 1988 s 157 (as amended): see INCOME TAXATION vol 23(1) (Reissue) PARA 713.

3 For the meaning of 'earner' see PARA 33 ante.

4 As to the charge to tax under Schedule E (PAYE) see INCOME TAXATION vol 23(1) (Reissue) PARA 605 et seq.

5 For the meaning of 'employment' see PARA 32 note 2 ante.

6 For the meaning of 'employed earner's employment' see PARA 32 ante.

7 Social Security Contributions and Benefits Act 1992 s 10(1). Regulations may make such amendments of s 10 (as amended) as appear to the Secretary of State to be necessary or expedient in consequence of any alteration to the Income and Corporation Taxes Act 1988 ss 157 or 158 (both as amended) or Sch 6 (as substituted and amended): Social Security Contributions and Benefits Act 1992 s 10(7).

8 As to secondary Class 1 contributions and liability for their payment see PARAS 35, 37 ante.

9 A payment of earnings is a 'relevant payment of earnings' for these purposes if it is made to or for the benefit of the earner in respect of the employment by reason of which the car is made available: Social Security Contributions and Benefits Act 1992 s 10(3).

10 Ie but for ibid s 6(1)(b): see PARA 35 ante.

11 Ibid s 10(2).

12 Ibid s 10(8).

13 For the meaning of 'prescribed' see PARA 19 note 3 ante.

14 Social Security Contributions and Benefits Act 1992 s 10(9). There are certain exemptions from and reductions of Class 1A liability in the Social Security (Contributions) Regulations 1979, SI 1979/591, regs 22A-22G (added by SI 1992/667 and further amended). There is provision for the return of contributions paid in error: see the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 33A (added by SI 1992/97 and further amended).

15 Social Security Contributions and Benefits Act 1992 s 1(4), Sch 1 para 5. At the date at which this volume states the law, no such regulations had been made and none had effect as if so made.

## UPDATE

### 31-46 Contributions

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help

participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

### **38 Liability to pay Class 1A contributions [and benefits in kind]**

TEXT AND NOTES--Replaced.

Where (1) for any tax year an earner is chargeable to income tax under the Income Tax (Earnings and Pensions) Act 2003 on an amount of general earnings received by him from any employment ('the relevant employment')<sup>1</sup>; (2) the relevant employment is both employed earner's employment, and an employment, other than an excluded employment, within the meaning of the benefits code<sup>2</sup>, and (3) the whole or a part of the general earnings falls, for the purposes of Class 1 contributions, to be left out of account in the computation of is payable for that tax year, in accordance with these provisions, in respect of that earner and so much of the general earnings as falls to be so left out of account<sup>3</sup>. Subject to rules relating to third party providers of benefits in kind<sup>4</sup>, a Class 1A contribution for any tax year is payable by (a) the person who is liable to pay the secondary Class 1 contribution relating to the last (or only) relevant payment of earnings<sup>5</sup> in that tax year in relation to which there is a liability to pay such a Class 1 contribution; or (b) if head (a) does not apply, the person who, if the general earnings in respect of which the Class 1A contribution is payable were earnings in respect of which Class 1 contributions would be payable, would be liable to pay the secondary Class 1 contribution<sup>6</sup>. The amount of the Class 1A contribution in respect of any general earnings is the Class 1A percentage<sup>7</sup> of so much of them as falls to be left out of account as mentioned in head (3) above<sup>8</sup>. No Class 1A contribution is payable for any tax year in respect of so much of any general earnings as is taken for the purposes of the making of Class 1B contributions for that year to be included in a PAYE settlement agreement<sup>9</sup>.

The Treasury may by regulations provide (i) for Class 1A contributions not to be payable, in prescribed circumstances, by prescribed persons or in respect of prescribed persons or emoluments; (ii) for reducing Class 1A contributions in prescribed circumstances<sup>10</sup>.

1 In calculating for these purposes the amount of general earnings received by an earner from an employment, a deduction under any of the excluded provisions is to be disregarded: Social Security Contributions and Benefits Act 1992 s 10(7) (s 10 substituted by the Child Support, Pensions and Social Security Act 2000 s 74(2); 1992 Act s 10(7)-(7B) substituted by the Income Tax (Earnings and Pensions) Act 2003 Sch 6 para 174(9); 1992 Act s 10(7B) amended by the Social Security Contributions and Benefits Act 1992 (Modification of Section 10(7B)) Regulations 2007, SI 2007/799). For these purposes, 'excluded provision' means (1) any provision of the 2003 Act Pt 5 Ch 2 (ss 333-360) (deductions for employee's expenses) (see INCOME TAXATION), other than s 352 (limited deduction for agency fees paid by entertainers) (see INCOME TAXATION), (2) any of ss 363-365 (certain deductions from benefits code earnings), or (3) any provision of Pt 5 Ch 5 (ss 369-377) (deductions for earnings representing benefits or reimbursed expenses) (see INCOME TAXATION); 1992 Act s 10(7B) (as so substituted and amended). Where a deduction in respect of a matter is allowed under an excluded provision, and the amount deductible is at least equal to the whole of any corresponding amount which would (but for s 10) fall by reference to that matter to be included in the general earnings

mentioned in s 10(7B), the whole of the corresponding amount is treated as not included: s 10(7A) (as so substituted).

The Treasury may by regulations (a) modify the effect of s 10(7), (7A) by amending s 10(7B) so as to include any enactment contained in the Income Tax Acts within the meaning of 'excluded provision'; or make such amendments of s 10(7)-(7B) as appear to them to be necessary or expedient in consequence of any alteration of the provisions of the Income Tax Acts relating to the charge to tax on employment income: s 10(8).

2 le the 2003 Act Pt 3 Ch 2 (ss 63-69).

3 1992 Act s 10(1) (s 10(1) amended by the 2003 Act Sch 6 para 174(2)-(5)).

4 le 1992 Act s 10ZA: see PARA 38A.

5 'Relevant payment of earnings' means a payment which for the purposes of Class 1 contributions is a payment of earnings made to or for the benefit of the earner in respect of the relevant employment: ibid s 10(3).

6 Ibid s 10(2) (s 10(2) amended by the 2003 Act Sch 6 para 174(6)).

7 'The Class 1A percentage' means a percentage rate equal to the secondary percentage for the tax year in question: s 10(5); s 10(5) amended by the National Insurance Contributions Act 2002 Sch 1 para 2).

8 1992 Act s 10(4); s 10(4) amended by the 2003 Act Sch 6 para 174(7)).

9 1992 Act s 10(6); s 10(6) amended by the 2003 Act Sch 6 para 174(8)).

10 1992 Act s 10(9). There are certain reductions of Class 1A liability in the Social Security (Contributions) Regulations 2001, SI 2001/1004, reg 36 (amended by SI 2004/770). There is provision for the return of contributions paid in error: see SI 2001/1004 reg 55 (amended by SI 2002/2366, SI 2004/770).

In addition, regulations made by the Inland Revenue may (1) make provision for calculating the amount of Class 1A contributions so as to avoid fractional amounts; (2) modify s 10 in relation to cases where something is provided or made available by reason of two or more employed earner's employments under different employers: 1992 Act s 1(4), Sch 1 para 5 (s 1(4) amended by the Social Security Act 1998 Sch 7 para 56(2); and the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 5(1), (3), Sch 10 Pt I; 1992 Act Sch 1 para 5 substituted by the Social Security Act 1998 Sch 7 para 77(6); and amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 34; and the Child Support, Pensions and Social Security Act 2000 s 74(4)). Regulations made by the Inland Revenue may also make provision for calculating the amount of Class 1B contributions so as to avoid fractional amounts: 1992 Act Sch 1 para 5A (added by the Social Security Act 1998 Sch 7 para 77(7); and amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 34).

As to the power to make retrospective provision in relation to Class 1A contributions in consequence of retrospective tax legislation see the 1992 Act s 10ZC; and PARA 38B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(ii) Class 1A Contributions/38A. Third party providers of benefits in kind.

### **38A. Third party providers of benefits in kind.**

The following rules apply where (1) a Class 1A contribution is payable for any tax year in respect of the whole or any part of general earnings received by an earner; (2) the general earnings, in so far as they are ones in respect of which such a contribution is payable, consists in a benefit provided for the earner or a member of his family or household<sup>1</sup>; (3) the person providing the benefit is a person other than the person ('the relevant employer') by whom, but for these rules, the Class 1A contribution would be payable<sup>2</sup>; and (4) the provision of the benefit by that other person has not been arranged or facilitated by the relevant employer<sup>3</sup>. For these purposes, if (a) the person providing the benefit pays an amount for the purpose of discharging any liability of the earner to income tax for any tax year; and (b) the income tax in question is tax chargeable in respect of the provision of the benefit or of the making of the payment itself, the amount of the payment must be treated as if it were general earnings consisting in the provision of a benefit to the earner in that tax year and falling, for the purposes of Class 1 contributions, to be left out of account in the computation of the earnings paid to or for the benefit of the earner<sup>4</sup>. The liability to pay any Class 1A contribution in respect of the benefit provided to the earner and any further benefit treated as so provided, falls on the person providing the benefit, instead of on the relevant employer<sup>5</sup>.

References in the provisions above to the provision of a benefit include references to the provision of a non-cash voucher<sup>6</sup>.

1 References to a member of a person's family or household are to be construed in accordance with the Income Tax (Earnings and Pensions) Act 2003 s 721(5) (see INCOME TAXATION): Social Security Contributions and Benefits Act 1992 s 10ZA(6) (ss 10ZA, 10ZB added by the Child Support, Pensions and Social Security Act 2000 s 75(1); 1992 Act s 10ZA(6) amended by the 2003 Act Sch 6 para 175(5)).

2 *Ie* in accordance with the 1992 Act s 10(2): see PARA 38.

3 *Ibid* s 10ZA(1) (s 10ZA(1) amended by the 2003 Act Sch 6 para 175(2), (3)). The Treasury may by regulations make provision specifying the circumstances in which a person is or is not to be treated for the purposes of the 1992 Act as having arranged or facilitated the provision of any benefit: s 10ZA(5). Such regulations may be expressed to have retrospective effect: see further the Child Support, Pensions and Social Security Act 2000 s 75(4).

4 1992 Act s 10ZA(2); s 10ZA(2) amended by the 2003 Act Sch 6 para 175(4)).

5 *Ibid* s 10ZA(3). This is subject to s 10ZA(4), by virtue of which s 10ZA(3) applies in the case of a Class 1A contribution for the tax year beginning 6 April 2000 only if the person providing the benefit in question gives notice in writing to the Inland Revenue on or before 6 July 2001 that he is a person who provides benefits in respect of which a liability to Class 1A contributions is capable of falling by virtue of s 10ZA on a person other than the relevant employer.

6 *Ibid* s 10ZB(1). Where (1) a non-cash voucher is received by any person from employment which is an excluded employment for the purposes of the benefits code; and (2) the case would be one in which the conditions in s 10ZA(1) (see heads (1)-(4) of the text) would be satisfied in relation to the provision of that voucher if that employment were not an excluded employment, ss 10, 10ZA have effect in relation to the provision of that voucher, and to any such payment in respect of the provision of that voucher as is mentioned in s 10ZA(2) (see TEXT AND NOTE 4), as if that employment were not an excluded employment: s 10ZB(2). 'Non-cash voucher' has the same meaning as in the 2003 Act s 84 (see INCOME TAXATION): 1992 Act s 10ZB(3) (s 10ZB(3) amended by the 2003 Act Sch 6 para 175(5)).

### **UPDATE**

### 31-46 Contributions

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for

which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(ii) Class 1A Contributions/38B. Class 1A contributions: power to make provision in consequence of retrospective tax legislation.

### **38B. Class 1A contributions: power to make provision in consequence of retrospective tax legislation.**

The Treasury may by regulations make such provision as appears to it to be expedient for any purpose of the law relating to Class 1A contributions in consequence of any relevant retrospective tax provision<sup>1</sup> which is passed or made at or before the time when the regulations are made or which may be passed or made after that time<sup>2</sup>. Regulations so made may, in particular, make provision modifying any provision of any enactment<sup>3</sup> or for any provision of any such enactment to apply in such cases, and with such modifications, if any, as the regulations may prescribe<sup>4</sup>. Such regulations may be made so as to have retrospective effect, but must not have effect in relation to any time before 2 December 2004<sup>5</sup>, and may not impose any liability to pay a Class 1A contribution or increase the amount of any Class 1A contribution<sup>6</sup>.

1 'Relevant retrospective tax provision' means a provision of the Income Tax Acts (see INCOME TAXATION vol 23(1) (Reissue) PARA 21) which has retrospective effect and affects the amount of general earnings received by an earner from an employment on which he is chargeable to income tax under the Income Tax (Earnings and Pensions) Act 2003 Pts 2-7 (ss 2-554) (see INCOME TAXATION) for a tax year: Social Security Contributions and Benefits Act 1992 s 10ZC(2) (s 10ZC added by National Insurance Contributions Act 2006 s 3(1)).

2 Social Security Contributions and Benefits Act 1992 s 10ZC(1). It does not matter whether the relevant retrospective tax provision was passed or made before 30 March 2006 (ie the day on which the 2006 Act was passed): Social Security Contributions and Benefits Act 1992 s 10ZC(3), (10). The powers conferred by s 10ZC are without prejudice to any liability to pay a Class 1A contribution which arises by virtue of any relevant retrospective tax provision and any powers conferred by or by virtue of any other provision of the Social Security Contributions and Benefits Act 1992 or any other enactment and, in particular, any modification of any provision of an instrument by regulations under s 10ZC is without prejudice to any other power to amend or revoke the provisions of the instrument, including the modified provision: s 10ZC(8), (9). 'Enactment' includes an instrument made under an Act: s 10ZC(10).

A statutory instrument containing, whether alone or with other provisions, regulations made by virtue of s 10ZC must not be made unless a draft of the instrument has been laid before Parliament and been approved by a resolution of each house: s 176(1) (amended by National Insurance Contributions Act 2006 s 3(2)).

3 'Any enactment' includes the 1992 Act and any enactment passed or made on or after 30 March 2006: Social Security Contributions and Benefits Act 1992 s 10ZC(4)(a).

4 Ibid s 10ZC(4)(b).

5 Ibid s 10ZC(5). In particular, regulations so made by virtue of s 10ZC(5) may affect matters determined before the time when the regulations are made and may provide for those matters to be redetermined accordingly: s 10ZC(6).

6 Ibid s 10ZC(7).

## **UPDATE**

### **31-46 Contributions**

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training

allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(ii) Class 1A Contributions/39. Amount of Class 1A contribution.

### **39. Amount of Class 1A contribution.**

The amount of the Class 1A contribution<sup>1</sup> is:

113 (1) the Class 1A percentage<sup>2</sup> of the cash equivalent of the benefit<sup>3</sup> of the car to the earner<sup>4</sup> in the tax year<sup>5</sup>; or

114 (2) where for the tax year an amount in respect of fuel for the car is also chargeable<sup>6</sup> on the earner to income tax under Schedule E<sup>7</sup>, the aggregate of the Class 1A percentage of the cash equivalent of the benefit of the fuel to the earner in the tax year and the amount mentioned in head (1) above<sup>8</sup>.

1 The Class 1A contribution referred to in the Social Security Contributions and Benefits Act 1992 s 10(1): see PARA 38 ante.

2 For these purposes, 'the Class 1A percentage' means a percentage rate equal to the percentage rate for secondary Class 1 contributions specified in *ibid* s 9(3) (as amended) (see PARA 37 ante) as appropriate for the highest secondary earnings bracket for the tax year in question: s 10(5). For the meaning of 'tax year' see PARA 9 note 6 ante.

3 The cash equivalents of the benefit of a car or fuel is to be ascertained, subject to the following provisions, in accordance with Income and Corporation Taxes Act 1988 s 157 (as amended) or, as the case may be, s 158 (as amended) and Sch 6 (as substituted and amended): Social Security Contributions and Benefits Act 1992 s 10(4). As to consequential amendments when those provisions are amended see PARA 38 note 7 ante. In calculating the cash equivalent of the benefit of a car or fuel: (1) the car must not be treated as being unavailable on a day by virtue of the Income and Corporation Taxes Act 1988 Sch 6 para 9(c) (as substituted) for the purposes of s 158(5) (as amended) or Sch 6 paras 3 or 6 (as substituted) unless the person liable to pay the contribution has information to show that the condition specified in Sch 6 para 9(c) (as substituted) is satisfied as regards that day; (2) the use of the car for the earner's business travel must be taken (a) for the purposes of Sch 6 para 2(1) (as substituted and amended) to have amounted to less than 18,000 miles (or such lower figure as is applicable by virtue of Sch 6 para 3(a) (as substituted)); and (b) for the purposes of Sch 2 para 2(2) (as substituted and amended) to have amounted to less than 2,500 miles (or such lower figure as is applicable by virtue of Sch 6 para 3(b) (as substituted)), unless in either case the person liable to pay the contribution has information to show to the contrary; and (3) for the purposes of Sch 6 para 4 (as substituted), the car must be treated as not having been the car used to the greatest extent for the employee's business travel, unless the person liable to pay the contribution has information to show the contrary: Social Security Contributions and Benefits Act 1992 s 106 (amended by the Social Security (Contributions) (Miscellaneous Amendments) Regulations 1994, SI 1994/667, reg 4(1)).

4 For the meaning of 'earner' see PARAS 32-33 ante.

5 Social Security Contributions and Benefits Act 1992 s 10(4)(a).

6 The charge to tax under Schedule E (PAYE) see INCOME TAXATION vol 23(1) (Reissue) PARA 718.

7 As to the charge to tax under Schedule E (PAYE) see INCOME TAXATION vol 23(1) (Reissue) PARA 605 et seq.

8 Social Security Contributions and Benefits Act 1992 s 10(4)(b). There are certain exemptions from and reductions of Class 1A liability in the Social Security (Contributions) Regulations 1979, SI 1979/591, regs 22A-22G (added by SI 1992/667 and further amended). There is provision for the return of contributions paid in error: see the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 33A (added by SI 1992/97 and further amended).

## **UPDATE**

### **31-46 Contributions**

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible

and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

### **39 Amount of Class 1A contribution**

TEXT AND NOTES--Replaced. See PARA 38.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(ii) Class 1A Contributions/39A. Class 1B contributions.

### **39A. Class 1B contributions.**

Where for any tax year<sup>1</sup> a person is accountable to the Inland Revenue in respect of income tax on general earnings of his employees in accordance with a PAYE settlement agreement<sup>2</sup>, a Class 1B contribution is payable by him for that tax year<sup>3</sup>. That contribution is payable in respect of (1) the amount of any of the general earnings included in that agreement which are chargeable emoluments<sup>4</sup>, and (2) the total amount of income tax in respect of which the person is accountable for the tax year in accordance with the agreement<sup>5</sup>.

The amount of the Class 1B contribution is the Class 1B percentage of the aggregate of the amount of any of the general earnings included in that agreement which are chargeable emoluments and the total amount of income tax in respect of which the person is accountable for the tax year in accordance with the PAYE settlement agreement<sup>6</sup>.

Where the PAYE settlement agreement was entered into after the beginning of the tax year, and Class 1 contributions<sup>7</sup> were due in respect of any general earnings before it was entered into, those emoluments are not to be taken to be included in the PAYE settlement agreement<sup>8</sup>. The Treasury may by regulations provide for persons to be excepted in prescribed circumstances from liability to pay Class 1B contributions<sup>9</sup>.

1 For the meaning of 'tax year' see PARA 9 NOTE 6.

2 'PAYE settlement agreement' has the same meaning as in the Income Tax (Earnings and Pensions) Act 2003 Pt 11 Ch 5 (ss 703-707) (see INCOME TAXATION); Social Security Contributions and Benefits Act 1992 s 122(1) (amended by the Social Security Act 1998 Sch 7 para 71(d); and the 2003 Act Sch 6 para 178(3)).

3 1992 Act s 10A(1) (s 10A added by the 1998 Act s 53; 1992 Act s 10A(1) amended by the 2003 Act Sch 6 para 177(2)).

4 1992 Act s 10A(2)(a); s 10A(2)(a) amended by the 2003 Act Sch 6 para 177(3)). General earnings are chargeable emoluments for these purposes if, apart from the 1992 Act s 6(2) (see PARA 35) or 10(6) (see PARA 38), the person accountable in accordance with the PAYE settlement agreement would be liable or entitled to pay secondary Class 1 contributions or Class 1A contributions (see PARA 38) in respect of them: s 10A(4) (s 10A(4) amended by the 2003 Act Sch 6 para 177(4); and the National Insurance Contributions and Statutory Payments Act 2004 Sch 1 para 1).

5 1992 Act s 10A(2)(b).

6 Ibid s 10A(3); s 10A(3) amended by the 2003 Act Sch 6 para 177(3)). For these purposes, the Class 1B percentage means a percentage rate equal to the secondary percentage for the tax year in question: s 10A(6) (s 10A(6) substituted by the Welfare Reform and Pensions Act 1999 s 77; and amended by the National Insurance Contributions Act 2002 Sch 1 para 3).

7 See PARA 35.

8 1992 Act s 10A(5); s 10A(5) amended by the 2003 Act Sch 6 para 177(5)).

9 Ibid s 10A(7); s 10A(7) amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 11. See the Social Security (Contributions) Regulations 2001, SI 2001/1004, regs 41, 42 (reg 42 amended by SI 2004/770).

## **UPDATE**

### **31-46 Contributions**

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible

and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(iii) Class 2 Contributions/40. Liability for Class 2 contributions.

### (iii) Class 2 Contributions

#### 40. Liability for Class 2 contributions.

Every self-employed earner<sup>1</sup> who is over the age of 16<sup>2</sup> is liable to pay Class 2 contributions at a flat weekly rate<sup>3</sup>. No such contributions are, however, payable by an earner in respect of any period after he attains pensionable age<sup>4</sup>.

Regulations may make provision so that an earner is liable for a weekly rate of Class 2 contributions higher than the specified weekly flat rate where he is treated<sup>5</sup> in respect of any employment<sup>6</sup> of his as being a self-employed earner and in any period or periods he has earnings from that employment and:

115 (1) those earnings are such that (disregarding their amount) he would be liable for Class 1 contributions<sup>7</sup> in respect of them if he were not so treated in respect of the employment; and

116 (2) no Class 4 contribution<sup>8</sup> is payable<sup>9</sup> in respect of the earnings<sup>10</sup>.

Regulations may also provide for an earner otherwise liable for Class 2 contributions in respect of employment as a self-employed earner to be excepted from the liability in respect of any period in which his earnings from such employment are, or are treated by regulations as being, less than a specified amount<sup>11</sup> for a tax year<sup>12</sup>, but a person may not be so excepted from liability to pay contributions otherwise than on his own application<sup>13</sup>.

1 For the meaning of 'self-employed earner' see PARA 32 ante.

2 As to when a person is treated as attaining a specified age see PARA 19 note 11 ante.

3 See the Social Security Contributions and Benefits Act 1992 s 11(1) (as amended). As to the alteration of rates see PARAS 15-16 ante.

4 Ibid s 11(2). For the meaning of 'pensionable age' see PARA 562 post.

5 Ie by regulations made under ibid s 2(2)(b): see PARA 32 ante.

6 For the meaning of 'employment' see PARA 32 note 2 ante.

7 As to Class 1 contributions see PARAS 34-37 ante.

8 As to Class 4 contributions see PARAS 43-45 post.

9 Ie by virtue of regulations under the Social Security Contributions and Benefits Act 1992 s 18(1) (as amended): see PARA 44 post.

10 Ibid s 11(3).

11 Ie an amount specified in ibid s 11(4) (as amended). At the date at which this volume states the law, that amount is £3,430.

12 Ibid s 11(4) (as amended) . For the meaning of 'tax year' see PARA 9 note 6 ante.

13 See ibid s 11(5). Regulations may provide for so excepting a person with effect from any date not earlier than 13 weeks before the date on which his application was made: s 11(5). As to the procedure for obtaining a

certificate of exception see the Social Security (Contributions) Regulations 1979, SI 1979/591, regs 24-26. There can be an application for a refund of Class 2 contributions on the ground of low earnings: reg 26A (added by SI 1990/1779 and further amended).

Exceptions are also laid down in regulations for any contribution week in which the earner is in receipt of incapacity benefit, or is incapable of work, or is in receipt of maternity allowance, or is undergoing imprisonment or detention in legal custody, or is in receipt of unemployment supplement or invalid care allowance: see the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 23(1). Although exempted, the earner may normally elect to pay a contribution for the week in question: see reg 23(3).

## UPDATE

### 31-46 Contributions

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment

made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means

receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

### **40 Liability for Class 2 contributions**

TEXT AND NOTES 5, 11--For 'Regulations may' read 'The Treasury may by regulations': 1992 Act s 11(3), (4), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 12.

NOTE 11--Amount now £5,075: 1992 Act s 11(4) (amended by SI 2009/593).

NOTE 13--1979 Regulations regs 23-26A now Social Security (Contributions) Regulations 2001, SI 2001/1004, regs 43-47 (reg 47 amended by SI 2003/2958). Reference to invalid care allowance is now to carer's allowance: reg 43 (amended by SI 2002/2924).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(iii) Class 2 Contributions/41. Class 2 contributions paid in a tax year later than the year in which they fall.

#### **41. Class 2 contributions paid in a tax year later than the year in which they fall.**

The following provisions apply to any Class 2 contribution<sup>1</sup> paid in respect of a week<sup>2</sup> falling within a tax year<sup>3</sup> ('the contribution year') earlier than the tax year in which it is paid ('the payment year')<sup>4</sup>. The amount of such a contribution is the amount which the earner<sup>5</sup> would have had to pay if he had paid the contribution in the contribution year<sup>6</sup>.

Subject as follows, in any case where:

- 117 (1) the earner pays an ordinary contribution<sup>7</sup> after the end of the tax year immediately following the contribution year; and
- 118 (2) the weekly rate of ordinary contributions for the week in respect of which the contribution was payable in the contribution year differs from the weekly rate applicable at the time of payment in the payment year,

the amount of the contribution must be computed by reference to the highest weekly rate of ordinary contributions in the period beginning with the week in respect of which the contribution is paid and ending with the day on which it is paid<sup>8</sup>. The Secretary of State may, however, by regulations direct that heads (1) and (2) above are to have effect in relation to a higher-rate contribution<sup>9</sup> subject to such modifications as may be prescribed<sup>10</sup>.

For the purposes of proceedings in any court relating to an earner's failure to pay Class 2 contributions<sup>11</sup>, the amount of each contribution which he is to be treated as having failed to pay is the amount which he would have paid in accordance with these provisions if he had paid that contribution on the date on which the proceedings commenced<sup>12</sup>.

1 As to Class 2 contributions see PARA 40 ante.

2 For the meaning of 'week' see PARA 32 note 7 ante.

3 For the meaning of 'tax year' see PARA 9 note 6 ante.

4 Social Security Contributions and Benefits Act 1992 s 12(1).

5 For the meaning of 'earner' see PARAS 32-33 ante.

6 Social Security Contributions and Benefits Act 1992 s 12(2), which is subject to s 12(3)-(5).

7 'Ordinary contribution' means a contribution under *ibid* s 11(1) (as amended) (see PARA 40 ante): s 12(8).

8 *Ibid* s 12(3). The Secretary of State may by regulations provide that the amount of any contribution which, apart from the regulations, would fall to be computed in accordance with s 12(3) must instead be computed by reference to a tax year not earlier than the contribution year but earlier than the payment year: s 12(6)(a). As to the Secretary of State see PARA 1 ante.

9 'Higher-rate contribution' means a contribution under regulations made under *ibid* s 11(3) (see PARA 40 ante): s 12(6)(b).

10 *Ibid* s 12(4). For the meaning of 'prescribed' see PARA 19 note 3 ante.

11 As to proceedings for failure to pay contributions see PARA 406 post.

12 Social Security Contributions and Benefits Act 1992 s 12(5). The Secretary of State may by regulations provide that the amount of any contribution which, apart from the regulations, would fall to be computed in accordance with s 12(3) must instead be computed by reference to a tax year not earlier than the contribution year but earlier than the tax year in which the proceedings commenced: s 12(6)(b). For these purposes, proceedings in the High Court or a county court commence when an action commences and proceedings under the Social Security Administration Act 1992 s 114 (offences relating to contributions: see PARA 404 post) commence when an information is laid: Social Security Contributions and Benefits Act 1992 s 12(7).

## **UPDATE**

### **31-46 Contributions**

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for

that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

#### **41 Class 2 contributions paid in a tax year later than the year in which they fall due**

NOTE 8--For 'Secretary of State' read 'Treasury': Social Security Contributions and Benefits Act 1992 s 12(6) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 13). See also SI 2001/1004 reg 65D (late payment of voluntary Class 2 and 3 contributions for tax year 2006-07) (added by SI 2008/3099).

TEXT AND NOTE 9--For 'Secretary of State' read 'Treasury': Social Security Contributions and Benefits Act 1992 s 12(4) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999) Sch 3 para 13).

NOTE 12--Civil proceedings in a magistrates' court commence when a complaint is made: Social Security Contributions and Benefits Act 1992 s 12(7) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 9 para 3). See the Social Security (Contributions) Regulations 2001, SI 2001/1004, reg 65ZA (amount of Class 2 and Class 3 contributions in certain cases where earnings removed) (added by SI 2007/2520).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(iv) Class 3 Contributions/42. Entitlement to pay Class 3 contributions.

## (iv) Class 3 Contributions

### 42. Entitlement to pay Class 3 contributions.

Regulations must provide for earners<sup>1</sup> and others, if over the age of 16<sup>2</sup>, to be entitled if they so wish, but subject to any prescribed conditions<sup>3</sup>, to pay Class 3 contributions at a flat weekly rate<sup>4</sup>. Payment of Class 3 contributions is to be allowed only with a view to enabling the contributor to satisfy contribution conditions of entitlement to benefit<sup>5</sup> by acquiring the requisite earnings factor<sup>6</sup> for the statutory purposes<sup>7</sup>.

Regulations may provide for Class 3 contributions, although paid in one tax year<sup>8</sup>, to be appropriated in prescribed circumstances to the earnings factor of another tax year<sup>9</sup>. The amount of a Class 3 contribution in respect of a tax year earlier than the tax year in which it is paid is, however, to be the same as if it had been paid in the earlier year and in respect of that year, subject to certain exceptions<sup>10</sup>.

No person is entitled to pay a Class 3 contribution in respect of any tax year if his earnings factor, or the aggregate of his earnings factors, for that year, derived:

- 119 (1) in the case of 1987-88 or any subsequent year, from earnings upon which Class 1 contributions<sup>11</sup> have been paid or treated as paid or from Class 2 contributions<sup>12</sup> actually paid; or
- 120 (2) in the case of any earlier year, from contributions actually paid,

is equal to or exceeds the qualifying earnings factor for that year; and regulations may provide for precluding the payment of Class 3 contributions in other cases<sup>13</sup>. In cases where payment of such contributions was precluded, regulations may also provide for their repayment<sup>14</sup>. Contributions repayable by virtue of such regulations are treated, for the purpose of determining the contributor's entitlement to any benefit, as not having been paid<sup>15</sup>.

1 For the meaning of 'earner' see PARAS 32-33 ante.

2 As to when a person is treated as attaining a specified age see PARA 19 note 11 ante.

3 The entitlement is subject to conditions as to residence or presence in Great Britain: see the Social Security (Contributions) Regulations 1979, SI 1979/591, regs 27(1), 119 (as amended). There are also conditions as to the time of the payments (see reg 27(2)-(4) (as amended)) and provision for late payment for good cause (see reg 29). For the meaning of 'prescribed' see PARA 19 note 3 ante.

4 See the Social Security Contributions and Benefits Act 1992 s 13(1) (as amended). As to the alteration of the rate of contributions see PARAS 15-16 ante. For the meaning of 'week' see PARA 32 note 7 ante.

5 For the meaning of 'benefit' see PARA 13 note 8 ante.

6 Ie for the purposes described in the Social Security Contributions and Benefits Act 1992 s 22 (as amended): see PARA 56 post. For the meaning of 'earnings' see PARA 33 ante.

7 Ibid s 13(2).

8 For the meaning of 'tax year' see PARA 9 note 6 ante.

9 Social Security Contributions and Benefits Act 1992 s 13(3).

10 See *ibid* s 13(4). In any case where (1) a Class 3 contribution is paid after the end of the next tax year but one following the contribution year; and (2) the amount of a Class 3 contribution applicable had the contribution been paid in the contribution year differs from the amount of a Class 3 contribution applicable at the time of payment in the payment year, the amount of the contribution must be computed by reference to the highest of those two amounts and of any other amount of a Class 3 contribution in the intervening period: s 13(6). The Secretary of State may by regulations provide that the amount of a contribution which apart from the regulations would fall to be computed in accordance with s 13(6) must instead be computed by reference to the amount of a Class 3 contribution for a tax year earlier than the payment year but not earlier than the contribution year: s 13(7). For these purposes, 'the payment year' means the tax year in which a contribution is paid and 'the contribution year' means the earlier year mentioned in s 13(4): s 13(5).

11 As to Class 1 contributions see PARAS 34-37 *ante*.

12 As to Class 2 contributions see PARAS 40-41 *ante*.

13 See the Social Security Contributions and Benefits Act 1992 s 14(1); and the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 28 (as amended).

14 Social Security Contributions and Benefits Act 1992 s 14(2).

15 *Ibid* s 14(3). Nothing in s 14(3) is, however, to be taken to imply that any other repayable contributions are to be treated for the purposes of benefit as having been paid: s 14(3). There is provision for the return of contributions paid in error: see the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 32 (as amended), reg 34.

## UPDATE

### 31-46 Contributions

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if

he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13

September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

### **42 Entitlement to pay Class 3 contributions**

TEXT AND NOTES--Any person paying Class 3 contributions in one year may appropriate such contributions to the earnings factor of another year if such contributions are payable in respect of that other year or, in the absence of any such appropriation, the Inland Revenue may, with the consent of the contributor, make such appropriation: Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001, SI 2001/769, reg 2. Where, for any year, a contributor's earnings factor derived from (1) earnings on which primary Class 1 contributions have been paid or treated as paid; (2) credited earnings; (3) Class 2 or Class 3 contributions paid by or credited to him; or (4) any or all of such earnings and contributions, falls short of a figure which is 52 times that year's lower earnings limit for Class 1 contributions by an amount which is equal to, or less than, half that year's lower earnings limit, that contributor must be credited with a Class 3 contribution for that year: reg 3.

As to the right to pay additional Class 3 contributions in certain cases see Social Security Contributions and Benefits Act 1992 s 13A (added by Pensions Act 2008 s 135(2)).

TEXT AND NOTE 1--For 'Regulations must' read 'The Treasury must by regulations': Social Security Contributions and Benefits Act 1992 s 13(1) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 14; and SI 2009/593).

NOTE 3--1979 Regulations regs 27, 29, 119 now Social Security (Contributions) Regulations 2001, SI 2001/1004, reg 48 (amended by SI 2004/1362, SI 2007/2520), SI 2001/1004 reg 49 (as amended: see NOTE 13), reg 145. See also SI 2001/1004 reg 49A (conditions relating to Class 3 contributions: transfers to the Communities' pension scheme) (added by SI 2007/1838); SI 2001/1004 reg 50 (Class 3 contributions not paid within prescribed periods) (substituted by SI 2002/2366); SI 2001/1004 reg 50A (Class 3 contributions: tax years 1996-97 to 2001-02) (added by SI 2004/1362, amended by SI 2007/2520); and SI 2001/1004 reg 50B (Class 3 contributions: tax years 1993-94 to 2007-08) (added by SI 2007/2520). See *Revenue and Customs Comrs v Kearney* [2010] EWCA Civ 288, [2010] STC 1137.

TEXT AND NOTE 8--For 'Regulations may' read 'The Secretary of State may by regulations': Social Security Contributions and Benefits Act 1992 s 13(3) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 14).

NOTE 10--In the Social Security Contributions and Benefits Act 1992 s 13(7), for 'Secretary of State' read 'Treasury': Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 14. See also SI 2001/1004 reg 65D (late payment of voluntary Class 2 and 3 contributions for tax year 2006-07) (added by SI 2008/3099).

TEXT AND NOTES 11-14--Regulations under the 1992 Act s 14(1), (2) must be made by the Treasury: s 14(5) (added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 15).

TEXT AND NOTES 11-13--Where primary Class 1 contributions have been paid or treated as paid on any part of a person's earnings, head (1) has effect as if such contributions had been paid or treated as paid on so much of those earnings as did not exceed the upper earnings limit: Social Security Contributions and Benefits Act 1992 s 14(4) (added by Social Security Act 1998 Sch 7 para 59).

NOTE 13--1979 Regulations reg 28 now SI 2001/1004 (NOTE 3) reg 49 (amended by SI 2001/3728, SI 2005/778). See also SI 2001/1004 reg 65ZA (amount of Class 2 and Class 3 contributions in certain cases where earnings removed) (added by SI 2007/2520); SI 2001/1004 reg 65B (added by SI 2005/778) (amount of Class 3 contributions payable after issue of full gender recognition certificate).

NOTE 15--1979 Regulations regs 32, 34 now SI 2001/1004 regs 52, 52A, 56 (regs 52, 52A substituted by SI 2004/770).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(v) Class 4 Contributions/43. Class 4 contributions recoverable under the Income Tax Acts.

## **(v) Class 4 Contributions**

### **43. Class 4 contributions recoverable under the Income Tax Acts.**

Class 4 contributions are payable in any tax year<sup>1</sup> in respect of all annual profits or gains<sup>2</sup> which are immediately derived from the carrying on or exercise of one or more trades, professions or vocations<sup>3</sup>, and are profits or gains chargeable to income tax under Case I or Case II of Schedule D for the year of assessment<sup>4</sup> corresponding to that tax year<sup>5</sup>. Such contributions are payable in the same manner as any income tax which is, or would be, chargeable in respect of those profits or gains, whether or not income tax in fact falls to be paid, and are payable by the person on whom the income tax is or would be charged<sup>6</sup>.

A Class 4 contribution for any tax year is to be an amount equal to a specified percentage<sup>7</sup> of so much of the profits or gains referred to above as exceeds a specified minimum and does not exceed a specified maximum figure<sup>8</sup>, when computed in accordance with the relevant statutory provisions<sup>9</sup>.

1 For the meaning of 'tax year' see PARA 9 note 6 ante.

2 This reference to profits or gains chargeable to income tax under Case I or Case II of Schedule D must be taken to include a reference to profits or gains consisting of a payment of enterprise allowance chargeable to income tax under Case VI of Schedule D by virtue of the Income and Corporation Taxes Act 1988 s 127(2) (see INCOME TAXATION vol 23(1) (Reissue) PARA 565); Social Security Contributions and Benefits Act 1992 s 15(5). As to the meaning of 'profits or gains' see INCOME TAXATION vol 23(1) (Reissue) PARA 1; and as to Cases I, II and VI of Schedule D see INCOME TAXATION vol 23(1) (Reissue) PARAS 88 et seq, 560 et seq.

3 As to the meaning of 'trade, profession or vocation' see INCOME TAXATION vol 23(1) (Reissue) PARAS 135-136.

4 For these purposes, the year of assessment which corresponds to a tax year is the year of assessment (within the meaning of the Tax Acts) which consists of the same period as that tax year: Social Security Contributions and Benefits Act 1992 s 15(4). For the meaning of 'the Tax Acts' see INCOME TAXATION vol 23(1) (Reissue) PARA 21.

5 Social Security Contributions and Benefits Act 1992 s 15(1).

6 Ibid s 15(2).

7 At the date at which this volume states the law, the percentage is 6%: see ibid s 15(3) (as amended).

8 At the date at which this volume states the law, the minimum and maximum figures are £7,010 and £24,180 respectively: see ibid s 15(3) (as amended).

9 See ibid s 15(3) (subject to frequent amendment). For the general rules for computation of profits and gains see s 16(3), Sch 2 paras 1, 2; as to reliefs see Sch 2 para 3 (as amended); as to partnerships see Sch 2 para 4; as to trustees see Sch 2 para 5; as to husband and wife see Sch 2 para 7; and for miscellaneous provisions see Sch 2 para 6.

## **UPDATE**

### **31-46 Contributions**

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland

Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

### **43 Class 4 contributions recoverable under the Income Tax Acts**

TEXT AND NOTES--Where income tax is, or would be, charged on a member of a limited liability partnership in respect of profits or gains arising from the carrying on of a trade or profession by the limited liability partnership, Class 4 contributions are payable by

him if they would be payable were the trade or profession carried on in partnership by the members: Social Security Contributions and Benefits Act 1992 s 15(3A) (added by Limited Liability Partnerships Act 2000 s 13). As to limited liability partnerships generally see PARTNERSHIP vol 79 (2008) PARA 234 et seq.

NOTE 4--Social Security Contributions and Benefits Act 1992 s 15(4) repealed: Income Tax (Trading and Other Income) Act 2005 Sch 1 para 420(4), Sch 3.

TEXT AND NOTES 7-9--Social Security Contributions and Benefits Act 1992 s 15(3) now s 15(3), (3ZA) (substituted by National Insurance Contributions Act 2002 s 3(1)). The amount of a Class 4 contribution under the Social Security Contributions and Benefits Act 1992 s 15 for any tax year is equal to the aggregate of (1) the main Class 4 percentage of so much of the profits or gains referred to in s 15(1) (computed in accordance with Sch 2) as exceeds £5,715 but does not exceed £43,875; and (2) the additional Class 4 percentage of so much of those profits or gains as exceeds £43,875; but the figures specified in heads (1) and (2) are subject to alteration under the Social Security Administration Act 1992 s 141 (see PARA 15): Social Security Contributions and Benefits Act 1992 s 15(3) (amended by Income Tax (Trading and Other Income) Act 2005 Sch 1 para 420(3), Sch 3; and SI 2009/593). For the purposes of the Social Security Contributions and Benefits Act 1992 (a) the main Class 4 percentage is 8 per cent; and (b) the additional Class 4 percentage is 1 per cent; but the main Class 4 percentage is subject to alteration under the Social Security Administration Act 1992 s 143 (see PARA 16): Social Security Contributions and Benefits Act 1992: s 15(3ZA).

NOTE 9--Social Security Contributions and Benefits Act 1992 Sch 2 paras 2-4, 6 amended: Social Security Act 1998 s 59, Sch 8. Social Security Contributions and Benefits Act 1992 Sch 2 para 6(2) repealed: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3(6). Social Security Contributions and Benefits Act 1992 Sch 2 para 3 modified: Finance Act 2009 Sch 6 para 2(6).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(v) Class 4 Contributions/44. Class 4 contributions recoverable under regulations.

#### **44. Class 4 contributions recoverable under regulations.**

Provision may be made by regulations so that where:

- 121 (1) an earner<sup>1</sup>, in respect of any one or more employments<sup>2</sup> of his, is treated by regulations<sup>3</sup> as being self-employed; and
- 122 (2) in any tax year<sup>4</sup> he has earnings from any such employment (one or more) which fall within the provisions imposing potential liability to pay Class 2 contributions at the higher rate<sup>5</sup> but he is not in fact liable for a higher weekly rate of Class 2 contributions by virtue of regulations excepting him from that liability<sup>6</sup>; and
- 123 (3) the total of those earnings exceeds a specified minimum figure<sup>7</sup>,

he is to be liable, in respect of those earnings, to pay a Class 4 contribution of an amount equal to a specified percentage<sup>8</sup> of so much of the total as exceeds that minimum figure and does not exceed a specified maximum figure<sup>9</sup>.

It is for the Secretary of State<sup>10</sup>, and not the Inland Revenue, to recover Class 4 contributions payable by virtue of such regulations and generally to be responsible for the relevant administration<sup>11</sup>.

1 For the meaning of 'earner' see PARAS 32-33 ante.

2 For the meaning of 'employment' see PARA 32 note 2 ante.

3 Ie regulations under the Social Security Contributions and Benefits Act 1992 s 2(2)(b): see PARA 32 ante.

4 For the meaning of 'tax year' see PARA 9 note 6 ante.

5 Ie falling within the Social Security Contributions and Benefits Act 1992 s 11(3)(b)(i): see PARA 40 ante.

6 Ie regulations under ibid s 11(3): see PARA 40 ante.

7 At the date at which this volume states the law, the specified minimum was £7,010: see ibid s 18(1) (as amended).

8 At the date at which this volume states the law, the specified percentage was 6%: see ibid s 18(1) (as amended).

9 Ibid s 18(1) (which is subject to frequent amendment). At the date at which this volume states the law, the specified maximum was £24,180: see s 18(1) (as amended).

10 As to the Secretary of State see PARA 1 ante.

11 Social Security Contributions and Benefits Act 1992 s 18(2). In relation to contributions so payable, regulations may (1) apply any of the provisions of s 1(4), Sch 1 (as amended) (see PARA 34 ante) (except a provision conferring power to make regulations); and (2) make any such provision as may be made by regulations under Sch 1 (as amended), except Sch 1 para 6 (as amended) (see PARA 49 post): s 18(2). At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Contributions) Regulations 1979, SI 1979/591 (as amended), partly have effect as if so made.

#### **UPDATE**

### 31-46 Contributions

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements

known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

### **44 Class 4 contributions recoverable under regulations**

TEXT AND NOTES 1-9--The amount of a Class 4 contribution payable by virtue of regulations under the Social Security Contributions and Benefits Act 1992 s 18 is equal to the aggregate of (a) the main Class 4 percentage of so much of the total of the earnings referred to in head (2) as exceeds £5,715 but does not exceed £43,875; and (b) the additional Class 4 percentage (see PARA 43) of so much of that total as exceeds £40,040; but the figures specified in heads (a), (b) are subject to alteration under the Social Security Administration Act 1992 s 141 (see PARA 15): Social Security Contributions and Benefits Act 1992 s 18(1A) (added by National Insurance Contributions Act 2002 s 3(3); and amended by SI 2009/593).

TEXT AND NOTE 7--Words 'of an amount ... maximum figure' omitted: Social Security Contributions and Benefits Act 1992 s 18(1) (amended by National Insurance Contributions Act 2002 Sch 2).

NOTE 7--Specified minimum now £5,715: 1992 Act s 18(1) (amended by SI 2008/579).

NOTE 9--Specified maximum now £43,875: 1992 Act s 18(1) (amended by SI 2008/579).

NOTE 11--For 'In relation to contributions so payable' read 'In relation to Class 4 contributions payable by virtue of regulations under the 1992 Act s 118': Social Security Contributions and Benefits Act 1992 18(2) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 7). In head (2), reference is to regulations under the Social Security Contributions and Benefits Act 1992 Sch 1 except Sch 1 para 6 or 7BZA: s 18(2) (amended by the National Insurance Contributions and Statutory Payments Act 2004 Sch 1 para 1(3)). Social Security Contributions and Benefits Act 1992 s 1(4) amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 5, Sch 10. 1979 Regulations consolidated in Social Security (Contributions) Regulations 2001, SI 2001/1004 (see PARA 33).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(2) THE CLASSES OF CONTRIBUTIONS/(v) Class 4 Contributions/45. Exceptions, deferment and incidental matters relating to Class 4 contributions.

#### **45. Exceptions, deferment and incidental matters relating to Class 4 contributions.**

The Secretary of State<sup>1</sup> may by regulations made with the concurrence of the Inland Revenue provide:

- 124 (1) for excepting persons from liability to pay Class 4 contributions<sup>2</sup>; or
- 125 (2) for deferring any person's liability,

and may certify from time to time to the Inland Revenue the persons who are excepted from liability, or whose liability is to be deferred, and who accordingly are not required (except in accordance with the regulations) to be assessed for contributions<sup>3</sup>. Exception from liability or deferment may, in particular, be by reference:

- 126 (a) to a person otherwise liable for contributions being under a prescribed age<sup>4</sup> at the beginning of a tax year<sup>5</sup>;
- 127 (b) to a person having attained pensionable age<sup>6</sup>;
- 128 (c) to a person being in receipt of earnings<sup>7</sup> in respect of which primary Class 1 contributions<sup>8</sup> are, or may be, payable; or
- 129 (d) to a person not satisfying prescribed conditions as to residence or presence in the United Kingdom<sup>9</sup>.

Regulations made with the concurrence of the Inland Revenue<sup>10</sup> may provide for any matters arising out of the deferment of liability for Class 4 contributions, including in particular provision for the amount of a person's profits or gains<sup>11</sup> to be certified by the Inland Revenue to the Secretary of State and the person liable<sup>12</sup>, but no such certificate must relate to a person's profits or gains so far as they exceed the higher of the two money sums for the time being specified<sup>13</sup> in relation to Class 4 contributions<sup>14</sup>. Regulations so made may also provide for any incidental matters arising out of the payment of any Class 4 contributions recovered by the Inland Revenue, including in particular the return, in whole or in part, of such contributions in cases where payment has been made in error or repayment ought for any other reason to be made<sup>15</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 Ie in accordance with the Social Security Contributions and Benefits Act 1992 ss 15, 16(1)-(3) (as amended): see PARAS 43 ante, 51 post.

3 Ibid s 17(1).

4 For the meaning of 'prescribed' see PARA 19 note 3 ante; and as to when a person is treated as attaining a certain age see PARA 19 note 11 ante.

5 For the meaning of 'tax year' see PARA 9 note 6 ante.

6 For the meaning of 'pensionable age' see PARA 562 post.

7 For the meaning of 'earnings' see PARA 33 ante.

8 As to primary Class 1 contributions see PARAS 34-36 ante.

9 Social Security Contributions and Benefits Act 1992 s 17(2). For the meaning of 'United Kingdom' see PARA 15 note 4 ante. Exceptions are made by the Social Security (Contributions) Regulations 1979, SI 1979/591 (as amended), in respect of persons over pensionable age or not resident in the United Kingdom (reg 58), divers and diving supervisors (reg 59) and persons under 16 (reg 60). The principal exemption is in favour of a person who has paid Class 1 contributions on earnings chargeable to income tax under Schedule D up to a prescribed level: reg 61 (as amended). Provision is made for an application to be made for deferment of Class 4 liability in such cases, or in cases where such liability is doubtful due to this exemption: see regs 62-66. In addition, there is a maximum placed on the amount payable by way of Class 4 contributions in any year in combination with Class 1 and/or Class 2 contributions, which may in practice have the effect of negating the Class 4 liability: see reg 67 (as amended).

10 See the Social Security Contributions and Benefits Act 1992 s 17(6).

11 le as computed in accordance with *ibid* s 16(3), Sch 2 (as amended): see PARA 43 note 9 ante.

12 *Ibid* s 17(4).

13 le specified in *ibid* s 15(3) (as amended): see PARA 43 ante.

14 *Ibid* s 17(5). As to the provision made for granting certificates of exemption and for the deferment of liability see the Social Security (Contributions) Regulations 1979, SI 1979/591, Pt VII (regs 58-80) (as amended).

15 Social Security Contributions and Benefits Act 1992 s 17(3). There is provision for the repayment of Class 4 contributions which were not due: see the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 69 (as amended).

## UPDATE

### 31-46 Contributions

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if

he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13

September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **34-45 The Classes of Contributions**

There is a new Class of contribution, Class 1B: see the Social Security Contributions and Benefits Act 1992 s 10A; and PARA 39A.

### **45 Exceptions, deferment and incidental matters relating to Class 4 contributions**

TEXT AND NOTES 1, 2--For 'The Secretary of State ... Inland Revenue' read 'The Inland Revenue may by regulations': 1992 Act s 17(1) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 17).

TEXT AND NOTE 2--In head (2) for 'Class 4 contributions' read 'Class 4 contributions or any prescribed part of such contributions': 1992 Act s 17(1) (amended by the National Insurance Contributions Act 2002 Sch 1 para 4(2)).

TEXT AND NOTE 3--Words 'and may certify ... assessed for contributions' omitted: 1992 Act s 17(1) (amended by the 1999 Act Sch 1 para 6, Sch 10 Pt I).

NOTE 9--1979 Regulations regs 58-67 now Social Security (Contributions) Regulations 2001, SI 2001/1004, regs 91-100. See also reg 94A (exception from Class 4 liability in respect of certain amounts chargeable to income tax under Schedule D) (added by SI 2003/2958).

TEXT AND NOTES 10-12--For 'Regulations may' read 'The Inland Revenue may by regulations': 1992 Act s 17(4) (amended by the 1999 Act Sch 3 para 17, Sch 10 Pt I).

NOTE 10--1992 Act s 17(6) repealed: 1999 Act Sch 3 para 17(4), Sch 10 Pt I.

TEXT AND NOTE 12--Words 'the Secretary of State and' omitted: 1992 Act s 17(4) (amended by the 1999 Act Sch 1 para 6, Sch 10 Pt I).

TEXT AND NOTES 13, 14--Repealed: National Insurance Contributions Act 2002 Sch 2, with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(3) CONSEQUENTIAL PROVISIONS/46. General power to regulate liability for contributions.

### (3) CONSEQUENTIAL PROVISIONS

#### 46. General power to regulate liability for contributions.

Regulations may provide either generally or in relation to any prescribed<sup>1</sup> category of earners<sup>2</sup> or earners in any prescribed category of employments<sup>3</sup>, that their liability in a particular tax year<sup>4</sup> in respect of contributions of prescribed classes is not to exceed such maximum amount or amounts as may be prescribed<sup>5</sup>. Such regulations may also provide:

- 130 (1) for an earner whose liability is subject to a maximum so prescribed to be liable in the first instance for the full amount of any contributions due from him apart from the regulations, or to be relieved from liability for such contributions in prescribed circumstances and to the prescribed extent; and
- 131 (2) for contributions paid in excess of any such maximum to be repaid at such times, and in accordance with such conditions, as may be prescribed<sup>6</sup>.

Regulations may provide, in relation to earners otherwise liable for contributions of any class, for excepting them from the liability for such periods, and in such circumstances, as may be prescribed<sup>7</sup>.

As respects any woman who was married or a widow on 6 April 1977<sup>8</sup> regulations must provide:

- 132 (a) for enabling her to elect that her liability in respect of primary Class 1 contributions is to be a liability to contribute at such reduced rate as may be prescribed; and
- 133 (b) Either for enabling her to elect that her liability in respect of Class 2 contributions<sup>9</sup> is to be a liability to contribute at such reduced rate as may be prescribed or for enabling her to elect that she is to be under no liability to pay such contributions; and
- 134 (c) for enabling her to revoke any such election<sup>10</sup>;

and such regulations may:

- 135 (i) provide for the making or revocation of any election under the regulations to be subject to prescribed exceptions and conditions;
- 136 (ii) preclude a person who has made such an election from paying Class 3 contributions<sup>11</sup> while the election has effect;
- 137 (iii) provide for treating an election made or revoked for the purpose of any provision of the regulations as made or revoked also for the purpose of any other provision of the regulations;
- 138 (iv) provide for treating an election made in accordance with previous regulations<sup>12</sup> as made for these purposes<sup>13</sup>.

Regulations may also provide for earnings factors<sup>14</sup> to be derived in a specified manner<sup>15</sup> for such purposes as may be prescribed and if provision is made for a person to have earnings factors so derived for the purpose of establishing entitlement to any benefit<sup>16</sup>, the regulations

may, in relation to that person, vary or add to the requirements for entitlement to that benefit<sup>17</sup>.

1 For the meaning of 'prescribed' see PARA 19 note 3 ante.

2 For the meaning of 'earner' see PARAS 32-33 ante.

3 For the meaning of 'employment' see PARA 32 note 2 ante.

4 For the meaning of 'tax year' see PARA 9 note 6 ante.

5 Social Security Contributions and Benefits Act 1992 s 19(1). Regulations may also provide for reducing primary or secondary Class 1 contributions which are payable in respect of persons to whom the Employment Rights Act 1996 Pt XI (ss 135-181) (redundancy payments) does not apply by virtue of s 199(2) (exclusion of certain mariners) or s 209 (Secretary of State's general powers of amendment) (see EMPLOYMENT): Social Security Contributions and Benefits Act 1992 s 6(5) (amended by the Employment Rights Act 1996 s 240, Sch 1 para 51(1), (2)). As to Class 1 contributions see PARAS 34-37 ante.

6 Social Security Contributions and Benefits Act 1992 s 19(2). As to the provision which has been made see PARA 53 post.

7 Ibid s 19(3).

8 Ie the date of the coming into force of the repeal of the old provisions that primary Class 1 contributions might be paid at a reduced rate and Class 2 contributions need not be paid by a married woman or a widow: see the Social Security Pensions Act 1975 ss 3(1) (repealed), 65(3), Sch 5 (repealed).

9 As to Class 2 contributions see PARAS 40-41 ante.

10 Social Security Contributions and Benefits Act 1992 s 19(4).

11 As to Class 3 contributions see PARA 42 ante.

12 Ie regulations under the Social Security Act 1975 s 130(2) (repealed).

13 Social Security Contributions and Benefits Act 1992 s 19(5). As to the provision which has been made see PARA 53 post.

14 As to earnings factors see PARA 56 post. For the meaning of 'earnings' see PARA 33 ante.

15 Ie (1) in the case of earnings factors for 1987-88 or any subsequent tax year, from earnings upon which primary Class 1 contributions are paid at a reduced rate by virtue of regulations under the Social Security Contributions and Benefits Act 1992 s 19(4) or from Class 2 contributions paid at a reduced rate by virtue of such regulations; and (2) in the case of earnings factors for any earlier tax year, from contributions which are paid at a reduced rate by virtue of regulations under s 19(4): s 19(6).

16 For the meaning of 'benefit' see PARA 13 note 8 ante.

17 See the Social Security Contributions and Benefits Act 1992 s 19(6).

## UPDATE

### 31-46 Contributions

Contributions under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) are now under the care and management of the Commissioners of Inland Revenue: see further the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 3.

For the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force

Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425).

The 'New Deal' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 18 or over and less than 26 immediately prior to entry are eligible and which are designed to help New Deal participants to obtain work or to improve their prospects of obtaining work; a person is, or, as the case may be, was, at any material time, a 'New Deal participant' if he is or was at that time using facilities; 'facilities' means facilities provided for the participant in pursuance of one or more of the New Deal components; the 'New Deal components' means any of the programmes of employment or employment-related training under the New Deal known individually as 'the Full-time Education and Training Option', 'the Voluntary Sector Option', 'the Employment Option' and 'the Environment Task Force Option'; and 'trading receipt' means, in relation to a participant under the Employment Option, any payment made to him in consideration of goods or services supplied by him in the course of his participation under that option: SI 1998/217 art 1 (amended by SI 1998/1425). See further PARA 304.

Also for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of

facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A), if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2). 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

#### **46 General power to regulate liability for contributions**

TEXT AND NOTES--Where (1) payments by way of Class 1, Class 1A or Class 1B contributions are made in respect of earnings paid to or for the benefit of an earner (or in respect of a benefit made available to an earner) in 1998-99 or a subsequent tax year ('year 1'), (2) the payments are made in error, in that the employment from which the earnings are derived (or by reason of which the benefit is made available) is not employed earner's employment, and (3) the person making the payments has not been notified of the error by the Inland Revenue before the end of the tax year following year 1 ('year 2'), after the end of year 2 the earner must, except in such circumstances as may be prescribed (by regulations made by the Treasury), be treated for all purposes relating to contributions and contributory benefits, and statutory sick pay and statutory maternity pay, as if the earnings were derived from (or the benefit were made available by reason of) employed earner's employment: Social Security Contributions and Benefits Act 1992 s 19A (added by the Social Security Act 1998 s 54; and amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 20, Sch 9 para 4). Head (1) does not apply where (a) in respect of the earnings derived in year 1 from an employment of the earner, Class 1, 1A or 1B

contributions have been paid; (b) in respect of that employment and before the end of year 2 (i) an application for the determination of a question as to the category of earners in which the earner is or was to be included ('the categorisation question') has been made under the Social Security Administration Act 1992 s 17(1)(a) (see PARA 357) in accordance with the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 13(1) (revoked), (ii) a question of law arising in connection with the categorisation question has been referred by the Secretary of State to a court under the Social Security Administration Act 1992 s 18 (see PARA 358), (iii) a request in writing has been made that an officer of the Inland Revenue decide the categorisation question under the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 8(1)(a) (see PARA 357), or vary a decision made under s 8, or (iv) the amount of income tax, which is liable to be paid in respect of year 1 and in respect of which the person liable to pay a Class 1B contribution is accountable, has been the subject of a relevant tax appeal (see PARA 49 NOTE 4); and (c) the question, reference, request or appeal referred to in head (b) has not been determined or finally disposed of, as the case may be, at the end of year 2: Social Security (Contributions) Regulations 2001, SI 2001/1004, reg 59.

TEXT AND NOTES 1-13--Regulations under the Social Security Contributions and Benefits Act 1992 s 19(1)-(5) must be made by the Treasury: s 19(5A) (added by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 19).

TEXT AND NOTE 5--Now refers to contributions of prescribed classes, or any prescribed part of such contributions: Social Security Contributions and Benefits Act 1992 s 19(1) (amended by the National Insurance Contributions Act 2002 Sch 1 para 5(2), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2)).

NOTE 5--Social Security Contributions and Benefits Act 1992 s 6(5) now s 6(6) (see PARA 35).

TEXT AND NOTE 7--Now refers to contributions of any class, or any part of such contributions: *ibid* s 19(3) (amended by the National Insurance Contributions Act 2002 Sch 1 para 5(3), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2))).

TEXT AND NOTE 9--Head (a) now refers to so much of her liability in respect of primary Class 1 contributions as is attributable to the Social Security Contributions and Benefits Act 1992 s 8(1)(a) (see PARA 36 TEXT AND NOTES 1-9 head (1)): s 19(4) (amended by the National Insurance Contributions Act 2002 Sch 1 para 5(4), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2))).

TEXT AND NOTE 14--For 'Regulations may' read 'The Secretary of State may by regulations': Social Security Contributions and Benefits Act 1992 s 19(6) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 19).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(3) CONSEQUENTIAL PROVISIONS/47. General regulation-making powers.

#### **47. General regulation-making powers.**

Regulations may provide:

- 139 (1) for requiring persons to maintain, in such form and manner as may be prescribed<sup>1</sup>, records of the earnings<sup>2</sup> paid by them to and in respect of earners<sup>3</sup>, and of the contributions paid or payable in respect of earnings so paid, for the purpose of enabling the incidence of liability for contributions of any class to be determined, and to retain the records for so long as may be prescribed<sup>4</sup>;
- 140 (2) for requiring persons to maintain, in such form and manner as may be prescribed, records of such matters as may be prescribed for the purpose of enabling the incidence of liability for Class 1A contributions<sup>5</sup> to be determined, and to retain the records for so long as may be prescribed<sup>6</sup>;
- 141 (3) for treating primary Class 1 contributions<sup>7</sup>, when payable on the primary contributor's behalf by the secondary contributor<sup>8</sup>, but not paid, as actually paid where the failure to pay is shown not to have been with the consent or connivance of, or attributable to any negligence on the part of, the primary contributor and, in the case of contributions so treated, for treating them also as paid at a prescribed time or in respect of a prescribed period<sup>9</sup>;
- 142 (4) for treating, for the purpose of any entitlement to benefit<sup>10</sup>, contributions paid at or after any prescribed time as paid at some other time (whether earlier or later) or, in the case of contributions paid after the due date for payment, or at such later date as may be prescribed, as not having been paid<sup>11</sup>;
- 143 (5) for enabling contributions to be treated as paid in respect of a tax year<sup>12</sup> earlier or later than that in respect of which they were actually paid<sup>13</sup>;
- 144 (6) for treating, for the purposes of Class 2 contributions<sup>14</sup>, a week<sup>15</sup> which falls partly in one, and partly in another, tax year as falling wholly within one or the other of those tax years<sup>16</sup>;
- 145 (7) for treating contributions of the wrong class, or at the wrong rate, or of the wrong amount, as paid on account of contributions properly payable<sup>17</sup> or as paid (wholly or in part) in discharge of a liability for a contributions equivalent premium<sup>18</sup>;
- 146 (8) for the repayment, in prescribed cases, of the whole or a prescribed part of any contributions paid by reference to earnings which have become repayable<sup>19</sup>;
- 147 (9) for the repayment, in prescribed cases, of a prescribed part of any Class 1A contribution as to which the Secretary of State<sup>20</sup> is satisfied, in the light of information<sup>21</sup> that has become available to him, that too much has been paid<sup>22</sup>;
- 148 (10) for the repayment, on the making of an application in the prescribed manner and within the prescribed time, of Class 2 contributions paid by a person in respect of a period which consists of, or falls within, a tax year for which his earnings from employment as a self-employed earner<sup>23</sup> were, or were such as to be treated<sup>24</sup> as being, at a lower rate than the one specified<sup>25</sup> for that year<sup>26</sup>;
- 149 (11) for excepting a person from liability for contributions repaid by virtue of head (10) above, to the extent that he would not otherwise<sup>27</sup> have been so excepted<sup>28</sup>;
- 150 (12) without prejudice to head (7) above, for enabling:
  - 7 9. (a) the whole or part of any payment of secondary Class 1 contributions to be treated as a payment of Class 1A contributions;

10. (b) the whole or part of any payment of Class 1A contributions to be treated as a payment of secondary Class 1 contributions or Class 2 contributions;
  11. (c) the whole or part of any payment of Class 2 contributions to be treated as a payment of secondary Class 1 contributions or Class 1A contributions<sup>29</sup>;
- 8
- 151 (13) for the return of the whole or any prescribed part of any contributions paid either in error or in such circumstances that, under any provision of Part I of the Social Security Contributions and Benefits Act 1992 or of regulations, they fall to be repaid<sup>30</sup>;
  - 152 (14) for treating a person as being an employed earner<sup>31</sup>, notwithstanding that his employment is outside Great Britain<sup>32</sup>;
  - 153 (15) for treating a person's employment as continuing during periods of holiday, unemployment or incapacity for work and in such other circumstances as may be prescribed<sup>33</sup>;
  - 154 (16) for any other matters incidental to the payment, collection or return of contributions<sup>34</sup>.

1 For the meaning of 'prescribed' see PARA 19 note 3 ante.

2 For the meaning of 'earnings' see PARA 33 ante.

3 For the meaning of 'earners' see PARAS 32-33 ante.

4 Social Security Contributions and Benefits Act 1992 s 1(4), Sch 1 para 8(1)(a).

5 As to Class 1A contributions see PARAS 38-39 ante.

6 Social Security Contributions and Benefits Act 1992 Sch 1 para 8(1)(b).

7 As to primary Class 1 contributions see PARAS 35-36 ante.

8 For the meaning of 'secondary contributor' see PARA 35 note 9 ante.

9 Social Security Contributions and Benefits Act 1992 Sch 1 para 8(1)(c).

10 For the meaning of 'benefit' see PARA 13 note 8 ante.

11 Social Security Contributions and Benefits Act 1992 Sch 1 para 8(1)(d).

12 For the meaning of 'tax year' see PARA 9 note 6 ante.

13 Social Security Contributions and Benefits Act 1992 Sch 1 para 8(1)(e).

14 As to Class 2 contributions see PARAS 40-41 ante.

15 For the meaning of 'week' see PARA 32 note 7 ante.

16 Social Security Contributions and Benefits Act 1992 Sch 1 para 8(1)(f).

17 Ie notwithstanding *ibid* s 14 in the case of Class 3 contributions: see PARA 42 ante.

18 *Ibid* Sch 1 para 8(1)(g) (amended by the Pensions Act 1995 s 151, Sch 5 para 14).

19 Social Security Contributions and Benefits Act 1992 Sch 1 para 8(1)(h).

20 As to the Secretary of State see PARA 1 ante.

21 Ie information of a kind mentioned in the Social Security Contributions and Benefits Act 1992 s 10(6)(a), (b) or (c) (as amended): see PARA 39 ante.

22 *Ibid* Sch 1 para 8(1)(i).

23 For the meaning of 'self-employed earner' see PARA 32 ante.

24 le by regulations under the Social Security Contributions and Benefits Act 1992 s 11(4) (as amended): see PARA 40 ante.

25 le specified in ibid s 11(4) (as amended): see PARA 40 ante.

26 Ibid Sch 1 para 8(1)(j).

27 le by virtue of ibid s 11(4) (as amended): see PARA 40 ante.

28 Ibid Sch 1 para 8(1)(k).

29 Ibid Sch 1 para 8(1)(l).

30 Ibid Sch 1 para 8(1)(m). See the Social Security (Additional Pension) (Contributions Paid in Error) Regulations 1996, SI 1996/1245; and PARA 566 post.

31 For the meaning of 'employed earner' see PARA 32 ante.

32 Social Security Contributions and Benefits Act 1992 Sch 1 para 8(1)(n). For the meaning of 'Great Britain' see PARA 15 note 4 ante.

33 Ibid Sch 1 para 8(1)(o).

34 Ibid Sch 1 para 8(1)(q). The power to make regulations requiring persons to apply for a national insurance number formerly contained in Sch 1 para 8(1)(p) is repealed and replaced by the Social Security Administration Act 1992 s 182C (as added): see PARA 52 post. As to the exercise of the powers conferred by Sch 1 para 8 (as amended) see note 30 supra; and see also, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Contributions) Regulations 1979, SI 1979/591 (as amended); and the Social Security (Categorisation of Earners) Regulations 1978, SI 1978/1689 (as amended). The relevant provisions of the 1978 and 1979 regulations are discussed in their appropriate context in this title.

## UPDATE

### 47 General regulation-making powers

TEXT AND NOTES--Regulations under 1992 Act Sch 1 para 8 must now be made by the appropriate authority: Sch 1 para 8(1) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 39). The 'appropriate authority' means the Treasury, except that, in relation to (a) provision made by virtue of head (4) of the text, and (b) provision made by virtue of head (16) in relation to the matters referred to in head (4), it means the Secretary of State, acting with the concurrence of the Inland Revenue: 1992 Act Sch 1 para 8(1A) (added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 39; and amended by Welfare Reform and Pensions Act 1999 Sch 11 para 3).

Regulations may provide for the repayment, in prescribed cases, of the whole or a prescribed part of a Class 1A (see PARA 38) or of a Class 1B contribution (see PARA 39A): Social Security Contributions and Benefits Act 1992 Sch 1 para 8(1)(ia) (added by the Social Security Act 1998 Sch 7 para 77(15); and amended by the Child Support, Pensions and Social Security Act 2000 s 74(5)).

Regulations may also provide for requiring a secondary contributor to notify a person to whom any of his liabilities are transferred by an election under the Social Security Contributions and Benefits Act 1992 Sch 1 para 3B (see PARA 35) of any transferred liability that arises, the amount of any transferred liability that arises and the contents of any notice of withdrawal by the Inland Revenue of any approval that relates to that election: Sch 1 para 8(1)(ca) (added by Child Support, Pensions and Social Security Act 2000 s 77(4)).

NOTE 4--1992 Act s 1(4) amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 5, Sch 10.

TEXT AND NOTE 5--Also refers to Class 1B contributions: Social Security Contributions and Benefits Act 1992 Sch 1 para 8(1)(b) (amended by 1998 Act Sch 7 para 77(14)).

TEXT AND NOTES 20-22--Social Security Contributions and Benefits Act 1992 Sch 1 para 8(1)(i) repealed: Child Support, Pensions and Social Security Act 2000 Sch 9 Pt VIII.

TEXT AND NOTE 29--In heads (12)(a)-(c), for 'Class 1A contributions' read 'Class 1A contributions or a Class 1B contribution': Social Security Contributions and Benefits Act 1992 Sch 1 para 8(1)(l) (amended by 1998 Act Sch 7 para 77(16)(a), (b), (d)).

Additional head (12)(d) the whole or part of any payment of a Class 1B contribution to be treated as a payment of secondary Class 1 contributions, Class 1A contributions or Class 2 contributions: Social Security Contributions and Benefits Act 1992 Sch 1 para 8(1)(ia) (added by 1998 Act Sch 7 para 77(16)(c)).

NOTE 34--Social Security Contributions and Benefits Act 1992 Sch 1 para 8 amended: Welfare Reform and Pensions Act Sch 13 Pt VI. 1979 Regulations consolidated in Social Security (Contributions) Regulations 2001, SI 2001/1004 (see PARA 33).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(3) CONSEQUENTIAL PROVISIONS/48. Late paid and unpaid contributions.

#### **48. Late paid and unpaid contributions.**

The general rule is that contributions paid after the due date are treated as not paid at all if paid after the end of the second year<sup>1</sup> following the year in which liability arose<sup>2</sup>; if paid before then, they are normally treated as paid on the date of payment<sup>3</sup>. Late paid contributions are treated as not paid for the purpose of entitlement to benefit in respect of any period before their date of payment<sup>4</sup>. For the purpose of any entitlement to benefit<sup>5</sup> in respect of any other period, a late paid contribution is treated as paid on the date on which payment of the contribution is made<sup>6</sup>. For the purpose of entitlement to a contribution-based jobseeker's allowance<sup>7</sup> or short-term incapacity benefit<sup>8</sup>, a late paid contribution is treated as paid on the due date if paid before the beginning of the relevant benefit year<sup>9</sup>, and if paid later as not paid until a period of 42 days (including Sundays) has expired from the date of payment of the contribution, and as paid at the expiry of that period in relation to entitlement to benefit in respect of any other period<sup>10</sup>.

Where a contribution (other than a Class 4 contribution)<sup>11</sup> is paid after the time when it would have been treated as paid for the purpose of entitlement to contributory benefit<sup>12</sup>, but it is shown to the satisfaction of the Secretary of State<sup>13</sup> that the failure to pay before that time is attributable to ignorance or error on the part of the person or persons making the payment and that that ignorance or error was not due to any failure to exercise due care and diligence, the Secretary of State may direct that the contribution is to be treated as paid on such earlier day as he may consider appropriate in the circumstances<sup>14</sup>.

Where a primary Class 1 contribution<sup>15</sup> which is payable on behalf of a primary contributor by a secondary contributor<sup>16</sup> is paid after the due date, or is not paid, or (in relation to a contribution-based jobseeker's allowance, short-term incapacity benefit or maternity allowance) is not paid before the relevant time for that benefit, and the delay or failure in making the payment is shown to the satisfaction of the Secretary of State not to have been with the consent or connivance of, or attributable to any negligence on the part of, the primary contributor, that primary contribution is to be treated for the purpose of the first contribution condition of entitlement to contribution-based jobseeker's allowance<sup>17</sup> or short-term incapacity benefit (and for the purpose of the contribution condition for maternity allowance) as paid on the day on which payment is made of the earnings in respect of which the contribution is payable<sup>18</sup>, and for the purpose of any entitlement to contributory benefit, as paid on the due date<sup>19</sup>.

If a person dies, any contributions which, immediately before his death, he was entitled (but not liable) to pay may be paid notwithstanding his death, subject to the time limits that would otherwise be applicable<sup>20</sup>.

1 'Year' means tax year: Social Security (Contributions) Regulations 1979, SI 1979/591, reg 1(2). For the meaning of 'tax year' see PARA 9 note 6 ante.

2 See *ibid* reg 38(1), (2)(a). In the case of Class 2 or Class 3 contributions, this rule is extended to the end of the sixth year: reg 38(1A) (added by SI 1984/77). In relation to Class 3 see also the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 38(3) (as amended), reg 38A (as added).

3 See *ibid* reg 38(1), (2)(b) (as amended).

4 See *ibid* reg 38(5)(a).

5 For the meaning of 'benefit' see PARA 13 note 8 ante.

- 6 Social Security (Contributions) Regulations 1979, SI 1979/591, reg 38(5)(b).
- 7 As to jobseeker's allowance see PARA 258 et seq post.
- 8 As to incapacity benefit see PARA 59 et seq post.
- 9 See the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 38(6)(a) (as amended).
- 10 See *ibid* reg 38(6)(b) (as amended). In relation to maternity allowance, a late contribution paid before the beginning of the period for maternity allowance is treated as paid on the due date: see reg 38(7), (8) (substituted by SI 1994/1553). As to maternity allowance see PARA 76 et seq post.
- 11 As to Class 4 contributions see PARAS 43-45 post.
- 12 As to contributory benefits see PARA 54 et seq post.
- 13 As to the Secretary of State see PARA 1 ante.
- 14 See the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 41. A similar rule applies to voluntary Class 2 contributions: see reg 40.
- 15 As to primary Class 1 contributions see PARAS 35-36 ante.
- 16 For the meaning of 'secondary contributor' see PARA 35 note 9 ante.
- 17 See the condition specified in the Jobseekers Act 1995 s 2(1)(a) (see PARA 266 post): Social Security (Contributions) Regulations 1979, SI 1979/591, reg 39(2) (added by SI 1996/2367).
- 18 See the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 39(1)(a) (amended by SI 1987/2111; SI 1995/829; and SI 1996/2367).
- 19 See the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 39(1)(b).
- 20 See *ibid* reg 43.

## UPDATE

### 48 Late paid and unpaid contributions

TEXT AND NOTES 1-10--SI 1979/591 regs 38, 38A revoked: SI 2001/769. Provision is made relating to the treatment for the purposes of any contributory benefit of (1) late paid contributions generally (see the Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001, SI 2001/769, regs 4, 8 (reg 4 amended by SI 2004/1361, SI 2007/1154, SI 2007/2582, SI 2008/1554, SI 2009/659)); (2) late paid primary Class 1 contributions where there was no consent, connivance or negligence by the primary contributor (see SI 2001/769 regs 5, 8 (reg 5 amended by SI 2002/2366, SI 2008/1554)); (3) contributions under the Social Security Contributions and Benefits Act 1992 paid late through ignorance or error (see SI 2001/769 regs 6, 8 (reg 6 amended by SI 2002/2366)); (4) duly paid primary Class 1 contributions in respect of retrospective earnings (see SI 2001/769 reg 5A (added by SI 2007/1154, amended by SI 2008/1554)); (5) certain late paid Class 3 contributions (see SI 2001/769 reg 6A (added by SI 2004/1361)); (6) certain Class 2 and Class 3 contributions which may have been paid late as a result of official error but less than six years after the end of the year in which the claimant was advised of the error (see SI 2001/769 reg 6B (added by SI 2007/2582)); and (7) additional Class 3 contributions which are treated as paid under the Social Security Contributions and Benefits Act 1992 s 13A: SI 2001/768 reg 6C (added by SI 2009/659).

See *Revenue and Customs Comrs v Thompson* [2007] STC 240 (late payment under SI 2001/769 reg 6).

As to the application of the Finance Act 2009 Sch 56 (penalty for failure to make payments on time) in relation to the late payment of Class 1, Class 1A and Class 1B contributions, see SI 2001/1004 regs 67A, 67B (added by SI 2010/721).

NOTE 14--SI 1979/591 reg 41 revoked: SI 2001/769. SI 1979/591 reg 40 now Social Security (Contributions) Regulations 2001, SI 2001/1004, reg 61. See also SI 2001/1004 reg 61A (added by SI 2007/2520).

NOTES 17-19--SI 1979/591 reg 39 now SI 2001/1004 reg 60 (amended by SI 2002/2366, SI 2007/1056).

TEXT AND NOTE 17--Words 'or is paid after the due date, or' and 'delay or' omitted: SI 2001/1004 reg 60.

NOTE 20--Now SI 2001/1004 reg 62.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(3) CONSEQUENTIAL PROVISIONS/49. Power to combine collection of Class 1, Class 1A or Class 2 contributions with tax.

#### **49. Power to combine collection of Class 1, Class 1A or Class 2 contributions with tax.**

Regulations made with the concurrence of the Inland Revenue may:

- 155 (1) provide for Class 1, Class 1A or Class 2 contributions<sup>1</sup> to be paid, accounted for and recovered in like manner as income tax deducted from the emoluments of an office or employment by virtue of regulations under the statutory provisions relating to PAYE<sup>2</sup>;
- 156 (2) apply or extend with or without modification in relation to such contributions any of the provisions of the Income Tax Acts<sup>3</sup> or of regulations relating to PAYE;
- 157 (3) make provision for the appropriation of the payments made by any person between his liabilities in respect of income tax and contributions<sup>4</sup>.

Earnings-related contributions and Class 1A contributions are to be paid, accounted for and recovered in like manner as income tax deducted from the emoluments of an office or employment<sup>5</sup>. However, the Secretary of State<sup>6</sup> may, if he thinks fit, and subject to such terms and conditions as he may impose, authorise arrangements by which contributions are paid in a different manner or at a different time<sup>7</sup>.

The Inland Revenue must, at such times and in such manner as the Treasury may direct, account to the Secretary of State for, and pay to him the sums estimated by the Inland Revenue, in such manner as may be so directed, to have been received by the Inland Revenue as contributions in accordance with these provisions and so much of any interest recovered by the Inland Revenue as remains after the deduction of any administrative costs attributable to its recovery<sup>8</sup>.

1 As to Class 1, Class 1A and Class 2 contributions see PARAS 34-41 ante.

2 The regulations under the Income and Corporation Taxes Act 1988 s 203 (as amended): see INCOME TAXATION vol 23(1) (Reissue) PARA 754 et seq.

3 For the meaning of 'the Income Tax Acts' see INCOME TAXATION vol 23(1) (Reissue) PARA 21.

4 See the Social Security Contributions and Benefits Act 1992 s 1(4), Sch 1 para 6(1). For the specific provision that may be made see Sch 1 para 6(2)-(6) (as amended). The Taxes Management Act 1970 s 98 (as amended) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1711) applies in relation to regulations so made as it applies in relation to regulations made under the Income and Corporation Taxes Act 1988 s 203 (as amended): Social Security Contributions and Benefits Act 1992 Sch 1 para 6(7). As to penalties in the case of returns see Sch 1 para 7.

5 See the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 46 (amended by SI 1992/97).

6 As to the Secretary of State see PARA 1 ante.

7 See the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 47 (amended by SI 1992/97). For the consequential provisions where such an arrangement is entered into see the Social Security (Contributions) Regulations 1979, SI 1979/591, regs 48, 49.

8 Social Security Contributions and Benefits Act 1992 Sch 1 para 6(8).

#### **UPDATE**

#### **49 Power to combine collection of Class 1, Class 1A, [Class 1B] or Class 2 contributions with tax**

TEXT AND NOTES--As to the recovery of those Class 1, Class 1A, Class 1B and Class 2 contributions to which regulations under the Social Security Contributions and Benefits Act 1992 Sch 1 para 6 do not apply see PARA 49A.

TEXT AND NOTE 1--Social Security Contributions and Benefits Act 1992 Sch 1 para 6 also refers to Class 1B contributions (see PARA 39A): Sch 1 para 6(1)(a) (substituted by the Social Security Act 1998 Sch 7 para 77(8)). Regulations under the Social Security Contributions and Benefits Act 1992 Sch 1 para 6 must now be made by the Inland Revenue: Sch 1 para 6 (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 35).

NOTE 2--1988 Act s 203 replaced by Income Tax (Earnings and Pensions) Act 2003 ss 684, 685.

NOTE 4--Social Security Contributions and Benefits Act 1992 Sch 1 paras 6(2), (5), (6), 7 amended: Social Security Act 1998 s 56, Sch 7 para 77(9), (12), Sch 8, the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 36, and the Welfare Reform and Pensions Act 1999 Sch 12 para 78(6).

Regulations under the 1992 Act Sch 1 para 6 may not require the payment of interest on a sum due in respect of a Class 1B contribution if a relevant tax appeal (ie an appeal against a determination as to the amount of income tax in respect of which the person liable to pay the Class 1B contribution is accountable in accordance with the relevant PAYE settlement agreement has been brought but not finally determined: Sch 1 para 6(4A) (added by the Social Security Act 1998 Sch 7 para 77(11); and amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 9 para 5). For the meaning of 'PAYE settlement agreement', see PARA 39A. Social Security Contributions and Benefits Act 1992 s 1(4), Sch 1 para 6(5)-(7), 7 further amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 paras 5, 17-18, Sch 10. Social Security Contributions and Benefits Act 1992 Sch 1 para 7 further amended: Child Support, Pensions and Social Security Act 2000 s 76(1), (2). Interest required to be paid, by virtue of the Social Security Contributions and Benefits Act 1992 Sch 1 para 6(2)(a) or (b), by regulations under Sch 1 para 6(1), is payable without any deduction of income tax and is not taken into account in computing any income, profits or losses for tax purposes: Sch 1 para 6(4B) (added by the Finance Act 2003 s 147(2)).

NOTE 5--1979 Regulations reg 46 now Social Security (Contributions) Regulations 2001, SI 2001/1004, reg 67 (amended by SI 2001/1004, SI 2008/636). As to the direct collection and recovery of earnings-related contributions see SI 2001/1004 reg 68; and as to the transfer of liability from a secondary contributor to an employed earner in respect of relevant employment income see reg 69, Sch 5 (reg 69 amended by SI 2004/2096, Sch 5 amended by SI 2004/2096, SI 2007/1175). 'Relevant employment income' has the meaning given in the Social Security Contributions and Benefits Act 1992 Sch 1 para 3B(1A): SI 2001/1004 reg 1(2) (definition added by SI 2004/2096).

TEXT AND NOTES 6, 7--Replaced. In the cases where an employer is liable to pay a Class 1A contribution to the Inland Revenue, contributions must be so paid in accordance with *ibid* regs 71-83: reg 70(1), (2). Where any payment to the Inland Revenue is made by cheque, and the cheque is paid on its first presentation to the banker on whom it is drawn, the payment is treated as made on the day on which the cheque was received by the Inland Revenue, and the terms 'pay', 'paid', 'unpaid' and 'overpaid' are construed accordingly, and 'employer' means the person liable to pay a Class 1A

contribution in accordance with the Social Security Contributions and Benefits Act 1992 s 10(2) or 10ZA: SI 2001/1004 (NOTE 5) reg 70(3), (4) (reg 70(4) amended by SI 2002/2929). SI 2001/1004 regs 71-83 (regs 71-73, 76 amended by SI 2004/770; SI 2001/1004 reg 80 amended by SI 2001/2187, SI 2004/770; SI 2001/1004 reg 81 amended by SI 2010/721) provide for the due date for any such direct payment, for interest on any overdue payment, for payment of interest on a repaid direct payment, for remission of interest on any direct payment, for returns by employers where such a direct payment is payable, for penalties for incorrect and incomplete returns, and for the setting-off of contributions falling to be repaid against earnings-related contributions.

The Finance Act 2001 s 107 (waiver of interest on overdue tax for farmers affected by the foot-and-mouth outbreak) applies, with modifications, for the purposes of Class 1, Class 1A and Class 1B social security contributions: Social Security Contributions (Deferred Payments and Interest) Regulations 2001, SI 2001/1818.

NOTE 7--1979 Regulations reg 47 now SI 2001/1004 (NOTE 5) reg 70. 1979 Regulations regs 48, 49 now SI 2001/1004 regs 84, 85.

TEXT AND NOTE 8--Social Security Contributions and Benefits Act 1992 Sch 1 para 6(8) repealed: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 35, Sch 10.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(3) CONSEQUENTIAL PROVISIONS/49A. Recovery of contributions where income tax recovery provisions not applicable.

**49A. Recovery of contributions where income tax recovery provisions not applicable.**

The following provisions have effect with respect to the recovery of (1) those Class 1, Class 1A, Class 1B and Class 2 contributions to which regulations under the Social Security Contributions and Benefits Act 1992 Sch 1 para 6 (see PARA 49) or para 7BZA (added by the National Insurance Contributions and Statutory Payments Act 2004 s 5(4)) do not apply; (2) interest or penalties payable under regulations made under the Social Security Contributions and Benefits Act 1992 Sch 1 para 7A (Sch 1 paras 7A, 7B added by the Social Security Act 1998 s 56; Social Security Contributions and Benefits Act 1992 Sch 1 para 7A amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 37, Sch 9 para 6); and (3) interest or penalties payable under regulations made under the Social Security Contributions and Benefits Act 1992 Sch 1 para 7B (as added; amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 38, Sch 9 para 7, Sch 10 Pt I; and the Child Support, Pensions and Social Security Act 2000 s 76(1), (3), (4)) and to which regulations under the Social Security Contributions and Benefits Act 1992 Sch 1 para 7BZA do not apply: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 4 (amended by the 2004 Act Sch 1 para 5, Sch 2 Pt 1).

**1. In general**

Proceedings may be brought for the recovery of the total amount of Class 1 or Class 1A contributions which an employer has become liable to pay on a particular date and any sum due by way of interest or penalty in respect of those contributions without distinguishing the amounts which the employer is liable to pay in respect of each employee and without specifying the employees in question; and for the purposes of proceedings brought in the magistrates' court<sup>1</sup> or in the county court<sup>2</sup> that total amount is one cause of action or one matter of complaint<sup>3</sup>. Nothing in the provision above prevents the bringing of separate proceedings for the recovery of each of the several amounts of Class 1 or Class 1A contributions which the employer is liable to pay<sup>4</sup>.

1 See PARA 49A.2.

2 See PARA 49A.3.

3 Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 4 para 5(1).

4 Ibid Sch 4 para 5(2).

**2. Recovery in magistrates' court**

Any amount which (1) is due by way of contributions or by way of interest or penalty in respect of contributions, and (2) does not exceed the prescribed sum<sup>1</sup>, is, without prejudice to any other remedy, recoverable summarily as a civil debt in proceedings commenced in the name of an authorised officer<sup>2</sup>. All or any of the sums due from any one person in respect of contributions, or interest or penalties in respect of contributions, (being sums which are by law recoverable summarily) may be included in the same complaint, summons, order, warrant or other document required by law to be laid before justices or to be issued by justices, and every

such document, as respects each such sum, is to be construed as a separate document and its invalidity as respects any one such sum does not affect its validity as respects any other such sum<sup>3</sup>. Proceedings in England and Wales may be brought (a) in the case of Class 2 contributions or interest or penalties in respect of such contributions, at any time before the end of the year following the tax year<sup>4</sup> in which the contributor becomes liable to pay the contributions, and (b) in any other case, not later than the first anniversary of the day on which the contributions became due<sup>5</sup>.

1 'The prescribed sum' means the sum for the time being specified in the Taxes Management Act 1970 s 65(1) (recovery of income tax, etc in magistrates' courts; see INCOME TAXATION vol 23(2) (Reissue) PARA 1821): Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 4 para 2(5).

2 Ibid Sch 4 para 2(1). 'Authorised officer' means an officer of the Commissioners of Inland Revenue authorised by them for the purposes of Sch 4: Sch 4 para 1.

3 Ibid Sch 4 para 2(2).

4 'Tax year' means the 12 months beginning with 6 April in any year: ibid Sch 4 para 2(5).

5 Ibid Sch 4 para 2(3).

### **3. Recovery in county court**

Without prejudice to any other remedy, any sum which is due by way of contributions or by way of interest or penalty in respect of contributions may in England and Wales, be sued for and recovered from the person liable as a debt due to the Crown by proceedings in a county court commenced in the name of an authorised officer<sup>1</sup>. An authorised officer may conduct any such proceedings before a county court in England and Wales, although not a barrister or solicitor<sup>2</sup>.

1 Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 4 para 3(1). For the meaning of 'authorised officer' see PARA 49A.2 NOTE 2.

2 Ibid Sch 4 para 3(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(3) CONSEQUENTIAL PROVISIONS/50. Collection of Class 2 or Class 3 contributions.

## **50. Collection of Class 2 or Class 3 contributions.**

Every person who becomes, or ceases to be, liable to pay a Class 2 contribution<sup>1</sup>, or becomes, or ceases to be entitled to pay such a contribution, or is entitled to pay a Class 3 contribution<sup>2</sup> and wishes to do so or to cease to do so must notify the relevant date in writing to the Secretary of State immediately<sup>3</sup>. Where a person has done so and the Secretary of State (within 14 days after the end of the contribution quarter<sup>4</sup> in question) has issued him with a written notice of the number of contribution weeks in that quarter, the weekly rate of contributions and the date specified as the date of notification, then (in the case of Class 2) the person is to pay to the Secretary of State the amount of contributions for which he is liable not later than 28 days after the specified date of notification<sup>5</sup>. Alternatively, the Secretary of State may, if he thinks fit and subject to such terms and conditions as he may impose, approve arrangements whereby contributions are to be paid at times or in a manner other than those prescribed above; in particular, where the person is likely to be liable as both an employed and a self-employed earner and his contributions from the former are likely to exceed the maximum for contribution payments the Secretary of State may, with a view to avoiding excess payment of contributions, make special arrangements with that person as to the manner or date of any or any further Class 2 contributions in respect of that year<sup>6</sup>.

1 As to Class 2 contributions see PARAS 40-41 ante.

2 As to Class 3 contributions see PARA 42 ante.

3 Social Security (Contributions) Regulations 1979, SI 1979/591, reg 53A (added by SI 1993/260). The old method was by the physical acquisition of contribution stamps and their affixation to a contribution card: see the Social Security (Contributions) Regulations 1979, SI 1979/591, regs 51-53 (revoked). Regulations made by the Secretary of State providing for the payment of Class 2 or Class 3 contributions (at the option of the persons liable to pay) either by means of adhesive stamps or by some alternative method, the use of which involves greater expense in administration to the government departments concerned than would be incurred if the contributions were paid by means of such stamps, may include provision for the payment to the Secretary of State by any person who adopts any alternative method, and for the recovery by the Secretary of State, of the prescribed fees in respect of any difference in the expense in administration: Social Security Contributions and Benefits Act 1992 s 1(4), Sch 1 para 8(2). Where contributions are payable by means of adhesive stamps, the Secretary of State may, with the consent of the Treasury, arrange for the preparation and sale of those stamps, and may by regulations provide for applying, with the necessary modifications as respects those stamps, all or any of the provisions of the Stamp Duties Management Act 1891, the Stamp Act 1891 s 9 (as amended) and the Post Office Act 1953 s 63 (as amended): Social Security Contributions and Benefits Act 1992 Sch 1 para 8(3).

4 'Contribution quarter' means one of the four periods of not less than 13 contribution weeks commencing with the first day of the first, fourteenth, twenty-seventh or fortieth contribution weeks in any year: see the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 54(8).

5 See *ibid* reg 54(1), (2) (reg 54 substituted by SI 1993/260). There are equivalent provisions in relation to Class 3 contributions in the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 54(1), (3) (as so substituted). Continuing notification is provided for in reg 54(4) (as so substituted). The written notice, in any case, is to be accompanied by a bank giro credit form in order that the payment may be made at a bank: reg 54(7) (as so substituted).

6 See *ibid* reg 54A (added by SI 1993/260).

## **UPDATE**

## **50 Collection of Class 2 or Class 3 contributions**

TEXT AND NOTES--1979 Regulations consolidated in the Social Security (Contributions) Regulations 2001, SI 2001/1004 (see PARA 33).

TEXT AND NOTES 1-3--For 'every' read 'A'; and for 'notify ... immediately' read 'immediately notify the relevant date to the Inland Revenue in writing or by such means of electronic communications as is approved': *ibid* reg 87. 'Electronic communications' includes any communications conveyed by means of an electronic communications network: SI 2001/1004 (TEXT AND NOTES) reg 1(2) (amended by SI 2003/2155). As to electronic communications see SI 2001/1004 Pt 7A (regs 90A-90R) (added by SI 2004/770; and amended by SI 2006/576, SI 2007/1056, SI 2009/2028, SI 2010/721). A person liable to pay Class 2 contributions, or paying Class 2 (although not liable to do so) or Class 3 contributions, must immediately notify the Inland Revenue of any change of his address in writing or by such means of electronic communications as is approved: SI 2001/1004 reg 88.

NOTE 3--Social Security Contributions and Benefits Act 1992 Sch 1 para 8(2), (3) repealed: Welfare Reform and Pensions Act 1999 Sch 13 Pt VI. Social Security Contributions and Benefits Act 1992 s 1(4) amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 5, Sch 10.

NOTES 4, 5--Provision is made relating to the treatment for the purpose of any contributory benefit of contributions paid under the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 54 (now SI 2001/1004 reg 89): see the Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001, SI 2001/769, regs 7, 8.

TEXT AND NOTE 6--The Commissioners of Inland Revenue may from time to time approve arrangements under which contributions are paid at times or in a manner different from those prescribed by SI 2001/1004 reg 89; this is subject to reg 89(2)-(4): reg 89(1). When granting approval under reg 89(1) the Commissioners may impose such conditions as they see fit: reg 89(2). They may, in particular, grant approval under reg 89(2) if, as respects any year in which a person is both an employed earner and a self-employed earner, the condition in reg 89(4) is satisfied: reg 89(3). The condition is that the Commissioners are satisfied that the total amount of primary Class 1 contributions likely to be paid by or in respect of that person will exceed the maximum amount prescribed in reg 21 for that year: reg 89(4).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(3) CONSEQUENTIAL PROVISIONS/51. Collection of Class 4 contributions.

## **51. Collection of Class 4 contributions.**

All the provisions of the Income Tax Acts<sup>1</sup> (including in particular the provisions relating to assessment, collection, repayment, recovery, payment and penalties) apply, with necessary modifications<sup>2</sup>, in relation to Class 4 contributions<sup>3</sup> as if they were income tax chargeable under Case I or Case II of Schedule D<sup>4</sup>.

The Inland Revenue must, at such times and in such manner as the Treasury may direct, account to the Secretary of State<sup>5</sup> for, and pay to him:

- 158 (1) the sums estimated by the Inland Revenue (in the manner so directed) to have been collected by the Inland Revenue as Class 4 contributions<sup>6</sup>; and
- 159 (2) so much of any interest recovered by the Inland Revenue<sup>7</sup> as remains after the deduction of any administrative costs attributable to its recovery<sup>8</sup>.

1 For the meaning of 'the Income Tax Acts' see INCOME TAXATION vol 23(1) (Reissue) PARA 21.

2 Specific modifications are contained in the Social Security Contributions and Benefits Act 1992 s 16(3), Sch 2 (as amended); see PARA 43 note 9 ante.

3 As to Class 4 contributions see PARAS 43-45 ante.

4 See the Social Security Contributions and Benefits Act 1992 s 16(1), (2). As to the charge to tax under Case I or Case II of Schedule D see INCOME TAXATION vol 23(1) (Reissue) PARA 88 et seq.

5 As to the Secretary of State see PARA 1 ante.

6 Ie under the Social Security Contributions and Benefits Act 1992 s 15 (as amended) (see PARA 43 ante) or the corresponding Northern Ireland legislation.

7 Ie by virtue of ibid Sch 2 para 6.

8 Ibid s 16(4). So much of any money received by the Secretary of State under s 16(4) above as is estimated by him, in accordance with any directions of the Treasury, to represent Class 4 contributions collected, or interest in respect of such contributions recovered, from persons in Northern Ireland must be paid over by him to the Northern Ireland Department: s 16(5).

## **UPDATE**

### **51 Collection of Class 4 contributions**

TEXT AND NOTES 5-8--1992 Act s 16(4) repealed: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 16, Sch 10.

NOTE 8--1992 Act s 16(5) repealed: National Insurance Contributions Act 2002 Sch 2.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(3) CONSEQUENTIAL PROVISIONS/52. National Insurance numbers.

## **52. National Insurance numbers.**

Regulations may make provision requiring a person to apply for a national insurance number to be allocated to him and such an application must be accompanied by information or evidence enabling such a number to be allocated<sup>1</sup>.

Every person who is over the age of 16<sup>2</sup> and satisfies conditions as to presence or residence in Great Britain<sup>3</sup> must, unless he has already been allocated a national insurance number, apply to the Secretary of State<sup>4</sup> for the allocation of such a number, in such manner and at such time as he may direct<sup>5</sup>.

Every employed earner, in respect of whom any person is liable to pay an earnings-related<sup>6</sup> contribution, must on request supply his national insurance number to that person<sup>7</sup>.

1 Social Security Administration Act 1992 s 182C(1), (2) (added by the Social Security Administration (Fraud) Act 1997 s 22, Sch 1 para 9). At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Contributions) Regulations 1979, SI 1979/591 (as amended), partly have effect as if so made.

2 As to when a person attains a specified age see PARA 19 note 11 ante.

3 The conditions in the Social Security (Contributions) Regulations 1979, SI 1979/591, regs 87 or 119 (as amended). For the meaning of 'Great Britain' see PARA 15 note 4 ante.

4 As to the Secretary of State see PARA 1 ante.

5 Social Security (Contributions) Regulations 1979, SI 1979/591, reg 44(1). This does not apply to a person who is neither an employed earner nor a self-employed earner, unless and until that person wishes to pay a Class 3 contribution: reg 44(2). The Secretary of State may either arrange for a national insurance number to be assigned to a person in the 12 months before reaching the age of 16, or direct that person to apply for the allocation of a number before attaining that age: reg 44(3). As to Class 3 contributions see PARA 42 ante. For the meaning of 'employed earner' and 'self-employed earner' see PARA 32 ante.

6 For the meaning of 'earnings' see PARA 33 ante.

7 Social Security (Contributions) Regulations 1979, SI 1979/591, reg 45.

## **UPDATE**

## **52 National Insurance numbers**

TEXT AND NOTES--Functions of the Secretary of State under SI 1979/591 (excluding reg 44) transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2; Welfare Reform and Pensions Act 1999 Sch 11 para 35(a).

TEXT AND NOTE 1--Regulations under the Social Security Administration Act 1992 s 182C(1) may require the application to be made to the Secretary of State or the Inland Revenue (see TEXT AND NOTE 4): s 182C(1A) (added by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 31).

NOTE 1--Subject to the provisions of the Social Security (Crediting and Treatment of Contributions, and National Insurance Numbers) Regulations 2001, SI 2001/769, reg 9(2), every person, who is over the age of 16 and satisfies the conditions specified in

the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 87 or 119 (now the Social Security (Contributions) Regulations 2001, SI 2001/1004, reg 117 or 145) must, unless he has already been allocated a national insurance number under the Social Security Contributions and Benefits Act 1992, the Social Security Act 1975 or the National Insurance Act 1965, apply either to the Secretary of State or to the Inland Revenue for the allocation of a national insurance number and must make such application at such time and in such manner as the Secretary of State directs: SI 2001/769 reg 9(1). An application under reg 9(1) must be accompanied by a document of a description specified for the time being in the Immigration (Restrictions on Employment) Order 2004, SI 2004/755, Schedule Pt 1 or Pt 2 paras 1(b), 2: SI 2001/769 reg 9(1A) (added by SI 2006/2897, amended by SI 2008/223). As respects any person who is neither an employed earner nor a self-employed earner the provisions of SI 2001/769 reg 9(1) do not apply unless and until that person wishes to pay a Class 3 contribution: reg 9(2). The Secretary of State may authorise arrangements for the allocation of a national insurance number to any person during the 12 months before that person reaches the age of 16, and in particular may direct that a person who will attain the age of 16 within 12 months after such direction applies for the allocation of a national insurance number before attaining the age of 16, and any such person must accordingly comply with such direction: reg 9(3). Where a person (1) qualifies for a loan made in accordance with regulations made under the Teaching and Higher Education Act 1998 s 22, or the Education (Scotland) Act 1980 ss 73, 74(1) in connection with an academic year beginning on or after 1 September 2007; and (2) has been required as a condition of entitlement to payment of the loan to provide his national insurance number, he must, unless he has already been allocated a national insurance number, apply to the Secretary of State or the Revenue and Customs Commissioners for one to be allocated to him, and the Secretary of State or, as the case may be, the Commissioners may direct how the application is to be made: SI 2001/769 reg 9(4) (added by SI 2006/2897).

TEXT AND NOTES 3-5--1979 Regulations reg 44 revoked: SI 2001/769.

NOTE 7--Now SI 2001/1004 (NOTE 1) reg 66.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/2. CONTRIBUTIONS/(3) CONSEQUENTIAL PROVISIONS/53. Special classes of earners; reduced rate for married women and widows.

### **53. Special classes of earners; reduced rate for married women and widows.**

Special provisions relating to contributions are made in respect of airmen<sup>1</sup>, employment on the continental shelf<sup>2</sup>, mariners<sup>3</sup>, members of the forces<sup>4</sup>, persons abroad<sup>5</sup> and volunteer development workers<sup>6</sup>.

A woman who, on 6 April 1977, was married, or a widow in receipt of certain benefits<sup>7</sup>, may elect that her liability in respect of Class 1 contributions is to be a liability to contribute at the reduced rate, and elect that she is to be under no liability to pay Class 2 contributions<sup>8</sup>. Where there is such an election, Class 1 contributions are at a prescribed lower rate<sup>9</sup> and there is no liability to pay Class 2 contributions<sup>10</sup>.

1 See the Social Security (Contributions) Regulations 1979, SI 1979/591, regs 81-84. 'Airman' means a person who is, or has been, employed under a contract of service either as a pilot, commander, navigator or other member of the crew of any aircraft, or in any other capacity on board any aircraft where (1) the employment in that other capacity is for the purposes of the aircraft or its crew or of any passengers or cargo or mails carried thereby; and (2) the contract is entered into in the United Kingdom with a view to its performance (in whole or in part) while the aircraft is in flight, but does not include a person in so far as his employment is as a serving member of the forces: see reg 81. For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

2 See *ibid* reg 85 (as amended). This refers to employment (under a contract of employment or not) in any area which may from time to time be designated by Order in Council under the Continental Shelf Act 1964 s 1(7) where the employment is in connection with any activity mentioned in the Oil and Gas (Enterprise) Act 1982 s 23(2) in such designated area: Social Security (Contributions) Regulations 1979, SI 1979/591, reg 85 (amended by SI 1982/1738).

3 See the Social Security (Contributions) Regulations 1979, SI 1979/591, regs 86-98 (as amended). 'Mariner' means a person who is or has been in employment under a contract of service either as a master or member of the crew of any ship or vessel, or in any other capacity on board any ship or vessel where (1) the employment in that other capacity is for the purposes of that ship or vessel or her crew or any passengers or cargo or mails carried thereby; and (2) the contract is entered into in the United Kingdom with a view to its performance (in whole or in part) while the ship or vessel is on her voyage, but does not include a person in so far as his employment is as a serving member of the forces: reg 86.

4 See *ibid* regs 113-118 (as amended); and as to the composition of the forces see Sch 3.

5 See *ibid* regs 119-123 (as amended).

6 See *ibid* regs 123A-123F (added by SI 1986/485 and further amended).

7 As to the qualifying benefits see the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 100(8).

8 See *ibid* reg 100(1). An election for one purpose is deemed to be an election also for the other purpose: see reg 100(2).

9 As to the reduced rate (3.85% at the date at which this volume states the law) see *ibid* reg 104 (as amended).

10 See *ibid* reg 100(3). No election may be made after 11 May 1977: reg 100(4). Duration of the election is set out in reg 101 (as amended); in particular, it ceases on cessation of marriage (other than by reason of the death of the husband), a cessation of qualifying widowhood, on the making of certain contributions and on the revocation of the election. Consequential provisions relating to women who have made the election are set out in regs 102-112.

### **UPDATE**

### **53 Special classes of earners; reduced rate for married women and widows**

TEXT AND NOTES--1979 Regulations consolidated in the Social Security (Contributions) Regulations 2001, SI 2001/1004 (see PARA 33).

NOTE 1--1979 Regulations regs 81-83 now SI 2001/1004 regs 111-113. 1979 Regulations reg 84 (special transitional provisions) not reproduced.

NOTE 2--1979 Regulations reg 85 now SI 2001/1004 reg 114.

NOTE 3--1979 Regulations regs 86-98 now SI 2001/1004 regs 115-125 (reg 120 amended by SI 2003/964; SI 2001/1004 reg 125 amended by SI 2004/944, SI 2005/915, SI 2007/1094, SI 2008/703).

NOTE 4--1979 Regulations regs 113-118, Sch 3 now SI 2001/1004 regs 140-144, Sch 6.

NOTE 5--1979 Regulations regs 119-122 now SI 2001/1004 regs 145-148. 1979 Regulations reg 123 not reproduced.

NOTE 6--1979 Regulations regs 123A-123F now SI 2001/1004 regs 149-154 (reg 149 amended by SI 2002/2366).

NOTES 7-10--1979 Regulations reg 100 now SI 2001/1004 reg 127.

NOTE 10--1979 Regulations regs 102-112 now SI 2001/1004 regs 129-139 (regs 131, 133, 134, 136, 139 amended by SI 2003/964).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3.  
CONTRIBUTORY BENEFITS/STOP PRESS: CHILD BENEFIT ACT 2005

### **3.**

#### **STOP PRESS:**

The Child Benefit Act 2005 makes provision for and in connection with altering descriptions of persons in respect of whom a person may be entitled to child benefit. The Act received the royal assent on 24 March 2005 and came into force for the purpose of making regulations on that day. Subject to that, the Act comes into force on 10 April 2006.

Section 1 amends the Social Security Contributions and Benefits Act 1992 ss 141, 142 so as to make child benefit payable to a person who is responsible for a child or children who have not attained the age of 16 or a qualifying young person or persons who have not attained a prescribed age greater than 16 and satisfy further prescribed conditions. Corresponding provision is made in relation to Northern Ireland: 2005 Act s 2. Section 3, Schs 1, 2 deal with consequential amendments and repeals. Financial provision is provided for by s 4. Section 5 deals with extent, s 6 with commencement, and s 7 with short title.

#### ***Amendments and repeals***

The following parts of Acts will be amended or repealed: Social Security Contributions and Benefits Act 1992 ss 37, 39A, 77, 84(4), 85, 114, 122(1), 143, 144, 145(2), 145A, 146, 147, Sch 4 Pt 5, Schs 7, 9, 10; Social Security Administration Act 1992 ss 13, 73(2), 80, 155(6), 157(2), 158(1); Social Security Act 1998 s 18(2); and Tax Credits Act 2002 s 49(1).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(1) IN GENERAL/54. Description of contributory benefits.

## **(1) IN GENERAL**

### **54. Description of contributory benefits.**

Recent legislation has made major changes to the structure of the principal contributory benefits. In April 1995 sickness benefit and invalidity benefit were abolished and replaced by incapacity benefit<sup>1</sup> and in October 1996 unemployment benefit was abolished and replaced by jobseeker's allowance<sup>2</sup>. While incapacity benefit remains a wholly contributory benefit and so dealt with under this heading, jobseeker's allowance became a hybrid; the initial entitlement is to contribution-based jobseeker's allowance which remains contributory, but on the expiry of that, the claimant's entitlement is to income-based jobseeker's allowance (that is, the income support rules applied to those required to be available for work), which is a means-tested benefit<sup>3</sup>. Jobseeker's allowance is therefore treated separately in this title<sup>4</sup>.

The contributory benefits under Part II of the Social Security Contributions and Benefits Act 1992<sup>5</sup> are:

- 160 (1) incapacity benefit (short-term and long-term)<sup>6</sup>;
- 161 (2) maternity allowance (with increase for adult dependants)<sup>7</sup>;
- 162 (3) widow's benefit (comprising widow's payment, widowed mother's allowance with increase for child dependants and widow's pension)<sup>8</sup>;
- 163 (4) Category A retirement pension, payable to a person by virtue of his own contributions (with increase for adult and child dependants)<sup>9</sup>;
- 164 (5) Category B retirement pension, payable to a person by virtue of the contributions of a spouse (with increase for child dependants)<sup>10</sup>.

Retirement pensions are discussed elsewhere in this title<sup>11</sup>.

There is still, in addition, a benefit known as child's special allowance payable to mothers who did not qualify for widowed mother's allowance because they had been divorced from their former husbands before those husbands died, but this benefit was abolished as from 5 April 1987 and is only payable to a claimant already in receipt of it at that date<sup>12</sup>.

Within the scheme of the legislation, 'long-term benefits' means long-term incapacity benefit, widowed mother's allowance, widow's pension and a Category A or Category B retirement pension<sup>13</sup>; 'short-term benefits' means short-term incapacity benefit and maternity allowance<sup>14</sup>.

1 See the Social Security (Incapacity for Work) Act 1994 ss 1-4; the Social Security (Incapacity for Work) Act 1994 (Commencement) Order 1994, SI 1994/2926; and PARA 59 et seq post.

2 See the Jobseekers Act 1995 Pt I (ss 1-23); the Jobseekers Act 1995 (Commencement No 4) Order 1996, SI 1996/2208; and PARA 258 et seq post.

3 The other principal difference is that the Social Security (Incapacity for Work) Act 1994 operated by amending the sickness provisions in the Social Security Contributions and Benefits Act 1992, into which the law on incapacity benefit is inserted, whereas the Jobseekers Act 1995 itself contains the substantive law on the jobseeker's allowances and operates independently of the 1992 Act.

4 See PARA 258 et seq post.

5 Ie the Social Security Contributions and Benefits Act 1992 Pt II (ss 20-62) (as amended): see PARA 55 post.

6 See PARA 59 et seq post.

7 See PARAS 77-79 et seq post.

8 See PARA 80 et seq post.

9 See PARA 568 et seq post.

10 Social Security Contributions and Benefits Act 1992 s 20(1) (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 2; the Jobseekers Act 1995 s 41(5), Sch 3; and the Pensions Act 1995 s 126(c), Sch 4 para 21(1)). As to Category B retirement pensions see PARA 571 et seq post.

11 See generally para 561 et seq post. The provisions of the Social Security Contributions and Benefits Act 1992 Pt II (as amended) are subject to the provisions of the Pension Schemes Act 1993 Pt III (ss 7-68) (as amended) (reduction in state scheme contributions and benefits for members of certified schemes: see PARA 877 et seq post): Social Security Contributions and Benefits Act 1992 s 20(3) (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 35).

12 See the Social Security Contributions and Benefits Act 1992 s 56. A woman whose marriage has been terminated by divorce is entitled to a child's special allowance at the weekly rate specified in Sch 4 Pt I para 6 (as amended) if (1) the husband of that marriage is dead and satisfied the contribution condition for a child's special allowance specified in s 21(3), Sch 3 para 6; and (2) she is entitled to child benefit in respect of a child and either was so entitled immediately before that husband's death or in such circumstances as may be prescribed, he was then so entitled; and (3) either that husband had before his death been contributing at not less than the prescribed weekly rate to the cost of providing for that child or at the date of that husband's death she was entitled, under an order of a court, trust or agreement which she has taken reasonable steps to enforce, to receive (whether from that husband or from another person) payments in respect of that child at not less than that rate provided or procured by that husband: s 56(1). A child's special allowance is not payable to a woman for any period after her remarriage or for any period during which she and a man to whom she is not married are living together as husband and wife (as to which see PARA 83 post); and where a person is otherwise entitled to receive, in respect of a particular child, payment of an amount by way of a child's special allowance, that amount is not payable unless one of the specified conditions is satisfied: s 56(2), (3). Those conditions are that the beneficiary would be treated for the purposes of child benefit law as having the child living with him or that the requisite contributions are being made to the cost of providing for the child, and the latter condition is to be treated as satisfied if, but only if, such contributions are being made at a weekly rate not less than the amount of child's special allowance by the beneficiary or, where the beneficiary is one of two spouses residing together, by them together and (except in prescribed cases), the contributions are over and above those required for the purpose of satisfying s 143(1)(b) (see PARA 240 post): s 56(4), (5). A child's special allowance is not payable for any period after 5 April 1987 except to a woman who immediately before 6 April 1987 satisfied the conditions set out in heads (1)-(3) supra and was not barred from payment of the allowance for either of the reasons mentioned in s 56(2), and who has so continued since 6 April 1987: s 56(6). For the meaning of 'beneficiary' see PARA 21 note 2 ante.

13 Ibid s 20(2) (amended by the Social Security (Incapacity for Work) Act 1994 Sch 1 para 2).

14 Social Security Contributions and Benefits Act 1992 s 20(2) (as amended: see note 13 supra; further amended by the Jobseekers Act 1995 Sch 3).

## UPDATE

### 54 Description of contributory benefits

TEXT AND NOTES 5-10--Head (1) prospectively repealed: Welfare Reform Act 2007 Sch 8. In head (3) reference to widow's payment omitted and heads (6), (7) added as follows (6) bereavement benefits, (comprising bereavement payment (see PARA 84), widowed parent's allowance (see PARA 87A), and bereavement allowance (see PARA 87B); and (7) shared additional pension (see PARA 582A): Social Security Contributions and Benefits Act 1992 s 20(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 8 para 3(2), Sch 12 paras 14, 15(2), Sch 13 Pt V, Tax Credits Act 2002 Sch 6). Subject to savings (see SI 2003/938) Social Security Contributions and Benefits Act 1992 s 20(1) further amended so as to omit the words '(with increase for child dependants)' (in each place) and in head (4) the words 'with increase for adult and child dependants': Tax Credits Act 2002 Sch 6, Welfare Reform Act 2009 Sch 7 Pt 2. In head (5) after 'spouse' add 'or civil partner': Civil Partnership Act 2004 Sch 24 para 13.

NOTE 12--Subject to savings (see SI 2003/938) Social Security Contributions and Benefits Act 1992 s 56(1) amended: Tax Credits Act 2002 Sch 6.

TEXT AND NOTE 13--'Long-term benefit' also now means a widowed parent's allowance and bereavement allowance (Social Security Contributions and Benefits Act 1992 s 20(2) (amended by the Welfare Reform and Pensions Act 1999 Sch 8 paras 2, 3(1), (3))) and a shared additional pension (Social Security Contributions and Benefits Act 1992 s 20(2) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 14, 15(1), (3))).

As from a day to be appointed 1992 Act s 20(2) further amended: Welfare Reform Act 2007 Sch 8.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(1) IN GENERAL/55. Contribution conditions; in general.

## 55. Contribution conditions; in general.

Entitlement to the contributory benefits<sup>1</sup>, except for long-term incapacity benefit<sup>2</sup> and either short-term or long-term incapacity benefit for widows or widowers<sup>3</sup>, depends on the contribution conditions being satisfied, either by the claimant<sup>4</sup> or by some other person, according to the particular benefit<sup>5</sup>. The relevant contribution conditions are specified<sup>6</sup> in relation to each benefit<sup>7</sup>.

The class or classes of contribution<sup>8</sup> which are relevant<sup>9</sup> in relation to each of those benefits are as follows:

- 165 (1) short-term incapacity benefit<sup>10</sup>, Class 1 or 2;
- 166 (2) maternity allowance, Class 1 or 2;
- 167 (3) widow's payment, Class 1, 2 or 3;
- 168 (4) widowed mother's allowance, Class 1, 2 or 3;
- 169 (5) widow's pension, Class 1, 2 or 3;
- 170 (6) Category A retirement pension, Class 1, 2 or 3;
- 171 (7) Category B retirement pension, Class 1, 2 or 3;
- 172 (8) child's special allowance, Class 1, 2 or 3<sup>11</sup>.

1 For the meaning of 'contributory benefit' see PARA 54 ante.

2 The condition for receiving this is the exhaustion of the entitlement to short-term incapacity benefit, which itself is contributory: see the Social Security Contributions and Benefits Act 1992 s 30A(5) (as added); and PARA 60 post.

3 Ie under ibid ss 40 or 41 (as substituted): see PARAS 88-89 post.

4 For the meaning of 'claimant' see PARA 19 note 5 ante.

5 Social Security Contributions and Benefits Act 1992 s 21(1) (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 3). As to contributions generally see PARA 31 et seq ante.

6 Ie in the Social Security Contributions and Benefits Act 1992 s 21(3), Sch 3 Pt I (paras 2-6) (as amended): see PARAS 54 note 12 ante, 61, 77, 84-85 post. The contribution conditions for contribution-based jobseeker's allowance are set out separately in the Jobseekers Act 1995 s 2, but using the same expressions and techniques: see PARA 266 post.

7 Social Security Contributions and Benefits Act 1992 s 21(3). Special conditions apply for the satisfaction of contribution conditions for benefit, other than maternity allowance, in certain cases where a claim for short-term benefit or a widow's payment is, or has on a previous occasion been, made in the first or second year after that in which the contributor concerned first became liable for primary Class 1 or Class 2 contributions: see s 21(4), Sch 3 Pt II (paras 7-9) (as amended); and PARAS 61, 84 post. For the purposes of s 21(4), Sch 3 (as amended), (1) 'the contributor concerned', for the purposes of any contribution condition, means the person by whom the condition is to be satisfied; (2) 'a relevant class', in relation to any benefit, means a class of contributions specified in relation to that benefit in heads (1)-(8) in the text; (3) 'the earnings factor' means (a) where the year in question is 1987-88 or any subsequent tax year, in relation to a person, the aggregate of his earnings factors derived from all his earnings upon which primary Class 1 contributions have been paid or treated as paid and from his Class 2 and Class 3 contributions; and (b) where the year in question is any earlier tax year, in relation to a person's contributions of any class or classes, the aggregate of his earnings factors derived from all those contributions; (4) except in the expression 'benefit year', 'year' means a tax year: s 21(5). In Pt II (as amended) 'benefit year' means a period beginning with the first Sunday in January in any calendar year, and ending with the Saturday immediately preceding the first Sunday in January in the following calendar year; but for any prescribed purposes of Pt II (as amended), 'benefit year' may by regulations be made to mean such other period (whether or not a period of 12 months) as may be specified in the regulations: s 21(6). At the date at which this volume states the law, no such regulations had been made and none had effect

as if so made. As to primary Class 1 contributions, Class 2 and Class 3 contributions see PARAS 34-42 ante; for the meaning of 'tax year' see PARA 9 note 6 ante; and as to earnings factors generally see PARA 56 post.

8 As to classes of contributions see PARA 31 ante.

9 Ie for the purposes of the Social Security Contributions and Benefits Act 1992 s 21(1) (as amended: see note 5 supra).

10 Ie under ibid s 30A (as added): see PARA 60 post.

11 Ibid s 21(2) (amended by the Social Security (Incapacity for Work) Act 1994 Sch 1 para 3; and the Jobseekers Act 1995 s 41(5), Sch 3). Like the previous unemployment benefit, contribution-based jobseeker's allowance remains the exception because it can only be claimed by a person who has paid the necessary Class 1 contributions, ie it can only be claimed by a person who contributed as an employee: see the Jobseekers Act 1995 s 2; and PARA 266 post.

## UPDATE

### 55 Contribution conditions; in general

TEXT AND NOTES--Where primary Class 1 contributions have been paid or treated as paid on any part of a person's earnings, the Social Security Contributions and Benefits Act 1992 ss 21(5)(c), 22(1)(a), (2A), (3)(a), 23(3)(a), 24(2)(a), 44(6)(za), (a), Sch 3 paras 2(4)(a), (5)(a), 4(2)(a), 5(2)(b), (4)(a), 7(4)(a) have effect as if such contributions had been paid or treated as paid on so much of the earnings as did not exceed the upper earnings limit: s 21(5A) (added by the Social Security Act 1998 Sch 7 para 60; and amended by the Child Support, Pensions and Social Security Act 2000 s 35(1), (2); and Tax Credits Act 2002 Sch 6).

As from a day to be appointed 1992 Act s 21 further amended: Welfare Reform Act 2007 Sch 8.

TEXT AND NOTES 1-5--Also excepted are maternity allowance under the Social Security Contributions and Benefits Act 1992 s 35 (see PARA 76), shared additional pension under s 55A (see PARA 582A) and short-term incapacity benefit under s 30A(1)(b): s 21(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 8 paras 21, 31(2), Sch 12 para 16).

NOTE 7--Words 'other than maternity allowance' omitted and for 'widow's payment' read 'bereavement payment': Social Security Contributions and Benefits Act 1992 s 21(4) (amended by the Welfare Reform and Pensions Act 1999 Sch 8 paras 4(3), 31(4)).

In head (3)(a) for 'all his earnings' read 'so much of his earnings as did not exceed the upper earnings limit and': Social Security Contributions and Benefits Act 1992 s 21(5) (amended by the National Insurance Contributions Act 2002 Sch 1 para 6, with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2))).

TEXT AND NOTES 8-11--Head (2) omitted; in head (3) for 'widow's payment' read 'bereavement payment'; and heads (9) widowed parent's allowance, Class 1, 2 or 3; and (10) bereavement allowance, Class 1, 2 or 3, added: Social Security Contributions and Benefits Act 1992 s 21(2) (amended by the Welfare Reform and Pensions Act 1999 Sch 8 paras 4(2), 31(3)).

NOTE 10--Now refers to Social Security Contributions and Benefits Act 1992 s 30A(1)(a) (see reference to s 30A(1) as originally enacted: see PARA 60).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(1) IN GENERAL/56. Earnings factors.

## **56. Earnings factors.**

For the purposes of establishing, by reference to the satisfaction of contribution conditions<sup>1</sup>, entitlement to a contribution-based jobseeker's allowance<sup>2</sup> or to any specified contributory benefit<sup>3</sup> other than maternity allowance<sup>4</sup> or of calculating the additional pension<sup>5</sup> in the rate of a long-term benefit<sup>6</sup>, a person is to be treated as having annual earnings<sup>7</sup> factors derived:

- 173 (1) in the case of 1987-88 or any subsequent tax year<sup>8</sup>, from those of his earnings upon which primary Class 1 contributions<sup>9</sup> have been paid or treated as paid and from Class 2 or Class 3 contributions<sup>10</sup>; and
- 174 (2) in the case of any earlier tax year, from his contributions of any of Classes 1, 2 and 3<sup>11</sup>.

Earnings factors so derived, including those factors as increased by any revaluation order<sup>12</sup>, are to be expressed as whole numbers of pounds sterling<sup>13</sup> and are to be made ascertainable from tables or rules to be drawn up by the Secretary of State<sup>14</sup> and embodied in regulations<sup>15</sup>.

No earnings factor is to be derived from earnings on which primary Class 1 contributions are paid at the reduced rate<sup>16</sup>.

Regulations may provide for crediting earnings or Class 2 or Class 3 contributions for 1987-88 or any subsequent tax year, or contributions of any class for any earlier tax year, for the purpose of bringing a person's earnings factor for that tax year to a figure which will enable him to satisfy contribution conditions of entitlement to a contribution-based jobseeker's allowance or to any prescribed description of benefit (whether his own entitlement or another person's)<sup>17</sup>. Regulations may also impose limits with respect to the earnings factors which a person may have or be treated as having in respect of any one tax year<sup>18</sup>.

The Secretary of State must in each tax year review the general level of earnings obtaining in Great Britain<sup>19</sup> and any changes in that level which have taken place since the end of the period taken into account for the last such review, for the purpose of securing that earnings factors which are relevant:

- 175 (a) to the calculation of the additional pension in the rate of any long-term benefit or of any guaranteed minimum pension; or
- 176 (b) to any other calculation required under the provisions of the Pension Schemes Act 1993 relating to contracting out<sup>20</sup>,

maintain their value in relation to the general level of earnings obtaining in Great Britain; and for the purposes of any such review the Secretary of State must estimate the general level of earnings in such manner as he thinks fit<sup>21</sup>. If on any such review the Secretary of State concludes, having regard to earlier orders made under these provisions, that earnings factors for any previous tax year (not being earlier than 1978-79) have not, during the period taken into account for that review, maintained their value in relation to the general level of earnings, he must make an order directing that, for the purposes of any such calculation as is mentioned in heads (a) and (b) above, the earnings factors for the tax year in question are to be increased by such percentage of their amount, apart from earlier orders, as the Secretary of State thinks necessary to make up that fall in their value, during the period taken into account for the review together with other falls in their value which had been made up by such earlier orders<sup>22</sup>.

He is not, however, required to direct any increase where it appears to him that the increase would be inconsiderable<sup>23</sup>.

If on any such review the Secretary of State determines that he is not required to make an order, he must instead lay before each House of Parliament a report explaining his reasons for arriving at that determination<sup>24</sup>.

1 As to contribution conditions generally see PARA 55 ante.

2 As to the contribution-based jobseeker's allowance see PARA 266 et seq post.

3 Ie any of the contributory benefits specified in the Social Security Contributions and Benefits Act 1992 s 20(1) (as amended): see PARA 54 ante.

4 As to maternity allowance see PARAS 76-79 post.

5 As to the additional pension see PARA 569 post.

6 For the meaning of 'long-term benefit' see PARA 54 ante.

7 For the meaning of 'earnings' see PARA 33 ante.

8 For the meaning of 'tax year' see PARA 9 note 6 ante.

9 As to primary Class 1 contributions see PARAS 34-36 ante.

10 As to Class 2 and Class 3 contributions see PARAS 40-42 ante.

11 Social Security Contributions and Benefits Act 1992 s 22(1), (2) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 22). Separate earnings factors may be derived for 1987-88 and subsequent tax years (1) from earnings upon which primary Class 1 contributions have been paid or treated as paid; (2) from earnings which have been credited; (3) from contributions of different classes paid or credited in the same tax year; (4) by any combination of heads (1)-(3) supra; and may be derived for any earlier tax year from contributions of different classes paid or credited in the same tax year, and from contributions which have actually been paid, as opposed to those not paid but credited: Social Security Contributions and Benefits Act 1992 s 22(3).

12 Ie any order under the Social Security Administration Act 1992 s 148: see the text and notes 19-24 infra.

13 Earnings factors in respect of the tax year 1978-79 or any subsequent tax year which have been revalued for the purpose of calculating guaranteed minimum pensions under the Pension Schemes Act 1993 or the Social Security Pensions Act 1975 (largely repealed) are not, however, required to be expressed as whole numbers of pounds: Social Security Contributions and Benefits Act 1992 s 23(2) (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 36).

14 As to the Secretary of State see PARA 1 ante.

15 Social Security Contributions and Benefits Act 1992 s 23(1) (amended by the Pensions Act 1995 s 134(1)). The tables and rules referred to in the text must be drawn up so that, in general (1) in respect of the tax year 1987-88 and any subsequent tax year, the amount of earnings upon which primary Class 1 contributions have been paid or treated as paid gives rise to an earnings factor for that year equal or approximating to the amount of those earnings; and (2) any number of Class 2 or Class 3 contributions in respect of a tax year gives rise to an earnings factor for that tax year equal or approximating to that year's lower earnings limit for Class 1 contributions multiplied by the number of contributions: Social Security Contributions and Benefits Act 1992 s 23(3). The Secretary of State may by regulations make such modifications of head (1) supra as appear to him to be appropriate in consequence of s 8(2) (as amended) (primary percentages: see PARA 36 ante): s 23(4). At the date at which this volume states the law, no regulations had been made for these purposes, but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Earnings Factor) Regulations 1979, SI 1979/676 (as amended), partly have effect as if so made.

16 See the Social Security Contributions and Benefits Act 1992 s 22(4), which is expressed to be subject to s 19(4)-(6); and see PARA 53 ante.

17 Ibid s 22(5) (amended by the Jobseekers Act 1995 Sch 2 para 22). The power to amend regulations made before 30 March 1977 (date of the passing of the Social Security (Miscellaneous Provisions) Act 1977) under the Social Security Contributions and Benefits Act 1992 s 22(5) (as so amended) may be so exercised as to restrict the circumstances in which and the purposes for which a person is entitled to credits in respect of weeks before

the coming into force of the amending regulations; but not so as to affect any benefit for a period before the coming into force of the amending regulations if it was claimed before 18 March 1977: s 22(7). The following regulations partly have effect, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), as if made under the Social Security Contributions and Benefits Act 1992 s 22(5): (1) the Social Security (Credits) Regulations 1975, SI 1975/556 (as amended); (2) the Social Security (Married Women and Widows) (Amendment and Transitional Provisions) Regulations 1975, SI 1975/562 (as amended); (3) the Social Security (Contributions) Regulations 1979, SI 1979/591 (as amended). In addition, by virtue of predecessor provisions and of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Benefit) (Married Women and Widows Special Provisions) Regulations 1974, SI 1974/2010 (as amended) partly have effect as if so made.

18 Social Security Contributions and Benefits Act 1992 s 22(6). At the date at which volume states the law, no such regulations had been made and none had effect as if so made.

19 For the meaning of 'Great Britain' see PARA 15 note 4 ante.

20 Ie under the Pension Schemes Act 1993 Pt III (ss 7-68) (as amended): see PARA 877 et seq post.

21 Social Security Administration Act 1992 s 148(1), (2) (amended by virtue of the Pension Schemes Act 1993 s 190, Sch 8 para 31).

22 Social Security Contributions and Benefits Act 1992 s 148(3), (4).

23 See *ibid* s 148(5).

24 *Ibid* s 148(6). For these purposes, and without prejudice to the Interpretation Act 1978 ss 16, 17 (see STATUTES vol 44(1) (Reissue) PARA 1296 et seq), any review under the Social Security Pensions Act 1975 s 21 (repealed) is to be treated as a review, and any order thereunder is to be treated as an order, under the Social Security Administration Act 1992 s 148 (as amended): s 148(7) (amended by the Pension Schemes Act 1993 Sch 8 para 27).

## UPDATE

### 56 Earnings factors

TEXT AND NOTES 1-18--The Social Security Contributions and Benefits Act 1992 s 23A (see PARA 565A) makes provision for the crediting of Class 3 contributions for the purpose of determining entitlement to the benefits to which s 23A applies: s 22(5A) (added by Pensions Act 2007 Sch 1 para 9).

TEXT AND NOTES 1-11--For the purpose of calculating the additional pension in the rate of a long-term benefit, in the case of the first appointed year or any subsequent tax year a person's earnings factor is treated as derived only from so much of his earnings as did not exceed the applicable limit and on which primary Class 1 contributions have been paid or treated as paid: Social Security Contributions and Benefits Act 1992 s 22(2A) (added by the Child Support, Pensions and Social Security Act 2000 s 30(1); and amended by the National Insurance Contributions Act 2002 Sch 1 para 7(2), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2)); further amended by Pensions Act 2007 s 12(1)(a)). 'First appointed year' means such tax year, no earlier than 2002-03, as may be appointed by order: Social Security Contributions and Benefits Act 1992 s 122(1) (amended by the Child Support, Pensions and Social Security Act 2000 s 35(14)). The tax year 2002-03 has been appointed as the first appointed year: SI 2001/208. 'The applicable limit' means (1) in relation to a tax year before 2009-10, the upper earnings limit; (2) in relation to 2009-10 or any subsequent tax year, the upper accrual point: Social Security Contributions and Benefits Act 1992 s 22(2B) (added by Pensions Act 2007 s 12(1)(b); and amended by the National Insurance Contributions Act 2008 s 3(2)). The 1992 Act s 22(2A) does not affect the operation of ss 44A and 44B (deemed earnings factors: see PARA 569): s 22(2A) (amended by Pensions Act 2007 Sch 1 para 33). References in the Social Security Contributions and Benefits Act 1992 or any other Act to earnings factors derived from so much of a person's earnings as do not exceed the upper accrual point or the upper

earnings limit are to be read, in relation to earners paid otherwise than weekly, as references to earnings factors derived from so much of those earnings as do not exceed the prescribed equivalent: s 22(9) (added by the National Insurance Contributions Act 2008 Sch 1 para 2).

TEXT AND NOTE 3--Or entitlement to a contributory employment and support allowance: Social Security Contributions and Benefits Act 1992 s 22(2) (amended by Welfare Reform Act 2007 Sch 3 para 9(3)(a)). In the Social Security Contributions and Benefits Act 1992 s 22, 'contributory employment and support allowance' means a contributory allowance under the Welfare Reform Act 2007 Pt 1 (ss 1-29): Social Security Contributions and Benefits Act 1992 s 22(8) (added by Welfare Reform Act 2007 Sch 3 para 9(4)).

TEXT AND NOTE 9--For 'those of his earnings' read 'so much of his earnings as did not exceed the upper earnings limit and': Social Security Contributions and Benefits Act 1992 s 22(1) (amended by the 2002 Act Sch 1 para 7(2)).

NOTE 11--Head (1) now refers to earnings not exceeding the upper earnings limit: Social Security Contributions and Benefits Act 1992 s 22(3) (amended by the 2002 Act Sch 1 para 7(3)).

NOTE 15--Head (1) now refers to the amount of earnings not exceeding the upper earnings limit: Social Security Contributions and Benefits Act 1992 s 23(3) (amended by the 2002 Act Sch 1 para 8). In relation to 2009-10 and subsequent tax years, head (1) has effect, for the purposes specified in the Social Security Contributions and Benefits Act 1992 s 22(2)(b), as if the reference to the upper earnings limit were to the upper accrual point: s 23(3A) (added by the National Insurance Contributions Act 2008 Sch 1 para 3(3)). SI 1979/676 further amended: SI 2003/608.

TEXT AND NOTE 16--For 'on which' read 'in respect of which': Social Security Contributions and Benefits Act 1992 s 22(4) (amended by the Social Security Act 1998 Sch 7 para 61).

TEXT AND NOTE 17--Refers also to entitlement to a contributory employment and support allowance (see PARA 75A): 1992 Act s 22(5) (amended by Welfare Reform Act 2007 Sch 3 para 9(3)(b)).

NOTE 17--Head (1) SI 1975/556 further amended: SI 1999/568, SI 2000/1483, SI 2000/3120, SI 2001/518, SI 2001/573, SI 2001/1711, SI 2003/521, SI 2005/2877, SI 2007/1749, SI 2007/2582, SI 2008/1554, SI 2009/2206, SI 2010/385, SI 2010/424. With regard to SI 1975/556 see also the New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915. Head (3) 1979 Regulations consolidated in the Social Security (Contributions) Regulations 2001, SI 2001/1004 (see PARA 33).

Regulations made under the Social Security Contributions and Benefits Act 1992 s 22(5)(a) (ie for 1987-88 or any subsequent tax year), in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

SI 1974/2010 further amended: SI 2005/2877, SI 2008/1554.

TEXT AND NOTE 20--For 'taken place since ... such review' read 'taken place (1) since the end of the period taken into account for the last review under the Social Security Administration Act 1992 s 148; or (2) since such other date (whether earlier or later) as he may determine': s 148(2) (amended by the Child Support, Pensions and Social Security Act 2000 s 37).

NOTE 22--See the Social Security Revaluation of Earnings Factors Order 1999, SI 1999/1235; the Social Security Revaluation of Earnings Factors Order 2000, SI 2000/1365; the Social Security Revaluation of Earnings Factors Order 2001, SI 2001/631; the Social Security Revaluation of Earnings Factors Order 2002, SI 2002/519; the Social Security Revaluation of Earnings Factors Order 2003, SI 2003/517; the Social Security Revaluation of Earnings Factors Order 2004, SI 2004/262; the Social Security Revaluation of Earnings Factors Order 2005, SI 2005/216; the Social Security Revaluation of Earnings Order 2006, SI 2006/496; the Social Security Revaluation of Earnings Factors Order 2007, SI 2007/781; the Social Security Revaluation of Earnings Factors Order 2008, SI 2008/730; and the Social Security Revaluation of Earnings Factors Order 2009, SI 2009/608.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(1) IN GENERAL/57. Records of earnings and contributions.

## **57. Records of earnings and contributions.**

Regulations may provide for requiring persons to maintain, in such form and manner as may be prescribed<sup>1</sup>, records of such earnings<sup>2</sup> paid by them as are relevant for the purpose of calculating earnings factors<sup>3</sup>, and to retain such records for so long as may be prescribed<sup>4</sup>.

Where the Secretary of State<sup>5</sup> is satisfied that records of earnings relevant for the purposes of calculating a person's earnings factors for the tax year<sup>6</sup> 1987-88 or any subsequent tax year have not been maintained or retained, or are otherwise unobtainable, then for the purpose of determining those earnings factors he may:

- 177 (1) compute, in such manner as he thinks fit, an amount which is to be regarded as the amount of that person's earnings on which primary Class 1 contributions<sup>7</sup> have been paid or treated as paid; or
- 178 (2) take the amount of those earnings to be such sum as he may specify in the particular case<sup>8</sup>.

With regard to official records, it is provided that a certificate signed by a duly authorised officer of the Department of Social Security, as to the manner in which any contributions paid or treated as having been paid or as not repaid have been, or are to be, recorded in the records of the department is to be sufficient evidence of the facts so certified; any document purporting to be so signed is to be deemed to be so signed unless the contrary is proved<sup>9</sup>.

1 For the meaning of 'prescribed' see PARA 19 note 3 ante.

2 For the meaning of 'earnings' see PARA 33 ante.

3 As to earnings factors see PARA 56 ante.

4 Social Security Contributions and Benefits Act 1992 s 24(1). At the date at which this volume states the law, no such regulations had been made and none had effect as if so made.

5 As to the Secretary of State see PARA 1 ante.

6 For the meaning of 'tax year' see PARA 9 note 6 ante.

7 As to primary Class 1 contributions see PARAS 34-36 ante.

8 Social Security Contributions and Benefits Act 1992 s 24(2).

9 See the Social Security (Earnings Factors) Regulations 1979, SI 1979/676, reg 3 (amended by SI 1988/1843).

## **UPDATE**

## **57 Records of earnings and contributions**

TEXT AND NOTE 7--For 'that person's earnings' read 'so much of that person's earnings as did not exceed the upper earnings limit and': Social Security Contributions and Benefits Act 1992 s 24(2) (amended by the National Insurance Contributions Act 2002 Sch 1 para 9, with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2))).



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(1) IN GENERAL/58. Failure to satisfy contribution conditions; contributions paid in error.

## **58. Failure to satisfy contribution conditions; contributions paid in error.**

Where the first contribution condition is satisfied but not the second<sup>1</sup>, a person may still be eligible for a widowed mother's allowance, a widow's pension, or a Category A or Category B retirement pension, but at a reduced rate<sup>2</sup>. Where, however, an employed earner dies as a result of an industrial accident or disease, his widow may still be entitled to a widow's payment, widowed mother's allowance, widow's pension or Category B retirement pension, even though he did not satisfy the contribution conditions<sup>3</sup>.

There is a power for the Secretary of State<sup>4</sup> to provide that any primary Class 1 contributions<sup>5</sup> paid in error (because the individual was not an employed earner) are to entitle the individual to an additional pension<sup>6</sup> for the purposes of Category A or B retirement pension, widowed mother's allowance, widow's pension or incapacity benefit<sup>7</sup>.

1 The relevant contribution conditions are those set out in the Social Security Contributions and Benefits Act 1992 s 21(3), Sch 3 para 5 (as amended): see PARA 565 post.

2 See the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, SI 1979/642, reg 6(1) (substituted by SI 1990/2642). The basic rule is that the benefit is reduced to the percentage of actual qualifying years in relation to the requisite number of years specified for that person's working life in the Social Security Contributions and Benefits Act 1992 Sch 3 para 5 (as amended), subject to a minimum of 25%. See further PARA 565 post.

3 See the Social Security Contributions and Benefits Act 1992 s 60(2),(3) (as amended); and PARA 565 post.

4 As to the Secretary of State see PARA 1 ante.

5 As to primary Class 1 contributions see PARAS 34-36 ante.

6 I.e. the additional pension in a Category A retirement pension under the Social Security Contributions and Benefits Act 1992 s 45 (see PARA 569 post), which is then further applied for the purposes of the other benefits listed in the text.

7 See *ibid* 61A (added by the Pensions Act 1995 s 133); and PARA 566 post.

## **UPDATE**

### **58 Failure to satisfy contribution conditions; contributions paid in error**

TEXT AND NOTE 2--A person may also still be eligible for widowed parent's allowance or bereavement allowance but at a reduced rate: SI 1979/642 reg 6(1) (amended by SI 2000/1483).

TEXT AND NOTE 3--For 'widow's payment' read 'bereavement payment'; his widow may also be entitled to a widowed parent's allowance and bereavement allowance: Social Security Contributions and Benefits Act 1992 s 60(3) (amended by the Welfare Reform and Pensions Act 1999 Sch 8 paras 2, 8(3)). As to widowed parent's allowance see PARA 87A, and as to bereavement allowance see PARA 87B.

TEXT AND NOTE 7--1992 Act s 61A amended: see PARA 566.

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## **(2) INCAPACITY BENEFIT**

### **(i) In general**

#### **59. Introduction.**

Prior to 1994 an employee becoming incapable of work was entitled to statutory sick pay for the first 28 weeks, paid through the employer, whereas a person not so entitled could claim sickness benefit directly from the Department of Social Security, again for a maximum of 28 weeks<sup>1</sup>. If either entitlement was exhausted, the person could then claim invalidity benefit, which was the principal benefit for the long-term sick<sup>2</sup>. This system was radically changed, as from 13 April 1995, by the Social Security (Incapacity for Work) Act 1994. The statutory sick pay scheme remains as before, but sickness and invalidity benefits were abolished<sup>3</sup> and replaced by incapacity benefit, payable at three levels: lower rate short-term benefit for the first 28 weeks, higher rate short-term benefit for the remainder of the first year, and long-term benefit into the future, with additions for age and dependants<sup>4</sup>.

Equally radical was the complete change in the manner of establishing incapacity for work. Previously, this was a question of fact, taking into account the claimant's actual ability to undertake work that he could reasonably be expected to do, but that link with actual ability to work has now been broken; such ability is only relevant while the 'own occupation' test is applicable<sup>5</sup>, which is normally for the first 28 weeks, but thereafter the claimant is subject to the 'all work' test<sup>6</sup>, which is based on a series of work-related functions and a medical assessment of whether the claimant can perform them; they are scored on a points system and continued qualification for the benefit depends on scoring the requisite number of points, not on actual ability or inability to do any particular work<sup>7</sup>.

These new tests for incapacity for work apply wherever that factor is relevant under the Social Security Contributions and Benefits Act 1992<sup>8</sup> (except in relation to statutory sick pay or the industrial injuries scheme)<sup>9</sup>. However, they are principally of importance in relation to incapacity benefit and so are considered in that context.

The Secretary of State<sup>10</sup> was given power by regulations to make such provision as appeared to him to be necessary or expedient for the purposes of, or in connection with, the transition to incapacity benefit from sickness benefit and invalidity benefit<sup>11</sup>, including in particular provision for transitional awards of incapacity benefit where a person was entitled to sickness benefit or invalidity benefit immediately before 18 November 1994<sup>12</sup>. For the period of four years from 5 July 1994 a statutory instrument which contains, whether alone or with other provisions, any such regulations may not be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House<sup>13</sup>.

The Secretary of State also has a general power to make transitional and consequential provision relating to incapacity benefit<sup>14</sup>.

1 As to statutory sick pay see EMPLOYMENT vol 39 (2009) PARA 498 et seq. Sickness benefit was governed by the Social Security Contributions and Benefits Act 1992 ss 31, 32 (repealed).

2 Invalidity benefit was governed by *ibid* ss 33, 34 (repealed).

3 See the Social Security (Incapacity for Work) Act 1994 s 11, Sch 1 para 7, Sch 2.

- 4 See the Social Security Contributions and Benefits Act 1992 ss 30A-30E (as added); and PARA 60 et seq post. Transitional provisions were contained in the Social Security (Incapacity Benefit) (Consequential and Transitional Amendments and Savings) Regulations 1995, SI 1995/829; and the Social Security (Incapacity Benefit) (Transitional) Regulations 1995, SI 1995/310 (as amended).
- 5 See PARA 67 post.
- 6 See PARA 68 post.
- 7 See PARAS 69-75 post.
- 8 See the Social Security Contributions and Benefits Act 1992 s 171A(1) (added by the Social Security (Incapacity for Work) Act 1994 s 5); and PARA 65 post.
- 9 See the Social Security Contributions and Benefits Act 1992 s 171G(1) (added by the Social Security (Incapacity for Work) Act 1994 s 6(1)); and PARA 65 post.
- 10 As to the Secretary of State see PARA 1 ante.
- 11 See the Social Security (Incapacity for Work) Act 1994 s 4(1). The Social Security Contributions and Benefits Act 1992 s 175(2)-(4) (as amended) (see PARA 30 ante) applies in relation to this power as it applies in relation to a power conferred by that Act to make regulations: Social Security (Incapacity for Work) Act 1994 s 4(11).
- 12 See *ibid* s 4(3). For details of the provision that may be made by such regulations see s 4(2), (4)-(10). The Social Security (Incapacity Benefit) (Transitional) Regulations 1995, SI 1995/310 (as amended), partly have effect as if so made.
- 13 Social Security (Incapacity for Work) Act 1994 s 4(12). A statutory instrument which contains (whether alone or with other provisions) any regulations made under s 4 and which is not subject to any requirement that a draft of the instrument be laid before and approved by a resolution of each House of Parliament, is subject to annulment in pursuance of a resolution of either House of Parliament: s 4(13).
- 14 See *ibid* s 12. This power is not exercisable in respect of any matter for which provision may be made under s 4 or s 7 (power to provide for the transition to new test of incapacity for work): s 12(2). As to the provision so made see 40 Halsbury's Statutes (1997 Reissue) 806.

## **UPDATE**

### **59-75 Incapacity Benefit**

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

## **59 Introduction**

NOTES 4, 12--SI 1995/310 further amended: SI 1995/987, SI 1996/3207, SI 1998/2231, SI 1999/2422, SI 1999/3109, SI 2000/590, SI 2002/491, SI 2006/2378, SI 2007/688, SI 2008/632, SI 2009/497, SI 2009/1488.

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## 60. Entitlement to incapacity benefit.

A person is entitled<sup>1</sup> to short-term incapacity benefit in respect of any day of incapacity for work which forms part of a period of incapacity for work<sup>2</sup>, if he satisfies either of the following conditions:

- 179 (1) he is under pensionable age<sup>3</sup> on the day in question and satisfies the relevant contribution conditions<sup>4</sup> for short-term incapacity benefit<sup>5</sup>; or
- 180 (2) he is over pensionable age on that day (but not more than five years over), the period of incapacity for work began before he attained pensionable age, and:
  - 9 12. (a) he would be entitled to a Category A retirement pension<sup>6</sup> if his entitlement had not been deferred or if he had not made an election to defer entitlement<sup>7</sup>; or
  13. (b) he would be entitled to a Category B retirement pension<sup>8</sup> by virtue of the contribution of his deceased spouse, but for any such deferment or election<sup>9</sup>.
- 10

A person is not entitled to short-term incapacity benefit for the first three days of any period of incapacity for work<sup>10</sup> and in any period of incapacity for work, a person is not entitled to short-term incapacity benefit for more than 364 days<sup>11</sup>. Where a person ceases to be entitled to the short-term benefit by reason of the expiry of the 364 days, he becomes entitled to long-term incapacity benefit in respect of any subsequent day of incapacity for work in the same period of incapacity for work on which he is not over pensionable age<sup>12</sup>.

1 For the meaning of 'entitled' see PARA 21 note 9 ante.

2 As to days and periods of incapacity for work see PARA 63 post.

3 For the meaning of 'pensionable age' see PARA 562 post. As to when a person attains a particular age see PARA 19 note 11 ante.

4 For the contribution conditions see PARA 61 post.

5 Social Security Contributions and Benefits Act 1992 s 30A(1), (2)(a) (s 30A added by the Social Security (Incapacity for Work) Act 1994 s 1(1)).

6 As to Category A retirement pensions and the possibility of deferment see PARA 568 et seq post.

7 Ie an election under the Social Security Benefits and Contributions Act 1992 s 54(1); and the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, SI 1979/642 (as amended): see PARA 584 post.

8 As to Category B retirement pensions see PARA 571 et seq post.

9 Social Security Contributions and Benefits Act 1992 s 30A(1), (2)(b) (as added: see note 5 supra).

10 Ibid s 30A(3) (as added: see note 5 supra).

11 Ibid s 30A(4) (as added: see note 5 supra). For the rules relating to the calculation of this period see PARA 64 post.

12 Ibid s 30A(5) (as added: see note 5 supra). A person who is terminally ill or entitled to the highest rate of the care component of disability living allowance is in effect entitled to the rate for the long-term benefit after only 196 days: see s 30B(4) (as added); and PARA 62 post.

## **UPDATE**

### **59-75 Incapacity Benefit**

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

### **60 Entitlement to incapacity benefit**

TEXT AND NOTES--1992 Act s 30A is modified in respect of persons who have been members of Her Majesty's forces: see the Social Security Contributions and Benefits Act 1992 (Modifications for Her Majesty's Forces and Incapacity Benefit) Regulations 2003, SI 2003/737, reg 2.

TEXT AND NOTE 2--For 'any day of incapacity for work' read 'the relevant day': Social Security Contributions and Benefits Act 1992 s 30A(1) (amended by the Welfare Reform and Pensions Act 1999 s 64(1)).

TEXT AND NOTE 3--For 'either of the following conditions' read 'either of the following conditions or, if he satisfies neither of those conditions, each of the conditions mentioned in the Social Security Contributions and Benefits Act 1992 s 30A(2A)': s 30A(1), (2) (s 30A(1) as amended (see TEXT AND NOTE 2); s 30A(2) amended by the 1999 Act s 64(2)(a)). The conditions mentioned in the Social Security Contributions and Benefits Act 1992 s 30A(2A) are that (1) he is aged 16 or over on the relevant day; (2) he is under the age of 20 or, in prescribed cases, 25 on a day which forms part of the period of incapacity for work; (3) he was incapable of work throughout a period of 196 consecutive days immediately preceding the relevant day, or an earlier day in the period of incapacity for work on which he was aged 16 or over; (4) on the relevant day he satisfies the prescribed conditions as to residence in Great Britain, or as to presence there; and (5) he is not, on that day, a person who is receiving full-time education: s 30A(2A) (amended by the Welfare Reform and Pensions Act 1999 s 64(3)). Regulations may provide that persons who have previously been entitled to incapacity benefit will, in prescribed circumstances, be entitled to short-term incapacity benefit under the extended principle outlined above notwithstanding that they do not satisfy the condition set out in head (2), while regulations may prescribe the circumstances in which a person is or is not to be treated as receiving full-time education for the purposes of head (5): Social Security Contributions and Benefits 1992 s 30A(6), (7) (added by the 1999 Act s 64(5)).

TEXT AND NOTE 4--In head (1) for 'the day in question' read 'the relevant day': Social Security Contributions and Benefits Act 1992 s 30A(2)(a) (amended by the 1999 Act s 64(2)(b)).

TEXT AND NOTE 9--In the 1992 Act s 30A(2)(b) after 'spouse' add 'or deceased civil partner': Civil Partnership Act 2004 Sch 24 para 14.

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## **61. Contribution conditions.**

The contribution conditions<sup>1</sup> for short-term incapacity benefit<sup>2</sup> comprise two requirements<sup>3</sup>. The first is that (1) the claimant<sup>4</sup> must have actually paid contributions of a relevant class<sup>5</sup> in respect of any one year, and those contributions must have been paid before the relevant time<sup>6</sup>; and (2) the earnings factor<sup>7</sup> so derived must be not less than that year's lower earnings limit<sup>8</sup> multiplied by 25<sup>9</sup>. The second is that (a) the claimant must, in respect of the last two complete years before the beginning of the relevant benefit year<sup>10</sup>, have either paid or been credited with contributions of a relevant class, or been credited (in the case of 1987-88 or any subsequent year) with earnings<sup>11</sup>; and (b) the earnings factor so derived must be not less in each of those years than the year's lower earnings limit multiplied by 50<sup>12</sup>.

As either Class 1 or Class 2 contributions are relevant for these purposes<sup>13</sup> the benefit can be claimed by the employed and by the self-employed<sup>14</sup>.

1 As to contribution conditions generally see PARA 55 ante.

2 As to short-term incapacity benefit generally see PARA 60 ante.

3 Social Security Contributions and Benefits Act 1992 s 21(3), Sch 3 para 2(1) (amended by the Social Security (Incapacity for Work) Act 1994 s 1(2)).

4 For the meaning of 'claimant' see PARA 19 note 5 ante.

5 As to the relevant class of contributions see PARA 55 ante.

6 For these purposes, 'the relevant time' is the day in respect of which benefit is claimed: Social Security Contributions and Benefits Act 1992 Sch 3 para 2(6)(a). For the meaning of 'benefit' see PARA 13 note 8 ante.

7 For the meaning of 'earnings' see PARA 33 ante; and for the meaning of 'earnings factor' see PARA 56 ante. The earnings factor for this purpose is that which is derived (1) if the year in question is 1987-88 or any subsequent year, from earnings upon which primary Class 1 contributions have been paid or treated as paid or from Class 2 Contributions; and (2) if the year in question is an earlier year, from the contributions paid as mentioned in head (1) in the text: *ibid* Sch 3 para 2(4). As to primary Class 1 contributions and Class 2 contributions see PARAS 34-36, 40-41 ante.

8 For the meaning of 'lower earnings limit' see PARA 34 ante.

9 Social Security Contributions and Benefits Act 1992 Sch 3 para 2(2). Where a person claims short-term incapacity benefit, he is taken to satisfy the first contribution condition for the benefit if on a previous claim for any short-term benefit he has satisfied the first contribution condition for that benefit, by virtue of the Social Security Act 1975 s 13(6), (8), Sch 3 para 8 (repealed), with contributions of a class relevant to short-term incapacity benefit: Social Security Contributions and Benefits Act 1992 s 21(4), Sch 3 para 8 (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 38(1), (4)).

10 The 'relevant benefit year' is the benefit year in which there falls the beginning of the period of incapacity for work which includes the relevant time (as to which see note 6 *supra*): Social Security Contributions and Benefits Act 1992 Sch 3 para 2(6)(b) (amended by the Social Security (Incapacity for Work) Act 1994 Sch 1 para 38(1), (2)).

11 As to provision for crediting a person with earnings see PARA 56 ante.

12 Social Security Contributions and Benefits Act 1992 Sch 3 para 2(3). The earnings factor for this purpose is that which is derived (1) if the year in question is 1987-88 or any subsequent year, from earnings upon which primary Class 1 contributions have been paid or treated as paid or from earnings credited, or from Class 2 contributions; and (2) if the year in question is an earlier year, from the contributions referred to in head (a) in the text: Sch 3 para 2(5). Where a person makes a claim for incapacity benefit and does not satisfy this second

contribution condition and, in a later benefit year in which he would satisfy that condition had no such claim been made, he makes a further claim, the previous claim is to be disregarded: Sch 3 para 2(7) (added by the Social Security (Incapacity for Work) Act 1994 s 3(2)). For the meaning of 'benefit year' see PARA 55 note 7 ante.

13 See PARA 55 ante.

14 For the meaning of 'employed' and 'self-employed' see PARA 32 ante.

## **UPDATE**

### **59-75 Incapacity Benefit**

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

### **61 Contribution conditions**

TEXT AND NOTES--Regulations may (1) provide for the first contribution condition (specified in the Social Security Contributions and Benefits Act 1992 Sch 3 para 2(2) (see TEXT AND NOTES 4-9)) to be taken to be satisfied in the case of persons who have been entitled to any prescribed description of benefit during any prescribed period or at any prescribed time; (2) with a view to securing any relaxation of the requirements of that condition (as so specified) in relation to persons who have been so entitled, provide for that condition to apply in relation to them subject to prescribed modifications; for these purposes, 'benefit' includes (in addition to any benefit under the Social Security Contributions and Benefits Act 1992 Pts II-V (ss 20-111)) (a) any benefit under Pts VII-XII (ss 123-171); and (b) credits under regulations under s 22(5) (see PARA 56); and 'modifications' includes additions, omissions and amendments: Sch 3 para 2(8), (9) (added by the Welfare Reform and Pensions Act 1999 s 62(1), (4)).

TEXT AND NOTES 4-9--Now, head (1) the claimant must have actually paid contributions of a relevant class in respect of one of the last three complete years before the beginning of the relevant benefit year, and those contributions must have been paid before the relevant time: Social Security Contributions and Benefits Act 1992 Sch 3 para 2(2)(a) (substituted by the Welfare Reform and Pensions Act 1999 s 62(1), (2)). The first requirement of the contribution conditions is relaxed in certain circumstances: see further the Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, reg 2B (added by SI 2000/3120; and amended by SI 2001/1305, SI 2001/2979).

NOTE 7--In head (1) for 'earnings upon' read 'so much of the claimant's earnings as did not exceed the upper earnings limit and on': Social Security Contributions and Benefits Act 1992 Sch 3 para 2(4) (amended by the National Insurance Contributions Act 2002

Sch 1 para 14(2), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2)).

NOTE 10--1992 Act Sch 3 para 2(6) is modified in respect of persons who have been members of Her Majesty's forces: see the Social Security Contributions and Benefits Act 1992 (Modifications for Her Majesty's Forces and Incapacity Benefit) Regulations 2003, SI 2003/737, reg 4.

NOTE 12--In head (1) for 'earnings upon' read 'so much of the claimant's earnings as did not exceed the upper earnings limit and on': Social Security Contributions and Benefits Act 1992 Sch 3 para 2(5) (amended by the National Insurance Contributions Act 2002 Sch 1 para 14(2), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2))). In head (2) for 'does not satisfy' read 'does not satisfy the first contribution condition (specified in the Social Security Contributions and Benefits Act 1992 Sch 3 para 2(2)) or, as the case may be': Sch 3 para 2(7) (amended by the Welfare Reform and Pensions Act 1999 s 62(1), (3)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(2) INCAPACITY BENEFIT/(i) In general/62. Levels and rates of incapacity benefit.

## **62. Levels and rates of incapacity benefit.**

Short-term incapacity benefit<sup>1</sup> is payable at two rates, at the lower rate for the first 196 days of entitlement in any period of incapacity for work<sup>2</sup> and at the higher rate for the remainder of the 364 day maximum period<sup>3</sup>. These rates are fixed by legislation<sup>4</sup>, as is the rate for long-term incapacity benefit, which is set at a higher level than the short-term rates<sup>5</sup>. These benefit rates are subject to annual up-rating<sup>6</sup>; they are expressed as weekly rates, the daily rate being one seventh of the appropriate weekly rate<sup>7</sup>.

In the case of a person who has been entitled to short-term incapacity benefit for 196 days or more in any period of incapacity for work and who is either terminally ill<sup>8</sup> or entitled to the highest rate of the care component of disability living allowance<sup>9</sup>, the weekly rate of short-term incapacity benefit payable is to be equal to the rate at which long-term incapacity benefit would be payable to him if he were entitled to it, if this is greater than the rate otherwise payable<sup>10</sup> to him<sup>11</sup>. The benefit is, however, still referred to as higher rate short-term benefit for the appropriate period<sup>12</sup>.

Regulations may provide that if a person is, on the qualifying date<sup>13</sup> in relation to a period of incapacity for work, under such age as may be prescribed, the rate of long-term incapacity benefit payable to him in respect of any day in that period is to be increased by such amount as may be prescribed<sup>14</sup>. The rate of long-term benefit is thus increased by a prescribed amount if on the qualifying date the claimant was under the age of 35, and by a lower amount if on that date he had attained the age of 35 but was under the age of 45<sup>15</sup>.

In addition, the weekly rates of short-term and long-term benefit are increased by a prescribed amount where the claimant has an adult dependant<sup>16</sup>, unless that dependant has earnings exceeding the amount of the increase (in the case of short-term lower rate benefit) or an amount equivalent to the rate of the old unemployment benefit (in the case of short-term higher rate benefit or long-term benefit)<sup>17</sup>. Likewise, there is an addition of a prescribed amount for each dependent child<sup>18</sup>, unless the claimant's partner has earnings in excess of set limits<sup>19</sup>; the general rule is that a child is a dependant if the beneficiary is entitled to child benefit in relation to him<sup>20</sup>, but there are prescribed circumstances in which a person not so entitled is to be treated as entitled, and vice versa<sup>21</sup>.

A recipient of incapacity benefit is permitted to act as a local councillor, but if his councillor's allowance exceeds a prescribed amount, the excess is deducted from the amount of the benefit<sup>22</sup>.

1 As to short-term incapacity benefit see PARA 60 ante.

2 As to periods of incapacity for work see PARA 63 post.

3 Social Security Contributions and Benefits Act 1992 s 30B(2) (s 30B added by the Social Security (Incapacity for Work) Act 1994 s 2(1)). In the case of a person over pensionable age, the rate of short-term incapacity benefit is that at which the relevant retirement pension would have been payable, disregarding: (1) any increase for married people under the Social Security Contributions and Benefits Act 1992 s 51A(2) (as added) (see PARA 577 post) or for deferred retirement under s 55 (as substituted), Sch 5 (as amended) (see PARA 585 post); (2) any increase (for dependants) under ss 80, 83 or 85 (as amended) (see PARAS 590-591, 594 post) (or, with effect from 6 April 2010, under ss 80, 83A or 85 (as amended and added)); and (3) any increase (for Category A or Category B pensioners) under the Social Security Administration Act 1992 s 150 (as amended) (annual up-rating; see PARA 17 ante) of the sums mentioned in s 150(1)(e) (as amended): Social Security

Contributions and Benefits Act 1992 s 30B(3) (as so added). For the meaning of 'pensionable age' see PARA 562 post.

4 See *ibid* s 30B(2) (as added: see note 3 *supra*), Sch 4 Pt I para 2 (which is subject to frequent amendment).

5 See *ibid* s 30(B)(6) (as added: see note 3 *supra*), Sch 4 Pt I para 2A (as added; subject to frequent amendment).

6 See PARA 17 *ante*.

7 Social Security Contributions and Benefits Act 1992 s 30B(1) (as added: see note 3 *supra*).

8 A person is terminally ill if he suffers from a progressive disease and his death in consequence of that disease can reasonably be expected within six months: *ibid* s 30B(4) (as added: see note 3 *supra*).

9 As to disability living allowance see PARA 102 *et seq post*.

10 *Ie* under the Social Security Contributions and Benefits Act 1992 s 30B(2), (3) (as added: see note 3 *supra*).

11 *Ibid* s 30B(4) (as added: see note 3 *supra*).

12 References to short-term incapacity benefit at the higher rate must be construed as including short-term incapacity benefit payable to any person who has been entitled to that benefit for 196 days or more in a period of incapacity for work, notwithstanding that the rate of benefit is determined in accordance with *ibid* s 30B(3) or (4) (as added: see note 3 *supra*): s 30B(5) (as so added).

13 'The qualifying date' means the first day of the period of incapacity for work or such earlier day as may be prescribed: *ibid* s 30B(7) (as added: see note 3 *supra*). For the meaning of 'prescribed' see PARA 19 note 3 *ante*. Special provision has been made in relation to persons previously entitled to statutory sick pay, members of the armed forces and widows: see the Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 11-13.

14 Social Security Contributions and Benefits Act 1992 s 30B(7) (as added: see note 3 *supra*).

15 See the Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, reg 10 (amended by SI 1997/543). As to when a person attains a prescribed age see PARA 19 note 11 *ante*.

16 See the Social Security Contributions and Benefits Act 1992 s 86A(1) (as added); Sch 4 Pt IV (as amended); the Social Security (Incapacity Benefit -Increases for Dependants) Regulations 1994, SI 1994/2945, Pt III (regs 9-14) (as amended); and PARA 123 *post*.

17 See *ibid* reg 10 (amended by SI 1996/1345). No increase is permitted if the dependant is absent from Great Britain or in custody: see the Social Security (Incapacity Benefit -Increases for Dependants) Regulations 1994, SI 1994/2945, reg 14. For the meaning of 'Great Britain' see PARA 15 note 4 *ante*.

18 See the Social Security Contributions and Benefits Act 1992 s 80(1), (2) (as amended); Sch 4 Pt IV (as amended); and PARA 122 *post*. For the meaning of 'child' see PARA 19 note 11 *ante*.

19 See *ibid* s 80(3), (4) (as amended); and PARA 122 *post*.

20 See *ibid* s 80(1) (as amended); and PARA 122 *post*. Maintenance of a child not living with the beneficiary is governed by s 81: see PARA 122 *post*. For the meaning of 'beneficiary' see PARA 21 note 2 *ante*.

21 See the Social Security (Incapacity Benefit Increases for Dependants) Regulations 1994, SI 1994/2945, regs 6, 7.

22 See the Social Security Contributions and Benefits Act 1992 s 30(E) (added by the Social Security (Incapacity for Work) Act 1994 s 3(1)). Where the net amount of councillor's allowance to which a person is entitled in respect of any week exceeds such amount as may be prescribed, an amount equal to the excess must be deducted from the amount of any incapacity benefit to which he is entitled in respect of that week, and only the balance remaining (if any) is payable: Social Security Contributions and Benefits Act 1992 s 30E(1) (as so added). For these purposes, 'councillor's allowance' means, in England or Wales, an allowance under or by virtue of the Local Government Act 1972 ss 173 or 177 (both as amended) or under or by virtue of a scheme made by virtue of the Local Government and Housing Act 1989 s 18 (as amended), other than such an allowance as is mentioned in the Local Government Act 1972 section 173(4) (as amended); and where any such allowance is paid otherwise than weekly, an amount calculated or estimated in accordance with regulations must be regarded as the weekly amount of the allowance: Social Security Contributions and Benefits Act 1992 s

30E(2) (as so added). 'Net amount', in relation to any councillor's allowance to which a person is entitled, means the aggregate amount of the councillor's allowance or allowances to which he is entitled for the week in question, reduced by the amount of any expenses incurred by him in that week in connection with his membership of the council or councils in question: s 30E(3) (as so added). See also the Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 8, 9 (reg 8 as amended).

## **UPDATE**

### **59-75 Incapacity Benefit**

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

### **62 Levels and rates of incapacity benefit**

TEXT AND NOTES--Where (1) a person is entitled to incapacity benefit in respect of any period of a week or part of a week; (2) a pension payment, a PPF periodic payment, or any combination of them, is payable to him in respect of that period (or a period which forms part of that period or includes that period or part of it); and (3) the amount of that payment or payments (or, as the case may be, the amount which in accordance with regulations is to be taken as payable to him by way of pension payments or PPF periodic payments in respect of that period) exceeds the threshold, the amount of that benefit will be reduced by an amount equal to 50 per cent of that excess: Social Security Contributions and Benefits Act 1992 s 30DD(1) (s 30DD added by the Welfare Reform and Pensions Act 1999 s 63; s 30DD(1) substituted by SI 2006/343). 'PPF periodic payments' means (1) any periodic compensation payments made in relation to a person, payable under the pension compensation provisions specified in the Pensions Act 2004 s 162(2), or (2) any periodic payments made in relation to a person payable under s 166: Social Security Contributions and Benefits Act 1992 s 122(1) (definition added by SI 2006/343).

In this context, 'the threshold' means (a) if the period in question is a week, £85 or such greater amount as may be prescribed; or (b) if that period is not a week, such proportion of the amount mentioned in head (a) as falls to be calculated in accordance with regulations on such basis as may be prescribed: Social Security Contributions and Benefits Act 1992 s 30DD(2) (as added). Regulations may secure that a person of any prescribed description does not suffer any reduction under s 30DD(1) in any amount of incapacity benefit to which he is entitled: s 30DD(3) (as added). Regulations may provide (i) for sums of any specified description to be disregarded for the purposes of s 30DD; (ii) for sums of any specified description to be treated for those purposes as payable to persons as pension payments or PPF periodic payments (including, in particular, sums in relation to which there is a deferred right of receipt); (iii) for the

aggregation of sums of any specified description which are payable as pension payments or PPF periodic payments (or treated as being so payable) in respect of the same or different periods; (iv) for such sums or aggregate sums to be apportioned between or otherwise allocated to periods in respect of which persons are entitled to incapacity benefit: s 30DD(4) (as added; further amended by SI 2006/343). In this context, 'pension payment' means (A) a periodical payment made in relation to a person under a personal pension scheme or, in connection with the coming to an end of an employment of his, under an occupational pension scheme or a public service pension scheme; (B) a payment of any specified description, being a payment made under an insurance policy providing benefits in connection with physical or mental illness, disability, infirmity or defect; or (C) a payment of any other specified description; and 'specified' means prescribed by or determined in accordance with regulations under s 30DD: s 30DD(5) (as added). For the purposes of s 30DD(5), 'personal pension scheme', 'occupational pension scheme' and 'public service pension scheme' each have the meaning given by the Pension Schemes Act 1993 s 1 (see PARAS 710, 741, 874 respectively), except that 'personal pension scheme' includes a contract or trust scheme approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch III (ss 618-629) (retirement annuities: see PARA 677 et seq): Social Security Contributions and Benefits Act 1992 s 30DD(6) (as added).

TEXT AND NOTES 1-14--Ibid s 30B has effect subject to s 30DD (see TEXT AND NOTES) and s 30E: s 30B(8) (added by the Welfare Reform and Pensions Act 1999 Sch 8 para 22).

NOTE 3--Head (1) now refers to married people or civil partners: Social Security Contributions and Benefits Act 1992 s 30B(3) (amended by the Civil Partnership Act 2004 Sch 24 para 15).

Subject to savings (see SI 2003/938) reference to Social Security Contributions and Benefits Act 1992 s 80 omitted: s 30B(3) (amended by the Tax Credits Act 2002 Sch 6).

Head (2) omitted: Pensions Act 2007 Sch 1 para 12, Sch 7 Pt 2.

NOTE 15--SI 1994/2946 reg 10 now as amended by SI 2008/632.

NOTES 16, 17--SI 1994/2945 further amended: SI 2005/2877, SI 2006/692, SI 2006/1069, SI 2006/2378.

TEXT AND NOTES 18-20--Subject to savings (see SI 2003/938) Social Security Contributions and Benefits Act 1992 s 80 repealed: Tax Credits Act 2002 Sch 6.

NOTE 22--SI 1994/2946 reg 8 now as amended by SI 2007/2618, SI 2008/2365, SI 2009/2343.

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### **63. Days and periods of incapacity for work.**

A day of incapacity for work means<sup>1</sup> a day on which a person is incapable of work<sup>2</sup>. In the case of the night worker whose shift extends over midnight, the day on which the lesser part of the shift falls is treated as a day of incapacity for work if he was incapable for the remainder of that day<sup>3</sup>. Regulations may make provision as to the days which are or are not to be treated as days of incapacity for work for the purposes of the provisions relating to incapacity benefit<sup>4</sup>.

A period of incapacity for work means a period of four or more consecutive days, each of which is a day of incapacity for work<sup>5</sup>. Where any two such periods are not separated by a period of more than eight weeks<sup>6</sup> they are 'linked', that is, they are treated as one period of incapacity for work<sup>7</sup>. The Secretary of State<sup>8</sup> may provide by regulations that these provisions are to have effect as if the reference to four consecutive days were to such lesser number of days, whether consecutive or not, within such period of consecutive days as may be prescribed<sup>9</sup> and as if for the reference to eight weeks there were substituted a reference to such larger number of weeks as may be prescribed<sup>10</sup>.

Where:

- 181 (1) a person who is engaged and normally engaged in remunerative work ceases to be so engaged; and
- 182 (2) he is entitled<sup>11</sup> to a disability working allowance<sup>12</sup> for the week in which there falls the last day on which he is so engaged; and
- 183 (3) he qualified for a disability working allowance for that week by virtue of the higher rate of short-term incapacity benefit<sup>13</sup>, or long-term incapacity benefit<sup>14</sup>, having been payable to him; and
- 184 (4) the first day after he ceases to be engaged in remunerative work is for him a day of incapacity for work and falls not later than the end of the period of two years beginning with the last day for which he was entitled to such benefit,

any day since that day which fell within a week for which he was entitled to a disability working allowance must be treated for the purposes of any claim<sup>15</sup> for such benefit for a period commencing after he ceases to be engaged in remunerative work as having been a day of incapacity for work<sup>16</sup>. Similarly, where a person becomes engaged in training for work<sup>17</sup>, he was entitled to the higher rate of short-term incapacity benefit, or to long-term incapacity benefit for one or more of the 56 days immediately before he became so engaged, and the first day after he ceases to be so engaged is for him a day of incapacity for work and falls not later than the end of the period of two years beginning with the last day for which he was entitled to such benefit, any day since that day in which he was engaged in training for work must be treated for the purposes of any claim for such benefit for a period commencing after he ceases to be so engaged as having been a day of incapacity for work<sup>18</sup>. The linking period is thus increased to two years in such cases.

1    le for the purposes of any provisions of the Social Security Contributions and Benefits Act 1992 relating to incapacity benefit, subject to the provisions of s 30C (as added) and save as otherwise expressly provided: see s 30C(1) (s 30C added by the Social Security (Incapacity for Work) Act 1994 s 3(1)).

2    Social Security Contributions and Benefits Act 1992 s 30C(1)(a) (as added: see note 1 supra). Incapacity for work is now determined for these purposes by the 'own occupation' and 'all work' tests: see PARA 65 et seq post.

Any day which falls within the maternity allowance period (as defined in s 35(2) (see PARA 78 post) is treated as a day of incapacity for work, unless the woman is disqualified for receiving a maternity allowance for that day by virtue of regulations under s 35(3)(a) (see PARA 79 post): s 30C(2) (as so added).

3 Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, reg 5(1). If the hours worked before and after midnight are equal, then (1) if the days in question fall at the beginning of a period of incapacity for work, the second day is treated as a day of incapacity for work; (2) if they fall at the end of such a period, the first day is so treated: reg 5(2).

4 Social Security Contributions and Benefits Act 1992 s 30C(3) (as added: see note 1 supra). Provision has been made for the following days to be so treated: (1) a day in respect of which the person has either made no claim for incapacity benefit, made a claim which is out of time (and good cause for delay is not shown), or made a claim which is defeated by the 12 month limit on back claims; (2) a day on which the person is disqualified for the benefit during a period of absence from Great Britain or imprisonment or detention in lawful custody, if that disqualification is for more than six weeks; (3) a day on which a person attends a training course in respect of which he is paid a statutory training allowance: see the Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, reg 4. For the meaning of 'Great Britain' see PARA 15 note 4 ante.

5 Social Security Contributions and Benefits Act 1992 s 30C(1)(b) (as added: see note 1 supra). Where a person is receiving stipulated regular medical treatment (such as kidney dialysis), this definition is amended to apply to periods of two days, whether consecutive or not, within a period of seven consecutive days: see the Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, reg 6.

6 'Week' for these purposes means any period of seven days: Social Security Contributions and Benefits Act 1992 s 30C(7) (as added: see note 1 supra).

7 Ibid s 30C(1)(c) (as added: see note 1 supra).

8 As to the Secretary of State see PARA 1 ante.

9 See note 5 supra. For the meaning of 'prescribed' see PARA 19 note 3 ante.

10 Social Security Contributions and Benefits Act 1992 s 30C(4) (as added: see note 1 supra).

11 For the meaning of 'entitled' see PARA 21 note 9 ante.

12 As to disability working allowance see PARA 218 et seq post.

13 As to the higher rate of short-term incapacity benefit see PARA 62 note 12 ante.

14 Ie under the Social Security Contributions and Benefits Act 1992 s 30A (as added): see PARA 60 ante.

15 For the meaning of 'claim' see PARA 19 note 5 ante.

16 Social Security Contributions and Benefits Act 1992 s 30C(5) (as added; see note 1 supra).

17 'Training for work' means such training in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (substituted by the Employment Act 1988 s 25(1)) (see EMPLOYMENT vol 40 (2009) PARA 563) or training of such other description as may be prescribed: see the Social Security Contributions and Benefits Act 1992 s 30C(6) (as added: see note 1 supra). The prescribed description of training is any training received on a course which a person attends for 16 hours or more a week, the primary purpose of which is the teaching of occupational or vocational skills: Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2496, reg 3.

18 Social Security Contributions and Benefits Act 1992 s 30C(6) (as added: see note 1 supra).

## UPDATE

### 59-75 Incapacity Benefit

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss

171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

### **63 Days and periods of incapacity for work**

TEXT AND NOTES--Regulations made under the Social Security Contributions and Benefits Act 1992 s 30C, in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

NOTE 4--Or, under head (1), a day in respect of which the person, subject to SI 1994/2946 reg 2A (added by SI 1997/2676 and amended by SI 2009/471), is not entitled to incapacity benefit because the Social Security Administration Act 1992 s 1(1A) applies: SI 1994/2946 reg 4 (amended by SI 1999/2226, SI 2000/678, SI 2006/2144).

Also, head (4) a day which is, for the purposes of the Social Security Contributions and Benefits Act 1992 s 30A(2A)(c) (see PARA 60) not part of any consecutive days of incapacity: SI 1994/2946 reg 4 (amended by SI 2000/3120).

For the purposes of incapacity benefit for persons incapacitated in youth under the Social Security Contributions and Benefits Act 1992 s 30A(2A), certain days in respect of which a person is entitled to statutory sick pay immediately before the relevant day are to be treated as days of incapacity for work: SI 1994/2946 reg 4A (added by SI 2000/3120; and amended by SI 2007/2618, SI 2008/2683).

TEXT AND NOTES 6, 7--In the case of a person who has been determined in accordance with the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A as a welfare to work beneficiary (see PARA 71), the 1992 Act s 30C(1)(c) has effect as if for the reference to eight weeks there were substituted a reference to 104 weeks: Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, reg 5A (added by SI 1998/2231; and amended by SI 2006/2378).

TEXT AND NOTES 11-16--Social Security Contributions and Benefits Act 1992 s 30C(5) replaced by s 30C(5), (5A) (substituted by the Tax Credits Act 2002 Sch 3 para 25). Where a person claims the higher rate of short-term incapacity benefit, or long-term incapacity benefit, under the Social Security Contributions and Benefits Act 1992 s 30A (see PARA 60) for a period commencing after he has ceased to be in qualifying remunerative work (within the meaning of the Tax Credits Act 2002 Pt 1 (ss 1-48, Schs 1-3: see PARA 227A.10) and (1) the day following that on which he so ceased was a day of incapacity for work for him, (2) he has been entitled to the higher rate of short-term incapacity benefit, or to long-term incapacity benefit, under the Social Security Contributions and Benefits Act 1992 s 30A within the period of two years ending with that day of incapacity for work, and (3) he satisfied the relevant tax credit conditions on the day before he so ceased, every day during that period on which he satisfied

those conditions is to be treated for the purposes of the claim as a day of incapacity for work for him: s 30C(5) (as so substituted). A person satisfies the relevant tax credit conditions on a day if (a) he is entitled for the day to the disability element of working tax credit (on a claim made by him or by him jointly with another) or would be so entitled but for the fact that the relevant income (within the meaning of the Tax Credits Act 2002 Pt 1: see PARA 227A.7) in his or their case is such that he is not so entitled, and (b) either working tax credit or any element of child tax credit other than the family element is paid in respect of the day on such a claim: Social Security Contributions and Benefits Act 1992 s 30C(5A) (as substituted). As to the Tax Credits Act 2002 generally see PARA 227A.

NOTE 17--Reference to SI 1994/2496 should be to SI 1994/2946.

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#### **64. Calculating the days of entitlement.**

An essential element of incapacity benefit<sup>1</sup> is the calculation of the 196 days of entitlement to the lower rate of short-term benefit<sup>2</sup>, and the 364 days of entitlement to the short-term benefit overall (before the long-term benefit becomes payable)<sup>3</sup>. In calculating, for the purposes of:

- 185 (1) the length of entitlement to short-term incapacity benefit<sup>4</sup>;
- 186 (2) the period after which short-term incapacity benefit is payable at the higher rate<sup>5</sup>;
- 187 (3) the period after which incapacity benefit is payable at the long-term rate in a case of terminal illness<sup>6</sup>; and
- 188 (4) the construction of references to short-term incapacity benefit at the higher rate,

the number of days for which a person has been entitled to short-term incapacity benefit, the first three days of a period of incapacity for work are included<sup>7</sup> (although no benefit is payable)<sup>8</sup>. In the case of a woman, any days for which she was entitled<sup>9</sup> to maternity allowance<sup>10</sup> are included<sup>11</sup>. There must also be included such days as may be prescribed<sup>12</sup> in respect of which a person was entitled to statutory sick pay<sup>13</sup>, and on the first of which he satisfied the contribution conditions<sup>14</sup> for short-term incapacity benefit<sup>15</sup>.

Any days in respect of which a person was disqualified for receiving incapacity benefit are excluded<sup>16</sup>.

An employee who becomes incapable of work while employed will in fact be eligible for statutory sick pay, rather than lower rate short-term incapacity benefit, and statutory sick pay thus has to count toward the period to be served before there is entitlement to higher rate short-term benefit, and then long-term benefit<sup>17</sup>. However, incapacity benefit is a contributory benefit, whereas statutory sick pay is not<sup>18</sup>. Thus, the rule is that days in receipt of statutory sick pay are included in calculating the number of days for which a person has been entitled to short-term incapacity benefit, provided those days:

- 189 (a) fall within a period of entitlement to statutory sick pay as between that person and his employer which ended not later than the fifty-seventh day before the first day of the period of incapacity for work to which the calculation relates; and
- 190 (b) fall on or after a day on which the person satisfied the contribution conditions for short-term incapacity benefit<sup>19</sup>.

1 As to incapacity benefit generally see PARAS 59-60 ante.

2 See PARA 62 ante.

3 See PARAS 60, 62 ante.

4 Ie for the purposes of the Social Security Contributions and Benefits Act 1992 s 30A(4) (as added): see PARA 60 ante.

5 Ie for the purposes of ibid s 30B(2) (as added): see PARA 62 ante.

6 le for the purposes of *ibid* s 30B(4) (as added): see PARA 62 ante. For the meaning of 'terminal illness' see PARA 62 note 8 ante.

7 Social Security Contributions and Benefits Act 1992 s 30D(1), (2)(a) (s 30D added by the Social Security (Incapacity for Work) Act 1994 s 3(1)).

8 See PARA 60 ante.

9 For the meaning of 'entitled' see PARA 21 note 9 ante.

10 As to maternity allowance see PARAS 76-79 post.

11 Social Security Contributions and Benefits Act 1992 s 30D(1), (2)(b) (as added: see note 7 supra).

12 For the meaning of 'prescribed' see PARA 19 note 3 ante.

13 As to statutory sick pay see EMPLOYMENT vol 39 (2009) PARA 498 et seq.

14 As to the contribution conditions see PARA 61 ante.

15 Social Security Contributions and Benefits Act 1992 s 30D(3) (as added: see note 7 supra).

16 *Ibid* s 30D(4) (as added: see note 7 supra).

17 See the text and notes 12-15 supra. Like lower rate short-term incapacity benefit, statutory sick pay is payable for a maximum of 28 weeks (196 days) in one period of entitlement. If the employee exhausts that and is still incapable of work, he may claim higher rate short-term incapacity benefit: see EMPLOYMENT vol 39 (2009) PARA 518 et seq.

18 Statutory sick pay may only be claimed by an employee being paid above the weekly lower limit for the payment of National Insurance contributions (see EMPLOYMENT vol 39 (2009) PARA 514), but other than that it is not dependent on a satisfactory contributions history.

19 See the Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, reg 7.

## UPDATE

### 59-75 Incapacity Benefit

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

### 64 Calculating the days of entitlement

TEXT AND NOTES--As to the effect of statutory maternity pay and statutory adoption pay on incapacity benefit, see SI 1994/2946 regs 7A, 7B (added by SI 2002/2690). 1992 Act s 30D is modified in respect of persons who have been members of Her Majesty's

forces: see the Social Security Contributions and Benefits Act 1992 (Modifications for Her Majesty's Forces and Incapacity Benefit) Regulations 2003, SI 2003/737, reg 3; and SI 1994/2946 reg 7C (added by SI 2003/1068).

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## **(ii) Determination of Incapacity for Work**

### **65. The tests of incapacity for work; in general.**

The method of determining whether a person is incapable of work is now governed by the Social Security (Incapacity for Work) Act 1994 and the Social Security (Incapacity for Work) (General) Regulations 1995<sup>1</sup>. Actual inability for the person's normal employment is determined only for a period of 28 weeks (the 'own occupation test')<sup>2</sup>; after that, the 'all work test' applies which is determined by reference to stated physical and mental descriptors which set out detailed abilities and disabilities, with points scored for each. If the claimant attains the necessary number of points he qualifies for the relevant benefit on the basis of being deemed to be incapable of work; if he does not attain the necessary number of points he cannot be considered incapable of work (unless he comes within an exceptional category), even if he could show that in reality he could not reasonably be expected to work<sup>3</sup>.

These tests apply wherever the question of incapacity for work has to be determined for the purposes of the Social Security Contributions and Benefits Act 1992<sup>4</sup>, except in relation to statutory sick pay and the industrial injuries scheme and for such other purposes as may be prescribed<sup>5</sup>. Regulations may:

- 191 (1) make provision as to the information or evidence required for the purpose of determining whether a person is capable or incapable of work and the manner in which that information or evidence is to be provided, and may provide that if a person without good cause fails to provide that information or evidence, or to do so in the manner required, he must be treated as capable of work<sup>6</sup>;
- 192 (2) provide that in any case where a question arises as to whether a person is capable of work he may be called to attend for such medical examination as may be required in accordance with regulations, and if he fails without good cause to attend for or submit himself to such examination, he must be treated as capable of work<sup>7</sup>;
- 193 (3) prescribe for these purposes matters which are or are not to be taken into account in determining whether a person does or does not have good cause for any act or omission, or circumstances in which a person is or is not to be regarded as having or not having good cause for any act or omission<sup>8</sup>.

For the period of four years from 5 July 1994, no such regulations may be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House<sup>9</sup>.

1 See PARA 59 ante; and see the Social Security Contributions and Benefits Act 1992 Pt XIA (ss 171A-171G) (added by the Social Security (Incapacity for Work) Act 1994 ss 5, 6(1)); the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311 (as amended); and PARAS 66-75 post.

2 See PARA 67 post. If the person has no usual occupation, the all work test applies immediately: see PARA 68 post.

3 See PARAS 66-75 post.

4 See the Social Security Contributions and Benefits Act 1992 s 171A(1) (as added: see note 1 supra).

5 Ibid s 171G(1) (as added: see note 1 supra). For the period of four years from 5 July 1994, a statutory instrument which contains (whether alone or with other provisions) any regulations made under s 171G(1)(c) (as so added) (prescribed purposes for which Pt XIA (as added) is not to apply) may not be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House: Social Security (Incapacity for Work) Act 1994 s 6(2)(a).

6 Social Security Contributions and Benefits Act 1992 s 171A(2) (as added: see note 1 supra).

7 Ibid s 171A(3) (as added: see note 1 supra). 'Medical examination' includes bacteriological and radiographical tests and similar investigations, and 'medically examined' has a corresponding meaning: see s 122(1). See also the Social Security Administration Act 1992 s 191, which contains an identical definition.

8 Social Security Contributions and Benefits Act 1992 s 171A(4) (as added: see note 1 supra).

9 Social Security (Incapacity for Work) Act 1994 s 3(a).

## UPDATE

### 59-75 Incapacity Benefit

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

### 65-75 Determination of Incapacity for Work

As from a day to be appointed, Social Security Contributions and Benefits Act 1992 ss 171A-171G repealed: Welfare Reform Act 2007 Sch 3 para 9(12), Sch 8.

Regulations made under the Social Security Contributions and Benefits Act 1992 Pt XIA (ss 171A-171G), in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

In certain circumstances, a person who is a welfare to work beneficiary is also treated as incapable of work: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A (added by SI 1998/2231). A person is a welfare to work beneficiary on any day in a linking term, where he (1) was incapable of work for a period of incapacity for work of more than 196 days in his immediate past period of incapacity for work; (2) ceased to be entitled to the benefit at the end of that immediate past period of incapacity for work on a day which falls on or after 5 October 1998; and (3) became engaged in remunerative work within one month of so ceasing to be entitled to that benefit at the end of that immediate past period of incapacity for

work: reg 13A(1) (amended by SI 1999/3901, SI 2006/2378). 'Linking term' means a period of 104 weeks (whether or not broken by days of incapacity for work) fixed on the first day immediately following the last day of incapacity in a period of incapacity for work: SI 1995/311 reg 13A(4) (definition amended by SI 2006/2378). 'Remunerative work' means (a) work (other than exempt work under reg 17: see PARA 72) for which payment is made or which is done in expectation of payment, or (b) attendance on a training course in respect of which the person receives a training allowance in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3): SI 1995/311 reg 13A(4). 'Immediate past period of incapacity for work' means the most recent of (i) a period of incapacity for work under the Social Security Contributions and Benefits Act 1992 s 30C(1), (ii) a period of incapacity for work under s 152, or (iii) a term composed of a period of incapacity for work under s 30C(1) and a period of incapacity for work under s 152 and includes any two such periods of incapacity for work which are separated by a period of not more than eight weeks: SI 1995/311 reg 13A(4) (definition substituted by SI 2006/757). 'Benefit' means any benefit, allowance or advantage under the Social Security Contributions and Benefits Act 1992 (other than statutory sick pay), or under the Jobseekers Act 1995, for which entitlement is dependent on incapacity for work: SI 1995/311 reg 13A(4).

A person is not a welfare to work beneficiary if his immediate past period of incapacity for work was ended by a determination (ie other than a determination in the circumstances applicable to a person under reg 13A(1) or (3A)) that he was, or was treated as, capable of work: reg 13A(3) (amended by SI 2006/2378). The circumstances are that the person had successfully appealed against a determination made in respect of the personal capability assessment or the own occupation test in relation to his immediate past period of incapacity for work: SI 1995/311 reg 13A(3A) (added by SI 2006/2378).

A welfare to work beneficiary is treated as incapable of work or having limited capability for work on any day in a period, consisting of a cumulative number of days of incapacity for work or limited capacity for work not exceeding 91 days in total, beginning within the linking term and ending on a day not later than 13 weeks from the end of that linking term, where he (A) claims benefit for any day falling within that linking term; (B) submits certain medical evidence (ie in accordance with the Social Security (Medical Evidence) Regulations 1976, SI 1976/615, reg 2 (amended by SI 1999/3109, SI 2000/590, SI 2001/2931, SI 2008/1554); and (C) in his immediate past period of incapacity for work, had been assessed and determined to be incapable of work (see SI 1995/311 Pt III (regs 23-28); and PARA 68) or had been treated (under reg 10), by virtue of having a severe condition, as incapable of work: reg 13A(2).

## **65 The tests of incapacity for work; in general**

NOTES 4-7--All information supplied in pursuance of the Social Security Contributions and Benefits Act 1992 s 171A must be taken for all purposes to be information relating to social security: s 171A(5) (s 175A added by the Welfare Reform and Pensions Act 1999 Sch 8 para 23(1), (4)).

NOTE 6--In head (1), the reference to such information or evidence as is there mentioned includes information or evidence capable of being used for assisting or encouraging the person in question to obtain work or enhance his prospects of obtaining it: Social Security Contributions and Benefits Act 1992 s 171A(2A) (added by the 1999 Act Sch 8 para 23(1), (2)).

TEXT AND NOTE 7--In head (2), for 'a question arises as to' read 'it falls to be determined':  
Social Security Contributions and Benefits Act 1992 s 171A(3) (amended by 1999 Act  
Sch 8 para 23(1), (3)).

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## **66. Power to provide for the transition to the new test of incapacity for work.**

The Secretary of State<sup>1</sup> was given power to make by regulations such provision as appeared to him to be necessary or expedient for the purposes of, or in connection with, the transition to the new test<sup>2</sup> of incapacity for work<sup>3</sup>. Without restriction on the generality of that power, such regulations may provide that a person's continued enjoyment after 19 November 1994 of any allowance or other advantage under any provision for the purposes of which the statutory provisions containing the new test<sup>4</sup> apply is to be subject, except as may be prescribed<sup>5</sup>, to satisfying that test of incapacity for work and for the determination in accordance with those provisions of the question whether the person is incapable of work<sup>6</sup>. For the period of four years from 5 July 1994, a statutory instrument which contains (whether alone or with other provisions) any regulations under these provisions may not be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House<sup>7</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 I.e. the test provided for by the Social Security Contributions and Benefits Act 1992 Pt XIA (ss 171A-171G) (as added): see PARAS 67-75 post.

3 Social Security (Incapacity for Work) Act 1994 s 7(1). The Social Security Contributions and Benefits Act 1992 s 175(2)-(4) (as amended) (see PARA 30 ante) applies in relation to this power as it applies in relation to a power conferred by that Act to make regulations: Social Security (Incapacity for Work) Act 1994 s 7(4).

4 I.e. the Social Security Contributions and Benefits Act 1992 Pt XIA (as amended): see PARAS 67-75 post.

5 'Prescribed' means prescribed by regulations under the Social Security (Incapacity for Work) Act 1994 s 7: s 7(2).

6 Ibid s 7(3)(b), (c). Power is given under s 7(3)(a) to provide that days of incapacity before 18 November 1994, and other prescribed days, are to be taken into account for the purposes of determining the period after which the all work test (see PARA 68 post) applies, but that power is effectively spent.

7 Ibid s 7(5). A statutory instrument which contains (whether alone or with other provisions) any regulations made under s 7, and which is not subject to any requirement that a draft of the instrument be laid before and approved by a resolution of each House of Parliament, is subject to annulment in pursuance of a resolution of either House of Parliament: s 7(6). As to the power to make general transitional provisions see PARA 59 ante.

The Social Security (Incapacity Benefit) (Transitional) Regulations 1995, SI 1995/310 (as amended) partly have effect as if made for these purposes.

## **UPDATE**

### **59-75 Incapacity Benefit**

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19

(added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

## **65-75 Determination of Incapacity for Work**

As from a day to be appointed, Social Security Contributions and Benefits Act 1992 ss 171A-171G repealed: Welfare Reform Act 2007 Sch 3 para 9(12), Sch 8.

Regulations made under the Social Security Contributions and Benefits Act 1992 Pt XIA (ss 171A-171G), in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

In certain circumstances, a person who is a welfare to work beneficiary is also treated as incapable of work: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A (added by SI 1998/2231). A person is a welfare to work beneficiary on any day in a linking term, where he (1) was incapable of work for a period of incapacity for work of more than 196 days in his immediate past period of incapacity for work; (2) ceased to be entitled to the benefit at the end of that immediate past period of incapacity for work on a day which falls on or after 5 October 1998; and (3) became engaged in remunerative work within one month of so ceasing to be entitled to that benefit at the end of that immediate past period of incapacity for work: reg 13A(1) (amended by SI 1999/3901, SI 2006/2378). 'Linking term' means a period of 104 weeks (whether or not broken by days of incapacity for work) fixed on the first day immediately following the last day of incapacity in a period of incapacity for work: SI 1995/311 reg 13A(4) (definition amended by SI 2006/2378). 'Remunerative work' means (a) work (other than exempt work under reg 17: see PARA 72) for which payment is made or which is done in expectation of payment, or (b) attendance on a training course in respect of which the person receives a training allowance in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3): SI 1995/311 reg 13A(4). 'Immediate past period of incapacity for work' means the most recent of (i) a period of incapacity for work under the Social Security Contributions and Benefits Act 1992 s 30C(1), (ii) a period of incapacity for work under s 152, or (iii) a term composed of a period of incapacity for work under s 30C(1) and a period of incapacity for work under s 152 and includes any two such periods of incapacity for work which are separated by a period of not more than eight weeks: SI 1995/311 reg 13A(4) (definition substituted by SI 2006/757). 'Benefit' means any benefit, allowance or advantage under the Social Security Contributions and Benefits Act 1992 (other than statutory sick pay), or under the Jobseekers Act 1995, for which entitlement is dependent on incapacity for work: SI 1995/311 reg 13A(4).

A person is not a welfare to work beneficiary if his immediate past period of incapacity for work was ended by a determination (ie other than a determination in the circumstances applicable to a person under reg 13A(1) or (3A)) that he was, or was treated as, capable of work: reg 13A(3) (amended by SI 2006/2378). The circumstances are that the person had successfully appealed against a determination made in respect of the personal capability assessment or the own occupation test in

relation to his immediate past period of incapacity for work: SI 1995/311 reg 13A(3A) (added by SI 2006/2378).

A welfare to work beneficiary is treated as incapable of work or having limited capability for work on any day in a period, consisting of a cumulative number of days of incapacity for work or limited capacity for work not exceeding 91 days in total, beginning within the linking term and ending on a day not later than 13 weeks from the end of that linking term, where he (A) claims benefit for any day falling within that linking term; (B) submits certain medical evidence (ie in accordance with the Social Security (Medical Evidence) Regulations 1976, SI 1976/615, reg 2 (amended by SI 1999/3109, SI 2000/590, SI 2001/2931, SI 2008/1554); and (C) in his immediate past period of incapacity for work, had been assessed and determined to be incapable of work (see SI 1995/311 Pt III (regs 23-28); and PARA 68) or had been treated (under reg 10), by virtue of having a severe condition, as incapable of work: reg 13A(2).

## **66 Power to provide for the transition to the new test of incapacity for work**

NOTE 7--SI 1995/310 further amended: see PARA 59 NOTES 4, 12.

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## 67. The own occupation test.

Where a person has been engaged in remunerative work<sup>1</sup> for more than eight weeks<sup>2</sup> in the 21 weeks immediately preceding the day with respect to which it falls to be determined whether he is or was incapable of work, the test applicable is the own occupation test<sup>3</sup>. The own occupation test is whether he is incapable by reason of some specific disease or bodily or mental disablement<sup>4</sup> of doing work which he could reasonably be expected to do in the course of the occupation in which he was so engaged<sup>5</sup>.

Where it is determined<sup>6</sup> in relation to a person that the test applicable with respect to any day is the own occupation test, and that he is on that test incapable for work, that test remains applicable in his case until the end of that spell of incapacity<sup>7</sup> beginning with that day or in which that day falls, or until the one hundred and ninety-seventh day of incapacity<sup>8</sup> for work in that spell, whichever is the earlier<sup>9</sup>.

1 Provision may be made by regulations defining for these purposes what is meant by 'remunerative work' and the regulations may, in particular, provide for 'remunerative work' to be defined by reference to the number of hours worked per week and for training of any prescribed description to be treated as if it were remunerative work: Social Security Contributions and Benefits Act 1992 s 171B(6) (s 171B added by the Social Security (Incapacity for Work) Act 1994 s 5). Provision may also be made by regulations as to the application of these provisions in cases where a person engages in more than one occupation or in different kinds of work: Social Security Contributions and Benefits Act 1992 s 171B(7) (as so added). For the period of four years from 5 July 1994, a statutory instrument which contains (whether alone or with other provisions) any regulations made under s 171B(7) (as so added) or under s 171B(4)(d), (6) or (8) (all as added) (see notes 7-8 infra), may not be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House: Social Security (Incapacity for Work) Act 1994 s 6(3)(a).

It is provided that 'remunerative work' means work (1) in one occupation in which a person was engaged for 16 or more hours a week for more than 8 weeks; and (2) for which payment was made or which was done in expectation of payment: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 4(1). For these purposes, (a) one occupation comprises either all work of the same kind (whether or not it is for the same employer and whether a person is employed or self-employed) or all work for the same employer; and (b) a person who was normally engaged in one occupation for 16 or more hours a week is to be treated as if he had been engaged in that occupation in relation to any week when he was on paid or unpaid leave: reg 4(2). Where a person was engaged in more than one occupation qualifying as remunerative work in the above period of 21 weeks, his occupation for these purposes is the last such occupation in which he was engaged during that period; if, however, during his last week of remunerative work in that period he was engaged in more than one such occupation he must satisfy the own occupation test in respect of each: reg 5.

2 'Week' means any period of seven days: Social Security Contributions and Benefits Act 1992 s 171G(2) (added by the Social Security (Incapacity for Work) Act 1994 s 6(1)).

3 Social Security Contributions and Benefits Act 1992 s 171B(1) (as added: see note 1 supra).

4 The phrase 'incapable by reason of some specific disease or bodily or mental disablement' appeared in the previous law on sickness and invalidity benefit, though the case law on it was sparse. 'Disease' means a departure from health capable of identification by its signs and symptoms, and constituting an abnormality: Decision CS 221/49. Extraneous circumstances such as domestic responsibilities are not to be taken into account: Decision R(S) 13/54; see also R(S) 8/53. Difficult distinctions may arise in relation to mental disablement; mere personality defects may not qualify (Decision R(S) 6/59 (Munchausen's syndrome)), unless it can be shown to be serious enough to constitute a disability of mind (Decision CS 7/82).

5 Social Security Contributions and Benefits Act 1992 s 171B(2) (as added: see note 1 supra).

6 Ie for any purpose of the Social Security Contributions and Benefits Act 1992: see PARA 21 et seq ante, 68 et seq post.

7 A 'spell of incapacity' means a series of four or more consecutive days of incapacity for work; and any two such spells not separated by a period of more than eight weeks are to be treated as one spell of incapacity: *ibid* s 171B(3) (as added: see note 1 *supra*). The Secretary of State may by regulations provide that s 171B(3) (as added) is to have effect as if (1) the reference there to four consecutive days were to such lesser number of days, whether consecutive or not, within such period of consecutive days as may be prescribed; and (2) for the reference to eight weeks there were substituted a reference to such larger number of weeks as may be prescribed: s 171B(8) (as so added). For the meaning of 'prescribed' see PARA 19 note 3 *ante*. At the date at which this volume states the law, no such regulations had been made.

8 For these purposes, a day of incapacity for work means a day: (1) with respect to which it has been determined for any purpose of the Social Security Contributions and Benefits Act 1992 that the person in question was incapable of work; or (2) in respect of which he was entitled to statutory sick pay (see EMPLOYMENT vol 39 (2009) PARA 498 *et seq*); or (3) in the case of a woman, which falls within the maternity allowance period (as to which see PARA 78 *post*); or (4) which is treated in accordance with regulations as a day of incapacity for work: s 171B(4) (as added: see note 1 *supra*). Apart from s 171B(4) (as added), any provision of the Social Security Contributions and Benefits Act 1992 treating a day as being or not being a day of incapacity is to be disregarded for the purposes of the own occupation test: s 171B(5) (as so added).

9 *Ibid* s 171B(3) (as added: see note 1 *supra*).

## **UPDATE**

### **59-75 Incapacity Benefit**

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

### **65-75 Determination of Incapacity for Work**

As from a day to be appointed, Social Security Contributions and Benefits Act 1992 ss 171A-171G repealed: Welfare Reform Act 2007 Sch 3 para 9(12), Sch 8.

Regulations made under the Social Security Contributions and Benefits Act 1992 Pt XIAA (ss 171A-171G), in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

In certain circumstances, a person who is a welfare to work beneficiary is also treated as incapable of work: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A (added by SI 1998/2231). A person is a welfare to work beneficiary on any day in a linking term, where he (1) was incapable of work for a period of incapacity for work of more than 196 days in his immediate past period of

incapacity for work; (2) ceased to be entitled to the benefit at the end of that immediate past period of incapacity for work on a day which falls on or after 5 October 1998; and (3) became engaged in remunerative work within one month of so ceasing to be entitled to that benefit at the end of that immediate past period of incapacity for work: reg 13A(1) (amended by SI 1999/3901, SI 2006/2378). 'Linking term' means a period of 104 weeks (whether or not broken by days of incapacity for work) fixed on the first day immediately following the last day of incapacity in a period of incapacity for work: SI 1995/311 reg 13A(4) (definition amended by SI 2006/2378). 'Remunerative work' means (a) work (other than exempt work under reg 17: see PARA 72) for which payment is made or which is done in expectation of payment, or (b) attendance on a training course in respect of which the person receives a training allowance in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3): SI 1995/311 reg 13A(4). 'Immediate past period of incapacity for work' means the most recent of (i) a period of incapacity for work under the Social Security Contributions and Benefits Act 1992 s 30C(1), (ii) a period of incapacity for work under s 152, or (iii) a term composed of a period of incapacity for work under s 30C(1) and a period of incapacity for work under s 152 and includes any two such periods of incapacity for work which are separated by a period of not more than eight weeks: SI 1995/311 reg 13A(4) (definition substituted by SI 2006/757). 'Benefit' means any benefit, allowance or advantage under the Social Security Contributions and Benefits Act 1992 (other than statutory sick pay), or under the Jobseekers Act 1995, for which entitlement is dependent on incapacity for work: SI 1995/311 reg 13A(4).

A person is not a welfare to work beneficiary if his immediate past period of incapacity for work was ended by a determination (ie other than a determination in the circumstances applicable to a person under reg 13A(1) or (3A)) that he was, or was treated as, capable of work: reg 13A(3) (amended by SI 2006/2378). The circumstances are that the person had successfully appealed against a determination made in respect of the personal capability assessment or the own occupation test in relation to his immediate past period of incapacity for work: SI 1995/311 reg 13A(3A) (added by SI 2006/2378).

A welfare to work beneficiary is treated as incapable of work or having limited capability for work on any day in a period, consisting of a cumulative number of days of incapacity for work or limited capacity for work not exceeding 91 days in total, beginning within the linking term and ending on a day not later than 13 weeks from the end of that linking term, where he (A) claims benefit for any day falling within that linking term; (B) submits certain medical evidence (ie in accordance with the Social Security (Medical Evidence) Regulations 1976, SI 1976/615, reg 2 (amended by SI 1999/3109, SI 2000/590, SI 2001/2931, SI 2008/1554); and (C) in his immediate past period of incapacity for work, had been assessed and determined to be incapable of work (see SI 1995/311 Pt III (regs 23-28); and PARA 68) or had been treated (under reg 10), by virtue of having a severe condition, as incapable of work: reg 13A(2).

## **67 The own occupation test**

TEXT AND NOTE 3--For 'the test applicable is the own occupation test' read 'the own occupation test is applicable in his case': Social Security Contributions and Benefits Act 1992 s 171B(1) (amended by Welfare Reform and Pensions Act 1999 Sch 8 para 24).

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## **68. The all work test; in general.**

Where in any case the own occupation test is not applicable<sup>1</sup> or has ceased to apply<sup>2</sup>, the test applicable is the all work test<sup>3</sup>. Provision must be made by regulations defining the all work test by reference to the extent of a person's incapacity by reason of some specific disease or bodily or mental disablement<sup>4</sup> to perform such activities as may be prescribed<sup>5</sup> and as to the manner of assessing whether the all work test is satisfied<sup>6</sup>.

Regulations may provide that where the all work test applies the test must, if the prescribed conditions are met, be treated as satisfied until the person has been assessed or he falls to be treated<sup>7</sup> as capable of work<sup>8</sup> and the prescribed conditions may include the condition that it has not previously been determined, within such period as may be prescribed, that the person in question is or is to be treated as capable of work<sup>9</sup>.

The all work test is a test of the extent of a person's incapacity to perform prescribed activities which fall into two categories, physical and mental<sup>10</sup>. There are 14 prescribed physical activities<sup>11</sup> and four mental activities<sup>12</sup> each divided into separate 'descriptors' which have points attached to them. In determining the extent of a person's incapacity to perform any of the physical activities, he is to be assessed as if he were wearing any prosthesis with which he is fitted or any aid or appliance which he normally wears or uses<sup>13</sup> and in determining the extent of a person's incapacity to perform any of the physical or mental activities, is a condition that the incapacity arises (1) in respect of a physical disability, from a specific bodily disease or disablement; or (2) in respect of a mental disability, from some specific mental illness or disablement<sup>14</sup>.

A person satisfies the all work test when one or more of the descriptors apply to him if, by adding the points allocated against each descriptor, he scores in total at least:

- 194 (a) 15 points in respect of physical descriptors;
- 195 (b) ten points in respect of mental descriptors; or
- 196 (c) 15 points in respect of a combination of physical and mental descriptors<sup>15</sup>.

In calculating the points, the following rules or qualifications apply:

- 197 (i) within any physical activity, only the highest scoring descriptor can be counted; by contrast in relation to the four mental activities, any points scored under any of the descriptors can be aggregated<sup>16</sup>;
- 198 (ii) as there is substantial overlap between the first two physical activities (walking on level ground with a walking stick or other aid if such aid is normally used and walking up and down stairs), only one descriptor from these activities can be counted, which is to be that with the higher score<sup>17</sup>;
- 199 (iii) where the person is seeking to rely on physical and mental descriptors together, an aggregate score of less than six points on mental descriptors is to be disregarded, and an aggregate score of between six and nine points on mental descriptors is to be treated as a score of nine points when added to the score in respect of physical descriptors<sup>18</sup>.

Where the all work test applies, it is to be treated as satisfied until a person has been assessed<sup>19</sup> if prescribed conditions are met<sup>20</sup>.

- 1 As to when the own occupation test applies see PARA 67 ante.
- 2 Ie where the maximum period of 196 days has been exhausted: see PARA 67 ante.
- 3 Social Security Contributions and Benefits Act 1992 s 171C(1) (s 171C added by the Social Security (Incapacity for Work) Act 1994 s 5).
- 4 For the meaning of this phrase see PARA 67 note 4 ante.
- 5 For the meaning of 'prescribed' see PARA 19 note 3 ante.
- 6 Social Security Contributions and Benefits Act 1992 s 171C(2) (as added: see note 3 supra).
- 7 Ie in accordance with ibid s 171A(2) or (3) (as added) (see PARA 65 ante) or s 171E (as added) (see PARA 73 post).
- 8 Ibid s 171C(2) (as added: see note 3 supra). For the period of four years from 5 July 1994, a statutory instrument which contains (whether alone or with other provisions) any regulations made under s 171C(2) (as so added) or under s 171C(3) (as so added) (see note 9 infra), may not be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House: Social Security (Incapacity for Work) Act 1994 s 6(3)(a).
- 9 Social Security Contributions and Benefits Act 1992 s 171C(3) (as added: see note 3 supra).
- 10 See the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 24.
- 11 See ibid reg 24, Schedule Pt I (amended by SI 1996/3207).
- 12 See the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, Schedule Pt II (amended by SI 1996/3207).
- 13 Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 25(2) (amended by SI 1996/3207).
- 14 Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 25(3) (added by SI 1996/3207)
- 15 Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 25(1). In considering whether a claimant can perform the all work test, it has been held that it should be asked whether he or she can reasonably do so, and with regularity: see Decision CSIB/17/96.
- 16 Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 26(3), (4).
- 17 Ibid reg 26(2).
- 18 Ibid reg 26(1) (amended by SI 1996/3207).
- 19 Or until he falls to be treated as capable of work under the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 7 (failure to provide information) or reg 8 (failure to attend a medical examination); for disqualification on these grounds see PARA 73 post.
- 20 Ibid reg 28(1). The prescribed conditions are that (1) the person provides evidence of his incapacity for work in prescribed form; and (2) it has not been determined that he is capable of work (in relation to any benefit, allowance or advantage) within the previous six months, unless (a) he is suffering from some specific disease or bodily or mental disablement which he was not suffering from at the time of that determination; or (b) a disease or bodily or mental disablement which he was suffering from at the time of that determination has significantly worsened, or (c) in the case of a person who was treated as capable of work because of failure to provide information, he has since provided the information requested by the Secretary of State: see reg 28(2) (amended by SI 1995/987; and SI 1996/3207).

## UPDATE

### 59-75 Incapacity Benefit

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

## **65-75 Determination of Incapacity for Work**

As from a day to be appointed, Social Security Contributions and Benefits Act 1992 ss 171A-171G repealed: Welfare Reform Act 2007 Sch 3 para 9(12), Sch 8.

Regulations made under the Social Security Contributions and Benefits Act 1992 Pt XIA (ss 171A-171G), in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

In certain circumstances, a person who is a welfare to work beneficiary is also treated as incapable of work: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A (added by SI 1998/2231). A person is a welfare to work beneficiary on any day in a linking term, where he (1) was incapable of work for a period of incapacity for work of more than 196 days in his immediate past period of incapacity for work; (2) ceased to be entitled to the benefit at the end of that immediate past period of incapacity for work on a day which falls on or after 5 October 1998; and (3) became engaged in remunerative work within one month of so ceasing to be entitled to that benefit at the end of that immediate past period of incapacity for work: reg 13A(1) (amended by SI 1999/3901, SI 2006/2378). 'Linking term' means a period of 104 weeks (whether or not broken by days of incapacity for work) fixed on the first day immediately following the last day of incapacity in a period of incapacity for work: SI 1995/311 reg 13A(4) (definition amended by SI 2006/2378). 'Remunerative work' means (a) work (other than exempt work under reg 17: see PARA 72) for which payment is made or which is done in expectation of payment, or (b) attendance on a training course in respect of which the person receives a training allowance in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3): SI 1995/311 reg 13A(4). 'Immediate past period of incapacity for work' means the most recent of (i) a period of incapacity for work under the Social Security Contributions and Benefits Act 1992 s 30C(1), (ii) a period of incapacity for work under s 152, or (iii) a term composed of a period of incapacity for work under s 30C(1) and a period of incapacity for work under s 152 and includes any two such periods of incapacity for work which are separated by a period of not more than eight weeks: SI 1995/311 reg 13A(4) (definition substituted by SI 2006/757). 'Benefit' means any

benefit, allowance or advantage under the Social Security Contributions and Benefits Act 1992 (other than statutory sick pay), or under the Jobseekers Act 1995, for which entitlement is dependent on incapacity for work: SI 1995/311 reg 13A(4).

A person is not a welfare to work beneficiary if his immediate past period of incapacity for work was ended by a determination (ie other than a determination in the circumstances applicable to a person under reg 13A(1) or (3A)) that he was, or was treated as, capable of work: reg 13A(3) (amended by SI 2006/2378). The circumstances are that the person had successfully appealed against a determination made in respect of the personal capability assessment or the own occupation test in relation to his immediate past period of incapacity for work: SI 1995/311 reg 13A(3A) (added by SI 2006/2378).

A welfare to work beneficiary is treated as incapable of work or having limited capability for work on any day in a period, consisting of a cumulative number of days of incapacity for work or limited capacity for work not exceeding 91 days in total, beginning within the linking term and ending on a day not later than 13 weeks from the end of that linking term, where he (A) claims benefit for any day falling within that linking term; (B) submits certain medical evidence (ie in accordance with the Social Security (Medical Evidence) Regulations 1976, SI 1976/615, reg 2 (amended by SI 1999/3109, SI 2000/590, SI 2001/2931, SI 2008/1554); and (C) in his immediate past period of incapacity for work, had been assessed and determined to be incapable of work (see SI 1995/311 Pt III (regs 23-28); and PARA 68) or had been treated (under reg 10), by virtue of having a severe condition, as incapable of work: reg 13A(2).

## **68 The all work test; in general**

TEXT AND NOTES 1-9--Replaced. Where the own occupation test is not applicable, or has ceased to apply, in the case of a person, the question whether the person is capable or incapable of work is to be determined in accordance with a personal capability assessment: Social Security Contributions and Benefits Act 1992 s 171C(1) (s 171C substituted by Welfare Reform and Pensions Act 1999 s 61). Provision must be made by regulations (1) defining a personal capability assessment by reference to the extent to which a person who has some specific disease or bodily or mental disablement is capable or incapable of performing such activities as may be prescribed; (2) as to the manner of assessing whether a person is, in accordance with a personal capability assessment, incapable of work: 1992 Act s 171C(2). For the purposes of head (1) the personal capability assessment is an assessment of the extent to which a person who has some specific disease or bodily or mental disablement is capable of performing the prescribed activities, or is incapable by reason of such disease or bodily or mental disablement of performing those activities: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 24 (substituted by SI 1999/3109). As to the prescribed activities see SI 1995/311 Schedule Pts I, II. For the purposes of head (2) a person is incapable of work in accordance with the personal capability assessment when one or more of the descriptors in Schedule Pt I or II applies to him if, by adding the points allocated against the descriptor, he obtains a total score of at least (a) 15 points in respect of physical descriptors; or (b) ten points in respect of mental descriptors; or (c) 15 points in respect of a combination of mental and physical descriptors: reg 25 (substituted by SI 1999/3109). A person to whom the 1992 Act s 171C(1) applies must, if the prescribed conditions are met, be treated as incapable of work in accordance with a personal capability assessment until such time as such an assessment has been carried out in his case, or he falls to be treated as capable of work in accordance with regulations under s 171A(2) or (3) (see PARA 65) or s 171E (see PARA 73): s 171C(3); SI 1995/311 reg 28(1) (substituted by SI 1999/3109). Except in prescribed circumstances, a personal capability assessment carried out in the case of a

person before the time when the 1992 Act s 171C(1) applies to him is as effective for the purposes of s 171C (1) as one carried out thereafter: s 171C(4). In the case of a person who for any purpose of the 1992 Act has been determined to be incapable of work in accordance with a personal capability assessment, the question whether that person is capable or incapable of work is to be determined afresh in accordance with a further personal capability assessment: s 171C(5); Social Security (Incapacity for Work) Miscellaneous Amendments Regulations 1999, SI 1999/3109, reg 4.

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## **69. Power to provide that persons to be treated as capable or incapable of work.**

Regulations may provide that a person is to be treated as capable of work, or as incapable of work, in such cases or circumstances as may be prescribed<sup>1</sup> and may, in particular, provide that a person is to be treated as capable of work if he does work of a prescribed description, or more than the prescribed amount of work of a prescribed description<sup>2</sup>.

Accordingly, regulations may provide that a person is not to be treated as capable of work by reason only of his doing such work as may be prescribed, or no more than the prescribed amount of work of a prescribed description<sup>3</sup>.

1 Social Security Contributions and Benefits Act 1992 s 171D(1) (s 171D added by the Social Security (Incapacity for Work) Act 1994 s 6(1)). For the meaning of 'prescribed' see PARA 19 note 3 ante.

2 Social Security Contributions and Benefits Act 1992 s 171D(2) (as added: see note 1 supra).

3 Ibid s 171D(2) (as added: see note 1 supra). For the period of four years from 5 July 1994, a statutory instrument which contains (whether alone or with other provisions) any regulations made under s 171D (as added) may not be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House: Social Security (Incapacity for Work) Act 1994 s 6(3)(a).

The Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311 (as amended), partly have effect as if so made: see PARAS 67-68 ante, 70-74 post.

## **UPDATE**

### **59-75 Incapacity Benefit**

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

### **65-75 Determination of Incapacity for Work**

As from a day to be appointed, Social Security Contributions and Benefits Act 1992 ss 171A-171G repealed: Welfare Reform Act 2007 Sch 3 para 9(12), Sch 8.

Regulations made under the Social Security Contributions and Benefits Act 1992 Pt XIAA (ss 171A-171G), in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

In certain circumstances, a person who is a welfare to work beneficiary is also treated as incapable of work: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A (added by SI 1998/2231). A person is a welfare to work beneficiary on any day in a linking term, where he (1) was incapable of work for a period of incapacity for work of more than 196 days in his immediate past period of incapacity for work; (2) ceased to be entitled to the benefit at the end of that immediate past period of incapacity for work on a day which falls on or after 5 October 1998; and (3) became engaged in remunerative work within one month of so ceasing to be entitled to that benefit at the end of that immediate past period of incapacity for work: reg 13A(1) (amended by SI 1999/3901, SI 2006/2378). 'Linking term' means a period of 104 weeks (whether or not broken by days of incapacity for work) fixed on the first day immediately following the last day of incapacity in a period of incapacity for work: SI 1995/311 reg 13A(4) (definition amended by SI 2006/2378). 'Remunerative work' means (a) work (other than exempt work under reg 17: see PARA 72) for which payment is made or which is done in expectation of payment, or (b) attendance on a training course in respect of which the person receives a training allowance in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3): SI 1995/311 reg 13A(4). 'Immediate past period of incapacity for work' means the most recent of (i) a period of incapacity for work under the Social Security Contributions and Benefits Act 1992 s 30C(1), (ii) a period of incapacity for work under s 152, or (iii) a term composed of a period of incapacity for work under s 30C(1) and a period of incapacity for work under s 152 and includes any two such periods of incapacity for work which are separated by a period of not more than eight weeks: SI 1995/311 reg 13A(4) (definition substituted by SI 2006/757). 'Benefit' means any benefit, allowance or advantage under the Social Security Contributions and Benefits Act 1992 (other than statutory sick pay), or under the Jobseekers Act 1995, for which entitlement is dependent on incapacity for work: SI 1995/311 reg 13A(4).

A person is not a welfare to work beneficiary if his immediate past period of incapacity for work was ended by a determination (ie other than a determination in the circumstances applicable to a person under reg 13A(1) or (3A)) that he was, or was treated as, capable of work: reg 13A(3) (amended by SI 2006/2378). The circumstances are that the person had successfully appealed against a determination made in respect of the personal capability assessment or the own occupation test in relation to his immediate past period of incapacity for work: SI 1995/311 reg 13A(3A) (added by SI 2006/2378).

A welfare to work beneficiary is treated as incapable of work or having limited capability for work on any day in a period, consisting of a cumulative number of days of incapacity for work or limited capacity for work not exceeding 91 days in total, beginning within the linking term and ending on a day not later than 13 weeks from the end of that linking term, where he (A) claims benefit for any day falling within that linking term; (B) submits certain medical evidence (ie in accordance with the Social Security (Medical Evidence) Regulations 1976, SI 1976/615, reg 2 (amended by SI 1999/3109, SI 2000/590, SI 2001/2931, SI 2008/1554)); and (C) in his immediate past period of incapacity for work, had been assessed and determined to be incapable of work (see SI 1995/311 Pt III (regs 23-28); and PARA 68) or had been treated (under reg 10), by virtue of having a severe condition, as incapable of work: reg 13A(2).

**69 Power to provide that person to be treated as capable or incapable of work**

TEXT AND NOTES--Regulations made under the 1992 Act s 171D may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77 (amended by Welfare Reform and Pensions Act 1999 Sch 13 Pt IV).

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## **70. Exceptional circumstances.**

A person who does not satisfy the all work test<sup>1</sup> is to be treated as incapable of work if:

- 200 (1) he is suffering from a severe life threatening disease in relation to which there is medical evidence<sup>2</sup> that the disease is uncontrollable, or uncontrolled, by a recognised therapeutic procedure and, in the case of a disease which is uncontrolled, there is a reasonable cause for it not to be controlled by a recognised therapeutic procedure; or
- 201 (2) he suffers from a previously undiagnosed potentially life threatening condition which has been discovered during the course of a medical examination carried out for the purposes of the all work test by a doctor approved by the Secretary of State; or
- 202 (3) there exists medical evidence that he requires a major surgical operation or other major therapeutic procedure and it is likely that that operation or procedure will be carried out within three months of the date of a medical examination carried out for the purposes of the all work test<sup>3</sup>.

<sup>1</sup> As to the all work test see PARA 68 ante.

<sup>2</sup> 'Medical evidence' means (1) evidence from a doctor approved by the Secretary of State; and (2) evidence (if any) from any other doctor, or a hospital or similar institution or such part of such evidence as constitutes the most reliable evidence available in the circumstances: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 2(1) (definition added by SI 1996/3207). As to the Secretary of State see PARA 1 ante.

<sup>3</sup> Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 27 (substituted by SI 1996/3207).

## **UPDATE**

### **59-75 Incapacity Benefit**

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

## 65-75 Determination of Incapacity for Work

As from a day to be appointed, Social Security Contributions and Benefits Act 1992 ss 171A-171G repealed: Welfare Reform Act 2007 Sch 3 para 9(12), Sch 8.

Regulations made under the Social Security Contributions and Benefits Act 1992 Pt XI(A) (ss 171A-171G), in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

In certain circumstances, a person who is a welfare to work beneficiary is also treated as incapable of work: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A (added by SI 1998/2231). A person is a welfare to work beneficiary on any day in a linking term, where he (1) was incapable of work for a period of incapacity for work of more than 196 days in his immediate past period of incapacity for work; (2) ceased to be entitled to the benefit at the end of that immediate past period of incapacity for work on a day which falls on or after 5 October 1998; and (3) became engaged in remunerative work within one month of so ceasing to be entitled to that benefit at the end of that immediate past period of incapacity for work: reg 13A(1) (amended by SI 1999/3901, SI 2006/2378). 'Linking term' means a period of 104 weeks (whether or not broken by days of incapacity for work) fixed on the first day immediately following the last day of incapacity in a period of incapacity for work: SI 1995/311 reg 13A(4) (definition amended by SI 2006/2378). 'Remunerative work' means (a) work (other than exempt work under reg 17: see PARA 72) for which payment is made or which is done in expectation of payment, or (b) attendance on a training course in respect of which the person receives a training allowance in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3): SI 1995/311 reg 13A(4). 'Immediate past period of incapacity for work' means the most recent of (i) a period of incapacity for work under the Social Security Contributions and Benefits Act 1992 s 30C(1), (ii) a period of incapacity for work under s 152, or (iii) a term composed of a period of incapacity for work under s 30C(1) and a period of incapacity for work under s 152 and includes any two such periods of incapacity for work which are separated by a period of not more than eight weeks: SI 1995/311 reg 13A(4) (definition substituted by SI 2006/757). 'Benefit' means any benefit, allowance or advantage under the Social Security Contributions and Benefits Act 1992 (other than statutory sick pay), or under the Jobseekers Act 1995, for which entitlement is dependent on incapacity for work: SI 1995/311 reg 13A(4).

A person is not a welfare to work beneficiary if his immediate past period of incapacity for work was ended by a determination (ie other than a determination in the circumstances applicable to a person under reg 13A(1) or (3A)) that he was, or was treated as, capable of work: reg 13A(3) (amended by SI 2006/2378). The circumstances are that the person had successfully appealed against a determination made in respect of the personal capability assessment or the own occupation test in relation to his immediate past period of incapacity for work: SI 1995/311 reg 13A(3A) (added by SI 2006/2378).

A welfare to work beneficiary is treated as incapable of work or having limited capability for work on any day in a period, consisting of a cumulative number of days of incapacity for work or limited capacity for work not exceeding 91 days in total, beginning within the linking term and ending on a day not later than 13 weeks from the end of that linking term, where he (A) claims benefit for any day falling within that

linking term; (b) submits certain medical evidence (ie in accordance with the Social Security (Medical Evidence) Regulations 1976, SI 1976/615, reg 2 (amended by SI 1999/3109, SI 2000/590, SI 2001/2931, SI 2008/1554); and (c) in his immediate past period of incapacity for work, had been assessed and determined to be incapable of work (see SI 1995/311 Pt III (regs 23-28); and PARA 68) or had been treated (under reg 10), by virtue of having a severe condition, as incapable of work: reg 13A(2).

## **70 Exceptional circumstances**

TEXT AND NOTES--SI 1995/311 reg 27 (substituted by SI 1996/3207) has been held to be invalid due to a failure to follow the correct consultation procedures in adoption; in such circumstances, SI 1995/311 reg 27, continues in operation as it was prior to its substitution: *Howker v Secretary of State for Work and Pensions* [2002] EWCA 1623, [2003] ICR 405. SI 1985/311 reg 27 further amended: SI 2007/1626.

TEXT AND NOTE 1--For 'does not satisfy the all work test' read 'is not incapable of work in accordance with the personal capability assessment (see PARA 68)': SI 1995/311 reg 27 (amended by SI 1999/3109, SI 2000/590).

TEXT AND NOTE 3--In heads (2) and (3) the reference to the all work test is now to the personal capability assessment: SI 1995/311 reg 27.

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## **71. Persons treated as incapable of work.**

Where the all work test applies<sup>1</sup>, a person is to be treated as incapable of work on any day in respect of which the following circumstances apply to him:

- 203 (1) that he receives, in respect of the day in question, a payment of a specified allowance or pension<sup>2</sup>;
- 204 (2) that he is entitled to a specified disablement pension by reference to a degree of disability of not less than 80 per cent<sup>3</sup>;
- 205 (3) that prescribed evidence establishes that he suffers from a loss of physical or mental faculty such that the extent of the resulting disablement amounts to not less than 80 per cent<sup>4</sup>;
- 206 (4) that he is suffering from a progressive disease and his death in consequence of that disease can reasonably be expected within six months<sup>5</sup>;
- 207 (5) that he is a registered blind person<sup>6</sup>;
- 208 (6) that he is suffering from tetraplegia, persistent vegetative state, dementia, paraplegia or uncontrollable involuntary movements or ataxia which effectively renders the sufferer functionally paraplegic<sup>7</sup>;
- 209 (7) that he is suffering from any specified condition<sup>8</sup>, and there exists medical evidence<sup>9</sup> that he is suffering from any of them<sup>10</sup>.

A person is also to be treated as incapable of work on any day:

- 210 (a) in respect of which he is excluded from work on the certificate of a medical officer for environmental health and is under medical observation by reason of his being a carrier, or having been in contact with a case, of infectious or contagious disease<sup>11</sup>;
- 211 (b) on which he is undergoing medical or other treatment as an in-patient in a hospital or similar institution<sup>12</sup>; or
- 212 (c) on which he is engaged in certain stipulated regular treatment<sup>13</sup>.

A pregnant woman is to be treated as incapable of work:

- 213 (i) on any day on which, because of her pregnancy, there is a serious risk of damage to her health or to the health of her unborn child if, in a case where the own occupation test<sup>14</sup> applies, she does not refrain from work in the occupation which is relevant for the purposes of that test, or, in a case where the all work test applies, she does not refrain from work in any occupation; or
- 214 (ii) in the case of a woman whose expected or actual date of confinement has been certified<sup>15</sup>, on any day in the prescribed period<sup>16</sup>.

1 As to the all work test generally see PARA 68 ante.

2 I.e. a payment of (1) the highest rate care component of disability living allowance (see PARAS 102, 104 post); (2) an increase of disablement pension for constant attendance by virtue of the Social Security Contributions and Benefits Act 1992 s 104 (see PARA 147 post) at a rate greater than that specified in Sch 4 Pt V para 2(a) (as amended) or at the rate specified in Sch 4 Pt V para 2(b) (as amended); (3) a constant attendance allowance by virtue of the Naval, Military, and Air Forces etc (Disablement and Death) Service Pensions Order

1983, SI 1983/883, art 14(1)(b); (4) an increase of constant attendance allowance at a rate payable by virtue of the Personal Injuries (Civilians) Scheme 1983, SI 1983/686, art 14, Sch 3 para 3(a) (as substituted): see the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 10(2)(a) (substituted by SI 1995/987).

3     Ie a disablement pension by virtue of the Social Security Contributions and Benefits Act 1992 s 103 (see PARA 141 post) or the Naval, Military, and Air Forces etc (Disablement and Death) Service Pensions Order 1983, SI 1983/883, Pt III (arts 8-26A) (as amended) or the Personal Injuries (Civilians) Scheme 1983, SI 1983/686, Pt III (arts 8-25B) (as amended) (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 599 et seq): Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 10(2)(aa) (added by SI 1997/1009).

4     See the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 10(2)(ab) (added by SI 1997/1009).

5     See the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 10(2)(b).

6     See *ibid* reg 10(2)(c).

7     *Ibid* reg 10(2)(d).

8     The specified conditions are: (1) a severe learning disability (which, for these purposes, means a condition which results from the arrested or incomplete physical development of the brain, or severe damage to the brain, and which involves severe impairment of intelligence and social functioning); (2) a severe and progressive neurological or muscle wasting disease; (3) an active and progressive form of inflammatory polyarthritis; (4) a progressive impairment of cardio-respiratory function which severely and persistently limits effort tolerance; (5) dense paralysis of the upper limb, trunk and lower limb on one side of the body; (6) multiple effects of impairment of function of the brain or nervous system causing severe and irreversible motor, sensory and intellectual deficits; (7) manifestations of severe and progressive immune deficiency states characterised by the occurrence of severe constitutional disease or opportunistic infections or tumour formation; (8) a severe mental illness, involving the presence of mental disease, which severely and adversely affects a person's mood or behaviour, and which severely restricts his social functioning, or his awareness of his immediate environment: see *ibid* reg 10(2)(e) (amended by SI 1996/3207).

9     For the meaning of 'medical evidence' see PARA 70 note 2 ante.

10    Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 10(2)(e) (as amended: see note 8 supra).

11    *Ibid* reg 11.

12    *Ibid* reg 12.

13    *Ibid* reg 13(2). The stipulated treatments are (1) a regular weekly treatment by way of haemodialysis for chronic renal failure or peritoneal dialysis for chronic renal failure; (2) treatment by way of plasmapheresis, by the way of parenteral chemotherapy with cytotoxic drugs, anti-tumour agents or immuno-suppressive drugs or by way of radiotherapy; or (3) regular weekly treatment by way of total parenteral nutrition for gross impairment of enteric function: reg 13(1) (amended by SI 1996/3027). A person receiving such treatment but also working during the week in question is to be treated as capable of work (under the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 16 (as amended): see PARA 72 post) only on the actual day or days on which he works in that week: reg 13(3). Where a person is receiving such treatment, a 'spell of incapacity' for the purposes of the own occupation test (see PARA 67 note 7 ante) is established by a period of two days of incapacity for work, whether consecutive or not, in a period of seven consecutive days: reg 13(4).

14    As to the own occupation test see PARA 67 ante.

15    Ie in accordance with the Social Security (Medical Evidence) Regulations 1976, SI 1976/615 (as amended).

16    Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 14. The prescribed period is the period beginning with the first day of the sixth week before the expected week of her confinement or the actual date of her confinement, whichever is earlier, and ending on the fourteenth day after the actual date of her confinement, if she would have no entitlement to a maternity allowance or statutory maternity pay were she to make a claim in respect of that period: see reg 14.

## UPDATE

### 59-75 Incapacity Benefit

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

### **65-75 Determination of Incapacity for Work**

As from a day to be appointed, Social Security Contributions and Benefits Act 1992 ss 171A-171G repealed: Welfare Reform Act 2007 Sch 3 para 9(12), Sch 8.

Regulations made under the Social Security Contributions and Benefits Act 1992 Pt XIA (ss 171A-171G), in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

In certain circumstances, a person who is a welfare to work beneficiary is also treated as incapable of work: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A (added by SI 1998/2231). A person is a welfare to work beneficiary on any day in a linking term, where he (1) was incapable of work for a period of incapacity for work of more than 196 days in his immediate past period of incapacity for work; (2) ceased to be entitled to the benefit at the end of that immediate past period of incapacity for work on a day which falls on or after 5 October 1998; and (3) became engaged in remunerative work within one month of so ceasing to be entitled to that benefit at the end of that immediate past period of incapacity for work: reg 13A(1) (amended by SI 1999/3901, SI 2006/2378). 'Linking term' means a period of 104 weeks (whether or not broken by days of incapacity for work) fixed on the first day immediately following the last day of incapacity in a period of incapacity for work: SI 1995/311 reg 13A(4) (definition amended by SI 2006/2378). 'Remunerative work' means (a) work (other than exempt work under reg 17: see PARA 72) for which payment is made or which is done in expectation of payment, or (b) attendance on a training course in respect of which the person receives a training allowance in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3): SI 1995/311 reg 13A(4). 'Immediate past period of incapacity for work' means the most recent of (i) a period of incapacity for work under the Social Security Contributions and Benefits Act 1992 s 30C(1), (ii) a period of incapacity for work under s 152, or (iii) a term composed of a period of incapacity for work under s 30C(1) and a period of incapacity for work under s 152 and includes any two such periods of incapacity for work which are separated by a period of not more than eight weeks: SI 1995/311 reg 13A(4) (definition substituted by SI 2006/757). 'Benefit' means any

benefit, allowance or advantage under the Social Security Contributions and Benefits Act 1992 (other than statutory sick pay), or under the Jobseekers Act 1995, for which entitlement is dependent on incapacity for work: SI 1995/311 reg 13A(4).

A person is not a welfare to work beneficiary if his immediate past period of incapacity for work was ended by a determination (ie other than a determination in the circumstances applicable to a person under reg 13A(1) or (3A)) that he was, or was treated as, capable of work: reg 13A(3) (amended by SI 2006/2378). The circumstances are that the person had successfully appealed against a determination made in respect of the personal capability assessment or the own occupation test in relation to his immediate past period of incapacity for work: SI 1995/311 reg 13A(3A) (added by SI 2006/2378).

A welfare to work beneficiary is treated as incapable of work or having limited capability for work on any day in a period, consisting of a cumulative number of days of incapacity for work or limited capacity for work not exceeding 91 days in total, beginning within the linking term and ending on a day not later than 13 weeks from the end of that linking term, where he (A) claims benefit for any day falling within that linking term; (B) submits certain medical evidence (ie in accordance with the Social Security (Medical Evidence) Regulations 1976, SI 1976/615, reg 2 (amended by SI 1999/3109, SI 2000/590, SI 2001/2931, SI 2008/1554); and (C) in his immediate past period of incapacity for work, had been assessed and determined to be incapable of work (see SI 1995/311 Pt III (regs 23-28); and PARA 68) or had been treated (under reg 10), by virtue of having a severe condition, as incapable of work: reg 13A(2).

## **71 Persons treated as incapable of work**

TEXT AND NOTES--For provisions relating to welfare to work beneficiaries see PARA 65-75.

A person to whom SI 1995/311 reg 10A applies is to be treated as incapable of work on any day in a period of incapacity for work on which he does any approved work in respect of which no payment in the nature of earnings is expected or made: reg 10A(1) (reg 10A added by SI 2000/678). Subject to SI 1995/311 reg 10A(3), reg 10A applies to a person who is (1) incapable of work or treated as incapable of work; (2) receiving a prescribed benefit; and (3) engaged in approved work on a trial basis: reg 10A(2). Where such a person is determined to be capable of work, reg 10A(1) ceases to apply in his case: reg 10A(3). 'Approved work' means, in relation to a person, work arranged in writing with an employer in respect of him by an officer of, or a person providing services to, the Secretary of State who has been authorised by the Secretary of State for the purpose; 'a prescribed benefit' means any benefit, allowance or advantage under the Social Security Contributions and Benefits Act 1992 (other than statutory sick pay, statutory maternity pay or industrial injuries benefit) or the Jobseekers Act 1995, and for which entitlement is dependent on incapacity for work; and 'trial basis' means such trial period and other related matters as may be agreed between the person, and an officer of, or a person providing services to, the Secretary of State who has been authorised by the Secretary of State for the purpose, and an employer, in relation to the approved work: reg 10A(4) (amended by SI 2002/491).

NOTE 2--SI 1983/686 Sch 3 substituted: SI 2009/438.

TEXT AND NOTE 11--SI 1995/311 reg 11 substituted: SI 2006/2378.

NOTE 15--SI 1976/615 further amended: SI 1998/646, SI 2001/2931, SI 2002/881, SI 2002/2469, SI 2004/1771, SI 2008/1554.

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## **72. Persons treated as capable of work.**

Even if a person is determined to be, or is treated as being<sup>1</sup>, incapable of work, he is still to be treated as capable of work on each day of any week (commencing on a Sunday) in which he actually works<sup>2</sup>, unless that work (1) is exempt work<sup>3</sup> or work as a councillor<sup>4</sup>; and (2) if it is exempt work, it is done within the prescribed limits<sup>5</sup>.

The categories of exempt work are:

- 215 (a) work undertaken on the advice of a doctor which:  
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  - 14. (i) helps to improve, or to prevent or delay deterioration in, the disease or bodily or mental disablement which causes that person's incapacity for work; or
  - 15. (ii) is part of a treatment programme that is done under medical supervision while that person is an in-patient or regularly attending as an out-patient of a hospital or similar institution; or
  - 16. (iii) is done while that person is attending an institution which provides sheltered work for people with disabilities;
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- 216 (b) work done as a volunteer<sup>6</sup>;
- 217 (c) duties undertaken as a member of a disability appeal tribunal or the Disability Living Allowance Advisory Board<sup>7</sup>.

The prescribed weekly limits on exempt work are:

- 218 (A) that earnings from the work do not exceed the amount currently prescribed<sup>8</sup>;
- 219 (B) that the combined total of the number of hours spent doing work referred to in heads (a)(i) or (b) above is less than 16<sup>9</sup>;
- 220 (C) that the work referred to in head (c) above is not undertaken on more than one day<sup>10</sup>.

Where the all work test<sup>11</sup> applies, a person is to be treated as capable of work throughout any period in respect of which he claims a jobseeker's allowance<sup>12</sup>, notwithstanding that it has been determined that he satisfies that test or that he is, or is to be treated as, incapable of work<sup>13</sup> if throughout that period the following conditions are satisfied, namely that he has done some work or undertaken a course of education or training or similar activity in preparation for work while suffering from the specific disease or bodily or mental disablement which led to that determination and that since he did so, that disease or disablement has not worsened, nor is he suffering from any further disease or bodily or mental disablement which might affect his capacity for work, or if he is able to show that he has a reasonable prospect of obtaining employment<sup>14</sup>.

1 See PARAS 71-72 ante.

2 This applies to any work that the person does, whether or not undertaken in expectation of payment, other than (1) work as a councillor (see note 4 infra); and (2) care of a relative or domestic tasks carried out in his own home: Social Security (Incapacity for Work) (General) Regulations 1995 SI 1995/311, reg 16(2) (amended by SI 1996/3207). 'Relative' means a close relative, a spouse or, or in the case of an unmarried couple, the

other member of that couple, grandparent, grandchild, uncle, aunt, nephew or niece: see the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 2(1) (added by SI 1996/3207). 'Close relative' means a parent, parent-in-law, son-in-law, daughter, daughter-in-law, step-parent, step-son, step-daughter, brother, sister, or the spouse of any of the preceding persons, or if that person is one of an unmarried couple, the other member of that couple: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 2(1).

3 Ibid reg 16(1). Where a person does work in a week which is either the first week in which he becomes entitled to a benefit or the last week in a period of incapacity, he is treated as capable of work under these provisions only on the actual day or days of the week on which he does that work: reg 16(3) (amended by SI 1996/3207). A person is not to be treated as capable of work by reason only of the fact that, during an emergency, he undertook any activity to protect another person or to prevent serious damage to property or livestock: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 16(4).

4 In determining whether a person is capable or incapable of work, there must be disregarded any work which that person has undertaken as a councillor; and for these purposes, 'councillor' means (1) in relation to England and Wales, a member of a London borough council, a county council, a district council, a parish or community council, the Common Council of the City of London or the Council of the Isles of Scilly; and (2) in relation to Scotland, a member of a regional, islands or district council: Social Security Contributions and Benefits Act 1992 s 171F(1), (2) (s 171F added by the Social Security (Incapacity for Work) Act 1994 s 6(1)). The reference in the Social Security Contributions and Benefits Act 1992 s 171F(1) (as added) to the work which a person undertakes as a councillor is to be taken to include any work which he undertakes as a member of any of the bodies referred to in the Local Government Act 1972 s 177(1) (as amended) or the Local Government (Scotland) Act 1973 s 49(1) or s 49(1A) (as added) of which he is a member by virtue of his being a councillor: Social Security Contributions and Benefits Act 1992 s 171F(3) (as so added). For transitional provisions see s 171F(4) (as added). As to the treatment of earnings as a councillor see PARA 62 text and note 22 ante.

5 See the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 16(1) (amended by SI 1995/987).

6 'Volunteer' means a person who is engaged in voluntary work otherwise than for a close relative, where the only payment received by him or due to be paid to him by virtue of being so engaged is in respect of any expenses reasonably incurred by him in connection with that work: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 2(1) (definition substituted by SI 1996/3207).

7 Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 17(1). As to the Disability Living Allowance Advisory Board see PARA 410 post; and as to disability appeal tribunals see PARA 378 post.

8 At the date at which this volume states the law, the prescribed amount was £46.50 but this is subject to frequent change.

9 A person is not to be treated as capable of work because he has exceeded this hours limit in any week if he has worked or would be expected to work an average of less than 16 hours a week: (1) in a case where a recognised cycle in respect of that person's work has been established, in the period of that cycle in which the week in question falls; or (2) in any other case, in the period which comprises that week and the four weeks preceding it: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 17(3).

10 Ibid reg 17(2) (amended by SI 1997/546).

11 As to the all work test see PARA 68 ante.

12 As to the jobseeker's allowance see PARA 258 et seq post.

13 Ie under the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 10 (as amended) or reg 27 (as added): see PARAS 70-71 ante.

14 Ibid reg 17A (added by SI 1995/987; amended by SI 1996/1345).

## UPDATE

### 59-75 Incapacity Benefit

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social

Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

### **65-75 Determination of Incapacity for Work**

As from a day to be appointed, Social Security Contributions and Benefits Act 1992 ss 171A-171G repealed: Welfare Reform Act 2007 Sch 3 para 9(12), Sch 8.

Regulations made under the Social Security Contributions and Benefits Act 1992 Pt XIAA (ss 171A-171G), in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

In certain circumstances, a person who is a welfare to work beneficiary is also treated as incapable of work: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A (added by SI 1998/2231). A person is a welfare to work beneficiary on any day in a linking term, where he (1) was incapable of work for a period of incapacity for work of more than 196 days in his immediate past period of incapacity for work; (2) ceased to be entitled to the benefit at the end of that immediate past period of incapacity for work on a day which falls on or after 5 October 1998; and (3) became engaged in remunerative work within one month of so ceasing to be entitled to that benefit at the end of that immediate past period of incapacity for work: reg 13A(1) (amended by SI 1999/3901, SI 2006/2378). 'Linking term' means a period of 104 weeks (whether or not broken by days of incapacity for work) fixed on the first day immediately following the last day of incapacity in a period of incapacity for work: SI 1995/311 reg 13A(4) (definition amended by SI 2006/2378). 'Remunerative work' means (a) work (other than exempt work under reg 17: see PARA 72) for which payment is made or which is done in expectation of payment, or (b) attendance on a training course in respect of which the person receives a training allowance in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3): SI 1995/311 reg 13A(4). 'Immediate past period of incapacity for work' means the most recent of (i) a period of incapacity for work under the Social Security Contributions and Benefits Act 1992 s 30C(1), (ii) a period of incapacity for work under s 152, or (iii) a term composed of a period of incapacity for work under s 30C(1) and a period of incapacity for work under s 152 and includes any two such periods of incapacity for work which are separated by a period of not more than eight weeks: SI 1995/311 reg 13A(4) (definition substituted by SI 2006/757). 'Benefit' means any benefit, allowance or advantage under the Social Security Contributions and Benefits Act 1992 (other than statutory sick pay), or under the Jobseekers Act 1995, for which entitlement is dependent on incapacity for work: SI 1995/311 reg 13A(4).

A person is not a welfare to work beneficiary if his immediate past period of incapacity for work was ended by a determination (ie other than a determination in the circumstances applicable to a person under reg 13A(1) or (3A)) that he was, or was treated as, capable of work: reg 13A(3) (amended by SI 2006/2378). The circumstances are that the person had successfully appealed against a determination made in respect of the personal capability assessment or the own occupation test in relation to his immediate past period of incapacity for work: SI 1995/311 reg 13A(3A) (added by SI 2006/2378).

A welfare to work beneficiary is treated as incapable of work or having limited capability for work on any day in a period, consisting of a cumulative number of days of incapacity for work or limited capacity for work not exceeding 91 days in total, beginning within the linking term and ending on a day not later than 13 weeks from the end of that linking term, where he (A) claims benefit for any day falling within that linking term; (B) submits certain medical evidence (ie in accordance with the Social Security (Medical Evidence) Regulations 1976, SI 1976/615, reg 2 (amended by SI 1999/3109, SI 2000/590, SI 2001/2931, SI 2008/1554); and (C) in his immediate past period of incapacity for work, had been assessed and determined to be incapable of work (see SI 1995/311 Pt III (regs 23-28); and PARA 68) or had been treated (under reg 10), by virtue of having a severe condition, as incapable of work: reg 13A(2).

## **72 Persons treated as capable of work**

TEXT AND NOTES--SI 1995/311 reg 16 substituted: SI 2006/757.

NOTE 2--Definitions of 'relative' and 'close relative' in SI 1995/311 reg 2(1) amended: SI 2005/2877.

TEXT AND NOTES 6-10--SI 1995/311 reg 17 substituted by SI 2006/757; and amended by SI 2007/2618, SI 2008/2365, SI 2008/2683, SI 2009/2343.

TEXT AND NOTE 14--For 'Where the all work test applies' read 'Where the question of whether a person is capable or incapable of work falls to be determined in accordance with the personal capability assessment (see PARA 68)', and for 'satisfies that test' read 'incapable of work in accordance with that assessment': SI 1995/311 reg 17A; SI 2000/590.

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### 73. Disqualifications.

Regulations may provide for disqualifying a person for receiving any benefit<sup>1</sup>, allowance or other advantage under any provision for the purposes of which the statutory provisions relating to incapacity for work<sup>2</sup> apply, or, in such cases as may be prescribed<sup>3</sup>, provide that a person must be treated as capable of work, if:

- 221 (1) he has become incapable of work through his own misconduct;
- 222 (2) he fails without good cause to attend for or submit himself to such medical or other treatment as may be required in accordance with the regulations; or
- 223 (3) he fails without good cause to observe any prescribed rules of behaviour<sup>4</sup>;

and must provide that any such disqualification is to be, or, as the case may be, that the person is to be treated as capable of work, for such period not exceeding six weeks as may be determined in accordance with the provisions for adjudication<sup>5</sup>.

For these purposes, regulations may also prescribe matters which are or are not to be taken into account in determining whether a person does or does not have good cause for any act or omission, or circumstances in which a person is or is not to be regarded as having or not having good cause for any act or omission<sup>6</sup>.

There are three prescribed circumstances in which a person is to be disqualified for receiving incapacity benefit or severe disablement allowance (or, in the case of any other benefit, allowance or advantage, treated as capable of work) for a period not exceeding six weeks<sup>7</sup>. These are that the person:

- 224 (a) has become incapable of work through his own misconduct<sup>8</sup>, except in a case where the incapacity is due to pregnancy or a sexually transmitted disease; or
- 225 (b) fails without good cause<sup>9</sup> to attend for or submit himself to medical or other treatment (excluding vaccination, inoculation or major surgery) recommended by a doctor with whom, or a hospital or similar institution with which he is undergoing medical treatment and which would be likely to render him capable of work<sup>10</sup>; or
- 226 (c) fails without good cause to observe any of the following rules of behaviour, namely:

13

- 17. (i) to refrain from behaviour calculated to retard his recovery<sup>11</sup>; or
- 18. (ii) not to be absent from his place of residence without leaving word where he may be found<sup>12</sup>.

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1 For the meaning of 'benefit' see PARA 13 note 8 ante.

2 Ie the Social Security Contributions and Benefits Act 1992 Pt XIA (ss 171A-171G) (as added): see PARA 65 et seq ante.

3 For the meaning of 'prescribed' see PARA 19 note 3 ante.

4 Social Security Contributions and Benefits Act 1992 s 171E(1) (s 171E added by the Social Security (Incapacity for Work) Act 1994 s 6(1)).

5 Social Security Contributions and Benefits Act 1992 s 171E(2) (as added: see note 4 supra). As to adjudication see the Social Security Administration Act 1992 Pt II (ss 17-70) (as amended); and PARA 356 et seq post.

6 Social Security Contributions and Benefits Act 1992 s 171E(3) (as added: see note 4 supra). For the period of four years from 5 July 1994, a statutory instrument which contains (whether alone or with other provisions) any regulations made under s 171E (as added) may not be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House: Social Security (Incapacity for Work) Act 1994 s 6(2)(a). As to the regulations so made see the text and notes 7-12 infra.

7 See the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 18(2).

8 'Misconduct' is not defined; for the case law on the term when it applies to disqualification for jobseeker's allowance see PARA 305 post. Alcoholism was held to raise a prima facie inference of misconduct, unless the claimant could show that it was involuntary: Decision R(S)2/53.

9 The power to prescribe factors relevant to 'good cause' (see the text and note 6 supra) has not been exercised. The question thus remains one of fact. Ignorance of the rules or required behaviour is not good cause: Decision R(S)21/52. The burden of proving good cause lies on the claimant: Decision R(S)9/51, in which firm religious conviction was held to constitute good cause.

10 'Other treatment' means treatment for the disease or disablement, not job training: Decision R(S)3/57 (blind woman refusing to continue with work training course held not disqualified; the course could not have affected the blindness); the addition of the phrase 'likely to render him capable of work' widens the disqualification, but is still subject to the requirement that the refused treatment be medically-related.

11 The emphasis is on recovery from the disease or disability, not on improving employability, so that refraining from undertaking training does not come within this disqualification: Decision R(S)3/57. 'Calculated' means 'likely', not 'intended': Decision R(S)21/52.

12 Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 18(1) (amended by SI 1995/987; SI 1996/3207). With regard to head (c) in the text, the burden of proving breach of the rule of behaviour lies on the adjudication officer: Decision R(S)7/83. In that case it was held that head (c)(ii) in the text cannot apply to someone who does not have a normal place of residence. See also Decision R(S)1/87. Bona fide difficulty in leaving word where he may be found may constitute good cause: Decision R(S)6/55.

## UPDATE

### 59-75 Incapacity Benefit

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

### 65-75 Determination of Incapacity for Work

As from a day to be appointed, Social Security Contributions and Benefits Act 1992 ss 171A-171G repealed: Welfare Reform Act 2007 Sch 3 para 9(12), Sch 8.

Regulations made under the Social Security Contributions and Benefits Act 1992 Pt XIAA (ss 171A-171G), in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

In certain circumstances, a person who is a welfare to work beneficiary is also treated as incapable of work: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A (added by SI 1998/2231). A person is a welfare to work beneficiary on any day in a linking term, where he (1) was incapable of work for a period of incapacity for work of more than 196 days in his immediate past period of incapacity for work; (2) ceased to be entitled to the benefit at the end of that immediate past period of incapacity for work on a day which falls on or after 5 October 1998; and (3) became engaged in remunerative work within one month of so ceasing to be entitled to that benefit at the end of that immediate past period of incapacity for work: reg 13A(1) (amended by SI 1999/3901, SI 2006/2378). 'Linking term' means a period of 104 weeks (whether or not broken by days of incapacity for work) fixed on the first day immediately following the last day of incapacity in a period of incapacity for work: SI 1995/311 reg 13A(4) (definition amended by SI 2006/2378). 'Remunerative work' means (a) work (other than exempt work under reg 17: see PARA 72) for which payment is made or which is done in expectation of payment, or (b) attendance on a training course in respect of which the person receives a training allowance in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3): SI 1995/311 reg 13A(4). 'Immediate past period of incapacity for work' means the most recent of (i) a period of incapacity for work under the Social Security Contributions and Benefits Act 1992 s 30C(1), (ii) a period of incapacity for work under s 152, or (iii) a term composed of a period of incapacity for work under s 30C(1) and a period of incapacity for work under s 152 and includes any two such periods of incapacity for work which are separated by a period of not more than eight weeks: SI 1995/311 reg 13A(4) (definition substituted by SI 2006/757). 'Benefit' means any benefit, allowance or advantage under the Social Security Contributions and Benefits Act 1992 (other than statutory sick pay), or under the Jobseekers Act 1995, for which entitlement is dependent on incapacity for work: SI 1995/311 reg 13A(4).

A person is not a welfare to work beneficiary if his immediate past period of incapacity for work was ended by a determination (ie other than a determination in the circumstances applicable to a person under reg 13A(1) or (3A)) that he was, or was treated as, capable of work: reg 13A(3) (amended by SI 2006/2378). The circumstances are that the person had successfully appealed against a determination made in respect of the personal capability assessment or the own occupation test in relation to his immediate past period of incapacity for work: SI 1995/311 reg 13A(3A) (added by SI 2006/2378).

A welfare to work beneficiary is treated as incapable of work or having limited capability for work on any day in a period, consisting of a cumulative number of days of incapacity for work or limited capacity for work not exceeding 91 days in total, beginning within the linking term and ending on a day not later than 13 weeks from the end of that linking term, where he (A) claims benefit for any day falling within that linking term; (B) submits certain medical evidence (ie in accordance with the Social Security (Medical Evidence) Regulations 1976, SI 1976/615, reg 2 (amended by SI 1999/3109, SI 2000/590, SI 2001/2931, SI 2008/1554)); and (C) in his immediate past period of incapacity for work, had been assessed and determined to be incapable of work (see SI 1995/311 Pt III (regs 23-28); and PARA 68) or had been treated (under reg 10), by virtue of having a severe condition, as incapable of work: reg 13A(2).

### 73 Disqualifications

TEXT AND NOTES 1-6--Regulations may provide that a determination that a person is disqualified for any period in accordance with regulations under the Social Security Contributions and Benefits Act 1992 s 171E are to have effect for such purposes as may be prescribed as a determination that he is to be treated as capable of work for that period, and vice versa: Social Security Act 1998 s 31(1). Provision may be made by regulations for matters of such descriptions as may be prescribed to be determined by the Secretary of State, notwithstanding that other matters fall to be determined by another authority: s 31(2). See the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991 (see PARA 356A.13). Nothing in the Social Security Act 1998 s 31 is to be taken to prejudice the generality of the power conferred by s 17(2) (see PARA 356A.11): s 31(3).

Regulations may provide that a determination that a person is disqualified for any period in accordance with regulations under the Welfare Reform Act 2007 s 18(1)-(3) is to have effect for such purposes as may be prescribed as a determination that he is to be treated as not having limited capability for work for that period, and vice versa: 1998 Act s 31(1A) (added by 2007 Act Sch 3 para 17(7)).

NOTE 5--The reference is now to the Social Security Act 1998 Pt I Ch II (ss 8-39): Social Security Contributions and Benefits Act 1992 s 171E(2) (amended by Social Security Act 1998 Sch 7 para 76).

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#### **74. Information and evidence.**

The information or evidence required for the purposes of determining whether a person is capable or incapable of work is:

- 227 (1) where the own occupation test<sup>1</sup> or all work test<sup>2</sup> applies, evidence of his incapacity for work in accordance with the Social Security (Medical Evidence) Regulations 1976 (which prescribe the form of doctor's statement or other evidence required)<sup>3</sup>;
- 228 (2) where the all work test applies, such information as the Secretary of State<sup>4</sup> may request in the form of a questionnaire relating to the person's ability to perform the prescribed activities<sup>5</sup>;
- 229 (3) such additional information relating to the relevant test as the Secretary of State may request<sup>6</sup>.

Where a person fails without good cause to comply with such a request for information by way of the all work questionnaire under head (2) above, he is to be treated as capable of work<sup>7</sup>.

Where a question arises as to whether a person is capable of work, he may be called by or on behalf of a doctor approved by the Secretary of State to attend for a medical examination<sup>8</sup> and where a person fails without good cause to attend for or submit himself to such an examination, he is to be treated as capable of work<sup>9</sup>.

In determining good cause under either of the above provisions, the matters to be taken into account include:

- 230 (a) whether he was outside Great Britain<sup>10</sup> at the relevant time;
- 231 (b) his state of health at the relevant time;
- 232 (c) the nature of any disability from which he suffers<sup>11</sup>.

1 As to the own occupation test see PARA 67 ante.

2 As to the all work test see PARA 68 ante.

3 See the Social Security (Medical Evidence) Regulations 1976, SI 1976/615 (as amended). In practice, this means the form MED 4 completed by his own general practitioner which asks for a diagnosis of the disabling condition but (unlike the previous medical certificates under the old sickness benefit) does not require the doctor to certify that his patient is unfit for work.

4 As to the Secretary of State see PARA 1 ante.

5 As to the prescribed activities see PARA 69 ante. The questionnaire requires the claimant to give his own opinion on his ability to perform the physical activities, but without showing what points are scored by which descriptors; the mental descriptors are not covered by the questionnaire, and are only brought into contention if there is evidence of mental disablement from the claimant's own general practitioner. The self assessment questionnaire is available to the adjudication officer, along with the Benefits Agency Medical Service doctor's assessment (following the medical examination: see note 8 infra).

6 See the Social Security (Incapacity for Work) (General) Regulations, 1995 SI 1995/311, reg 6(1) (amended by SI 1995/987). This does not apply when determining (1) capacity for work for the purposes of jobseeker's allowance (as to which see PARA 263 post); or (2) whether a person is to be deemed to be incapable of work

under the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, regs 10-14 (as amended) (see PARA 71 ante): reg 6(3) (substituted by SI 1995/987; amended by SI 1996/1345).

7 Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 7(1). This only applies if (1) at least six weeks have elapsed since the Secretary of State sent the first request; (2) the Secretary of State has sent a further request at least four weeks after the first; and (3) at least two weeks have elapsed since that further request was sent: see reg 7(2).

8 Ibid reg 8(1). An approved doctor means in practice a Benefits Agency Medical Service doctor, who completes a form detailing the claimant's medical history and giving the doctor's opinion on each of the prescribed descriptors. This form is before the adjudication officer (along with the claimant's self assessment questionnaire and the form MED 4 from the claimant's own general practitioner) when making the decision on incapacity.

9 Ibid reg 8(2). This only applies if written notice of the time and place for the examination was sent to the claimant at least seven days beforehand or if he agreed to accept a shorter period of notice: reg 8(3).

10 For the meaning of 'Great Britain' see PARA 15 note 4 ante.

11 Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 9. The word 'include' means that the question remains a wide one of fact. There must be due compliance with the requirements of notification before there can be a disqualification (even in a case where no good cause is shown): Decision R(S) 1/64. The factors to be considered in a case of failure to attend a medical examination are set out in Decision R(S) 1/87, which also emphasises that the burden of proof of good cause lies on the claimant. Good cause can arise from a firm personal religious conviction: Decision R(S) 9/51.

## **UPDATE**

### **59-75 Incapacity Benefit**

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

### **65-75 Determination of Incapacity for Work**

As from a day to be appointed, Social Security Contributions and Benefits Act 1992 ss 171A-171G repealed: Welfare Reform Act 2007 Sch 3 para 9(12), Sch 8.

Regulations made under the Social Security Contributions and Benefits Act 1992 Pt XIAA (ss 171A-171G), in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

In certain circumstances, a person who is a welfare to work beneficiary is also treated as incapable of work: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A (added by SI 1998/2231). A person is a welfare to work beneficiary on any day in a linking term, where he (1) was incapable of work for a period of incapacity for work of more than 196 days in his immediate past period of incapacity for work; (2) ceased to be entitled to the benefit at the end of that immediate past period of incapacity for work on a day which falls on or after 5 October 1998; and (3) became engaged in remunerative work within one month of so ceasing to be entitled to that benefit at the end of that immediate past period of incapacity for work: reg 13A(1) (amended by SI 1999/3901, SI 2006/2378). 'Linking term' means a period of 104 weeks (whether or not broken by days of incapacity for work) fixed on the first day immediately following the last day of incapacity in a period of incapacity for work: SI 1995/311 reg 13A(4) (definition amended by SI 2006/2378). 'Remunerative work' means (a) work (other than exempt work under reg 17: see PARA 72) for which payment is made or which is done in expectation of payment, or (b) attendance on a training course in respect of which the person receives a training allowance in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3): SI 1995/311 reg 13A(4). 'Immediate past period of incapacity for work' means the most recent of (i) a period of incapacity for work under the Social Security Contributions and Benefits Act 1992 s 30C(1), (ii) a period of incapacity for work under s 152, or (iii) a term composed of a period of incapacity for work under s 30C(1) and a period of incapacity for work under s 152 and includes any two such periods of incapacity for work which are separated by a period of not more than eight weeks: SI 1995/311 reg 13A(4) (definition substituted by SI 2006/757). 'Benefit' means any benefit, allowance or advantage under the Social Security Contributions and Benefits Act 1992 (other than statutory sick pay), or under the Jobseekers Act 1995, for which entitlement is dependent on incapacity for work: SI 1995/311 reg 13A(4).

A person is not a welfare to work beneficiary if his immediate past period of incapacity for work was ended by a determination (ie other than a determination in the circumstances applicable to a person under reg 13A(1) or (3A)) that he was, or was treated as, capable of work: reg 13A(3) (amended by SI 2006/2378). The circumstances are that the person had successfully appealed against a determination made in respect of the personal capability assessment or the own occupation test in relation to his immediate past period of incapacity for work: SI 1995/311 reg 13A(3A) (added by SI 2006/2378).

A welfare to work beneficiary is treated as incapable of work or having limited capability for work on any day in a period, consisting of a cumulative number of days of incapacity for work or limited capacity for work not exceeding 91 days in total, beginning within the linking term and ending on a day not later than 13 weeks from the end of that linking term, where he (A) claims benefit for any day falling within that linking term; (B) submits certain medical evidence (ie in accordance with the Social Security (Medical Evidence) Regulations 1976, SI 1976/615, reg 2 (amended by SI 1999/3109, SI 2000/590, SI 2001/2931, SI 2008/1554)); and (C) in his immediate past period of incapacity for work, had been assessed and determined to be incapable of work (see SI 1995/311 Pt III (regs 23-28); and PARA 68) or had been treated (under reg 10), by virtue of having a severe condition, as incapable of work: reg 13A(2).

## **74 Information and evidence**

TEXT AND NOTE 1--Also, the information or evidence required which is capable of being used for assisting or encouraging a person to obtain work or to enhance his prospects of obtaining it: SI 1995/311 reg 6(1) (amended by SI 1999/3109).

TEXT AND NOTE 2--Words 'or the all work test' omitted; head (1) also applies where the question of whether a person is capable or incapable of work falls to be determined in accordance with the personal capability assessment (see PARA 68): SI 1995/311 reg 6(1)(a) (amended by SI 1999/3109).

NOTE 3--SI 1976/615 further amended: SI 1998/646, SI 2001/2931, SI 2002/881, SI 2002/2469, SI 2004/1771, SI 2008/1554.

TEXT AND NOTES 4, 5--Replaced. Now, head (2) where the question of whether a person is capable or incapable of work falls to be determined in accordance with the personal capability assessment, such information (a) relating to a person's ability to perform the prescribed activities, or (b) capable of being used for assisting or encouraging a person to obtain work or to enhance his prospects of obtaining it, as the Secretary of State may request in the form of a questionnaire: SI 1985/311 reg 6(1)(b); SI 1999/3109. Information requested for the purpose referred to in head (2)(b) above must not be used for the purposes of determining whether a person is capable or incapable of work in accordance with the Social Security Contributions and Benefits Act 1992 Part XIIA (ss 171A-171G): SI 1985/311 reg 6(4) (added by SI 1999/3109).

TEXT AND NOTE 6--For 'relating to the relevant test' read 'as is capable of being used for the purpose referred to in head (2)(b), or relating to the own occupation test or the personal capability assessment': SI 1985/311 reg 6(1)(c) (amended by SI 1999/3109).

NOTE 6--Head (2) now refers to regs 10, 11-14: SI 1995/311 reg 6(3) (amended by SI 2000/678).

TEXT AND NOTE 7--Reference to the all work questionnaire omitted: SI 1985/311 reg 7(1) (amended by SI 1999/3109).

TEXT AND NOTE 8--For 'a question arises as to' read 'it falls to be determined': SI 1985/311 reg 8(1) (amended by SI 1999/3109, SI 2007/1626).

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## **75. Special provisions on adjudication.**

Provision may be made by regulations, in relation to the determination, for any purpose for which the statutory test of incapacity for work applies<sup>1</sup>, whether a person:

- 233 (1) is, or is to be treated as, capable or incapable of work; or
- 234 (2) falls to be disqualified for any period<sup>2</sup>,

and in relation to the determination for any such purpose of such other related questions as may be prescribed<sup>3</sup>, for a determination made for one such purpose to be treated as conclusive for another such purpose<sup>4</sup>. Regulations may in particular provide that a determination that a person is disqualified for any period<sup>5</sup> is to have effect for such purposes as may be prescribed as a determination that he is to be treated as capable of work for that period, and vice versa<sup>6</sup>.

Provision may also be made by regulations:

- 235 (a) for questions of such descriptions as may be prescribed to be determined by an adjudication officer<sup>7</sup>, notwithstanding that other questions fall to be determined by another authority<sup>8</sup>;
- 236 (b) requiring a social security appeal tribunal<sup>9</sup> to sit with one or more medical assessors in such classes of case as may be prescribed<sup>10</sup>; and
- 237 (c) as to the constitution of panels of medical practitioners to act as medical assessors in such cases<sup>11</sup>;

and regulations under heads (b) and (c) above may confer on the President of social security appeal tribunals, medical appeal tribunals and disability appeal tribunals<sup>12</sup>, or such other person as may be prescribed, such functions as may be prescribed<sup>13</sup>.

Where a question arises as to whether a person is, or is to be treated as, capable or incapable of work in respect of any period (or whether a person is terminally ill<sup>14</sup>), that question is to be determined by an adjudication officer, notwithstanding that other questions fall to be determined by another authority<sup>15</sup>. There is therefore an appeal to a social security appeal tribunal<sup>16</sup>, but it is specifically provided that where a matter before the tribunal involves a question as to whether the claimant satisfies the all work test<sup>17</sup>, the tribunal must sit with a medical assessor<sup>18</sup>.

<sup>1</sup> ie for any purpose to which the Social Security Contributions and Benefits Act 1992 Pt XIA (ss 171A-171G) (as added) applies: see PARA 65 et seq ante.

<sup>2</sup> ie in accordance with regulations under ibid s 171E (as added): see PARA 73 ante.

<sup>3</sup> Social Security Administration Act 1992 s 61A(1) (s 61A added by the Social Security (Incapacity for Work) Act 1994 s 6(2)). For the meaning of 'prescribed' see PARA 19 note 3 ante.

<sup>4</sup> Social Security Administration Act 1992 s 61A(2) (as added: see note 3 supra). For the period of four years from 5 July 1994, a statutory instrument which contains (whether alone or with other provisions) any regulations made under s 61A(2) (as added) or under s 61A(3) or (4) (as added) (see notes 7-11 infra), may not be made unless a draft of the instrument has been laid before Parliament and approved by a resolution of each House: Social Security (Incapacity for Work) Act 1994 s 6(2)(a). As to the provisions that have been made see the text and notes 15-18 infra.

- 5 See note 2 *supra*.
- 6 Social Security Administration Act 1992 s 61A(2) (as added: see note 3 *supra*). See also note 4 *supra*.
- 7 As to adjudication officers see PARA 359 post.
- 8 Social Security Administration Act 1992 s 61A(3) (as added: see note 3 *supra*). See also note 4 *supra*.
- 9 As to social security appeal tribunals see PARA 360 post.
- 10 Social Security Administration Act 1992 s 61A(4)(a) (as added: see note 3 *supra*). See also note 4 *supra*.
- 11 *Ibid* s 61A(4)(b) (as added: see note 3 *supra*). See also note 4 *supra*.
- 12 As to the President see PARA 356 post.
- 13 Social Security Administration Act 1992 s 61A(4) (as added: see note 3 *supra*). See also note 4 *supra*.
- 14 For the meaning of 'terminally ill' see PARA 62 note 8 *ante*.
- 15 Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 20 (substituted by SI 1995/987). A determination that a person is, or is to be treated as, capable or incapable of work for the purposes of one benefit, allowance or advantage is to be treated as conclusive for the purposes of any other, in respect of the day or period in question: see the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 19.
- 16 See the Social Security Administration Act 1992 s 22; and PARA 361 post.
- 17 As to the all work test see PARA 68 *ante*.
- 18 Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 21. On any other questions (eg as to good cause for failure to comply with statutory requirements, or late claims) the tribunal will sit as normal, without a medical assessor. The president is to maintain a panel of doctors to act as medical assessors for the whole of Great Britain, and may appoint to that panel for such term as he thinks fit, and may terminate an appointment at any time: reg 22(1), (3). In order to be appointed, a doctor must have at least five years post-registration experience, and not be either (1) a civil servant in any government department; or (2) an employee of, or paid adviser to, an organisation which represents or promotes the interests of people with disabilities: reg 22(2) (amended by SI 1995/987). The medical assessor is neither a member of the tribunal, nor a witness, and is not to attest (or be asked to attest) to the question of incapability, which remains a matter for the tribunal: Decision R(I)23/57. A general power to appoint ad hoc assessors had long existed (if rarely used); under those provisions it was held that the function of a medical assessor was to act as a 'medical dictionary', available to help the tribunal to understand the medical evidence: *R v Deputy Industrial Injuries Comr, ex p Jones* [1962] 2 QB 677, [1962] 2 All ER 430, DC; see also *Richardson v Redpath, Brown & Co Ltd* [1944] AC 62, [1944] 1 All ER 110, HL, cited in Decision R(I)23/57 *supra* and also in Decision R(I)14/51, in which it was held that a medical assessor is not permitted to conduct a medical examination of the claimant.

## UPDATE

### 59-75 Incapacity Benefit

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension

payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

## **65-75 Determination of Incapacity for Work**

As from a day to be appointed, Social Security Contributions and Benefits Act 1992 ss 171A-171G repealed: Welfare Reform Act 2007 Sch 3 para 9(12), Sch 8.

Regulations made under the Social Security Contributions and Benefits Act 1992 Pt XIAA (ss 171A-171G), in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

In certain circumstances, a person who is a welfare to work beneficiary is also treated as incapable of work: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A (added by SI 1998/2231). A person is a welfare to work beneficiary on any day in a linking term, where he (1) was incapable of work for a period of incapacity for work of more than 196 days in his immediate past period of incapacity for work; (2) ceased to be entitled to the benefit at the end of that immediate past period of incapacity for work on a day which falls on or after 5 October 1998; and (3) became engaged in remunerative work within one month of so ceasing to be entitled to that benefit at the end of that immediate past period of incapacity for work: reg 13A(1) (amended by SI 1999/3901, SI 2006/2378). 'Linking term' means a period of 104 weeks (whether or not broken by days of incapacity for work) fixed on the first day immediately following the last day of incapacity in a period of incapacity for work: SI 1995/311 reg 13A(4) (definition amended by SI 2006/2378). 'Remunerative work' means (a) work (other than exempt work under reg 17: see PARA 72) for which payment is made or which is done in expectation of payment, or (b) attendance on a training course in respect of which the person receives a training allowance in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3): SI 1995/311 reg 13A(4). 'Immediate past period of incapacity for work' means the most recent of (i) a period of incapacity for work under the Social Security Contributions and Benefits Act 1992 s 30C(1), (ii) a period of incapacity for work under s 152, or (iii) a term composed of a period of incapacity for work under s 30C(1) and a period of incapacity for work under s 152 and includes any two such periods of incapacity for work which are separated by a period of not more than eight weeks: SI 1995/311 reg 13A(4) (definition substituted by SI 2006/757). 'Benefit' means any benefit, allowance or advantage under the Social Security Contributions and Benefits Act 1992 (other than statutory sick pay), or under the Jobseekers Act 1995, for which entitlement is dependent on incapacity for work: SI 1995/311 reg 13A(4).

A person is not a welfare to work beneficiary if his immediate past period of incapacity for work was ended by a determination (ie other than a determination in the circumstances applicable to a person under reg 13A(1) or (3A)) that he was, or was treated as, capable of work: reg 13A(3) (amended by SI 2006/2378). The circumstances are that the person had successfully appealed against a determination made in respect of the personal capability assessment or the own occupation test in relation to his immediate past period of incapacity for work: SI 1995/311 reg 13A(3A) (added by SI 2006/2378).

A welfare to work beneficiary is treated as incapable of work or having limited capability for work on any day in a period, consisting of a cumulative number of days

of incapacity for work or limited capacity for work not exceeding 91 days in total, beginning within the linking term and ending on a day not later than 13 weeks from the end of that linking term, where he (A) claims benefit for any day falling within that linking term; (B) submits certain medical evidence (ie in accordance with the Social Security (Medical Evidence) Regulations 1976, SI 1976/615, reg 2 (amended by SI 1999/3109, SI 2000/590, SI 2001/2931, SI 2008/1554); and (c) in his immediate past period of incapacity for work, had been assessed and determined to be incapable of work (see SI 1995/311 Pt III (regs 23-28); and PARA 68) or had been treated (under reg 10), by virtue of having a severe condition, as incapable of work: reg 13A(2).

## **75 Special provisions on adjudications**

TEXT AND NOTES 1-13--Social Security Administration Act 1992 s 61A repealed in relation to guardian's allowance, industrial injuries benefits, child benefit, issues arising under the Pension Schemes Act 1993, family credit and disability working allowance: Social Security Act 1998 Sch 8 (see SI 1999/1958, SI 1999/2739).

TEXT AND NOTES 14-18--As to review of decisions involving incapacity for work see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 59A (added by SI 1999/1302).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(2) INCAPACITY BENEFIT/(ii) Determination of Incapacity for Work/75A. Employment and support allowance.

## **75A. Employment and support allowance.**

The following provisions are in force unless otherwise stated: SI 2008/787, SI 2008/2772. The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. For transitional arrangements see s 29, Sch 4 (in force in part: SI 2008/787, SI 2008/3167); and the Employment and Support Allowance (Transitional Provisions) Regulations 2008, SI 2008/795 (amended by SI 2008/2783).

For the effect of alteration of rates of an employment and support allowance see Social Security Administration Act 1992 s 159C (added by Welfare Reform Act 2007 Sch 3 para 10(23)); and amended by Pensions Act 2007 Sch 1 para 28 (partly in force: see Pensions Act 2007 ss 5(3)-(7), 30(1)(a)). See also Social Security Act 1998 Sch 2 para 6(b)(iv) (added by Welfare Reform Act 2007 Sch 3 para 17(8)). As to the implementation of increases in employment and support allowance due to attainment of particular ages see 1992 Act s 160B (added by Welfare Reform Act 2007 Sch 3 para 10(24)).

### **1. General**

An allowance, to be known as an employment and support allowance, is payable in accordance with the provisions of Part 1<sup>1</sup> of the Welfare Reform Act 2007<sup>2</sup>. Subject to those provisions, a claimant<sup>3</sup> is entitled<sup>4</sup> to an employment and support allowance if he satisfies the basic conditions below and either (1) certain conditions relating to national insurance<sup>5</sup> or a condition relating to youth<sup>6</sup>, or (2) certain conditions relating to financial position<sup>7</sup>. The basic conditions are that the claimant (a) has limited capability for work<sup>8</sup>, (b) is at least 16 years old, (c) has not reached pensionable age<sup>9</sup>, (d) is in Great Britain, (e) is not entitled to income support<sup>10</sup>, and (f) is not entitled to a jobseeker's allowance (and is not a member of a couple who are entitled to a joint-claim jobseeker's allowance<sup>11</sup>)<sup>12</sup>. An employment and support allowance is payable in respect of a week<sup>13</sup>.

1    Ie the Welfare Reform Act 2007 Pt 1 (ss 1-29).

2    Ibid s 1(1).

3    In ibid Pt 1 'claimant' means a person who has claimed an employment and support allowance: s 24(1).

4    In ibid Pt 1 'entitled', in relation to an employment and support allowance, is to be construed in accordance with (1) the provisions of the Welfare Reform Act 2007, (2) the Social Security Administration Act 1992 s 1 (see PARA 337), and (3) the Social Security Act 1998 s 27 (see PARA 356A.16): Welfare Reform Act 2007 s 24(1).

5    Ie the conditions set out in ibid Sch 1 paras 1, 2 (Sch 1 para 1 amended by Pensions Act 2007 Sch 1 para 11).

6    Ie the condition set out in the Welfare Reform Act 2007 Sch 1 para 4.

7    Ibid s 1(2), referring to the conditions set out in Sch 1 Pt 2 (para 6).

8    For the purposes of ibid Pt 1, a person has limited capability for work if (1) his capability for work is limited by his physical or mental condition, and (2) the limitation is such that it is not reasonable to require him to work: s 1(4).

9 In *ibid* s 1(3) 'pensionable age' has the meaning given by the rules in the Pensions Act 1995 Sch 4 para 1: Welfare Reform Act 2007 s 1(6).

10 In *ibid* Pt 1 'income support' means income support under the Social Security Contributions and Benefits Act 1992 s 124: Welfare Reform Act 2007 s 24(1).

11 In *ibid* s 1(3) 'joint-claim jobseeker's allowance' means a jobseeker's allowance entitlement to which arises by virtue of the Jobseekers Act 1995 s 1(2B): Welfare Reform Act 2007 s 1(6).

12 *Ibid* s 1(3).

13 *Ibid* s 1(5). In Pt 1 'week' means a period of seven days beginning with a Sunday or such other period of seven days as may be prescribed; 'prescribed' means specified in, or determined in accordance with, regulations; and 'regulations' means regulations made by the Secretary of State: s 24(1). As to regulations generally under Pt 1 see s 25.

As to regulations made see Employment and Support Allowance Regulations 2008, SI 2008/794; and PARA 75A.2.

## 2. Amount of contributory allowance

In the case of a contributory allowance<sup>1</sup>, the amount payable in respect of a claimant<sup>2</sup> must be calculated by (1) taking such amount as may be prescribed<sup>3</sup>, (2) if in his case the conditions of entitlement to the support component<sup>4</sup> or the work-related activity component<sup>5</sup> are satisfied, adding the amount of that component, and (3) making prescribed deductions in respect of any payments<sup>6</sup>.

1 In the Welfare Reform Act 2007 Pt 1 (ss 1-29) 'contributory allowance' has the meaning given by s 1(7): s 24(1). In Pt 1 'contributory allowance' means an employment and support allowance entitlement to which is based on means an employment and support allowance entitlement to which is based on s 1(2)(a) (see PARA 75A.1 head (1)): s 1(7).

2 For the meaning of 'claimant' see PARA 75A.1.

3 For the meaning of 'prescribed' see PARA 75A.1.

4 The conditions of entitlement to the support component are (1) that the assessment phase has ended, (2) that the claimant has limited capability for work-related activity, and (3) that such other conditions as may be prescribed are satisfied: 2007 Act s 2(2). See further NOTE 5. For the purposes of Pt 1, the assessment phase, in relation to a claimant, is the period (a) beginning, subject to s 24(3), with the first day of the period for which he is entitled to an employment and support allowance, and (b) ending with such day as may be prescribed: s 24(2). Regulations may prescribe circumstances in which the assessment phase is to begin with such day as may be prescribed: s 24(3). For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under Pt 1 see s 25. As to Parliamentary control see s 26. For the purposes of Pt 1, a person has limited capability for work-related activity if (1) his capability for work-related activity is limited by his physical or mental condition, and (2) the limitation is such that it is not reasonable to require him to undertake such activity: s 2(5). 'Work-related activity' has the meaning given by s 13(7) (see PARA 75A.11): s 24(1).

5 The conditions of entitlement to the work-related activity component are (1) that the assessment phase has ended, (2) that the claimant does not have limited capability for work-related activity, and (3) that such other conditions as may be prescribed are satisfied: *ibid* s 2(3).

Regulations may (a) prescribe circumstances in which s 2(2)(a) (see NOTE 4 head (1)) or 2(3)(a) (see head (1)) is not to apply; (b) prescribe circumstances in which entitlement under s 2(2) or (3) is to be backdated; (c) make provision about the amount of the component under s 2(2) or (3): s 2(4). As to regulations made under Pt 1 see Employment and Support Allowance Regulations 2008, SI 2008/794 (amended by SI 2008/1599, SI 2008/2428, SI 2008/2683, SI 2008/3051, SI 2008/3157, SI 2009/362, SI 2009/471, SI 2009/583, SI 2009/1575, SI 2009/2343, SI 2009/2655, SI 2009/3228, SI 2010/442; and modified by SI 2008/3195 (amended by SI 2009/3257)).

6 Welfare Reform Act 2007 s 2(1), referring to any payments to which s 3 (see PARA 75A.3) applies.

## 3. Deductions from contributory allowance: supplementary

The following provisions<sup>1</sup> apply to payments of the following kinds which are payable to the claimant<sup>2</sup>: (1) pension payments<sup>3</sup>, (2) PPF periodic payments<sup>4</sup>, and (3) payments of a prescribed

description made to a person who is a member of, or has been appointed to, a prescribed body carrying out public or local functions<sup>5</sup>. Regulations<sup>6</sup> may (a) disapply provision relating to deductions<sup>7</sup>, so far as relating to pension payments or PPF periodic payments, in relation to persons of a prescribed description; (b) provide for pension payments or PPF periodic payments of a prescribed description to be treated for the purposes of that provision as not being payments to which these provisions<sup>8</sup> apply; (c) provide for sums of a prescribed description to be treated for the purposes of these provisions as payable to persons as pension payments or PPF periodic payments (including, in particular, sums in relation to which there is a deferred right of receipt); (d) make provision for the method of determining how payments to which these provisions are<sup>9</sup> to be related to periods for which a person is entitled to a contributory allowance<sup>10</sup>.

1    Ie the Welfare Reform Act 2003 s 3.

2    For the meaning of 'claimant' see PARA 75A.1.

3    In the 2007 Act s 3 'pension payment' means (1) a periodical payment made in relation to a person under a personal pension scheme or, in connection with the coming to an end of an employment of his, under an occupational pension scheme or a public service pension scheme, (2) a payment of a prescribed description made under an insurance policy providing benefits in connection with physical or mental illness or disability, and (3) such other payments as may be prescribed: s 3(3). In Pt 1 (ss 1-29) 'employment' and 'employed' have the meanings prescribed for the purposes of Pt 1: s 24(1). For the purposes of s 3(3), 'occupational pension scheme', 'personal pension scheme' and 'public service pension scheme' each have the meaning given by the Pension Schemes Act 1993 s 1, except that 'personal pension scheme' includes (a) an annuity contract or trust scheme approved under the Income and Corporation Taxes Act 1988 s 620 (repealed) or 621(repealed), and (b) a substituted contract within the meaning of s 622(3) (repealed), which is treated as having become a registered pension scheme by virtue of the Finance Act 2004 Sch 36 para 1(1)(f) (see PARA 873B.1): 2007 Act s 3(4). For the meaning of 'prescribed' see PARA 75A.1.

4    In *ibid* s 3 'PPF periodic payment' means (1) any periodic compensation payment made in relation to a person, payable under the pension compensation provisions as specified in the Pensions Act 2004 s 162(2) or the Pensions (Northern Ireland) Order 2005, SI 2005/255 (NI 1) art 146(2) (the pension compensation provisions), and (2) any periodic payment made in relation to a person, payable under the Pensions Act 2004 s 166 or the Pensions (Northern Ireland) Order 2005 art 150 (duty to pay scheme benefits unpaid at assessment date etc): 2007 Act s 3(3).

5    *Ibid* s 3(1).

6    For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under *ibid* Pt 1 see s 25.

7    Ie *ibid* s 2(1)(c): see PARA 75A.2 head (3).

8    Ie *ibid* s 3.

9    For the purposes of *ibid* s 2: see PARA 75A.2.

10   *Ibid* s 3(2). As to regulations made under s 3 see Employment and Support Allowance Regulations 2008, SI 2008/794; and PARA 75A.2.

#### **4. Amount of income-related allowance and advance award of income-related allowance**

In the case of an income-related allowance<sup>1</sup>, the amount payable in respect of a claimant<sup>2</sup> is (1) if he has no income, the applicable amount<sup>3</sup>; (2) if he has an income, the amount by which the applicable amount exceeds his income<sup>4</sup>. Regulations<sup>5</sup> may provide that, in prescribed cases, the applicable amount for the above purposes<sup>6</sup> is nil<sup>7</sup>. The conditions of entitlement to the support component are (a) that the assessment phase<sup>8</sup> has ended, (b) that the claimant has limited capability for work-related activity<sup>9</sup>, and (c) that such other conditions as may be prescribed are satisfied<sup>10</sup>. The conditions of entitlement to the work-related activity component are (i) that the assessment phase has ended, (ii) that the claimant does not have limited capability for work-related activity, and (iii) that such other conditions as may be prescribed are satisfied<sup>11</sup>.

Provision is made with respect to the advance award of income-related allowance<sup>12</sup>.

1 In the Welfare Reform Act 2007 Pt 1 (ss 1-29) 'income-related allowance' has the meaning given by s 1(7): s 24(1). In Pt 1 'income-related allowance' means an employment and support allowance entitlement to which is based on s 1(2)(b) (see PARA 75A.1 head (2)): s 1(7).

2 For the meaning of 'claimant' see PARA 75A.1e.

3 Subject to the 2007 Act s 4(3), the applicable amount for the purposes of s 4(1) is to be calculated by (1) taking such amount, or the aggregate of such amounts, as may be prescribed, and (2) if in the claimant's case the conditions of entitlement to the support component or the work-related activity component are satisfied, adding the amount of that component: s 4(2). For the meaning of 'prescribed' see PARA 75A.1.

4 Ibid s 4(1).

5 For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under ibid Pt 1 see s 25. As to Parliamentary control see s 26.

6 Ie for the purposes of ibid s 4(1).

7 Ibid s 4(3). As to regulations made under s 4 see Employment and Support Allowance Regulations 2008, SI 2008/794; and PARA 75A.2.

8 For the meaning of 'assessment phase' see PARA 75A.2.

9 In the 2007 Act Pt 1 'limited capability for work-related activity' must be construed in accordance with s 2(5) (see PARA 75A.2): s 24(1). For the meaning of 'work-related activity' see PARA 75A.11t.

10 Ibid s 4(4). See further NOTE 11.

11 Ibid s 4(5).

Regulations may (1) prescribe circumstances in which head (a) or (i) in the text is not to apply; (2) prescribe circumstances in which entitlement under s 4(4) or (5) is to be backdated; (3) make provision about the amount of the component under s 4(4) or (5): s 4(6). As to regulations see NOTE 7.

12 See ibid s 5. Section 5 applies to claims for an employment and support allowance by a person who (1) would be entitled to an income-related allowance, but for the fact that he does not satisfy the condition in Sch 1 para 6(1)(a), (2) would satisfy that condition if he were entitled to the component mentioned in s 4(4) or (5), and (3) is not entitled to a contributory allowance: s 5(1). For the meaning of 'entitled' and 'contributory allowance' see PARA 75A.1. In relation to claims to which s 5 applies, the Social Security Administration Act 1992 s 5(1) (see PARA 330) has effect as if (a) in s 5(1)(d) (see PARA 330), there were inserted at the end 'and to such other conditions as may be prescribed', and (b) in s 5(1)(e) (see PARA 330), for 'any of those requirements' there were substituted 'any of the conditions to which the award is made subject': 2007 Act s 5(2). Regulations may, in relation to claims to which s 5 applies, make provision enabling an award to be made on terms such that the time at which benefit becomes payable under the award is later than the start of the period for which the award is made: s 5(3). As to regulations see NOTE 7.

## 5. Amount payable where claimant entitled to both forms of allowance

Where a claimant<sup>1</sup> is entitled<sup>2</sup> to both a contributory allowance<sup>3</sup> and an income-related allowance<sup>4</sup>,

238 (1) if the claimant has no income, the amount payable by way of an employment and support allowance is the greater of

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19. (a) his personal rate<sup>5</sup>, and

20. (b) the applicable amount<sup>6</sup>;

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239 (2) if the claimant has an income, the amount payable by way of an employment and support allowance is the greater of

17

21. (a) his personal rate, and

22. (b) the amount by which the applicable amount exceeds his income<sup>7</sup>.  
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Where the amount payable to the claimant by way of an employment and support allowance does not exceed his personal rate, the allowance is to be treated as attributable to the claimant's entitlement to a contributory allowance<sup>8</sup>. Where the amount payable to the claimant by way of an employment and support allowance exceeds his personal rate, the allowance is to be taken to consist of two elements, namely (i) an amount equal to his personal rate, and (ii) an amount equal to the excess<sup>9</sup>.

1 For the meaning of 'claimant' see PARA 75A.1.

2 For the meaning of 'entitled' see PARA 75A.1.

3 For the meaning of 'contributory allowance' see PARA 75A.1.

4 Welfare Reform Act 2007 s 6(1). For the meaning of 'income-related allowance' see PARA 75A.1.

5 In *ibid* s 6 'personal rate' means the amount calculated in accordance with s 2(1) (see PARA 75A.2); s 6(8).

6 *Ibid* s 6(2). In *ibid* s 6 'applicable amount' means the amount which, in the claimant's case, is the applicable amount for the purposes of s 4(1) (see PARA 75A.4); s 6(8).

7 *Ibid* s 6(3).

8 *Ibid* s 6(4).

9 *Ibid* s 6(5). The element mentioned in head (i) in the text is to be treated as attributable to the claimant's entitlement to a contributory allowance: s 6(6). The element mentioned in head (ii) in the text is to be treated as attributable to the claimant's entitlement to an income-related allowance: s 6(7).

## 6. Exclusion of payments below prescribed minimum

Except in such circumstances as regulations<sup>1</sup> may provide, an employment and support allowance will not be payable where the amount otherwise payable would be less than a prescribed<sup>2</sup> minimum<sup>3</sup>.

1 For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under the Welfare Reform Act 2007 Pt 1 (ss 1-29) see s 25.

2 For the meaning of 'prescribed' see PARA 75A.1.

3 2007 Act s 7.

## 7. Limited capability for work

For the purposes of Part 1 of the Welfare Reform Act 2007<sup>1</sup>, whether a person's capability for work is limited by his physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require him to work is to be determined in accordance with regulations<sup>2</sup>. Such regulations must (1) provide for determination on the basis of an assessment of the person concerned; (2) define the assessment by reference to the extent to which a person who has some specific disease or bodily or mental disablement is capable or incapable of performing such activities as may be prescribed<sup>3</sup>; (3) make provision as to the manner of carrying out the assessment<sup>4</sup>. Such regulations may, in particular, make provision (a) as to the information or evidence required for the purpose of determining the matters mentioned above<sup>5</sup>; (b) as to the manner in which that information or evidence is to be provided; (c) for a person in relation to whom it falls to be determined whether he has limited capability for work<sup>6</sup> to be

called to attend for such medical examination as the regulations may require<sup>7</sup>. Regulations may include provision (i) for a person to be treated as not having limited capability for work if he fails without good cause (A) to provide information or evidence which he is required under such regulations to provide, (B) to provide information or evidence in the manner in which he is required under such regulations to provide it, or (C) to attend for, or submit himself to, a medical examination for which he is called under such regulations to attend; (ii) as to matters which are, or are not, to be taken into account in determining for the purposes of any provision made by virtue of head (i) above whether a person has good cause for any act or omission; (iii) as to circumstances in which a person is, or is not, to be regarded for the purposes of any such provision as having good cause for any act or omission<sup>8</sup>. Regulations may provide that, in prescribed circumstances, a person in relation to whom it falls to be determined whether he has limited capability for work, is to be treated, if prescribed conditions are met, as having limited capability for work until such time as it has been determined whether he has limited capability for work, or he falls in accordance with regulations under these provisions to be treated as not having limited capability for work<sup>9</sup>.

1    Ie the Welfare Reform Act 2007 ss 1-29.

2    Ibid s 8(1). For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under Pt 1 see s 25. As to regulations made under s 8 see Employment and Support Allowance Regulations 2008, SI 2008/794; and PARA 75A.2.

3    For the meaning of 'prescribed' see PARA 75A.1.

4    2007 Act s 8(2). The Secretary of State must lay before Parliament an independent report on the operation of the assessment under s 8 annually for the first five years after s 8 comes into force: s 10.

5    Ie the matters mentioned in ibid s 8(1).

6    In ibid Pt 1 'limited capability for work' must be construed in accordance with s 1(4) (see PARA 75A.1): s 24(1).

7    Ibid s 8(3).

8    Ibid s 8(4).

9    Ibid s 8(5). The prescribed conditions referred to in s 8(5) may include the condition that it has not previously been determined, within such period as may be prescribed, that the person in question does not have, or is to be treated as not having, limited capability for work: s 8(6).

## **8. Limited capability for work-related activity**

For the purposes of Part 1 of the Welfare Reform Act 2007<sup>1</sup>, whether a person's capability for work-related activity<sup>2</sup> is limited by his physical or mental condition and, if it is, whether the limitation is such that it is not reasonable to require him to undertake such activity must be determined in accordance with regulations<sup>3</sup>. Such regulations must (1) provide for determination on the basis of an assessment of the person concerned; (2) define the assessment by reference to such matters as the regulations may provide; (3) make provision as to the manner of carrying out the assessment<sup>4</sup>. Such regulations may, in particular, make provision (a) as to the information or evidence required for the purpose of determining specified matters<sup>5</sup>; (b) as to the manner in which that information or evidence is to be provided; (c) for a person in relation to whom it falls to be determined whether he has limited capability for work-related activity<sup>6</sup> to be called to attend for such medical examination as the regulations may require<sup>7</sup>. Regulations may include provision (i) for a person to be treated as not having limited capability for work-related activity if he fails without good cause (A) to provide information or evidence which he is required under such regulations to provide, (B) to provide information or evidence in the manner in which he is required under such regulations to provide it, or (C) to attend for, or submit himself to, a medical examination for which he is

called under such regulations to attend; (ii) as to matters which are, or are not, to be taken into account in determining for the purposes of any provision made by virtue of head (i) above whether a person has good cause for any act or omission; (iii) as to circumstances in which a person is, or is not, to be regarded for the purposes of any such provision as having good cause for any act or omission<sup>8</sup>.

1    le the Welfare Reform Act 2007 ss 1-29.

2    For the meaning of 'work-related activity' see PARA 75A.11.

3    2007 Act s 9(1). For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under Pt 1 see s 25. As to regulations made under s 9 see Employment and Support Allowance Regulations 2008, SI 2008/794; and PARA 75A.2.

4    2007 Act s 9(2). The Secretary of State must lay before Parliament an independent report on the operation of the assessment under s 9 annually for the first five years after s 9 comes into force: s 10.

5    le the matters mentioned in ibid s 9(1).

6    For the meaning of 'limited capability for work-related activity' see PARA 75A.2.

7    2007 Act s 9(3).

8    Ibid s 9(4).

## **9. Work-focused health-related assessments**

Regulations<sup>1</sup> may make provision for or in connection with imposing on a person who is (1) entitled<sup>2</sup> to an employment and support allowance, and (2) not a member of the support group<sup>3</sup>, a requirement to take part in one or more work-focused health-related assessments<sup>4</sup> as a condition of continuing to be entitled to the full amount payable to him in respect of the allowance apart from the regulations<sup>5</sup>. Regulations under these provisions may, in particular, make provision (a) prescribing circumstances in which such a person is subject to a requirement to take part in one or more work-focused health-related assessments; (b) for notifying such a person of any such requirement; (c) prescribing the work-focused health-related assessments in which a person who is subject to such a requirement is required to take part; (d) for the determination, and notification, of the time and place of any such assessment; (e) prescribing circumstances in which a person attending such an assessment is to be regarded as having, or not having, taken part in it; (f) for securing that the appropriate consequence follows if a person who is required under the regulations to take part in a work-focused health-related assessment (i) fails to take part in the assessment, and (ii) does not, within a prescribed period, show that he had good cause for that failure<sup>6</sup>; (g) prescribing matters which are, or are not, to be taken into account in determining whether a person had good cause for any failure to comply with the regulations; (h) prescribing circumstances in which a person is, or is not, to be regarded as having good cause for any such failure<sup>7</sup>. Regulations under these provisions must include provision for a requirement to take part in one or more work-focused health-related assessments to cease to have effect if the person subject to the requirement becomes a member of the support group<sup>8</sup>. Regulations under these provisions may include provision (A) that in such circumstances as the regulations may prescribe a requirement to take part in a work-focused health-related assessment that would otherwise apply to a person by virtue of such regulations is not to apply, or is to be treated as not having applied; (B) that in such circumstances as the regulations may prescribe such a requirement is not to apply until a prescribed time; (c) that in such circumstances as the regulations may prescribe the time and place of a work-focused health-related assessment in which a person is required by regulations under these provisions to take part may be redetermined<sup>9</sup>.

1 For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under the Welfare Reform Act 2007 Pt 1 (ss 1-29) see s 25. As to regulations made under s 11 see Employment and Support Allowance Regulations 2008, SI 2008/794; and PARA 75A.2.

2 For the meaning of 'entitled' see PARA 75A.1.

3 For the purposes of the Welfare Reform Act 2007 Pt 1, a person is a member of the support group if he is a person in respect of whom it is determined that he has, or is to be treated as having, limited capability for work-related activity: s 24(4). For the meaning of 'limited capability for work-related activity' see PARA 75A.2. For the meaning of 'work-related activity' see PARA 75A.11.

4 In *ibid* s 11, 'work-focused health-related assessment' means an assessment by a health care professional approved by the Secretary of State which is carried out for the purpose of assessing (1) the extent to which a person still has capability for work, (2) the extent to which his capability for work may be improved by the taking of steps in relation to his physical or mental condition, and (3) such other matters relating to his physical or mental condition and the likelihood of his obtaining or remaining in work or being able to do so, as may be prescribed: s 11(7). For the meaning of 'prescribed' see PARA 75A.1. In s 11(7), 'health care professional' means (a) a registered medical practitioner, (b) a registered nurse, (c) an occupational therapist or physiotherapist registered with a regulatory body established by an Order in Council under the Health Act 1999 s 60, or (d) a member of such other profession regulated by a body mentioned in the National Health Service Reform and Health Care Professions Act 2002 s 25(3) as may be prescribed: 2007 Act s 11(8).

5 *Ibid* s 11(1).

6 For the purposes of head (f) in the text, the appropriate consequence of a failure falling within that provision is that the amount payable to the person in question in respect of an employment and support allowance is reduced in accordance with regulations: *ibid* s 11(3). Regulations under s 11(3) may, in particular, make provision for determining (1) the amount by which an allowance is to be reduced, (2) when the reduction is to start, and (3) how long it is to continue, and may include provision prescribing circumstances in which the amount of the reduction is to be nil: s 11(4).

7 *Ibid* s 11(2).

8 *Ibid* s 11(5).

9 *Ibid* s 11(6).

## 10. Work-focused interviews

Regulations<sup>1</sup> may make provision for or in connection with imposing on a person who is (1) entitled<sup>2</sup> to an employment and support allowance, and (2) not a member of the support group<sup>3</sup>, a requirement to take part in one or more work-focused interviews<sup>4</sup> as a condition of continuing to be entitled to the full amount payable to him in respect of the allowance apart from the regulations<sup>5</sup>. Regulations under these provisions may, in particular, make provision (a) prescribing circumstances in which such a person is subject to a requirement to take part in one or more work-focused interviews; (b) for notifying such a person of any such requirement; (c) prescribing the work-focused interviews in which a person who is subject to such a requirement is required to take part; (d) for determining, in relation to work-focused interviews under the regulations, when and how the interview is to be conducted and, if it is to be conducted face to face, where it is to take place; (e) for notifying persons who are required under the regulations to take part in a work-focused interview of what is determined in respect of the matters mentioned in head (d) above; (f) prescribing circumstances in which a person who is a party to a work-focused interview under the regulations is to be regarded as having, or not having, taken part in it; (g) for securing that the appropriate consequence follows if a person who is required under the regulations to take part in a work-focused interview (i) fails to take part in the interview, and (ii) does not, within a prescribed period, show that he had good cause for that failure<sup>6</sup>; (h) prescribing matters which are, or are not, to be taken into account in determining whether a person had good cause for any failure to comply with the regulations; (i) prescribing circumstances in which a person is, or is not, to be regarded as having good cause for any such failure<sup>7</sup>. Regulations under these provisions must include provision for a requirement to take part in one or more work-focused interviews to cease to have effect if the

person subject to the requirement becomes a member of the support group<sup>8</sup>. Regulations under these provisions may include provision (A) that in such circumstances as the regulations may prescribe a requirement to take part in a work-focused interview that would otherwise apply to a person by virtue of such regulations is not to apply, or is to be treated as not having applied; (B) that in such circumstances as the regulations may prescribe such a requirement is not to apply until a prescribed time; (C) that in such circumstances as the regulations may prescribe matters mentioned in head (d) above may be redetermined<sup>9</sup>.

1 For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under the Welfare Reform Act 2007 Pt 1 (ss 1-29) see s 25. As to regulations made under s 12 see Employment and Support Allowance Regulations 2008, SI 2008/794; and PARA 75A.2.

2 For the meaning of 'entitled' see PARA 75A.1.

3 For the meaning of 'member of the support group' see PARA 75A.9.

4 In the 2007 Act s 12, 'work-focused interview' means an interview by the Secretary of State conducted for such purposes connected with getting the person interviewed into work, or keeping him in work, as may be prescribed: s 12(7). For the meaning of 'prescribed' see PARA 75A.1.

5 Ibid s 12(1).

6 For the purposes of head (g) in the text, the appropriate consequence of a failure falling within that provision is that the amount payable to the person in question in respect of an employment and support allowance is reduced in accordance with regulations: ibid s 12(3). Regulations under s 12(3) may, in particular, make provision for determining (1) the amount by which an allowance is to be reduced, (2) when the reduction is to start, and (3) how long it is to continue, and may include provision prescribing circumstances in which the amount of the reduction is to be nil: s 12(4).

7 Ibid s 12(2).

8 Ibid s 12(5).

9 Ibid s 12(6).

## **11. Work-related activity**

The following provisions are not yet in force unless otherwise stated.

Regulations<sup>1</sup> may make provision for or in connection with imposing on a person who is subject to a requirement<sup>2</sup> a requirement to undertake work-related activity<sup>3</sup> in accordance with regulations as a condition of continuing to be entitled<sup>4</sup> to the full amount payable to him in respect of an employment and support allowance apart from the regulations<sup>5</sup>. Regulations under these provisions may, in particular, make provision (1) prescribing<sup>6</sup> circumstances in which such a person is subject to a requirement to undertake work-related activity in accordance with regulations; (2) for notifying such a person of any such requirement; (3) prescribing the time or times at which a person who is subject to such a requirement is required to undertake work-related activity and the amount of work-related activity he is required at any time to undertake; (4) prescribing circumstances in which a person who is subject to such a requirement is, or is not, to be regarded as undertaking work-related activity; (5) for securing that the appropriate consequence follows if a person who is subject to such a requirement (i) fails to comply with the regulations, and (ii) does not, within a prescribed period, show that he had good cause for that failure<sup>7</sup>; (6) prescribing the evidence which a person who is subject to such a requirement needs to provide in order to show that he has complied with the regulations; (7) prescribing matters which are, or are not, to be taken into account in determining whether a person has complied with the regulations; (8) prescribing matters which are, or are not, to be taken into account in determining whether a person had good cause for any failure to comply with the regulations; (9) prescribing circumstances in which a person is, or is not, to be regarded as having good cause for any such failure<sup>8</sup>.

Regulations under these provisions must include provision for a requirement to undertake work-related activity in accordance with regulations to cease to have effect if the person subject to the requirement becomes a member of the support group<sup>9</sup>. Regulations under these provisions may include provision that in such circumstances as the regulations may provide a person's obligation under the regulations to undertake work-related activity at a particular time is not to apply, or is to be treated as not having applied<sup>10</sup>.

1 For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under the Welfare Reform Act 2007 Pt 1 (ss 1-29) see s 25. As to parliamentary control see s 26.

See also Welfare Reform Act 2009 s 8 (parliamentary procedure: regulations imposing work-related activity requirements on lone parents of children under seven) (in force).

2 I.e. a requirement imposed under the Welfare Reform Act 2007 s 12(1): see PARA 75A.10.

3 In *ibid* Pt 1, 'work-related activity', in relation to a person, means activity which makes it more likely that the person will obtain or remain in work or be able to do so: s 13(7) (in force: SI 2008/2772).

4 For the meaning of 'entitled' see PARA 75A.1.

5 2007 Act s 13(1).

6 For the meaning of 'prescribed' see PARA 75A.1.

7 For the purposes of head (5) in the text, the appropriate consequence of a failure falling within that provision is that the amount payable to the person in question in respect of an employment and support allowance is to be reduced in accordance with regulations: 2007 Act s 13(3). Regulations under s 13(3) may, in particular, make provision for determining (1) the amount by which an allowance is to be reduced, (2) when the reduction is to start, and (3) how long it is to continue, and may include provision prescribing circumstances in which the amount of the reduction is to be nil: s 13(4).

8 *Ibid* s 13(2).

9 *Ibid* s 13(5). For the meaning of 'member of the support group' see PARA 75A.9.

10 *Ibid* s 13(6).

## 12. Action plans in connection with work-focused interviews

The Secretary of State must in prescribed<sup>1</sup> circumstances provide a person subject to a requirement<sup>2</sup> with a document prepared for such purposes as may be prescribed (in these provisions referred to as an action plan)<sup>3</sup>. Regulations<sup>4</sup> may make provision about (1) the form of action plans; (2) the content of action plans; (3) the review and updating of action plans<sup>5</sup>. Regulations under these provisions may, in particular, make provision for action plans which are provided to a person who is subject<sup>6</sup> to a requirement to undertake work-related activity<sup>7</sup> to contain particulars of activity which, if undertaken, would enable the requirement to be met<sup>8</sup>. Regulations may make provision for reconsideration of an action plan at the request of the person to whom the plan is provided and may, in particular, make provision about (a) the circumstances in which reconsideration may be requested; (b) the period within which any reconsideration must take place; (c) the matters to which regard must be had when deciding on reconsideration whether the plan should be changed; (d) notification of the decision on reconsideration; (e) the giving of directions for the purpose of giving effect to the decision on reconsideration<sup>9</sup>.

1 For the meaning of 'prescribed' see PARA 75A.1.

2 I.e. a requirement imposed under the Welfare Reform Act 2007 s 12(1): see PARA 75A.10.

3 *Ibid* s 14(1).

4 For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under *ibid* Pt 1 (ss 1-29) see s 25. As to regulations made under s 14 see Employment and Support Allowance Regulations 2008, SI 2008/794; and PARA 75A.2.

5 2007 Act s 14(2).

6 *Ie* under *ibid* s 13: see PARA 75A.11.

7 For the meaning of 'work-related activity' see PARA 75A.11.

8 2007 Act s 14(3).

9 *Ibid* s 14(4).

### 13. Directions about work-related activity

The following provisions are not yet in force.

In prescribed<sup>1</sup> circumstances, the Secretary of State may by direction given to a person subject to a requirement<sup>2</sup> provide that the activity specified in the direction is (1) to be the only activity which, in the person's case, is to be regarded as being work-related activity<sup>3</sup>; or (2) to be regarded, in the person's case, as not being work-related activity<sup>4</sup>. But the direction may not specify medical or surgical treatment as the only activity which, in any person's case, is to be regarded as being work-related activity<sup>5</sup>. Such a direction given to any person (a) must be reasonable, having regard to the person's circumstances; (b) must be given to the person by being included in an action plan provided to the person<sup>6</sup>; and (c) may be varied or revoked by a subsequent direction under this provision<sup>7</sup>. Where a direction<sup>8</sup> varies or revokes a previous direction, it may provide for the variation or revocation to have effect from a time before the giving of the direction<sup>9</sup>.

1 For the meaning of 'prescribed' see PARA 75A.1.

2 *Ie* a requirement imposed under the Welfare Reform Act 2007 s 13(1): see PARA 75A.11.

3 For the meaning of 'work-related activity' see PARA 75A.11.

4 Welfare Reform Act 2007 s 15(1) (s 15(1), (1A), (2) substituted by Welfare Reform Act 2009 s 10).

5 Welfare Reform Act 2007 s 15(1A).

6 *Ie* under *ibid* s 14: see PARA 75A.12.

7 *Ibid* s 15(2).

8 *Ie* under *ibid* s 15(1)a.

9 *Ibid* s 15(3).

### 13a. Persons dependent on drugs etc

Schedule 1A to the Welfare Reform Act 2007<sup>1</sup> makes provision for or in connection with imposing requirements on persons in cases where (1) they are dependent on, or have a propensity to misuse, any drug, and (2) any such dependency or propensity is a factor affecting their prospects of obtaining or remaining in work<sup>2</sup>. Schedule 1A also contains a power for its provisions to apply in relation to alcohol<sup>3</sup>.

1 Welfare Reform Act 2007 Sch 1A added by Welfare Reform Act 2009 Sch 3 para 7.

2 Welfare Reform Act 2007 s 15A(1) (s 15A added by Welfare Reform Act 2009 Sch 3 para 6).

2 Welfare Reform Act 2007 s 15A(2).

## 14. Contracting out

The following functions of the Secretary of State may be exercised by, or by employees of, such person (if any) as the Secretary of State may authorise for the purpose, namely (1) conducting interviews<sup>1</sup>; (2) providing documents<sup>2</sup>; (3) giving, varying or revoking directions<sup>3</sup>. Further provision relating to contracting out is made<sup>4</sup>.

1 le under the Welfare Reform Act 2007 s 12: see PARA 75A.10.

2 le under ibid s 14: see PARA 75A.12.

3 le under ibid s 15 (see PARA 75A.13): s 16(1).

4 See ibid s 16(2)-(13). Regulations may provide for any of the following functions of the Secretary of State to be exercisable by, or by employees of, such person (if any) as the Secretary of State may authorise for the purpose (1) any function under regulations under any of ss 11-15 (see PARAS 75A.9-75A.13), except the making of a decision to which s 16(3) applies (an 'excluded decision'); (2) the function under the Social Security Act 1998 s 9(1) (see PARA 356A.2), so far as relating to decisions, except excluded decisions, that relate to any matter arising under such regulations; (3) the function under the 1998 Act s 10(1) (see PARA 356A.3), so far as relating to decisions, except excluded decisions, of the Secretary of State that relate to any matter arising under such regulations; (4) any function under Pt 1 Ch 2 (ss 8-39), except s 25(2) and (3) (see PARA 356A.15), which relates to the exercise of any of the functions falling within heads (1)-(3): 2007 Act s 16(2). For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under the Welfare Reform Act 2007 Pt 1 (ss 1-29) see s 25. Section 16(3) applies to the following decisions (a) a decision about whether a person has failed to comply with a requirement imposed by regulations under s 11, 12 or 13; (b) a decision about whether a person had good cause for failure to comply with such a requirement; (c) a decision about reduction of an employment and support allowance in consequence of failure to comply with such a requirement: s 11(3). Regulations under s 16(2) may provide that a function to which that provision applies may be exercised (i) either wholly or to such extent as the regulations may provide, (ii) either generally or in such cases or areas as the regulations may provide, and (iii) either unconditionally or subject to the fulfilment of such conditions as the regulations may provide: s 16(4).

As to regulations made under s 16 see Employment and Support Allowance Regulations 2008, SI 2008/794; and PARA 75A.2.

An authorisation given by virtue of the 2007 Act s 16(1), or by virtue of regulations under s 16(2), may authorise the exercise of the function concerned (1) either wholly or to such extent as may be specified in the authorisation, (2) either generally or in such cases or areas as may be so specified, and (3) either unconditionally or subject to the fulfilment of such conditions as may be so specified: s 16(5). In the case of an authorisation given by virtue of regulations under s 16(2), s 16(5) is subject to the provisions of the regulations: s 16(6). An authorisation given by virtue of s 16(1), or by virtue of regulations under s 16(2) (a) may specify its duration, (b) may be revoked at any time by the Secretary of State, and (c) does not prevent the Secretary of State or any other person from exercising the function to which the authorisation relates: s 16(7). Where a person is authorised to exercise any function by virtue of s 16(1), or by virtue of regulations under s 16(2), anything done or omitted to be done by or in relation to him (or an employee of his) in, or in connection with, the exercise or purported exercise of the function is to be treated for all purposes as done or omitted to be done by or in relation to the Secretary of State: s 16(8). Section 16(8) does not apply (i) for the purposes of so much of any contract made between the authorised person and the Secretary of State as relates to the exercise of the function, or (ii) for the purposes of any criminal proceedings brought in respect of anything done or omitted to be done by the authorised person (or an employee of his): s 16(9). Any decision which a person authorised to exercise any function by virtue of s 16(1), or by virtue of regulations under s 16(2), makes in exercise of the function has effect as a decision of the Secretary of State under the Social Security Act 1998 s 8 (see PARA 356A.1): 2007 Act s 16(10). Where (A) a person is authorised to exercise any function by virtue of s 16(1), or by virtue of regulations under s 16(2), and (B) the authorisation is revoked at a time when a relevant contract is subsisting, the authorised person is entitled to treat the relevant contract as repudiated by the Secretary of State (and not as frustrated by reason of the revocation): s 16(11). In s 16(11), the reference to a relevant contract is to so much of any contract made between the authorised person and the Secretary of State as relates to the exercise of the function: s 16(12).

In s 16, references to functions of the Secretary of State under (1) an enactment contained in, or in regulations under, Pt 1, or (2) an enactment contained in the Social Security Act 1998 Pt 1 Ch 2, include a reference to any function which the Secretary of State has by virtue of the application in relation to that enactment of the 1998 Act s 8(1)(c) (see PARA 356A.1): 2007 Act s 16(13).

## 15. Income and capital: general

In relation to a claim for an employment and support allowance, the income and capital of a person must be calculated or estimated in such manner as may be prescribed<sup>1</sup>. A person's income in respect of a week<sup>2</sup> must be calculated in accordance with prescribed rules, which may provide for the calculation to be made by reference to an average over a period (which need not include the week concerned)<sup>3</sup>. Circumstances may be prescribed in which (1) a person is to be treated as possessing capital or income which he does not possess; (2) capital or income which a person does possess is to be disregarded; (3) income is to be treated as capital; (4) capital is to be treated as income<sup>4</sup>. Regulations<sup>5</sup> may provide that a person's capital is to be deemed for the purposes of Part 1 of the Welfare Reform Act 2007 to yield him an income at a prescribed rate<sup>6</sup>.

1 Welfare Reform Act 2007 s 17(1). For the meaning of 'prescribed' see PARA 75A.1e.

2 For the meaning of 'week' see PARA 75A.1.

3 2007 Act s 17(2).

4 Ibid s 17(3).

5 For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under ibid Pt 1 (ss 1-29) see s 25. As to regulations made under s 17 see Employment and Support Allowance Regulations 2008, SI 2008/794; and PARA 75A.2.

6 2007 Act s 17(4).

## 16. Disqualification

Regulations<sup>1</sup> may provide for a person to be disqualified for receiving an employment and support allowance, or treated for such purposes as the regulations may provide as not having limited capability for work<sup>2</sup>, if (1) he has become someone who has limited capability for work through his own misconduct, (2) he remains someone who has limited capability for work through his failure without good cause to follow medical advice, or (3) he fails without good cause to observe any prescribed<sup>3</sup> rules of behaviour<sup>4</sup>. Regulations may prescribe for the above purposes<sup>5</sup> (a) matters which are, or are not, to be taken into account in determining whether a person has good cause for any act or omission; (b) circumstances in which a person is, or is not, to be regarded as having good cause for any act or omission<sup>6</sup>. Except where regulations otherwise provide, a person is disqualified for receiving a contributory allowance<sup>7</sup> for any period during which he is (i) absent from Great Britain, or (ii) undergoing imprisonment or detention in legal custody<sup>8</sup>.

1 For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under the Welfare Reform Act 2007 Pt 1 (ss 1-29) see s 25. As to regulations made under s 18 see Employment and Support Allowance Regulations 2008, SI 2008/794; and PARA 75A.2.

2 For the meaning of 'limited capability for work' see PARA 75A.1.

3 For the meaning of 'prescribed' see PARA 75A.1.

4 2007 Act s 18(1). Regulations under s 18(1) must provide for any such disqualification, or treatment, to be for such period not exceeding six weeks as may be determined in accordance with the Social Security Act 1998 Pt 1 Ch 2 (ss 8-39): 2007 Act s 18(2).

5 Ie the purposes of ibid s 18(1).

6 Ibid s 18(3).

7 For the meaning of 'contributory allowance' see PARA 75A.1.

8 2007 Act s 18(4).

## 17. Pilot schemes

Any regulations<sup>1</sup> to which this provision<sup>2</sup> applies<sup>3</sup> may be made so as to have effect for a specified period not exceeding 36 months<sup>4</sup>. Regulations which<sup>5</sup> are to have effect for a limited period are referred to in these provisions as a 'pilot scheme'<sup>6</sup>. A pilot scheme may provide that its provisions are to apply only in relation to (1) one or more specified areas; (2) one or more specified classes of person; (3) persons selected (a) by reference to prescribed<sup>7</sup> criteria, or (b) on a sampling basis<sup>8</sup>. A pilot scheme may make consequential or transitional provision with respect to the cessation of the scheme on the expiry of the specified period<sup>9</sup>. A pilot scheme may be replaced by a further pilot scheme making the same or similar provision<sup>10</sup>.

1 For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under the Welfare Reform Act 2007 Pt 1 (ss 1-29) see s 25. As to parliamentary control see s 26.

2 *Ibid* s 19(1).

3 Subject to *ibid* s 19(3), s 19(1) applies to (1) regulations which are made under any provision of Pt 1, other than ss 3 (see PARA 75A.3), 8 (see PARA 75A.7), and 9 (see PARA 75A.8); (2) regulations which are made under the Social Security Administration Act 1992, so far as they relate to an employment and support allowance: 2007 Act s 19(2). Section 19(1) only applies to regulations if they are made with a view to ascertaining whether their provisions will or will be likely to (a) encourage persons to obtain or remain in work, or (b) make it more likely that persons will obtain or remain in work or be able to do so: s 19(3).

4 *Ibid* s 19(1) (amended by Welfare Reform Act 2009 s 28(2)).

5 *Ibid* by virtue of the Welfare Reform Act 2007 s 19(1).

6 *Ibid* s 19(4).

7 For the meaning of 'prescribed' see PARA 75A.1.

8 2007 Act s 19(5).

9 *Ibid* s 19(6).

10 *Ibid* s 19(7).

## 18. Relationship with statutory payments

A person is not entitled<sup>1</sup> to an employment and support allowance in respect of a day if, for the purposes of statutory sick pay, that day (1) is a day of incapacity for work in relation to a contract of service, and (2) falls within a period of entitlement (whether or not it is a qualifying day)<sup>2</sup>. Except as regulations<sup>3</sup> may provide, a woman who is entitled to statutory maternity pay is not entitled to a contributory allowance<sup>4</sup> in respect of a day that falls within the maternity pay period<sup>5</sup>. Regulations may provide that (a) an amount equal to a woman's statutory maternity pay for a period is to be deducted from a contributory allowance in respect of the same period, (b) a woman is only to be entitled to a contributory allowance if there is a balance after the deduction, and (c) if there is such a balance, a woman is entitled to a contributory allowance at a weekly rate equal to it<sup>6</sup>. Except as regulations may provide, a person who is entitled to statutory adoption pay is not entitled to a contributory allowance in respect of a day that falls within the adoption pay period<sup>7</sup>. Regulations may provide that (i) an amount equal to a person's statutory adoption pay for a period is to be deducted from a contributory allowance in respect of the same period, (ii) a person is only entitled to a contributory allowance if there is a balance after the deduction, and (iii) if there is such a balance, a person is entitled to a contributory allowance at a weekly rate equal to it<sup>8</sup>. Except as regulations may provide, a

person who is entitled to additional statutory paternity pay is not entitled to a contributory allowance in respect of a day that falls within the additional paternity pay period<sup>9</sup>. Regulations may provide that (A) an amount equal to a person's additional statutory paternity pay for a period is to be deducted from a contributory allowance in respect of the same period, (B) a person is only entitled to a contributory allowance if there is a balance after the deduction, and (C) if there is such a balance, a person is entitled to a contributory allowance at a weekly rate equal to it<sup>10</sup>.

1 For the meaning of 'entitled' see PARA 75A.1.

2 Welfare Reform Act 2007 s 20(1).

3 For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under the Welfare Reform Act 2007 Pt 1 (ss 1-29) see s 25. As to regulations made under s 20 see Employment and Support Allowance Regulations 2008, SI 2008/794; and PARA 75A.2.

4 For the meaning of 'contributory allowance' see PARA 75A.1.

5 2007 Act s 20(2). In s 20 'the maternity pay period' has the meaning given in the Social Security Contributions and Benefits Act 1992 s 165(1) (see EMPLOYMENT vol 39 (2009) PARA 388); 2007 Act s 20(8).

6 Ibid s 20(3).

7 Ibid s 20(4). In s 20 'the adoption pay period' has the meaning given in the 1992 Act s 171ZN(2) (see EMPLOYMENT vol 39 (2009) PARA 475); 2007 Act s 20(8).

8 Ibid s 20(5).

9 Ibid s 20(6). In s 20 'the additional paternity pay period' has the meaning given in the 1992 Act s 171ZEE(2); 2007 Act s 20(8).

10 Ibid s 20(7).

## 19. Deemed entitlement for other purposes

Regulations<sup>1</sup> may provide for a person who would be entitled<sup>2</sup> to an employment and support allowance but for the operation of any provision of, or made under, Part 1 of the Welfare Reform Act 2007, the Social Security Administration Act 1992 or Chapter 2 of Part 1 of the Social Security Act 1998 (social security decisions and appeals) to be treated as if entitled to the allowance for the purposes of any rights or obligations (whether his own or another's) which depend on his entitlement, other than the right to payment of it<sup>3</sup>.

1 For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under the Welfare Reform Act 2007 Pt 1 (ss 1-29) see s 25.

2 For the meaning of 'entitled' see PARA 75A.1.

3 2007 Act s 21.

## 20. Supplementary provisions

Supplementary provision in respect of the employment and support allowance is made<sup>1</sup>. In particular, regulations<sup>2</sup> may make provision (1) for a person to be treated in prescribed<sup>3</sup> circumstances as having, or as not having, limited capability for work<sup>4</sup>; (2) for the question of whether a person has limited capability for work to be determined notwithstanding that he is for the time being treated by virtue of regulations under head (1) above as having limited capability for work; (3) for the question of whether a person has limited capability for work to be determined afresh in prescribed circumstances<sup>5</sup>. Except in prescribed circumstances, a

person is not entitled to an employment and support allowance in respect of a prescribed number of days at the beginning of a period of limited capability for work<sup>6</sup>. Regulations may make provision in relation to (a) entitlement to an employment and support allowance, or (b) the amount payable by way of such an allowance, in respect of any period of less than a week<sup>7</sup>. Regulations may provide for circumstances in which a period of limited capability for work which is separated from another period of limited capability for work by not more than a prescribed length of time is to be treated for the purposes of Part 1 of the Welfare Reform Act 2007 as a continuation of the earlier period<sup>8</sup>. Regulations may also prescribe circumstances where people are entitled to an employment and support allowance where they are not in Great Britain<sup>9</sup>. Additional provision is made<sup>10</sup>.

1 See Welfare Reform Act 2007 s 22, Sch 2.

2 For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under the Welfare Reform Act 2007 Pt 1 (ss 1-29) see s 25.

3 For the meaning of 'prescribed' see PARA 75A.1.

4 For the meaning of 'limited capability for work' see PARA 75A.1.

5 2007 Act Sch 2 para 1. As to regulations made under s 22, Sch 2 see Employment and Support Allowance Regulations 2008, SI 2008/794; and PARA 75A.2.

6 2007 Act Sch 2 para 2.

7 Ibid Sch 2 para 3.

8 Ibid Sch 2 para 4(1). Regulations may provide, in relation to periods which are linked by virtue of regulations under Sch 2 para 4(1), that a condition which was satisfied in relation to the earlier period is to be treated for the purposes of Pt 1 as satisfied in relation to the later period: Sch 2 para 4(2).

9 See ibid Sch 2 paras 5-8.

10 See ibid Sch 2 paras 9-15.

## **21. Recovery of sums in respect of maintenance**

Regulations<sup>1</sup> may make provision for the court<sup>2</sup> to have power to make a recovery order against any person where an award of income-related allowance<sup>3</sup> has been made to that person's spouse or civil partner<sup>4</sup>. Such regulations may include (1) provision as to the matters to which the court is, or is not, to have regard in determining any application under the regulations; (2) provision as to the enforcement of orders under the regulations; (3) provision for the transfer by the Secretary of State of the right to receive payments under, and to exercise rights in relation to, orders under the regulations<sup>5</sup>.

1 For the meaning of 'regulations' see PARA 75A.1. As to regulations generally under the Welfare Reform Act 2007 Pt 1 (ss 1-29) see s 25.

2 In ibid s 23, 'the court' means in relation to England and Wales, a magistrates' court: s 23(4).

3 For the meaning of 'income-related allowance' see PARA 75A.1.

4 2007 Act s 23(1). The reference in s 23(1) to a recovery order is to an order requiring the person against whom it is made to make payments to the Secretary of State or to such other person or persons as the court may determine: s 23(2). As to regulations made under s 23 see Employment and Support Allowance Regulations 2008, SI 2008/794; and PARA 75A.2.

5 2007 Act s 23(3). As to regulations see NOTE 4.

## **22. Financial provisions**

There must be paid out of the National Insurance Fund so much of any sums payable by way of employment and support allowance as is attributable to entitlement to a contributory allowance<sup>1</sup>. There must be paid out of money provided by Parliament (1) so much of any sums payable by way of employment and support allowance as is attributable to entitlement to an income-related allowance<sup>2</sup>, and (2) any administrative expenses of the Secretary of State or the Commissioners for Her Majesty's Revenue and Customs in carrying Part 1 of the Welfare Reform Act 2007<sup>3</sup> into effect<sup>4</sup>. The Secretary of State must pay into the National Insurance Fund sums estimated by him to be equivalent in amount to sums recovered by him in connection with payments of contributory allowance<sup>5</sup>. The Secretary of State must pay into the Consolidated Fund sums estimated by him to be equivalent in amount to sums recovered by him in connection with payments made by way of income-related allowance<sup>6</sup>.

1 Welfare Reform Act 2007 s 27(1). For the meaning of 'contributory allowance' see PARA 75A.1.

2 For the meaning of 'income-related allowance' see PARA 75A.1.

3 Ie the 2007 Act ss 1-29.

4 Ibid s 27(2).

5 Ibid s 27(3).

6 Ibid s 27(4).

## **UPDATE**

### **59-75 Incapacity Benefit**

The Welfare Reform Act 2007 Pt 1 (ss 1-29) makes provision for the employment and support allowance which replaces incapacity benefit and income support on grounds of incapacity for work or disability. Accordingly, as from a day to be appointed, the Social Security Contributions and Benefits Act 1992 ss 30A-30E (incapacity benefit) and ss 171A-171G (incapacity for work) are repealed: 2007 Act Sch 3 para 9(5), (12), Sch 8. As to employment and support allowance see PARA 75A.

Provision is made concerning (1) additional conditions for persons incapacitated in youth (Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, regs 14-19 (added by SI 2000/3120; SI 1994/2946 reg 15 amended by SI 2001/1305; SI 1994/2946 reg 16 amended by SI 2005/2877, SI 2006/2378; SI 1994/2946 reg 18 amended by SI 2001/1305, SI 2002/2311; SI 1994/2946 reg 19 amended by SI 2002/491)); and (2) the reduction or abatement of incapacity benefit for occupational or other pension payments (SI 1994/2946 regs 20-26) (added by SI 2000/3120; and amended by SI 2006/1069; SI 1994/2946 reg 21 further amended: SI 2008/2365; SI 1994/2946 reg 20A added: SI 2009/792).

### **65-75 Determination of Incapacity for Work**

As from a day to be appointed, Social Security Contributions and Benefits Act 1992 ss 171A-171G repealed: Welfare Reform Act 2007 Sch 3 para 9(12), Sch 8.

Regulations made under the Social Security Contributions and Benefits Act 1992 Pt XIAA (ss 171A-171G), in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or

more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

In certain circumstances, a person who is a welfare to work beneficiary is also treated as incapable of work: Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A (added by SI 1998/2231). A person is a welfare to work beneficiary on any day in a linking term, where he (1) was incapable of work for a period of incapacity for work of more than 196 days in his immediate past period of incapacity for work; (2) ceased to be entitled to the benefit at the end of that immediate past period of incapacity for work on a day which falls on or after 5 October 1998; and (3) became engaged in remunerative work within one month of so ceasing to be entitled to that benefit at the end of that immediate past period of incapacity for work: reg 13A(1) (amended by SI 1999/3901, SI 2006/2378). 'Linking term' means a period of 104 weeks (whether or not broken by days of incapacity for work) fixed on the first day immediately following the last day of incapacity in a period of incapacity for work: SI 1995/311 reg 13A(4) (definition amended by SI 2006/2378). 'Remunerative work' means (a) work (other than exempt work under reg 17: see PARA 72) for which payment is made or which is done in expectation of payment, or (b) attendance on a training course in respect of which the person receives a training allowance in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3): SI 1995/311 reg 13A(4). 'Immediate past period of incapacity for work' means the most recent of (i) a period of incapacity for work under the Social Security Contributions and Benefits Act 1992 s 30C(1), (ii) a period of incapacity for work under s 152, or (iii) a term composed of a period of incapacity for work under s 30C(1) and a period of incapacity for work under s 152 and includes any two such periods of incapacity for work which are separated by a period of not more than eight weeks: SI 1995/311 reg 13A(4) (definition substituted by SI 2006/757). 'Benefit' means any benefit, allowance or advantage under the Social Security Contributions and Benefits Act 1992 (other than statutory sick pay), or under the Jobseekers Act 1995, for which entitlement is dependent on incapacity for work: SI 1995/311 reg 13A(4).

A person is not a welfare to work beneficiary if his immediate past period of incapacity for work was ended by a determination (ie other than a determination in the circumstances applicable to a person under reg 13A(1) or (3A)) that he was, or was treated as, capable of work: reg 13A(3) (amended by SI 2006/2378). The circumstances are that the person had successfully appealed against a determination made in respect of the personal capability assessment or the own occupation test in relation to his immediate past period of incapacity for work: SI 1995/311 reg 13A(3A) (added by SI 2006/2378).

A welfare to work beneficiary is treated as incapable of work or having limited capability for work on any day in a period, consisting of a cumulative number of days of incapacity for work or limited capacity for work not exceeding 91 days in total, beginning within the linking term and ending on a day not later than 13 weeks from the end of that linking term, where he (A) claims benefit for any day falling within that linking term; (B) submits certain medical evidence (ie in accordance with the Social Security (Medical Evidence) Regulations 1976, SI 1976/615, reg 2 (amended by SI 1999/3109, SI 2000/590, SI 2001/2931, SI 2008/1554); and (C) in his immediate past period of incapacity for work, had been assessed and determined to be incapable of work (see SI 1995/311 Pt III (regs 23-28); and PARA 68) or had been treated (under reg 10), by virtue of having a severe condition, as incapable of work: reg 13A(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(3) STATE MATERNITY ALLOWANCE/76. Entitlement.

### (3) STATE MATERNITY ALLOWANCE

#### 76. Entitlement.

Most benefit that is payable to a person on the ground of maternity is paid out, through the employer, by way of statutory maternity pay<sup>1</sup>. However, for those who do not qualify for that benefit<sup>2</sup> there is the state maternity allowance, a contributory benefit<sup>3</sup>. A woman is entitled to this allowance if:

- 240 (1) she has become pregnant and has reached, or been confined before reaching, the commencement of the eleventh week<sup>4</sup> before the expected week of confinement<sup>5</sup>; and
- 241 (2) she has been engaged in employment<sup>6</sup> as an employed or self-employed earner<sup>7</sup> for at least 26 weeks in the 66 weeks immediately preceding the expected week of confinement; and
- 242 (3) she satisfies the applicable contribution condition<sup>8</sup>; and
- 243 (4) she is not entitled to statutory maternity pay for the same week in respect of the same pregnancy<sup>9</sup>.

The fact that the mother of a child is being paid maternity allowance is not to be taken into consideration by any court in deciding whether to order payment of expenses incidental to the birth of the child<sup>10</sup>.

1 As to statutory maternity pay see EMPLOYMENT vol 39 (2009) PARA 365 et seq.

2 This means principally those who have been self-employed, or employees who have not been in their current employment long enough to qualify for statutory maternity pay.

3 See the Social Security Contributions and Benefits Act 1992 s 35 which is amended, as from October 1994, by the Maternity Allowance and Statutory Maternity Pay Regulations 1994, SI 1994/1230, regs 1(2), 2 to bring it into line with the changes to statutory maternity pay required by the Pregnant Workers Directive (EC Council Directive 92/85 (OJ L348, 28.11.92, p 1)).

4 For the meaning of 'week' see PARA 32 note 7 ante.

5 'Confinement' means (1) labour resulting in the issue of a live child; or (2) labour after 24 weeks of pregnancy resulting in the issue of a child whether alive or dead; and 'confined' is to be construed accordingly: Social Security Contributions and Benefits Act 1992 s 35(6) (amended by the Still-Birth (Definition) Act 1992 s 2(1)(a)). In the case of miscarriage or still-birth, the length of the pregnancy can be determined by reference to the estimated date of confinement (Decision R(G)4/56) or from medical evidence as to the state of the foetus (Decision R(G)12/59). Where a woman's labour begins on one day and results in the issue of a child on another day, she is taken to be confined on the day of the issue of the child or, if labour results in the issue of twins or a greater number of children, she is taken to be confined on the day of the issue of the last of them: Social Security Contributions and Benefits Act 1992 s 35(6).

6 For the meaning of 'employment' see PARA 32 note 2 ante.

7 For the meaning of 'employed earner' and 'self-employed earner' see PARA 32 ante.

8 For the contribution condition see PARA 77 post.

9 Social Security Contributions and Benefits Act 1992 s 35(1).

10 Ibid s 35(7). For the meaning of 'child' see PARA 19 note 11 ante.

**UPDATE****76 Entitlement**

TEXT AND NOTES--As to the entitlement to maternity allowance for women who are ordinarily resident in Great Britain but who have worked abroad, see the Social Security (Maternity Allowance) (Work Abroad) Regulations 1987, SI 1987/417 (amended by SI 1994/1367, SI 2000/691).

TEXT AND NOTES 2-9--Social Security Contributions and Benefits Act 1992 s 35(1), (1A) now s 35(1) (substituted by the Welfare Reform and Pensions Act 1999 s 53(1)). The Social Security Contributions and Benefits Act 1992 s 35(1) (amended by Employment Act 2002 Sch 7 para 4(2)), provides that a woman is entitled to a maternity allowance, at the appropriate weekly rate determined under the 1992 Act s 35A (see PARA 78), if (1) she has become pregnant and has reached, or been confined before reaching, the commencement of the 11th week before the expected week of confinement; and (2) she has been engaged in employment as an employed or self-employed earner for any part of the week in the case of at least 26 of the 66 weeks immediately preceding the expected week of confinement; and (3) her average weekly earnings (within the meaning of s 35A (see PARA 78)) are not less than the maternity allowance threshold for the tax year in which the beginning of the period of 66 weeks mentioned in head (2) falls; and (4) she is not entitled to statutory maternity pay for the same week in respect of the same pregnancy.

In s 35 'the maternity allowance threshold', in relation to a tax year, means £30: s 35(6A) (s 35(6A)-(6D) added by the Employment Act 2002 Sch 7 para 4(4)). The Secretary of State may, in relation to any tax year after 2001-02, by order increase the amount for the time being specified in the 1992 Act s 35(6A) to such amount as is specified in the order: s 35(6B). When deciding whether, and (if so) by how much, to increase the amount so specified the Secretary of State must have regard to the movement, over such period as he thinks fit, in the general level of prices obtaining in Great Britain (estimated in such manner as he thinks fit): s 35(6C). The Secretary of State must in each tax year carry out such a review of the amount for the time being specified in s 35(6A) as he thinks fit: s 35(6D).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(3) STATE MATERNITY ALLOWANCE/77. Contribution condition.

## **77. Contribution condition.**

The contribution condition<sup>1</sup> for state maternity allowance<sup>2</sup> is:

- 244 (1) that the claimant<sup>3</sup> must, in respect of at least 26 weeks<sup>4</sup> in the 66 weeks immediately preceding the expected week of confinement<sup>5</sup>, have actually paid contributions of a relevant class<sup>6</sup>; and
- 245 (2) in the case of Class 1 contributions<sup>7</sup>, that they were not secondary contributions<sup>8</sup> and were paid otherwise than at the reduced rate<sup>9</sup>.

The relevant classes of contributions for state maternity allowance are Classes 1 or 2<sup>10</sup>, which means that it can be claimed by the employed or the self-employed<sup>11</sup>.

1 As to contribution conditions generally see PARA 55 ante.

2 As to state maternity allowance see PARA 76 ante.

3 For the meaning of 'claimant' see PARA 19 note 5 ante.

4 For the meaning of 'week' see PARA 32 note 7 ante.

5 For the meaning of 'confinement' see PARA 76 note 5 ante.

6 As to relevant classes of contributions see PARA 55 ante.

7 As to Class 1 contributions see PARAS 34-37 ante.

8 As to secondary Class 1 contributions see PARAS 35, 37 ante.

9 Social Security Contributions and Benefits Act 1992 s 21(3), Sch 3 para 3(1) (amended by the Maternity Allowance and Statutory Maternity Pay Regulations 1994, SI 1994/1230, regs 1(2), 2(4)). As to reduced rate contributions see PARA 53 ante. In the case of a claimant paid other than weekly, any week in which (1) she did not pay contributions of a relevant class; but (2) her earnings were such that, had she been paid weekly, she would have been required to pay primary Class 1 contributions in respect of that week; and (3) there was no election in force to continue to pay at the reduced rate (see PARA 53 ante), then that week is to be treated as a week in which she actually paid such contributions otherwise than at a reduced rate: Sch 3 para 3(2). For these purposes the amount of the claimant's earnings for any week are to be determined in accordance with regulations: Sch 3 para 3(3). For the meaning of 'earnings' see PARA 33 ante. At the date at which this volume states the law, no such regulations had been made and none had effect as if so made.

10 See *ibid* s 21(2) (as amended); and PARA 55 ante.

11 For the meaning of 'employed' and 'self-employed' see PARA 32 ante.

## **UPDATE**

### **77 Contribution condition**

TEXT AND NOTES 1-9--Repealed: Welfare Reform and Pensions Act 1999 Sch 13 Pt V.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(3) STATE MATERNITY ALLOWANCE/78. Amount and duration of state maternity allowance.

## **78. Amount and duration of state maternity allowance.**

The appropriate weekly rate<sup>1</sup> of state maternity allowance<sup>2</sup> is:

- 246 (1) in the case of a woman who is engaged in employment<sup>3</sup> as an employed earner<sup>4</sup> in the week<sup>5</sup> immediately preceding the fourteenth week before the expected week of confinement<sup>6</sup>, a weekly rate equal to the lower rate of statutory maternity pay<sup>7</sup>, or the weekly rate specified for the allowance<sup>8</sup>, whichever is the higher;
- 247 (2) in any other case, that specified weekly rate<sup>9</sup>.

The allowance is payable for a period (the 'maternity allowance period') which, if she were entitled to statutory maternity pay, would be the maternity pay period for that purpose<sup>10</sup>.

A woman ceases to be entitled<sup>11</sup> if she dies before the beginning of the maternity allowance period; if she dies after the beginning, but before the end, of that period, the allowance is not payable for any week subsequent to that in which she dies<sup>12</sup>.

1 The daily rate is calculated by (1) disregarding Sunday (or such other day of the week as may be prescribed); and (2) dividing the weekly rate by six: see the Social Security Contributions and Benefits Act 1992 s 35(5). For the meaning of 'prescribed' see PARA 19 note 3 ante.

2 As to state maternity allowance see PARA 76 ante.

3 For the meaning of 'employment' see PARA 32 note 2 ante.

4 For the meaning of 'employed earner' see PARA 32 ante.

5 For the meaning of 'week' see PARA 32 note 7 ante.

6 For the meaning of 'confinement' see PARA 76 note 5 ante.

7 Ie the rate prescribed under the Social Security Contributions and Benefits Act 1992 s 166(3) (as amended); see EMPLOYMENT vol 39 (2009) PARA 392.

8 Ie the weekly rate specified in ibid Sch 4 Pt I para 4 (which is subject to frequent amendment).

9 Ibid s 35(1A) (added by the Maternity Allowance and Statutory Maternity Pay Regulations 1994, SI 1994/1230, regs 1(2), 2(2)). The linkage to the statutory maternity pay rate in the case of an employed earner is necessary because the latter rate is in turn required to be no less than the equivalent rate of statutory sick pay, by the Pregnant Workers Directive (EC Council Directive 92/85 (OJ L348, 28.11.92, p 1)) art 11.

10 Social Security Contributions and Benefits Act 1992 s 35(2). For the maternity pay period (which is not to exceed 18 weeks) see s 165 (as amended); and see EMPLOYMENT vol 39 (2009) PARA 388. Regulations may provide that s 35 (as amended) and Sch 3 para 3 (as amended) (see PARA 77 note 9 ante) are to have effect subject to prescribed modifications in relation to cases in which a woman has been confined and has not made a claim for a maternity allowance in expectation of that confinement (other than a claim which has been disallowed), or has made a claim for a maternity allowance in expectation of that confinement (other than a claim which has been disallowed), but she was confined more than 11 weeks before the expected week of confinement: s 35(3)(b). Regulations may also provide that s 35(2) is to have effect subject to prescribed modifications in relation to cases in which a woman fails to satisfy the conditions referred to in s 35(1)(b), (c) (as amended) (see PARA 76 heads (2)-(3) ante) at the commencement of the eleventh week before the expected week of confinement, but subsequently satisfies those conditions at any time before she is confined: s 35(3)(c) (added by the Maternity Allowance and Statutory Maternity Pay Regulations 1994, SI 1994/1230, regs 1(2), 2(3)). The following particular modifications apply:

- 12 (1) where a woman was confined more than 11 weeks before the expected week of confinement, the maternity allowance period is 18 weeks commencing with the week immediately following the week in which she was confined, whether or not she made a claim in expectation of that confinement (Social Security (Maternity Allowance) Regulations 1987, SI 1987/416, reg 3(2)).
  - 13 (2) where a woman (a) is not entitled to the allowance at the eleventh week before the expected confinement; (b) subsequently becomes so entitled before being confined; and (c) has stopped work, the maternity allowance period is 18 weeks commencing with the week following that in which she stopped work (reg 3(2A) (added by SI 1994/1367)).
- 11 For the meaning of 'entitled' see PARA 21 note 9 ante.
- 12 Social Security Contributions and Benefits Act 1992 s 35(4).

## UPDATE

### 78 Amount and duration of state maternity allowance

TEXT AND NOTES--See PARA 76 TEXT AND NOTES.

TEXT AND NOTES 1-9--Social Security Contributions and Benefits Act 1992 s 35(1A) replaced by s 35A (s 35A added by the Welfare Reform and Pensions Act 1999 s 53(3)). For the purposes of the Social Security Contributions and Benefits Act 1992 s 35(1) (see PARA 76 ante) the appropriate weekly rate is, subject to s 35A(5A), whichever is the lower rate of (1) a weekly rate equivalent to 90 per cent of the woman's average weekly earnings; and (2) the weekly rate for the time being prescribed under s 166(1)(b) (see EMPLOYMENT vol 39 (2009) PARA 392): s 35A(1) (substituted by Employment Act 2002 s 48(1)). A woman's 'average weekly earnings' means the average weekly amount, as determined in accordance with regulations, of specified payments which (a) were made to her or for her benefit as an employed earner; or (b) are, in accordance with regulations, to be treated as made to her or for her benefit as a self-employed earner, during the specified period: s 35A(4) (s 35A as added). Regulations may make provision relating to the calculation of average weekly earnings: see s 35A(5) (amended by 2002 Act s 48(1)(b)); and the Social Security (Maternity Allowance) (Earnings) Regulations 2000, SI 2000/688 (amended by SI 2002/2690, SI 2003/659, SI 2007/1154). In the 1992 Act s 35A 'the maternity allowance threshold' has the same meaning as in s 35 (see PARA 76) and 'specified' means prescribed by or determined in accordance with regulations: s 35A(6) (substituted by 2002 Act Sch 7 para 5).

Where a woman is treated by virtue of regulations under the Social Security Contributions and Benefits Act 1992 s 35A(5)(c)(i) as having received a payment in respect of each week in the specified period equal to the amount mentioned in s 35A(5)(c)(i), the appropriate weekly rate is the weekly rate for the time being prescribed under s 166(1)(b): s 35A(5A), (5B) (added by 2002 Act s 48).

NOTE 1--The daily rate is now to be taken as one-seventh of the weekly rate of the allowance: Social Security Contributions and Benefits Act 1992 s 35(5) (amended by Social Security Act 1998 s 67).

NOTE 10--Reference to Social Security Contributions and Benefits Act 1992 Sch 3 para 3 is now to s 35A (see TEXT AND NOTES 1-9): s 35(3)(b) (amended by Welfare Reform and Pensions Act 1999 s 53(2)(a)). For 'conditions referred to in s 35(1)(b), (c)' read 'conditions referred to in s 35(1)(b) or (c)': s 35(3)(c); 1999 Act s 53(2)(b); 2002 Act Sch 7 para 4(3).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(3) STATE MATERNITY ALLOWANCE/79. Disqualifications for state maternity allowance.

## **79. Disqualifications for state maternity allowance.**

Regulations may provide for disqualifying a woman for receiving a maternity allowance<sup>1</sup> if:

- 248 (1) during the maternity allowance period<sup>2</sup> she does any work in employment<sup>3</sup> as an employed or self-employed earner<sup>4</sup>, or fails without good cause to observe any prescribed<sup>5</sup> rules of behaviour<sup>6</sup>; or
- 249 (2) at any time before she is confined<sup>7</sup> she fails without good cause<sup>8</sup> to attend for, or submit herself to, any medical examination required in accordance with the regulations<sup>9</sup>.

In the exercise of this power, provision has been made disqualifying a woman for receiving state maternity allowance if :

- 250 (a) during the maternity allowance period she does any work in employment as an employed or self-employed earner, and the disqualification is to be for such part of the maternity allowance period (but for not less than the number of days on which she so worked) as may be reasonable in the circumstances;
- 251 (b) during the maternity allowance period she fails without good cause to observe the following rules of behaviour, namely to take due care of her health and to answer reasonable inquiries (not being inquiries relating to medical examination, treatment or advice), by the Secretary of State<sup>10</sup> or his officers directed to ascertaining whether she is doing so, and such disqualification is to be for such part of the maternity allowance period as may be reasonable in the circumstances; or
- 252 (c) at any time before she is confined she fails without good cause to attend for or to submit herself to any medical examination for which she was given at least three days' notice in writing by or on behalf of the Secretary of State, and such disqualification is to be for such part of the maternity allowance period (being a part beginning not earlier than the day on which the failure occurs) as may be reasonable in the circumstances, except that in the event of her being confined after such failure she is not by reason of such failure to be so disqualified for the day on which the confinement occurs or any day thereafter<sup>11</sup>.

1 As to state maternity allowance generally see PARA 76 ante.

2 For the meaning of 'maternity allowance period' see PARA 78 ante.

3 For the meaning of 'employment' see PARA 32 note 2 ante.

4 For the meaning of 'employed earner' and 'self-employed earner' see PARA 32 ante.

5 For the meaning of 'prescribed' see PARA 19 note 3 ante.

6 See, in relation to incapacity benefit para 73 ante.

7 For the meaning of 'confined' and 'confinement' see PARA 76 note 5 ante.

8 See note 6 supra.

9 Social Security Contributions and Benefits Act 1992 s 35(3)(a).

10 As to the Secretary of State see PARA 1 ante.

11 See the Social Security (Maternity Allowance) Regulations 1987 SI 1987/416, reg 2.

## **UPDATE**

### **79 Disqualifications for state maternity allowance**

TEXT AND NOTES 2-6--Now, head (1)(a) during the maternity allowance period, except in prescribed cases, she does any work in employment as an employed or self-employed earner; (b) during the maternity allowance period she fails without good cause to observe any prescribed rules of behaviour: Social Security Contributions and Benefits Act 1992 s 35(3)(a) (amended by Work and Families Act 2006 Sch 1 para 6).

NOTE 11--SI 1987/416 reg 2 amended: SI 2006/2379.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/80. The benefits.

## **(4) WIDOW'S BENEFITS ETC**

### **80. The benefits.**

The regime of benefits on death has been subject to much change. The present system is that a woman who has been widowed<sup>1</sup> is entitled to a lump sum widow's payment<sup>2</sup>. If she has responsibility for a child or children, she is entitled to a widowed mother's allowance<sup>3</sup>. If over a certain age when widowed or when she ceases to be entitled to the widowed mother's allowance, she is entitled to a widow's pension instead<sup>4</sup>. The rate of the allowance and pension is linked to the rate of a Category A retirement pension<sup>5</sup>. Further, there are special rules allowing a widow to qualify more easily for incapacity benefit if unable to work when widowed or when the widowed mother's allowance ceases<sup>6</sup>. These benefits are contributory, based on her late husband's<sup>7</sup> contributions, and are not means tested.

These benefits are not complemented by any equivalent benefits for widowers<sup>8</sup> but provision is made for allowing a widower to qualify more easily for incapacity benefit if unable to work<sup>9</sup> and to receive a Category B retirement pension based on his late wife's contributions<sup>10</sup>.

There is no longer a contributory death grant to cover funeral expenses; instead a payment can be claimed to cover such expenses from the social fund, but this is of course a means tested benefit<sup>11</sup>.

1 For the meaning of 'widow' see PARA 82 post.

2 See PARA 84 post.

3 See PARA 85 post.

4 See PARA 86 post.

5 See PARA 87 post.

6 See PARA 88, 90 post.

7 For the meaning of 'late husband' see PARA 82 post.

8 This discrimination against widowers is not unlawful under EC equal treatment provisions because provisions concerning survivors' benefits are excluded from the principle of equal treatment of men and women in matters of social security: see EC Council Directive 79/7 (OJ L6, 10.1.79, p 24) art 3(2).

9 See PARA 89 post.

10 See PARA 574 et seq post.

11 See PARA 230 post.

## **UPDATE**

### **80 The benefits**

NOTE 8--See Application 36940/97 *Fielding v United Kingdom* (2002) Times, 25 February, ECtHR (application of Welfare Reform and Pensions Act 1999, enabling widowers to receive same benefits as widows: see PARA 84).



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/81. Forfeiture of widow's benefits.

### **81. Forfeiture of widow's benefits.**

Although the social security provisions constitute a comprehensive code, they must still be applied subject to the rules of public policy, in particular that disentitling a widow to benefit where she has created her status of widowhood by killing her husband<sup>1</sup>. The position is now governed in relation to homicide by the Forfeiture Act 1982, which defines the 'forfeiture rule' as the rule of public policy which in certain circumstances precludes a person who has unlawfully killed<sup>2</sup> another from acquiring a benefit in consequence of the killing<sup>3</sup>. The forfeiture rule must stand in the case of a person convicted of murder<sup>4</sup> but in a case of manslaughter there is a discretion to modify the application of the rule as follows<sup>5</sup>.

Where a question arises as to whether, if a person were otherwise entitled to or eligible for any benefit or advantage under a relevant enactment<sup>6</sup>, that person would be precluded by virtue of the forfeiture rule from receiving the whole or part of the benefit or advantage, that question must (notwithstanding anything in any relevant enactment) be determined by a social security commissioner<sup>7</sup>. Where a commissioner determines that the forfeiture rule has precluded a person ('the offender') who has unlawfully killed another from receiving the whole or part of any such benefit or advantage, the commissioner may make a decision modifying the effect of that rule and may do so whenever the unlawful killing occurred<sup>8</sup>. He may not, however, make such a decision in any case unless he is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the commissioner to be material, the justice of the case requires the effect of the rule to be so modified in that case<sup>9</sup>.

A decision under these provisions may modify the effect of the forfeiture rule in either or both of the following ways:

- 253 (1) so that it applies only in respect of a specified proportion of the benefit or advantage;
- 254 (2) so that it applies in respect of the benefit or advantage only for a specified period of time<sup>10</sup>,

but may not modify the effect of the forfeiture rule so as to allow any person to receive the whole or any part of a benefit or advantage in respect of any period before 25 July 1986<sup>11</sup>.

If the commissioner thinks it expedient to do so, he may direct that his decision is to apply to any future claim for a benefit or advantage under a relevant enactment on which a question as to whether a person otherwise entitled to the benefit or advantage would be precluded by virtue of the forfeiture rule from receiving the whole or part of the benefit or advantage arises by reason of the same unlawful killing<sup>12</sup> and it is immaterial for these purposes whether the claim is in respect of the same or a different benefit or advantage<sup>13</sup>.

For the purpose of obtaining a decision whether the forfeiture rule should be modified the Secretary of State<sup>14</sup> may refer to a commissioner for review any determination of a relevant question<sup>15</sup> that was made before these provisions came into force<sup>16</sup>, whether by a commissioner or not, and must do so if the offender requests him to refer such a determination<sup>17</sup>.

Regulations under these provisions may make such provision as appears to the Lord Chancellor to be necessary or expedient for carrying these provisions into effect; and (without prejudice to the generality of that) the regulations may, in relation to the relevant question<sup>18</sup> or any determination with regard to it<sup>19</sup> or any decision modifying the effect of the forfeiture rule<sup>20</sup>:

- 255 (a) apply any provision of any relevant enactment, with or without modifications, or exclude or contain provision corresponding to any such provision; and  
 256 (b) make provision corresponding to the provision made<sup>21</sup> for the procedure on adjudication<sup>22</sup>.

1 See *R v Chief National Insurance Comr, ex p Connor* [1981] QB 758, [1981] 1 All ER 769, DC, per Lord Lane CJ (it is not the label which the law applies to the crime, but the nature of the crime (which could be other than homicide) that will determine in an individual case whether the forfeiture rule applies).

2 Unlawful killing includes unlawfully aiding, abetting, counselling or procuring the death of another: see the Forfeiture Act 1982 s 1(2).

3 Ibid s 1(1). As to forfeiture generally see WILLS vol 50 (2005 Reissue) PARAS 341-342.

4 See ibid s 5 (amended by the Social Security Act 1986 s 76(1), (4)); and Decision R(G)1/91.

5 The power to modify does not include a power to disapply the rule completely: Decision R(G)3/90.

6 For these purposes, 'relevant enactment' includes the Social Security Contributions and Benefits Act 1992 and the Pension Schemes Act 1993, as well as the Pensions (Navy, Army, Air Force and Mercantile Marine) Act 1939 and the Personal Injuries (Emergency Provisions) Act 1939 (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 595 et seq), the Polish Resettlement Act 1947 (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1080), and previous social security legislation: see the Forfeiture Act 1982 s 4(5) (definition amended by the Statutory Sick Pay Act 1991 s 3(1)(c); the Social Security (Consequential Provisions) Act 1992 ss 3, 4, Sch 1, Sch 2 para 63(3); the Pension Schemes Act 1993 s 190, Sch 8 para 15).

7 Forfeiture Act 1982 s 4(1). As to social security commissioners see PARA 362 post.

8 Ibid s 4(1A) (s 4(1A)-(1H) added by the Social Security Act 1986 s 76(1)-(3)). Procedure is governed by the Social Security Commissioners Procedure Regulations 1987, SI 1987/214, regs 3, 23, 28.

9 Forfeiture Act 1982 s 4(1B) (as added: see note 8 supra). It is for the commissioner to consider all the circumstances, not just the fact of conviction or acquittal; where, however, a jury has made a reasoned decision on the merits, that will be important evidence, and the burden of proof is on the adjudication officer, on a standard akin to that in a criminal case: Decision R(G)2/90 (no forfeiture because unlawful killing not proved in a case where the claimant had been acquitted of murder and manslaughter). This is a wide discretion, in the exercise of which the culpability of the claimant will be an important factor, and there is certainly no obligation to modify the rule merely because the case falls short of murder: Decision R(G)3/90; and see Decision R(G)1/91 where there was full forfeiture of widow's benefits where the reduction by the Court of Appeal of a murder conviction to manslaughter was for technical reasons. In deciding whether to modify, matters such as provocation may be relevant (Decision R(G)3/90), as may mental illness (Decision R(G)3/84). However, in this context, decisions before the amendments by the Social Security Act 1986 must be treated with caution, since the law then did not permit modification and the commissioner's only function was to decide whether the forfeiture rule applied at all (Decision R(G)2/84).

10 Forfeiture Act 1982 s 4(1C) (as added: see note 8 supra).

11 Ibid s 4(1D) (as added: see note 8 supra).

12 Ibid s 4(1E) (as added: see note 8 supra).

13 Ibid s 4(1F) (as added: see note 8 supra).

14 As to the Secretary of State see PARA 1 ante.

15 Ie a question such as is mentioned in the Forfeiture Act 1982 s 4(1): see the text and note 7 supra.

16 Ie 25 July 1986: see the Social Security Act 1986 s 88(5).

17 Forfeiture Act 1982 s 4(1G) (as added: see note 8 supra). Section 4(1A)-(1F) (as added) has effect on such a reference as if in s 4(1A) (as added) the words 'it has been determined' were substituted for the words 'a commissioner determines': s 4(1H) (as so added).

18 See note 15 supra.

19 le under the Forfeiture Act 1982 s 4(1): see the text and note 7 supra.

20 le under ibid s 4(1A) (as added: see note 8 supra): see the text and note 8 supra.

21 le under the Social Security Administration Act 1992 s 59 (as amended): see PARA 332 post.

22 Forfeiture Act 1982 s 4(2) (amended by the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 63(1), (2)). The power to make such regulations is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Forfeiture Act 1982 s 4(3). The Social Security Contributions and Benefits Act 1992 s 175(3)-(5) (see PARA 30 ante) applies to this power with appropriate modifications: see the Forfeiture Act 1982 s 4(4) (amended by the Social Security (Consequential Provisions) Act 1992 Sch 2 para 63(1), (2)).

## UPDATE

### 81 Forfeiture of widow's benefits

TEXT AND NOTES--References to social security commissioners now to Upper Tribunal: Forfeiture Act 1982 s 4 (amended by SI 2008/2833).

NOTE 6--'Relevant enactment' also includes the Armed Forces (Pensions and Compensation) Act 2004 s 1 (see ARMED FORCES vol 2(2) (Reissue) PARA 266A): Forfeiture Act 1982 s 4(5) (definition amended by Armed Forces (Pensions and Compensation) Act 2004 s 7).

NOTE 8--SI 1987/214 replaced: Social Security Commissioners (Procedure) Regulations 1999, SI 1999/1495 (amended by SI 2000/2854, SI 2001/1095, SI 2005/207, SI 2005/870, SI 2008/2683).

NOTE 21--The reference is now to the Social Security Act 1998 s 16: 1982 Act s 4(2) (amended by the Social Security Act 1998 Sch 7 para 11(1)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/82. Meaning of 'widow' and 'late husband'.

## **82. Meaning of 'widow' and 'late husband'.**

There is no statutory definition of 'widow'. The two general requirements are that the claimant was (and remained) legally married to her husband at the date of his death, and that he has died. The first requirement may raise questions as to the validity of a marriage<sup>1</sup> and the effectiveness of any steps taken to dissolve it prior to the death<sup>2</sup>. Where the husband's death is not clearly documented, for example where he has simply disappeared, it has to be established by evidence and will not simply be presumed from elapse of time<sup>3</sup>.

'Late husband', in relation to a woman who has been more than once married, means her last husband<sup>4</sup>.

1 A void marriage has no effect and cannot be relied upon for these purposes: Decisions R(G)10/53; R(G)2/63; R(G)1/73. A voidable marriage is valid until nullified: Decisions R(G)1/73; R(G)2/73. As to the validity of a foreign marriage see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 208 et seq. Expert opinion may be relied upon to determine the relevant foreign law: Decision R(G)4/93. A polygamous marriage is not valid for these purposes (Decisions R(S)2/92; R(G)4/93); in deciding whether such a marriage was effective under its own law, much will depend on the husband's domicile (Decisions R(G)1/93; R(G)1/95). However, it is provided for social security purposes that a potentially polygamous marriage is to be treated as having the same consequences as a monogamous marriage for any day on which it is in fact monogamous: see the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975, SI 1975/561, reg 2(1).

2 A talaq divorce may be valid if performed abroad (Decisions R(G)2/71; R(G)4/74); though the foreign formalities must be satisfied (Decision CG17/1992). However, such a divorce will not be valid if performed in this country because it is not instituted by legal proceedings: Decision R(G)1/94.

3 This is because in England there is no statutory equivalent of the Presumption of Death (Scotland) Act 1977: see Decision R(G)1/80. Where statute has not intervened, the presumption is of continued life, not of death: Decision R(G)1/62; though cf (in the context of family law) *Chard v Chard* [1956] P 259, [1955] 3 All ER 721.

4 Social Security Contributions and Benefits Act 1992 s 122(1).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/83. Remarriage and living together as husband and wife.

### **83. Remarriage and living together as husband and wife.**

A widow ceases to be entitled to a widowed mother's allowance or a widow's pension if she remarries<sup>1</sup>. In addition, and more broadly, a widow is also disentitled to those benefits for any period during which she and a man to whom she is not married are living together as husband and wife<sup>2</sup>; further, a widow so living at the time of her husband's death is not entitled to a widow's payment<sup>3</sup>. The question of remarriage will usually cause few problems, unless an issue arises as to the validity of the second marriage<sup>4</sup>, but the question of living together as husband and wife causes many more difficulties<sup>5</sup>. It arises in several contexts in social security law<sup>6</sup>, and wherever it arises the same principles are to apply<sup>7</sup>. As many of the original decisions arose in relation to widow's benefits, the question is discussed in this context.

When deciding on the status of a man and woman who are living together, it is necessary to distinguish three cases :

- 257 (1) where they are living together and married;
- 258 (2) where they are unmarried but living together as husband and wife; and
- 259 (3) where they are unmarried and living together but not as husband and wife<sup>8</sup>.

The last category can cover a wide variety of relationships, such as a commercial relationship as house owner and lodger or housekeeper, through to cases where one party is caring for the other<sup>9</sup>, or where two disabled persons live together for mutual support<sup>10</sup>. The question is a wide one of fact in which both the subjective intention of the parties and the objective aspects of the relationship will be important; in approaching it, the statutory authorities consistently apply the following guidelines which have received judicial approval<sup>11</sup>:

- 260 (a) members of the same household: the couple must be living in the same household and neither partner will usually have any other home where he or she normally lives. This implies that the couple live together, apart from absences necessary for employment, visits to relatives and similar purposes<sup>12</sup>;
- 261 (b) stability: living together as husband and wife clearly implies more than an occasional or very brief association. When a couple first live together, it may be clear from the start that the relationship is similar to that of husband and wife (for example, if the woman has taken the man's name and has borne his child), but in cases where at the outset the nature of the relationship is less clear it may be right not to regard the couple as living together as husband and wife until it is apparent that a stable relationship has been formed<sup>13</sup>;
- 262 (c) financial support: in most husband and wife relationships one would expect to find financial support of one party by the other, or sharing of household expenses, but the absence of any such arrangement does not of itself prove that a couple are not living together;
- 263 (d) sexual relationship: similarly, a sexual relationship is a normal part of marriage and therefore of living together as husband and wife, but its absence at any particular time does not necessarily prove that a couple are not living as husband and wife<sup>14</sup>;
- 264 (e) children: when a couple are caring for a child of their union, there is a strong presumption that they are living together as husband and wife;

- 265 (f) public acknowledgment: whether a couple have represented themselves to other people as husband and wife is relevant. However, many couples living together do not wish to pretend that they are actually married. The fact that they retain their identity publicly as unmarried people does not mean that they cannot be regarded as living together as husband and wife<sup>15</sup>.

While these may be useful guidelines, they must not be applied too rigidly, and ultimately it is important to consider the general nature of the relationship, and also why they are living together, not just the fact that they are<sup>16</sup>.

1 Social Security Contributions and Benefits Act 1992 ss 37(3), 38(2).

2 Ibid ss 37(4)(b), 38(3)(c).

3 Ibid s 36(2).

4 See PARA 82 ante.

5 This used to be referred to as 'cohabitation', but that description is now used less often.

6 This is of particular importance in the definition of an 'unmarried couple' for the purposes of aggregation of a family's income and capital when claiming income support or income based jobseeker's allowance: see PARAS 175 note 1, 262 note 6 post.

7 Decisions R(G)3/81; R(SB)17/81.

8 *Robson v Secretary of State for Social Services* (1982) 3 FLR 232.

9 *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498, (1981) 2 FLR 264; Decision R(SB)35/85.

10 *Robson v Secretary of State for Social Services* (1982) 3 FLR 232.

11 The guidelines were those originally laid down in the Supplementary Benefits Handbook (produced by the DHSS, as it then was); these were said to be 'admirable signposts' by Woolf J in *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498 at 505, (1981) 2 FLR 264 at 270-271, and applied by the social security commissioner in Decisions R(G)3/81 and R(SB)17/81. As set out in the text they are taken from the final version of the Handbook (1984), in the light of certain changes to the fourth heading.

12 Absence of one party from the household (eg for an academic term) does not necessarily mean that the couple are not living together (Decision R(SB)30/83), unless the facts show that they have actually ceased so to live (Decision R(SB)19/85). A party cannot be considered to be living in more than one household at the same time: Decision R(SB)8/85.

13 Applying for a joint rental and selling one party's furniture was held to show stability in *Campbell v Secretary of State for Social Services* (1983) 4 FLR 138.

14 This factor has caused the most problems, and the guidance given in successive versions of the Supplementary Benefits Handbook changed: see Decision R(SB)35/85. The DHSS had sought to make this factor more neutral, to avoid criticism of being too intrusive into claimants' private lives, and social security officers are instructed not to question claimants too closely on the point. However, in Decision CIS 887/1993 the commissioner questioned this neutral stance on the basis that a sexual relationship or lack thereof is logically relevant, and that an instruction not to investigate it is inconsistent with the inquisitorial nature of the adjudication system. Under the older case law it had been held that it may be appropriate if necessary to infer a sexual relationship from the facts: Decision R(G)1/79.

15 Change of name may be an important factor: Decision R(G)1/79. See also *Crake v Supplementary Benefits Commission* [1982] 1 All ER 498 at 509, (1981) 2 FLR 264 at 274-275 ('..these were people who were happy together and appeared much as a family unit').

16 This appears particularly from the more recent decision in Decision CIS 87/1993 (a starred decision, to be reported); while not doubting the possible utility of the above factors, this emphasis on looking at the whole picture echoes the approach in some of the older commissioner's decisions: see Decisions R(G)3/71, R(G)2/72.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/84. Widow's payment.

#### **84. Widow's payment.**

A woman who has been widowed<sup>1</sup> is entitled<sup>2</sup> to a widow's payment (in the nature of a specified lump sum<sup>3</sup>) if:

- 266 (1) she was under pensionable age<sup>4</sup> at the time when her late husband<sup>5</sup> died, or he was then not entitled to a Category A retirement pension<sup>6</sup>; and
- 267 (2) her late husband satisfied the contribution condition specified for a widow's payment<sup>7</sup>.

This entitlement only arises where the husband died on or after 11 April 1988<sup>8</sup>.

1 For the meaning of 'widow' see PARA 82 ante. The entitlement is lost if at the time of her husband's death the woman was living together as husband and wife with another man: see the Social Security Contributions and Benefits Act s 36(2); and see PARA 83 ante.

2 For the meaning of 'entitled' see PARA 21 note 9 ante.

3 The sum is specified in the Social Security Contributions and Benefits Act 1992 Sch 4 Pt II (which is subject to frequent amendment).

4 For the meaning of 'pensionable age' see PARA 562 post. As to when a person attains a particular age see PARA 19 note 11 ante.

5 For the meaning of 'late husband' see PARA 82 ante.

6 As to Category A retirement pensions see PARA 568 et seq post.

7 Social Security Contributions and Benefits Act 1992 s 36(1). As to contribution conditions generally see PARA 55 ante. The contribution condition is that (1) the contributor concerned must in respect of any one relevant year (ie any year ending before he attained pensionable age or died under that age) have actually paid contributions of a relevant class; and (2) the earnings factor derived must be not less than that year's lower earnings limit multiplied by 25: s 21(3), Sch 3 para 4(1), (3). The earnings factor referred to is that which is derived: (a) if the year in question is 1987-88 or any subsequent year, from earnings upon which primary Class 1 contributions have been paid or treated as paid and from Class 2 and Class 3 contributions; or (b) if the year in question is an earlier year, from the contributions referred to in head (1) supra: Sch 3 para 4(2). The relevant classes are Class 1, 2 or 3: see s 21(2) (as amended); and see PARA 55 ante. For the meaning of 'earnings' and 'earnings factor' see PARAS 33, 56 ante.

Where a claim is made for a widow's payment, and the last complete year before the beginning of the benefit year in which the relevant time (ie the date on which the contributor concerned attained pensionable age or died under that age) falls was either the year in which the contributor concerned first became liable for primary Class 1 or Class 2 contributions or the year preceding that in which he first became so liable, then for the purposes of satisfaction by the contributor concerned of head (2) supra of the contribution condition for a widow's payment, all earnings factors falling within s 21(4), Sch 3 para 7(4) may be aggregated and that aggregate sum is to be treated as his earnings factor for the last complete year before the beginning of the benefit year in which the relevant time falls: Sch 3 para 7(1)-(3). The earnings factors referred to are (i) the contributor's earnings factors for 1987-88 and each subsequent year derived from the aggregate of his earnings upon which primary Class 1 contributions were paid or treated as paid and from Class 2 contributions actually paid by him before the relevant time; and (ii) his earnings factors for each earlier year, derived from his contributions of a relevant class actually paid by him before the relevant time: Sch 3 para 7(4). Where a woman claims a widow's payment, the contributor concerned for the purposes of the claim is to be taken to satisfy the contribution condition for the payment if on a claim made in the past for any short-term benefit he has satisfied the first contribution condition for the benefit, by virtue of the Social Security Act 1975 Sch 3 para 8 (repealed) with contributions of a class relevant to widow's payment: Social Security Contributions and Benefits Act 1992 Sch 3 para 9.

8 Ibid s 36(3). Prior to that, entitlement was to widow's allowance.

## UPDATE

### 84 [Bereavement payment]

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 s 36 substituted by Welfare Reform and Pensions Act 1999 s 54; and amended by Civil Partnership Act 2004 Sch 24 para 16. A person whose spouse or civil partner dies on or after the appointed day (as defined) is entitled to a bereavement payment if (1) either that person was under pensionable age at the time when the spouse or civil partner died or the spouse or civil partner was then not entitled to a Category A retirement pension under the Social Security Contributions and Benefits Act 1992 s 44 (see PARA 568); and (2) the spouse or civil partner satisfied the contribution condition for a bereavement payment specified in Sch 3 para 4 (see NOTE 7): s 36(1)). A bereavement payment is not payable to a person if (a) that person and a person of the opposite sex to whom that person was not married were living together as husband and wife at the time of the spouse's or civil partner's death, or (b) that person and a person of the same sex who was not his or her civil partner were living together as if they were civil partners at the time of the spouse's or civil partner's death: s 36(2). For the purposes of s 36, 'the appointed day' means the day appointed for the coming into force of the Welfare Reform and Pensions Act 1999 ss 54-56: s 36(3). See further PARA 85-89.

NOTE 7--Social Security Contributions and Benefits Act 1992 Sch 3 para 4(1) amended: Welfare Reform and Pensions Act 1999 Sch 8 para 13(2). In head (a) for 'earnings' read 'so much of the contributor's earnings as did not exceed the upper earnings limit and': Social Security Contributions and Benefits Act 1992 Sch 3 para 4(2) (amended by National Insurance Contributions Act 2002 Sch 1 para 14(3), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2))).

References in the Social Security Contributions and Benefits Act 1992 Sch 3 para 7(1), (3) (amended by Welfare Reform and Pensions Act 1999 Sch 8 para 13(4)) to 'widow's payment' are now to 'bereavement payment'. In head (i) for 'his earnings' read 'so much of his earnings as did not exceed the upper earnings limit and': Social Security Contributions and Benefits Act 1992 Sch 3 para 7(4) (amended by National Insurance Contributions Act 2002 Sch 1 para 14(6), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2))).

For 'Where a woman claims a widow's payment' read 'Where a claim is made for a bereavement payment' and for 'to widow's payment' read 'to bereavement payment': Social Security Contributions and Benefits Act 1992 Sch 3 para 9 (amended by Welfare Reform and Pensions Act 1999 Sch 8 para 13(5)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/85. Widowed mother's allowance.

### **85. Widowed mother's allowance.**

A woman who has been widowed<sup>1</sup> is entitled<sup>2</sup> to a widowed mother's allowance if her late husband<sup>3</sup> satisfied the contribution conditions specified for the benefit<sup>4</sup> and either:

- 268 (1) the woman is entitled to child benefit in respect of a qualifying child<sup>5</sup>; or
- 269 (2) the woman is pregnant by her late husband<sup>6</sup>; or
- 270 (3) if the woman and her late husband were residing together immediately before the time of his death, the woman is pregnant as the result of being artificially inseminated before that time with the semen of some person other than her husband, or as the result of the placing in her before that time of an embryo, of an egg in the process of fertilisation, or of sperm and eggs<sup>7</sup>.

The entitlement continues for as long as she satisfies one of these requirements, but ceases on remarriage<sup>8</sup>, or during any period during which she and a man to whom she is not married are living together as husband and wife<sup>9</sup>.

1 For the meaning of 'widow' see PARA 82 ante.

2 For the meaning of 'entitled' see PARA 21 note 9 ante.

3 For the meaning of 'late husband' see PARA 82 ante.

4 The contribution conditions are the same as those for a Category A or Category B retirement pension: see the Social Security Contributions and Benefits Act 1992 s 21(3), Sch 3 para 5 (as amended); and PARA 565 post.

5 A qualifying child is either (1) a son or daughter of the woman and her late husband; (2) a child in respect of whom her late husband was immediately before his death entitled to child benefit; or (3) if the woman and her late husband were residing together immediately before his death, a child in respect of whom she was then entitled to child benefit: in addition, the beneficiary must be treated for child benefit purposes as having the child living with her or the requisite contributions must be being made to the cost of providing for the child: see *ibid* ss 37(2), 81(2); and the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, SI 1979/642, reg 16 (amended by SI 1987/1854). As to entitlement to child benefit see PARA 238 post. For the meaning of 'beneficiary' see PARA 21 note 2 ante.

6 Where there is doubt whether the wife is pregnant by her husband or another man, the presumption of legitimacy is to be applied and the benefit is only to be denied if that presumption is rebutted by evidence to the contrary: Decision R(G)1/92.

7 Social Security Contributions and Benefits Act 1992 s 37(1).

8 See *ibid* s 37(3).

9 *Ibid* s 37(4). For the meaning of 'living together as husband and wife' see PARA 83 ante.

### **UPDATE**

#### **85-89 Widowed mother's allowance ... Long term incapacity benefit for widowers**

The Social Security Contributions and Benefits Act 1992 ss 37-40 apply only in cases where a woman's husband has died before the appointed day (as defined), and s 41

applies only in cases where a man's wife has died before that day: s 36A(1) (s 36A added by the Welfare Reform and Pensions Act 1999 s 55(1)).

The Social Security Contributions and Benefits Act 1992 ss 39A-39C (see PARAS 87A-87C) apply in cases where a person's spouse or civil partner dies on or after the appointed day, but s 39A also applies (in accordance with s 39A(1)(b)) in cases where a man's wife has died before that day: s 36A(2) (s 36A as added; s 36A(2) amended by Civil Partnership Act 2004 Sch 24 para 17).

For the purposes of the Social Security Contributions and Benefits Act 1992 s 36A, 39A, 39B, 'the appointed day' means the day appointed for the coming into force of the Welfare Reform and Pensions Act 1999 ss 54-56 (see PARA 84 TEXT AND NOTES): Social Security Contributions and Benefits Act 1992 s 36A(3) (s 36A as added). The Welfare Reform and Pensions Act 1999 ss 54-56 came into force for the purpose of making regulations on 24 April 2000 and for all other purposes on 9 April 2001: SI 2000/1047.

## **85 Widowed mother's allowance**

TEXT AND NOTES--See Application 36578/97 *Cornwell v United Kingdom*; Application 38890/97 *Leary v United Kingdom* (2000) Times, 10 May, ECtHR (settlement agreed in which allowance would be paid to two male applicants as if they had been bereaved widows until the Welfare Reform and Pensions Act 1999 entered into force).

As to entitlement to widowed mother's allowance where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 3. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

NOTE 5--Social Security Contributions and Benefits Act 1992 s 37(2) amended: Child Benefit Act 2005 Sch 1 para 2(3); Welfare Reform Act 2007 s 50, Sch 8. For transitional provision see SI 2009/775. SI 1979/642 reg 16 further amended: SI 2006/692.

TEXT AND NOTE 7--Social Security Contributions and Benefits Act 1992 s 37(1) amended: Child Benefit Act 2005 Sch 1 para 2(2).

TEXT AND NOTES 8, 9--Social Security Contributions and Benefits Act 1992 s 37(3), (4) amended: Civil Partnership Act 2004 Sch 24 para 18, Sch 30.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/86. Widow's pension.

## 86. Widow's pension.

A woman who has been widowed<sup>1</sup> is entitled<sup>2</sup> to a widow's pension if her late husband<sup>3</sup> satisfied the contribution conditions specified for the benefit<sup>4</sup> and either:

- 271 (1) she was, at the husband's death, over the age of 45<sup>5</sup> but under the age of 65;  
or
- 272 (2) she ceased to be entitled to a widowed mother's allowance<sup>6</sup> at a time when she was over the age of 45 but under the age of 65<sup>7</sup>.

The entitlement continues until she attains the age of 65, but ceases on remarriage<sup>8</sup>, or during any period during which she and a man to whom she is not married are living together as husband and wife<sup>9</sup>. There is no entitlement to widow's pension for any period in which she is entitled to a widowed mother's allowance<sup>10</sup> and widow's pension is not payable for any period falling before the day on which the widow's entitlement is regarded<sup>11</sup> as commencing for that purpose<sup>12</sup>.

1 For the meaning of 'widow' see PARA 82 ante.

2 For the meaning of 'entitled' see PARA 21 note 9 ante.

3 For the meaning of 'late husband' see PARA 82 ante.

4 The contribution conditions are the same as those for a Category A or Category B retirement pension: see the Social Security Contributions and Benefits Act 1992 s 21(3), Sch 3 para 5 (as amended); and PARA 565 post.

5 In the case of a widow whose late husband died before 11 April 1988 and who either (1) was over the age of 40 but under the age of 55 at the time of his death; or (2) is over the age of 40 but under the age of 55 at the time when she ceases to be entitled to a widowed mother's allowance, this provision has effect as if for '45' there were substituted '40': *ibid* s 38(4). As to when a person attains a particular age see PARA 19 note 11 ante.

6 As to widowed mother's allowance see PARA 85 ante.

7 Social Security Contributions and Benefits Act 1992 s 38(1).

8 *Ibid* s 38(2).

9 *Ibid* s 38(3)(c). For the meaning of 'living together as husband and wife' see PARA 83 ante.

10 *Ibid* s 38(3)(b).

11 *Ie* by virtue of Social Security Administration Act 1992 s 5(1)(k): see PARA 330 post.

12 Social Security Contributions and Benefits Act 1992 s 38(3)(a).

## UPDATE

### 85-89 Widowed mother's allowance ... Long term incapacity benefit for widowers

The Social Security Contributions and Benefits Act 1992 ss 37-40 apply only in cases where a woman's husband has died before the appointed day (as defined), and s 41

applies only in cases where a man's wife has died before that day: s 36A(1) (s 36A added by the Welfare Reform and Pensions Act 1999 s 55(1)).

The Social Security Contributions and Benefits Act 1992 ss 39A-39C (see PARAS 87A-87C) apply in cases where a person's spouse or civil partner dies on or after the appointed day, but s 39A also applies (in accordance with s 39A(1)(b)) in cases where a man's wife has died before that day: s 36A(2) (s 36A as added; s 36A(2) amended by Civil Partnership Act 2004 Sch 24 para 17).

For the purposes of the Social Security Contributions and Benefits Act 1992 s 36A, 39A, 39B, 'the appointed day' means the day appointed for the coming into force of the Welfare Reform and Pensions Act 1999 ss 54-56 (see PARA 84 TEXT AND NOTES): Social Security Contributions and Benefits Act 1992 s 36A(3) (s 36A as added). The Welfare Reform and Pensions Act 1999 ss 54-56 came into force for the purpose of making regulations on 24 April 2000 and for all other purposes on 9 April 2001: SI 2000/1047.

## **86 Widow's pension**

TEXT AND NOTES--As to entitlement to a widow's pension where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 4. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

As to the preservation of rights in respect of additional pensions for widows or widowers see PARA 86A.

The ineligibility of widower's for widow's pension is not discriminatory in contravention of the European Convention on Human Rights art 14: Application 47289/99 *Arkwell v United Kingdom* [2007] All ER (D) 144 (Sep), ECtHR.

TEXT AND NOTES 8-12--Social Security Contributions and Benefits Act 1992 s 38(2), (3) amended: Civil Partnership Act 2004 Sch 24 para 19, Sch 30.

TEXT AND NOTE 8--In 1992 Act s 38(2) for 'the age of 65' read 'pensionable age': Pensions Act 2007 Sch 1 para 40 (this amendment has effect as from 6 April 2024: see s 13(3)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/86A. Preservation of rights in respect of additional pensions for widows or widowers.

### **86A. Preservation of rights in respect of additional pensions for widows or widowers.**

The Secretary of State may by regulations make such provision as is authorised by the following provisions<sup>1</sup>. The regulations may provide for any prescribed provision of the statutory rules relating to contributory benefits<sup>2</sup> which relates to additional pension for widows, widowers or surviving civil partners to have effect, in relation to persons of any prescribed description, with such modifications as may be prescribed for securing that any such additional pension, or, in the case of any provision relating to the increase of pension or payment of lump sum where entitlement is deferred<sup>3</sup>, that any constituent element of an increase or of a lump sum provided for, is increased by such percentage as may be prescribed (which may be 100 per cent)<sup>4</sup>. The regulations may amend (or further amend) any prescribed provision of a list of specified provisions<sup>5</sup> so as to substitute a reference to a later date for any reference in that provision to 5 October 2002 or 6 October 2002 or any reference to a date already substituted by virtue of this provision<sup>6</sup>. The regulations may make provision for and in connection with (1) the establishment, for a prescribed period, of a scheme for dealing with claims made by persons on the grounds that, in reliance on any incorrect or incomplete information provided by a government department with respect to the SERPS reduction (however that information came to their knowledge), they (a) failed to take any, or any particular, relevant steps<sup>7</sup> which they would have taken, or (b) took any steps which they would not have taken, had they instead received correct and complete information with respect to that reduction; and (2) securing that, where persons have made successful claims under the scheme, surviving spouses of those persons (or, as the case may be, those persons themselves) will not be affected by the SERPS reduction<sup>8</sup>. The regulations may also provide<sup>9</sup> for a case in which a person who, as a consequence of receiving incorrect or incomplete information, did not give any consideration to the taking of a step which is a step he might have taken had he considered the matter on the basis of correct and complete information, or refraining from taking a step which is a step he did take but might have refrained from taking had he considered the matter on that basis, to be treated as a case in which his failure to take the step, or his taking of the step he did take, was in reliance on the incorrect or incomplete information and as a case in which that step is one which he would have taken, or (as the case may be) would not have taken, had the information been correct and complete<sup>10</sup>.

Until such time as regulations under these provisions are made, transitional provisions apply<sup>11</sup>.

<sup>1</sup> Welfare Reform and Pensions Act 1999 s 52(1). In exercise of the powers under s 52 see generally the Social Security (Inherited SERPS) Regulations 2001, SI 2001/1085 (amended by SI 2005/811, 2005/3030).

<sup>2</sup> Ie the Social Security Contributions and Benefits Act 1992 Pt II (ss 20-62).

<sup>3</sup> Ie any provision of *ibid* Sch 5.

<sup>4</sup> 1999 Act s 52(2) (amended by Pensions Act 2004 Sch 11 para 25; and SI 2005/2053).

<sup>5</sup> Ie specified in the Child Support, Pensions and Social Security Act 2000 s 39(2), namely the Social Security Contributions and Benefits Act 1992 ss 39(3), 39C(4) (widowed mother's allowance: see PARA 87; and PARA 87C), 48BB(7), 48C(3), 51(3) (Category B retirement pensions: see PARAS 573, 575, 576; and PARA 575A) and Sch 5 paras 4(3), 5A(2), (3), 6(3), (4) (deferred pensions: see PARA 585).

<sup>6</sup> 1999 Act s 52(3) (substituted by the 2000 Act s 39(3)).

7 'Relevant steps', in relation to a person, means steps towards safeguarding the financial position of that person's spouse in the event of the spouse becoming that person's surviving spouse or (as the case may be) towards safeguarding that person's own financial position in the event of that person becoming a surviving spouse (whether or not, in either case, that person was at any material time already married): 1999 Act s 52(5).

8 Ibid s 52(4). 'The SERPS reduction' means (1) (in the context of TEXT head (1)) the operation of any of (a) the provisions of the Social Security Act 1986 s 19, or (b) the provisions of the 1992 Act Pt II reproducing the effect of those provisions; (2) (in the context of TEXT head (2)) the operation of any of the provisions of the 1992 Act mentioned in head (1)(b) or of s 39C(4) or 48BB(7): 1999 Act s 52(5).

Regulations under s 52(4) may, in particular, make provision (i) with respect to the time within which, and the manner in which, claims under the scheme are to be made; (ii) for requiring claimants (A) to supply such information in connection with their claims as may be prescribed or reasonably requested by any person for the purpose of dealing with their claims, (B) to attend interviews at such time and place as may be reasonably specified by any person for that purpose; (iii) for a claim to be disallowed where the claimant fails to comply with a requirement imposed by virtue of head (i) or (ii) and does not show within the prescribed period that he had good cause for that failure; (iv) prescribing (A) matters which are or are not to be taken into account in determining whether a person does or does not have good cause for any failure to comply with any such requirement, or (B) circumstances in which a person is or is not to be regarded as having or not having good cause for any such failure; (v) prescribing the conditions which must be satisfied in relation to any claim in order for it to be a successful claim under the scheme; (vi) prescribing the matters that may be relied on, and the presumptions that may be made, in the determination of whether or not the prescribed conditions have been satisfied; (vii) with respect to (A) the manner in which decisions under the scheme are to be made (which may include authorising decisions of any prescribed description to be made by a computer), and (B) the time within which, and the manner in which, such decisions are to be notified to claimants; (viii) for provisions of the Social Security Act 1998 Pt I Ch II (ss 8-39) (social security decisions and appeals: see PARA 356A) to apply in relation to decisions under the scheme with such modifications as may be prescribed; (ix) for provisions of the 1992 Act Pt II to apply in relation to (A) surviving spouses of persons who have made successful claims under the scheme, or (B) persons who have themselves made such claims, with such modifications as may be prescribed: 1999 Act s 52(6) (amended by the 2000 Act s 39(5)).

9 le for the purposes of any provision made by virtue of the 1999 Act s 52(4).

10 Ibid s 54(4A) (added by the 2000 Act s 39(4)).

11 See the 1999 Act s 52(7).

## UPDATE

### **85-89 Widowed mother's allowance ... Long term incapacity benefit for widowers**

The Social Security Contributions and Benefits Act 1992 ss 37-40 apply only in cases where a woman's husband has died before the appointed day (as defined), and s 41 applies only in cases where a man's wife has died before that day: s 36A(1) (s 36A added by the Welfare Reform and Pensions Act 1999 s 55(1)).

The Social Security Contributions and Benefits Act 1992 ss 39A-39C (see PARAS 87A-87C) apply in cases where a person's spouse or civil partner dies on or after the appointed day, but s 39A also applies (in accordance with s 39A(1)(b)) in cases where a man's wife has died before that day: s 36A(2) (s 36A as added; s 36A(2) amended by Civil Partnership Act 2004 Sch 24 para 17).

For the purposes of the Social Security Contributions and Benefits Act 1992 s 36A, 39A, 39B, 'the appointed day' means the day appointed for the coming into force of the Welfare Reform and Pensions Act 1999 ss 54-56 (see PARA 84 TEXT AND NOTES): Social Security Contributions and Benefits Act 1992 s 36A(3) (s 36A as added). The Welfare Reform and Pensions Act 1999 ss 54-56 came into force for the purpose of making regulations on 24 April 2000 and for all other purposes on 9 April 2001: SI 2000/1047.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/87. Rate of widowed mother's allowance and widow's pension.

## **87. Rate of widowed mother's allowance and widow's pension.**

The weekly<sup>1</sup> rate of widowed mother's allowance<sup>2</sup> and widow's pension<sup>3</sup> is determined in accordance with the provisions applicable in the case of a Category A retirement pension<sup>4</sup>. A recipient of widowed mother's allowance is entitled to increases for her child dependants<sup>5</sup>. The rate is subject to reduction in two circumstances:

- 273 (1) where a widow's pension is payable to a woman who was under the age of 55<sup>6</sup> at the time when the applicable qualifying condition was fulfilled<sup>7</sup>, the weekly rate is reduced by seven per cent for each year by which her age at that time was less than 55, with any fraction of a year being counted as a year<sup>8</sup>;
- 274 (2) where a woman's husband dies after 5 April 2000, the additional pension<sup>9</sup> is to be one half of what it would otherwise have been<sup>10</sup>.

1 For the meaning of 'week' see PARA 32 note 7 ante.

2 As to widowed mother's allowance see PARA 85 ante.

3 As to widow's pension see PARA 86 ante.

4 See the Social Security Contributions and Benefits Act 1992 s 39(1) (amended by the Pensions Act 1995 s 127(2)). A Category A pension is calculated under the Social Security Contributions and Benefits Act 1992 ss 44-45A (as amended and added): see PARAS 568-569 post. In the application of ss 44-45A (as amended and added) by virtue of s 39(1) (as amended), where the woman's husband was over pensionable age when he died, references in those sections to the pensioner must be taken as references to the husband, and where the husband was under pensionable age when he died, references in those sections to the pensioner and the tax year in which he attained pensionable age must be taken as references to the husband and the tax year in which he died: s 39(2) (as so amended). See also s 46(2) (as amended); and PARA 569 note 9 post. For the meaning of 'pensionable age' see PARA 562 post; and for the meaning of 'tax year' see PARA 9 note 6 ante. As to when a person attains a particular age see PARA 19 note 11 ante.

5 See *ibid* s 80 (as amended); and PARAS 122, 590 post. This is because s 80(2)(d) applies the child dependant increases to Category A pensions. A widow in receipt of the child dependant increase can also claim child benefit in respect of that child, but not the extra child benefit payable in respect of her being a single parent or if the child is the only or eldest child: see the Social Security (Overlapping Benefits) Regulations 1979, SI 1979/597, reg 8 (substituted by SI 1991/547).

6 In the case of a widow whose late husband died before 11 April 1988 and who either (1) was over the age of 40 but under the age of 55 at the time of her husband's death; or (2) is over the age of 40 but under the age of 55 at the time when she ceases to be entitled to a widowed mother's allowance, head (1) in the text has effect as if for '55' there were substituted '50' in both places where it occurs: Social Security Contributions and Benefits Act 1992 s 39(6). For the meaning of 'late husband' see PARA 82 ante.

7 The time when the applicable qualifying condition is fulfilled is the time when the woman's late husband died or when she ceased to be entitled to a widowed mother's allowance: *ibid* s 39(5).

8 *Ibid* s 39(4).

9 *Ie* the additional pension falling to be calculated under *ibid* ss 44-45A (as amended and added) by virtue of s 39(1) (as amended): see PARA 569 post.

10 *Ibid* s 39(3) (amended by the Pensions Act 1995 s 127(2)).

## **UPDATE**

## **85-89 Widowed mother's allowance ... Long term incapacity benefit for widowers**

The Social Security Contributions and Benefits Act 1992 ss 37-40 apply only in cases where a woman's husband has died before the appointed day (as defined), and s 41 applies only in cases where a man's wife has died before that day: s 36A(1) (s 36A added by the Welfare Reform and Pensions Act 1999 s 55(1)).

The Social Security Contributions and Benefits Act 1992 ss 39A-39C (see PARAS 87A-87C) apply in cases where a person's spouse or civil partner dies on or after the appointed day, but s 39A also applies (in accordance with s 39A(1)(b)) in cases where a man's wife has died before that day: s 36A(2) (s 36A as added; s 36A(2) amended by Civil Partnership Act 2004 Sch 24 para 17).

For the purposes of the Social Security Contributions and Benefits Act 1992 s 36A, 39A, 39B, 'the appointed day' means the day appointed for the coming into force of the Welfare Reform and Pensions Act 1999 ss 54-56 (see PARA 84 TEXT AND NOTES): Social Security Contributions and Benefits Act 1992 s 36A(3) (s 36A as added). The Welfare Reform and Pensions Act 1999 ss 54-56 came into force for the purpose of making regulations on 24 April 2000 and for all other purposes on 9 April 2001: SI 2000/1047.

## **87 Rate of widowed mother's allowance and widow pension's benefit**

NOTES 4-10--References to the Social Security Contributions and Benefits Act 1992 ss 44-45A now ss 44-45B: s 39(1)-(3) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 14, 17, Pensions Act 2007 Sch 2 para 3(a), Sch 7 Pt 5). As to the Social Security Contributions and Benefits Act 1992 s 45B see PARA 569. Pensions Act 1995 s 127 repealed: Tax Credits Act 2002 Sch 6. For further amendment to Social Security Contributions and Benefits Act 1992 s 39(1)-(3) see Tax Credits Act 2002 Sch 3 para 27.

NOTE 4--In its application by virtue of the 1992 Act s 39(1), s 44(4) is to be read as if for the first amount specified in that provision there were substituted a reference to the amount prescribed for the purposes of s 39(2A): 1992 Act s 39(2A) (added by Pensions Act 2007 s 6(5)) (this amendment has effect in relation to the designated tax year and subsequent tax years: see s 6(7); for further effect see s 6(9), (10)).

NOTE 5--SI 1979/597 reg 8 amended: SI 1999/820, SI 1999/1362, SI 2000/799, SI 2003/136, SI 2004/565.

TEXT AND NOTES 9, 10--Social Security Contributions and Benefits Act 1992 s 39(3) repealed: Pensions Act 2007 Sch 2 para 3(b), Sch 7 Pt 5.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/87A. Widowed parent's allowance.

### **87A. Widowed parent's allowance.**

The following provisions apply where (1) a person whose spouse or civil partner dies on or after the appointed day<sup>1</sup> is under pensionable age at the time of the spouse's or civil partner's death; or (2) a man whose wife died before the appointed day (a) has not remarried before that day; and (b) is under pensionable age on that day<sup>2</sup>. The surviving spouse or civil partner is entitled to a widowed parent's allowance at the appropriate rate<sup>3</sup> if the deceased spouse or civil partner satisfied the contribution conditions for a widowed parent's allowance<sup>4</sup> and (i) the surviving spouse or civil partner is entitled to child benefit in respect of a child or qualifying young person falling within the specified description<sup>5</sup>; (ii) the surviving spouse is a woman who either (A) is pregnant by her late husband; or (B) if she and he were residing together immediately before the time of his death, is pregnant in certain circumstances<sup>6</sup>; or (iii) the surviving civil partner is a woman who (aa) was residing together with the deceased civil partner immediately before the time of the death, and (bb) is pregnant as the result of being artificially inseminated before that time with the semen of some person, or as a result of the placing in her before that time of an embryo, of an egg in the process of fertilisation, or of sperm and eggs<sup>7</sup>. The surviving spouse is not entitled to the allowance for any period after she or he remarries or forms a civil partnership but, subject to that, the surviving spouse continues to be entitled to it for any period throughout which she or he satisfies the requirements of head (i) or (ii) above, and is under pensionable age<sup>8</sup>. A widowed parent's allowance is not payable for any period falling before the day on which the surviving spouse's or civil partner's entitlement is to be regarded as commencing<sup>9</sup>, for any period during which the surviving spouse or civil partner and a person of the opposite sex to whom she or he is not married are living together as husband and wife, or for any period during which the surviving spouse or civil partner and a person of the same sex who is not his or her civil partner are living together as if they were civil partners<sup>10</sup>.

Provision is made as to the entitlement to widowed parent's allowance where a full gender recognition certificate is issued to a person<sup>11</sup>.

1 As to 'the appointed day', and commencement generally, see PARA 85-89.

2 Social Security Contributions and Benefits Act 1992 s 39A(1) (s 39A added by the Welfare Reform and Pensions Act 1999 s 55(2); and amended by Civil Partnership Act 2004 Sch 24 para 20, Sch 30; Child Benefit Act 2005 Sch 1 para 3; and Welfare Reform Act 2007 s 51, Sch 8). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

3 Ie the rate determined in accordance with the Social Security Contributions and Benefits Act 1992 s 39C (see PARA 87C).

4 Ie the conditions specified in *ibid* Sch 3 para 5 (see PARA 565).

5 A child or qualifying young person falls within the specified description if the child or qualifying young person is either (1) a son or daughter of the surviving spouse or civil partner and the deceased spouse or civil partner; or (2) a child or qualifying young person in respect of whom the deceased spouse or civil partner was immediately before his or her death entitled to child benefit; or (3) if the surviving spouse or civil partner and the deceased spouse or civil partner were residing together immediately before his or her death, a child or qualifying young person in respect of whom the surviving spouse or civil partner was then entitled to child benefit: s 39A(3) (s 39A as added and amended: see NOTE 2). For transitional provision see SI 2009/775. As to entitlement to child benefit for the purposes of the Social Security Contributions and Benefits Act 1992 s 39A(3), see the Social Security (Widow's Benefit and Retirement Pensions) Amendment Regulations 2001, SI 2001/1235. As to qualifying young persons see PARA 238.

6 Ie in the circumstances falling within the Social Security Contributions and Benefits Act 1992 s 37(1)(c) (see PARA 85 head (3)).

7 Ibid s 39A(2) (s 39A as added and amended: see NOTE 2). As to entitlement to child benefit for the purposes of s 39A(2), see SI 2001/1235.

8 Social Security Contributions and Benefits Act 1992 s 39A(4) (s 39A as added and amended: see NOTE 2).

The surviving civil partner entitled to the allowance for any period after she or he forms a subsequent civil partnership or is not married, but, subject to that, the surviving civil partner continues to be entitled to it for any period throughout which she or he (1) satisfies the requirements of head (i) or (ii) in the text; and (2) is under pensionable age: s 39A(4A) (added by Civil Partnership Act 2004 Sch 24 para 20(6)).

9 le by virtue of the Social Security Administration Act 1992 s 5(1)(k) (see PARA 330).

10 Social Security Contributions and Benefits Act 1992 s 39A(5) (s 39A as added and amended: see NOTE 2).

11 See Gender Recognition Act 2004 Sch 5 para 5; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

## UPDATE

### **85-89 Widowed mother's allowance ... Long term incapacity benefit for widowers**

The Social Security Contributions and Benefits Act 1992 ss 37-40 apply only in cases where a woman's husband has died before the appointed day (as defined), and s 41 applies only in cases where a man's wife has died before that day: s 36A(1) (s 36A added by the Welfare Reform and Pensions Act 1999 s 55(1)).

The Social Security Contributions and Benefits Act 1992 ss 39A-39C (see PARAS 87A-87C) apply in cases where a person's spouse or civil partner dies on or after the appointed day, but s 39A also applies (in accordance with s 39A(1)(b)) in cases where a man's wife has died before that day: s 36A(2) (s 36A as added; s 36A(2) amended by Civil Partnership Act 2004 Sch 24 para 17).

For the purposes of the Social Security Contributions and Benefits Act 1992 s 36A, 39A, 39B, 'the appointed day' means the day appointed for the coming into force of the Welfare Reform and Pensions Act 1999 ss 54-56 (see PARA 84 TEXT AND NOTES): Social Security Contributions and Benefits Act 1992 s 36A(3) (s 36A as added). The Welfare Reform and Pensions Act 1999 ss 54-56 came into force for the purpose of making regulations on 24 April 2000 and for all other purposes on 9 April 2001: SI 2000/1047.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/87B. Bereavement allowance where no dependent children.

### **87B. Bereavement allowance where no dependent children.**

The following provisions apply where a person whose spouse or civil partner dies on or after the appointed day<sup>1</sup> is over the age of 45 but under pensionable age at the spouse's or civil partner's death<sup>2</sup>. The surviving spouse or civil partner is entitled to a bereavement allowance at the appropriate rate<sup>3</sup> if the deceased spouse or civil partner satisfied the contribution conditions for a bereavement allowance<sup>4</sup>. A bereavement allowance is payable for not more than 52 weeks beginning with the date of the spouse's or civil partner's death or, if later, the day on which the surviving spouse's or civil partner's entitlement is to be regarded as commencing<sup>5</sup>. The surviving spouse is not entitled to the allowance for any period after she or he remarries or forms a civil partnership but, subject to that, the surviving spouse will continue to be entitled to it until (1) she or he attains pensionable age; or (2) the period of 52 weeks mentioned above expires, whichever happens first<sup>6</sup>. The allowance is not payable (a) for any period for which the surviving spouse or civil partner is entitled to a widowed parent's allowance; (b) for any period during which the surviving spouse or civil partner and a person of the opposite sex to whom she or he is not married are living together as husband and wife; or (c) for any period during which the surviving spouse or civil partner and a person of the same sex who is not his or her civil partner are living together as if they were civil partners<sup>7</sup>.

1 As to 'the appointed day', and commencement generally, see PARA 85-89.

2 Social Security Contributions and Benefits Act 1992 s 39B(1) (s 39B added by the Welfare Reform and Pensions Act 1999 s 55(2); and amended by Civil Partnership Act 2004 Sch 24 para 21). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

3 Ie the rate determined in accordance with the Social Security Contributions and Benefits Act 1992 s 39C: see PARA 87C.

4 Ibid s 39B(2), referring to the conditions specified in Sch 3 para 5 (see PARA 565).

5 Ibid s 39B(3), referring to entitlement commencing by virtue of the Social Security Administration Act 1992 s 5(1)(k) (see PARA 330).

6 Social Security Contributions and Benefits Act 1992 s 39B(4). The surviving civil partner is not entitled to the allowance for any period after she or he forms a subsequent civil partnership or marries, but, subject to that, the surviving civil partner continues to be entitled to it until (1) she or he attains pensionable age, or (2) the period of 52 weeks mentioned in s 39B(3) expires, whichever happens first: s 39B(4A) (added by Civil Partnership Act 2004 Sch 24 para 21(5)).

7 Social Security Contributions and Benefits Act 1992 s 39B(5).

## **UPDATE**

### **85-89 Widowed mother's allowance ... Long term incapacity benefit for widowers**

The Social Security Contributions and Benefits Act 1992 ss 37-40 apply only in cases where a woman's husband has died before the appointed day (as defined), and s 41 applies only in cases where a man's wife has died before that day: s 36A(1) (s 36A added by the Welfare Reform and Pensions Act 1999 s 55(1)).

The Social Security Contributions and Benefits Act 1992 ss 39A-39C (see PARAS 87A-87C) apply in cases where a person's spouse or civil partner dies on or after the appointed day, but s 39A also applies (in accordance with s 39A(1)(b)) in cases where a man's wife has died before that day: s 36A(2) (s 36A as added; s 36A(2) amended by Civil Partnership Act 2004 Sch 24 para 17).

For the purposes of the Social Security Contributions and Benefits Act 1992 s 36A, 39A, 39B, 'the appointed day' means the day appointed for the coming into force of the Welfare Reform and Pensions Act 1999 ss 54-56 (see PARA 84 TEXT AND NOTES): Social Security Contributions and Benefits Act 1992 s 36A(3) (s 36A as added). The Welfare Reform and Pensions Act 1999 ss 54-56 came into force for the purpose of making regulations on 24 April 2000 and for all other purposes on 9 April 2001: SI 2000/1047.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/87C. Rate of widowed parent's allowance and bereavement allowance.

### **87C. Rate of widowed parent's allowance and bereavement allowance.**

For amendments to the Social Security Contributions and Benefits Act 1992 s 39C see Pensions Act 2007 s 6(6) (amendments have effect in relation to the designated tax year and subsequent tax years: see s 6(7); for further effect see s 6(9), (10)).

The weekly rate of a widowed parent's allowance is determined in accordance with certain provisions applying in the case of a Category A retirement pension<sup>1</sup> as they apply in relation to such a pension, but subject, in particular, to certain additional provisions<sup>2</sup>.

<sup>1</sup> ie the Social Security Contributions and Benefits Act 1992 ss 44-45, Sch 4A (see PARAS 568, 569).

<sup>2</sup> ie subject to the Social Security Contributions and Benefits Act 1992 s 39C(2)-(5) (s 39C added by the Welfare Reform and Pensions Act 1999 s 55(2)); Social Security Contributions and Benefits Act 1992 s 39C(1) (as added; amended by the Child Support, Pensions and Social Security Act 2000 s 35(1), (4); the Tax Credits Act 2002 Sch 3 para 29; and the Pensions Act 2007 Sch 2 para 4(2)). As to commencement generally, see PARA 85-89. The weekly rate of a bereavement allowance is determined in accordance with the provisions of the Social Security Contributions and Benefits Act 1992 s 44 as they apply in the case of a Category A retirement pension so far as consisting only of the basic pension referred to in s 44(3)(a), but subject, in particular, to s 39C(3)-(5); s 39C(2) (as added; prospectively substituted by Pensions Act 2007 s 6(6)(a)). In the application of the 1992 Act ss 44-45, Sch 4A, or as the case may be, s 44 by virtue of s 39C(1) or (2), (1) where the deceased spouse or civil partner was over pensionable age at his or her death, references in ss 44-45 to the pensioner are to be taken as references to the deceased spouse or civil partner; and (2) where the deceased spouse or civil partner was under pensionable age at his or her death, references to the pensioner and the tax year in which he attained pensionable age are to be taken as references to the deceased spouse or civil partner and the tax year in which he or she died: s 39C(3) (as added, amended by the Child Support, Pensions and Social Security Act 2000 s 35(1), (4); the Tax Credits Act 2002 Sch 3 para 29; the Civil Partnership Act 2004 Sch 24 para 22; and the Pensions Act 2007 Sch 2 para 4(3); prospectively amended by Pensions Act 2007 s 6(6)(b)). Where a widowed parent's allowance is payable to a person whose spouse or civil partner died after 5 October 2002, the additional pension falling to be calculated under the Social Security Contributions and Benefits Act 1992 ss 44-45 by virtue of s 39C(1) is one half of the amount which it would be apart from this provision: s 39C(4) (as added, amended by the Child Support, Pensions and Social Security Act 2000 ss 35(1), (4), 39(1), (2); the Tax Credits Act 2002 Sch 3 para 29; and the Civil Partnership Act 2004 Sch 24 para 22). Where a bereavement allowance is payable to a person who was under the age of 55 at the time of the spouse's death or civil partner's, the weekly rate of the allowance is to be reduced by seven per cent of what it would be apart from this provision multiplied by the number of years by which that person's age at that time was less than 55, any fraction of a year being counted as a year: Social Security Contributions and Benefits Act 1992 s 39C(5) (as added and amended). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

Sections 44-45 also apply subject to s 46(2) and (4) (see PARA 569 NOTE 9): s 39C(1) (as added and amended).

### **UPDATE**

#### **85-89 Widowed mother's allowance ... Long term incapacity benefit for widowers**

The Social Security Contributions and Benefits Act 1992 ss 37-40 apply only in cases where a woman's husband has died before the appointed day (as defined), and s 41 applies only in cases where a man's wife has died before that day: s 36A(1) (s 36A added by the Welfare Reform and Pensions Act 1999 s 55(1)).

The Social Security Contributions and Benefits Act 1992 ss 39A-39C (see PARAS 87A-87C) apply in cases where a person's spouse or civil partner dies on or after the appointed day, but s 39A also applies (in accordance with s 39A(1)(b)) in cases where a

man's wife has died before that day: s 36A(2) (s 36A as added; s 36A(2) amended by Civil Partnership Act 2004 Sch 24 para 17).

For the purposes of the Social Security Contributions and Benefits Act 1992 s 36A, 39A, 39B, 'the appointed day' means the day appointed for the coming into force of the Welfare Reform and Pensions Act 1999 ss 54-56 (see PARA 84 TEXT AND NOTES): Social Security Contributions and Benefits Act 1992 s 36A(3) (s 36A as added). The Welfare Reform and Pensions Act 1999 ss 54-56 came into force for the purpose of making regulations on 24 April 2000 and for all other purposes on 9 April 2001: SI 2000/1047.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/88. Long term incapacity benefit for widows.

## 88. Long term incapacity benefit for widows.

There are provisions making it easier for a widowed<sup>1</sup> woman to qualify for long-term incapacity benefit if she is incapable of work but is either not entitled to widow's pension or has an entitlement which is reduced on account of her age when she qualified<sup>2</sup>. These provisions apply to a woman who:

- 275 (1) on her late husband's<sup>3</sup> death is not entitled<sup>4</sup> to a widowed mother's allowance<sup>5</sup> or subsequently ceases to be entitled to such an allowance;
- 276 (2) is incapable of work<sup>6</sup> at the time when he dies or when she subsequently ceases to be so entitled;
- 277 (3) Either would have been entitled to a widow's pension<sup>7</sup> if she had been over the age of 45<sup>8</sup> when her husband died or when she ceased to be entitled to a widowed mother's allowance, or is entitled to such a pension with a reduction because of her age<sup>9</sup>; and
- 278 (4) is not otherwise entitled to incapacity benefit<sup>10</sup>,

but do not apply to a woman unless either her husband died after 5 April 1979 or she ceased to be entitled to a widowed mother's allowance after that date (whenever her husband died)<sup>11</sup>. Where these provisions apply, the woman is entitled to long-term incapacity benefit<sup>12</sup> for any day of incapacity for work<sup>13</sup> which:

- 279 (a) falls in a period of incapacity for work<sup>14</sup> that began before the time when her late husband died or she subsequently ceased to be entitled to a widowed mother's allowance; and
- 280 (b) is after that time and after the first 364 days of incapacity for work in that period<sup>15</sup>.

The weekly rate of incapacity benefit under these provisions is:

- 281 (i) if the woman is not entitled to widow's pension, the amount which would apply if she were entitled to long-term incapacity benefit in the normal way<sup>16</sup>; and
- 282 (ii) if she is entitled to widow's pension but it is reduced because of her age, the difference between her weekly rate of pension and the weekly rate of long-term incapacity benefit<sup>17</sup>.

A woman is not entitled to incapacity benefit under these provisions if she is over pensionable age<sup>18</sup>; but if she has attained pensionable age and the period of incapacity for work<sup>19</sup> did not terminate before she attained that age she is, if not otherwise entitled to a Category A retirement pension<sup>20</sup>, entitled to such a pension<sup>21</sup>.

1 For the meaning of 'widowed' see PARA 82 ante.

2 See the text and notes 3-11 infra. As to incapacity benefit see PARA 59 et seq ante.

3 For the meaning of 'late husband' see PARA 82 ante.

- 4 For the meaning of 'entitled' see PARA 21 note 9 ante.
- 5 As to widowed mother's allowance see PARA 85 ante.
- 6 As to the test of incapacity for work see PARA 65 et seq ante.
- 7 As to entitlement to widow's pension see PARA 86 ante.
- 8 As to when a person attains a particular age see PARA 19 note 11 ante.
- 9 le under the Social Security Contributions and Benefits Act 1992 s 39(4): see PARA 87 ante.
- 10 Ibid s 40(1) (s 40 substituted by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 8).
- 11 Ibid s 40(2) (as substituted: see note 10 supra).
- 12 As to long-term incapacity benefit see PARA 62 ante.
- 13 As to days of incapacity for work see PARA 63 ante.
- 14 For the meaning of 'period of incapacity for work' see PARA 63 ante.
- 15 Social Security Contributions and Benefits Act 1992 s 40(3) (as substituted: see note 10 supra). A woman to whom these provisions apply who is not so entitled to long-term incapacity benefit but who is terminally ill (ie suffering from a progressive disease and her death in consequence of that disease can reasonably be expected within six months) is entitled to short-term incapacity benefit for any day of incapacity for work which falls in a period of incapacity for work that began before the time when her late husband died or she subsequently ceased to be entitled to a widowed mother's allowance and is after that time and after the first 196 days of incapacity for work in that period; and that benefit is at the higher rate: s 40(4), (8) (as substituted: see note 10 supra). This short-term benefit is in fact paid, in these circumstances, at the long-term rate: see s 30B(4) (as added); and PARA 62 ante.
- Where a woman entitled to short-term incapacity benefit under s 40(4) (as so substituted) attains pensionable age and defers her entitlement to a Category A pension or makes an election under s 54(1) (see PARA 584 post), the days of incapacity for work falling within the period of incapacity for work mentioned in s 40(4) (as so substituted) are to be treated, for the purpose of determining any subsequent entitlement to incapacity benefit under s 30A (as added) (see PARA 60 ante) or the rate of that benefit, as if they had been days of entitlement to short-term incapacity benefit: s 40(7) (as so substituted).
- 16 le under ibid s 30A (as added): see PARA 60 ante.
- 17 Ibid s 40(5) (as substituted: see note 10 supra).
- 18 For the meaning of 'pensionable age' see PARA 562 post.
- 19 le the period mentioned in the Social Security Contributions and Benefits Act 1992 s 40(3)(a) or (4)(a) (as substituted): see the text and note 15 supra.
- 20 As to Category A retirement pensions see PARA 568 et seq post.
- 21 Social Security Contributions and Benefits Act 1992 s 40(6)(a) (as substituted: see note 10 supra). The weekly rate of the Category A retirement pension to which she is entitled (whether by virtue of s 40(6)(a) (as substituted) or otherwise) must be determined in the prescribed manner: s 40(6)(b) (as so substituted).

## UPDATE

### **85-89 Widowed mother's allowance ... Long term incapacity benefit for widowers**

The Social Security Contributions and Benefits Act 1992 ss 37-40 apply only in cases where a woman's husband has died before the appointed day (as defined), and s 41 applies only in cases where a man's wife has died before that day: s 36A(1) (s 36A added by the Welfare Reform and Pensions Act 1999 s 55(1)).

The Social Security Contributions and Benefits Act 1992 ss 39A-39C (see PARAS 87A-87C) apply in cases where a person's spouse or civil partner dies on or after the

appointed day, but s 39A also applies (in accordance with s 39A(1)(b)) in cases where a man's wife has died before that day: s 36A(2) (s 36A as added; s 36A(2) amended by Civil Partnership Act 2004 Sch 24 para 17).

For the purposes of the Social Security Contributions and Benefits Act 1992 s 36A, 39A, 39B, 'the appointed day' means the day appointed for the coming into force of the Welfare Reform and Pensions Act 1999 ss 54-56 (see PARA 84 TEXT AND NOTES): Social Security Contributions and Benefits Act 1992 s 36A(3) (s 36A as added). The Welfare Reform and Pensions Act 1999 ss 54-56 came into force for the purpose of making regulations on 24 April 2000 and for all other purposes on 9 April 2001: SI 2000/1047.

## **88 Long term incapacity benefit for widows**

TEXT AND NOTES--As to entitlement to long term incapacity benefit where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 6. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

As from a day to be appointed 1992 Act s 40 repealed: Welfare Reform Act 2007 Sch 8.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/89. Long term incapacity benefit for widowers.

## **89. Long term incapacity benefit for widowers.**

A man whose wife has died on or after 6 April 1979 and who was either incapable of work<sup>1</sup> at the time when she died or became so within the prescribed period<sup>2</sup> after that time, and who is not otherwise entitled<sup>3</sup> to incapacity benefit<sup>4</sup>, is entitled to long-term incapacity benefit for any day of incapacity for work<sup>5</sup> which:

- 283 (1) falls in a period of incapacity for work<sup>6</sup> that began before the time when his wife died or within the prescribed period after that time; and
- 284 (2) is after that time and after the first 364 days of incapacity for work in that period<sup>7</sup>.

The weekly rate of incapacity benefit under these provisions is that which would apply if he were entitled to long-term incapacity benefit in the normal<sup>8</sup> way<sup>9</sup>.

A man is not entitled to incapacity benefit under these provisions if he is over pensionable age; but if he has attained pensionable age and the period of incapacity for work<sup>10</sup> did not terminate before he attained that age he is, if not otherwise entitled to a Category A retirement pension and also not entitled to a Category B retirement pension<sup>11</sup> by virtue of the contributions of his wife, entitled to a Category A retirement pension<sup>12</sup>.

1 As to the test of incapacity for work see PARA 65 et seq ante.

2 The prescribed period is 13 weeks: see the Social Security (Widow's and Widower's Invalidity Pension) Regulations 1979, SI 1978/529, reg 4 (substituted by SI 1995/829). For the meaning of 'week' see PARA 32 note 7 ante; and for the meaning of 'prescribed' see PARA 19 note 3 ante.

3 For the meaning of 'entitled' see PARA 21 note 9 ante.

4 As to incapacity benefit see PARA 59 et seq ante.

5 As to days of incapacity for work see PARA 63 ante.

6 For the meaning of 'period of incapacity for work' see PARA 63 ante.

7 Social Security Contributions and Benefits Act 1992 s 41(1), (2) (s 41 substituted by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 9). A man to whom the Social Security Contributions and Benefits Act 1992 s 41 (as substituted) applies who is not entitled to long-term incapacity benefit under s 41(2) (as substituted), but who is terminally ill, is entitled to short-term incapacity benefit for any day of incapacity for work which falls in a period of incapacity for work that began before the time when his wife died or within the prescribed period after that time and is after that time and after the first 196 days of incapacity for work in that period; and for these purposes a man is terminally ill if he suffers from a progressive disease and his death in consequence of that disease can reasonably be expected within six months: s 41(3) (as so substituted). Where a man entitled to short-term incapacity benefit under s 41(3) (as substituted) attains pensionable age and defers his entitlement to a Category A pension or makes an election under s 54(1) (see PARA 584 post), the days of incapacity for work falling within the period of incapacity for work mentioned in s 41(3) (as substituted) are to be treated, for the purpose of determining any subsequent entitlement to incapacity benefit under s 30A (as added) or the rate of that benefit, as if they had been days of entitlement to short-term incapacity benefit: s 41(6) (as so substituted). References to short-term incapacity benefit at the higher rate must be construed as including short-term incapacity benefit payable under s 41(3) (as substituted): s 41(7) (as so substituted). This short term benefit is in fact paid, in these circumstances, at the long term rate: see s 30B(4) (as added); and PARA 62 ante. For the meaning of 'pensionable age' see PARA 562 post; and as to when a person attains a particular age see PARA 19 note 11 ante. As to Category A pensions see PARA 568 et seq post. For the meaning of 'terminally ill' see PARA 62 note 8 ante.

8 le under *ibid* s 30A (as added): see PARA 60 ante.

9 *Ibid* s 41(4) (as substituted: see note 7 *supra*).

10 le the period mentioned in *ibid* s 41(2)(a) or (3)(a) (as substituted: see note 7 *supra*): see the text and note 7 *supra*.

11 As to Category B retirement pensions see PARA 571 et seq post.

12 Social Security Contributions and Benefits Act 1992 s 41(5)(a) (as substituted: see note 7 *supra*; amended by the Pensions Act 1995 s 126(c), Sch 4 para 21(4)). The weekly rate of the Category A retirement pension to which he is entitled (whether by virtue of the Social Security Contributions and Benefits Act 1992 s 41(5)(a) (as substituted and amended) or otherwise) must be determined in the prescribed manner: s 41(5)(b) (as so substituted).

## UPDATE

### **85-89 Widowed mother's allowance ... Long term incapacity benefit for widowers**

The Social Security Contributions and Benefits Act 1992 ss 37-40 apply only in cases where a woman's husband has died before the appointed day (as defined), and s 41 applies only in cases where a man's wife has died before that day: s 36A(1) (s 36A added by the Welfare Reform and Pensions Act 1999 s 55(1)).

The Social Security Contributions and Benefits Act 1992 ss 39A-39C (see PARAS 87A-87C) apply in cases where a person's spouse or civil partner dies on or after the appointed day, but s 39A also applies (in accordance with s 39A(1)(b)) in cases where a man's wife has died before that day: s 36A(2) (s 36A as added; s 36A(2) amended by Civil Partnership Act 2004 Sch 24 para 17).

For the purposes of the Social Security Contributions and Benefits Act 1992 s 36A, 39A, 39B, 'the appointed day' means the day appointed for the coming into force of the Welfare Reform and Pensions Act 1999 ss 54-56 (see PARA 84 TEXT AND NOTES): Social Security Contributions and Benefits Act 1992 s 36A(3) (s 36A as added). The Welfare Reform and Pensions Act 1999 ss 54-56 came into force for the purpose of making regulations on 24 April 2000 and for all other purposes on 9 April 2001: SI 2000/1047.

### **89 Long term incapacity benefit for widowers**

TEXT AND NOTES--As to entitlement to long term incapacity benefit where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 6. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

As from a day to be appointed 1992 Act s 41 repealed: Welfare Reform Act 2007 Sch 8.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/3. CONTRIBUTORY BENEFITS/(4) WIDOW'S BENEFITS ETC/90. Entitlement after a period of employment or training for work.

**90. Entitlement after a period of employment or training for work.**

Special provisions apply where a widow or widower claiming incapacity benefit<sup>1</sup> undertakes employment or training but then ceases to be engaged in that employment or training<sup>2</sup>. Where:

- 285 (1) a person who is engaged and normally engaged in remunerative work ceases to be so engaged; and
- 286 (2) that person is entitled<sup>3</sup> to a disability working allowance<sup>4</sup> for the week<sup>5</sup> in which there falls the last day on which he or she is so engaged; and
- 287 (3) that person qualified for a disability working allowance for that week by virtue of incapacity benefit under the special provisions relating to widows or widowers<sup>6</sup> having been payable to him or her; and
- 288 (4) the first day after that person ceases to be so engaged is for him or her a day of incapacity for work<sup>7</sup> and falls not later than the end of the period of two years beginning with the last day for which that person was so entitled to incapacity benefit,

any day since that day which fell within a week for which that person was entitled to a disability working allowance must be treated for the purposes of any claim for incapacity benefit under the special provisions relating to widows and widowers for a period commencing after he or she ceases to be so engaged as having been a day of incapacity for work<sup>8</sup>. Similarly, where a person becomes engaged in training for work<sup>9</sup>, and was entitled to incapacity benefit under those special provisions for one or more of the 56 days immediately before becoming so engaged, and the first day after ceasing to be so engaged is for that person a day of incapacity for work and falls not later than the end of the period of two years beginning with the last day for which he or she was entitled to incapacity benefit under those provisions, any day since that day in which that person was engaged in training for work must be treated for the purposes of any claim for incapacity benefit under those provisions for a period commencing after he or she ceases to be so engaged as having been a day of incapacity for work<sup>10</sup>.

The effect of these provisions is that the person can requalify immediately for incapacity benefit, subject to a specially extended linking period of two years<sup>11</sup>.

<sup>1</sup> I.e. under the Social Security Contributions and Benefits Act 1992 ss 40 or 41 (as substituted): see PARAS 88-89 ante.

<sup>2</sup> See the text and notes 3-10 infra.

<sup>3</sup> For the meaning of 'entitled' see PARA 21 note 9 ante.

<sup>4</sup> As to disability working allowance see PARA 218 et seq post.

<sup>5</sup> For these purposes, 'week' means any period of seven days: Social Security Contributions and Benefits Act 1992 s 42(3) (s 42 substituted by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 10).

<sup>6</sup> I.e. the provisions referred to in note 1 supra.

<sup>7</sup> As to days of incapacity for work see PARA 63 ante.

<sup>8</sup> Social Security Contributions and Benefits Act 1992 s 42(1) (as substituted: see note 5 supra).

9 For these purposes, 'training for work' means training for work in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (as substituted) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3) or training of such other description as may be prescribed: Social Security Contributions and Benefits Act 1992 s 41(2) (as substituted: see note 5 supra).

10 Ibid s 41(2) (as substituted: see note 5 supra).

11 As to linking periods see PARA 63 ante.

## **UPDATE**

### **90 Entitlement after a period of employment or training for work**

TEXT AND NOTES--As from a day to be appointed 1992 Act s 42 repealed: Welfare Reform Act 2007 Sch 8.

TEXT AND NOTES 3-8--Social Security Contributions and Benefits Act 1992 s 42(1) replaced by s 42(1), (1A) (substituted by Tax Credits Act 2002 Sch 3 para 30). Where a person claims incapacity benefit under the Social Security Contributions and Benefits Act 1992 s 40 (see PARA 88) or 41 (see PARA 89) for a period commencing after he has ceased to be in qualifying remunerative work (within the meaning of the Tax Credits Act 2002 Pt 1) (ss 1-48) (see PARA 227A.10) and (1) the day following that on which he so ceased was a day of incapacity for work for him, (2) he has been entitled to incapacity benefit under the Social Security Contributions and Benefits Act 1992 s 40 or 41 within the period of two years ending with that day of incapacity for work, and (3) he satisfied the relevant tax credit conditions on the day before he so ceased, every day during that period on which he satisfied those conditions is to be treated for the purposes of the claim as a day of incapacity for work for him: s 42(1) (as so substituted). A person satisfies the relevant tax credit conditions on a day if (a) he is entitled for the day to the disability element of working tax credit (on a claim made by him or by him jointly with another) or would be so entitled but for the fact that the relevant income (within the meaning of the Tax Credits Act 2002 Pt 1 (ss 1-48): (see PARA 227A.7) in his or their case is such that he is not so entitled, and (b) either working tax credit or any element of child tax credit other than the family element is paid in respect of the day on such a claim: Social Security Contributions and Benefits Act 1992 s 42(1A) (as substituted). As to the Tax Credits Act 2002 see generally para 227A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(1) IN GENERAL/91. Non-contributory benefits.

## 4. NON-CONTRIBUTORY BENEFITS

### (1) IN GENERAL

#### 91. Non-contributory benefits.

Current statutory provision relating to non-contributory benefits is primarily set out in Part III of the Social Security Contributions and Benefits Act 1992<sup>1</sup>. Non-contributory benefits are of the following descriptions:

- 289 (1) attendance allowance<sup>2</sup>;
- 290 (2) severe disablement allowance (with age related addition and increase for adult and child dependants)<sup>3</sup>;
- 291 (3) invalid care allowance (with increase for adult and child dependants)<sup>4</sup>;
- 292 (4) disability living allowance<sup>5</sup>;
- 293 (5) guardian's allowance<sup>6</sup>;
- 294 (6) retirement pensions of the following categories:
- 19 23. (a) Category C, payable to certain persons who were over pensionable age on 5 July 1948 and their wives and widows (with increase for adult and child dependants), and
- 24. (b) Category D, payable to persons over the age of 80 years<sup>7</sup>;
- 20 295 (7) age addition payable, in the case of persons over the age of 80 years, by way of increase of a retirement pension of any category or of some other pension or allowance from the Secretary of State<sup>8</sup>.

1 The Social Security Contributions and Benefits Act 1992 Pt III (ss 63-79) (as amended).

2 Ibid s 63(a): see PARAS 112-116 post.

3 Ibid s 63(b): see PARAS 92-99 post.

4 Ibid s 63(c): see PARAS 100-101 post.

5 Ibid s 63(d): see PARAS 102-111 post.

6 Ibid s 63(e): see PARAS 117-120 post.

7 Ibid s 63(f): see PARAS 579-582 post.

8 Ibid s 63(g): see PARA 588 post.

### UPDATE

#### 91 Non-contributory benefits

NOTE 1--SI 1984/1303 amended by SI 2003/937.

TEXT AND NOTE 3--Subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958 art 4), the Social Security Contributions and

Benefits Act 1992 s 63(b) is repealed: Welfare Reform and Pensions Act 1999 Sch 13 Pt IV.

TEXT AND NOTE 4--Subject to savings (see SI 2003/938), words 'with increase for adult and child dependants' omitted: Social Security Contributions and Benefits Act 1992 s 63(c) (amended by Tax Credits Act 2002 Sch 6; and Welfare Reform Act 2009 Sch 7 Pt 2).

TEXT AND NOTE 7--Head (6)(a). Subject to savings (see SI 2003/938), words 'and child' omitted: Social Security Contributions and Benefits Act 1992 s 63(f) (amended by the Tax Credits Act 2002 Sch 6).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(2) SEVERE DISABLEMENT ALLOWANCE/92. In general.

## **(2) SEVERE DISABLEMENT ALLOWANCE**

### **92. In general.**

Severe disablement allowance exists to provide a residual, non-contributory benefit for those who have been incapacitated for work from an early age (possibly from birth), or are both incapable of work and seriously disabled, but who have been unable to build up the contributions necessary for any major sickness-related contributory benefits<sup>1</sup>. Severe disablement allowance replaced, as from November 1984, the non-contributory invalidity pension which had served a similar function<sup>2</sup>.

Severe disablement allowance is payable to two types of claimant:

- 296 (1) those incapable of work, whose incapacity began before they reached the age of 20; and
- 297 (2) those who are both incapable of work and at least 80 per cent disabled;

and in both these cases the claimant must satisfy the condition of having been incapacitated from work for a minimum period of 196 days<sup>3</sup>.

It is paid at a weekly flat rate (below that for the equivalent contributory benefits), with an age addition and increases for child or adult dependants<sup>4</sup>.

1 The provisions relating to severe disablement allowance are contained in the Social Security Contributions and Benefits Act 1992 ss 68, 69 (as amended) and the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303 (as amended).

2 For transitional provisions relating to these two benefits see the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, regs 18-20 (as amended). In particular, any person who, immediately before 10 September 1984 and 29 November 1984 (the time of change) was entitled to a non-contributory invalidity pension was entitled to a severe disablement allowance for 29 November 1984 and any subsequent days which together with 29 November 1984 fell within a single period of incapacity for work, whether or not (1) he was disabled for the purposes of what is now the Social Security Contributions and Benefits Act 1992 s 68; or (2) 29 November 1984 was appointed for the purposes of the Health and Social Security Act 1984 s 11 (repealed) in relation to persons of his age, if he satisfied the other requirements for entitlement to such an allowance: see reg 20(1) (amended by SI 1994/2947); Interpretation Act 1978 s 17(2)(b). However, these transitional provisions were held to offend the sex equality provisions of EC Council Directive 79/7 (OJ L6 10.1.79, p 24) as invalidity pension, prior to its replacement, could only be claimed by a married woman if she showed both that she was incapable of work and was incapable of normal household duties: see Case 384/85 *Clarke v Chief Adjudication Officer* [1987] ECR 2865, [1987] 3 CMLR 277, EC; Decision R(S)2/88. In the light of this, subsequent legislation provided that a woman who (a) would have been entitled to a non-contributory invalidity pension immediately before 29 November 1984 but for the requirement that she be incapable of performing normal household duties (whether or not she had made a claim for that pension); and (b) had been continuously incapable of work since that date, was to be entitled to a severe disability allowance whether or not she is disabled for the purposes of the Social Security Contributions and Benefits Act 1992 s 68 and whether or not she has attained the age referred to in s 68(4)(d), if she satisfies the other requirements for entitlement to that allowance: Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 20(1A) (added by SI 1993/3194).

3 See the Social Security Contributions and Benefits Act 1992 s 68(1)-(3); and PARAS 93-94 post. There is provision for the making of regulations to direct (1) that persons who have previously been entitled to a severe disability allowance may be so entitled notwithstanding that they do not satisfy the conditions specified in s 68 (as amended); and (2) that those conditions are to have effect in relation to such persons subject to such modifications as may be specified: see s 68(11)(b).

- 4 See *ibid* s 68(7), Sch 4 Pt III para 2 (subject to frequent amendment); and PARA 96 post.

## **UPDATE**

### **92-99 Severe Disablement Allowance**

Subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958 art 4), the Social Security Contributions and Benefits Act 1992 ss 68, 69 are repealed: Welfare Reform and Pensions Act 1999 s 65, Sch 13 Pt IV.

### **92 In general**

NOTE 4--Subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958 art 4), the Social Security Contributions and Benefits Act 1992 Sch 4 Pt III para 2 is repealed: Welfare Reform and Pensions Act 1999 s 65, Sch 13 Pt IV.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(2) SEVERE DISABLEMENT ALLOWANCE/93. The age condition.

### **93. The age condition.**

A person is entitled to a severe disablement allowance for any day (the relevant day) if he satisfies the following conditions:

- 298 (1) on the relevant day he is incapable of work<sup>1</sup>; and
- 299 (2) he has been incapable of work for a period of not less than 196 consecutive days:
- 21
- 25. (a) beginning not later than the day on which he attained the age of 20 years; and
- 26. (b) Ending immediately before the relevant day<sup>2</sup>.
- 22

1 As to the meaning of 'incapable of work' see PARA 65 et seq ante. Regulations may prescribe circumstances in which a person is or is not to be treated as incapable of work: see the Social Security Contribution and Benefits Act 1992 s 68(11)(ca) (substituted by the Social Security (Incapacity for Work ) Act 1994 s 11(1), Sch 1 Pt 1 para 18(3)).

2 Social Security Contributions and Benefits Act 1992 s 68(1)(a), (2). The Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946, reg 5 (night workers) applies for the purposes of severe disablement allowance as it applies for the purposes of incapacity benefit: Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 7(1A) (added by SI 1994/2947); and see PARA 63 ante. As to when a person attains a particular age see PARA 19 note 11 ante.

### **UPDATE**

#### **92-99 Severe Disablement Allowance**

Subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958 art 4), the Social Security Contributions and Benefits Act 1992 ss 68, 69 are repealed: Welfare Reform and Pensions Act 1999 s 65, Sch 13 Pt IV.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(2) SEVERE DISABLEMENT ALLOWANCE/94. The disablement condition.

#### **94. The disablement condition.**

A person is entitled to a severe disablement allowance for any day (the relevant day) if he satisfies the following conditions:

- 300 (1) on the relevant day he is both incapable of work<sup>1</sup> and disabled; and
- 301 (2) he has been incapable of work and disabled for a period of not less than 196 consecutive days ending immediately before the relevant day<sup>2</sup>.

For these purposes, a person is disabled if he suffers from loss of physical or mental faculty such that the extent of the resulting disablement<sup>3</sup> amounts to not less than 80 per cent<sup>4</sup>.

There are, however, detailed regulatory provisions<sup>5</sup> setting out the evidence required to establish disablement of not less than 80 per cent on the relevant day, namely evidence that:

- 302 (a) on that day he is or was entitled to (a) a mobility allowance (now withdrawn and replaced by other allowances), the mobility component of disability living allowance at the higher rate or the care component of that allowance at the highest or middle rate<sup>6</sup>; or (b) to a mobility supplement<sup>7</sup>;
- 303 (b) on that day he is or was entitled to the care component of disability living allowance at the highest rate<sup>8</sup>;
- 304 (c) the extent of his disablement on that day has been assessed for the purposes of disablement pension as not less than 80 per cent<sup>9</sup>;
- 305 (d) that day is or was or is or was later than one in respect of which it has been determined under the Vaccine Damage Payments Act 1979 that he is or was severely disabled as a result of a vaccination against any of the diseases to which the 1979 Act applies;
- 306 (e) the degree of his disablement on that day has been assessed for the purpose of the Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order 1983 or the Personal Injuries (Civilians) Scheme 1983 as not less than 80 per cent;
- 307 (f) on that day he is or was registered as a blind or partially sighted person in a register compiled under the National Assistance Act 1948;
- 308 (g) he has been certified as blind or partially sighted and that in consequence he is or was registered on that day as blind or partially sighted in a register maintained by or on behalf of a regional or islands council;
- 309 (h) on that day the Secretary of State provides or provided him with an invalid carriage or other vehicle<sup>10</sup> pursuant to the National Health Service Act 1977 or makes or made payments by way of grant to him under that Act;
- 310 (i) on that day the Secretary of State provides or provided him with an invalid carriage or other vehicle pursuant to the National Health Service (Scotland) Act 1978 or makes or made payments by way of grant to him under that Act;
- 311 (j) the extent of his disablement on that day has been assessed for the purposes of severe disablement allowance as not less than 80 per cent,

or such other evidence as satisfies an adjudicating medical authority<sup>11</sup> that he so suffers or suffered<sup>12</sup>.

- 1 As to the meaning of 'incapable of work' see PARA 65 et seq ante.
- 2 Social Security Contributions and Benefits Act 1992 s 68(1)(b), (3).
- 3 Ie disablement as assessed in accordance with ibid s 68(6), Sch 6.
- 4 Ibid s 68(6).
- 5 These regulations are made by virtue of ibid s 68(11)(cc) (added by the Social Security (Incapacity for Work) Act 1994 s 9(1), (3)); and several of the regulations have the effect of 'passporting' the claimant to entitlement through existing receipt of some other benefit.
- 6 As to the withdrawal and replacment of mobility allowance see PARA 102 post. As to the mobility component of disability living allowance see PARAS 106, 109 post. As to the care component of disability living allowance see PARAS 104, 109 post.
- 7 Ie a mobility supplement under the Naval, Military and Air Forces etc (Disablement and Death) Service Pensions Order 1983, SI 1983/883, art 26A (as added and amended); or under the Personal Injuries (Civilians) Scheme 1983, SI 1983/686, art 25A (as added and amended): see generally WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 595 et seq. As to the VAT treatment of vehicle hire to persons in receipt of mobility supplement etc see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 186.
- 8 As to disability living allowance generally see PARA 102 et seq post.
- 9 As to disablement pension see PARA 141 et seq post.
- 10 'Invalid carriage or other vehicle' means a vehicle propelled by petrol engine or by electric power supplied for use on the road and to be controlled by the occupant: Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 10(2A) (added by SI 1986/1933).
- 11 'Adjudicating medical authority' means an adjudicating medical practitioner, or two or more such acting as a medical board, or a medical appeal tribunal: Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 10(4). See further PARAS 379-382 post.
- 12 Ibid reg 10(1) (amended by SI 1986/1933; SI 1991/2742; and SI 1997/1009); Interpretation Act 1978 s 17(2)(b).

For the purposes of heads (a)-(j) in the text, an official record of the Department of Social Security of any fact specified in those heads is sufficient evidence of that fact: Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 10(2); Transfer of Functions (Health and Social Security) Order 1988, SI 1988/1843, reg 5(4), Sch 3 para 3. Where such an official record exists, the disablement questions in relation to severe disablement allowance are to be referred to and determined by an adjudication officer: Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 10(3); Transfer of Functions (Health and Social Security) Order 1988, SI 1988/1843, reg 5(4), Sch 3 para 3. As to adjudication officers see PARA 359 et seq post.

## **UPDATE**

### **92-99 Severe Disablement Allowance**

Subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958 art 4), the Social Security Contributions and Benefits Act 1992 ss 68, 69 are repealed: Welfare Reform and Pensions Act 1999 s 65, Sch 13 Pt IV.

### **94 The disablement condition**

TEXT AND NOTES 6, 7--Head (a) omitted and in heads (f), (g) words 'or partially sighted' omitted: SI 1984/1303 reg 10(1); SI 1997/1009. In addition, head (k) during the period referred to in the 1984 Regulations reg 7(1B) (see PARA 97), evidence that he has been determined on that day to be a welfare to work beneficiary in accordance with the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A

(see PARA 71), but not a welfare to work beneficiary who, in his immediate past period of incapacity for work within the meaning of reg 13A, was not assessed to be disabled in accordance with the Social Security Contributions and Benefits Act 1992 s 68(6): SI 1984/1303 Regulations reg 10(1), (2B); SI 1998/2231.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(2) SEVERE DISABLEMENT ALLOWANCE/95. Assessment of extent of disablement.

## 95. Assessment of extent of disablement.

For the purposes of the severe disablement allowance, the extent of disablement is assessed by reference to the disabilities incurred by the claimant as a result of the relevant loss of faculty<sup>1</sup> and in accordance with the following principles:

- 312 (1) subject to heads (2) and (3) below, the disabilities to be taken into account are all disabilities so incurred (whether or not involving loss of earning power or additional expense) to which the claimant may be expected, having regard to his physical and mental condition at the date of assessment, to be subject during the period taken into account by the assessment as compared with a person of the same age and sex whose physical and mental condition is normal;
- 313 (2) the assessment is made without reference to the particular circumstances of the claimant other than age, sex and physical and mental condition;
- 314 (3) the disabilities resulting from such loss of faculty as may be prescribed are taken as amounting to 100 per cent disablement and other disabilities are assessed accordingly<sup>2</sup>.

In the case of an assessment of any person's disablement for the purposes of the severe disability allowance provisions<sup>3</sup>, the period to be taken into account for any such assessment is the period during which that person has suffered and may be expected to continue to suffer from the relevant loss of faculty, beginning not later than:

- 315 (a) the first claim day, if his entitlement to benefit falls to be determined in accordance with the relevant provisions<sup>4</sup>;
- 316 (b) where his disablement has previously been assessed for the purposes of the severe disability allowance provisions<sup>5</sup> at a percentage which is not less than 80 per cent:

23

- 27. (i) if the period taken into account for that assessment was or included the period of 196 days ending immediately before the first claim day, the first claim day; or
- 28. (ii) if the period so taken into account included any day falling within the period of 196 days, the day immediately following that day or, if there is more than one such day, the last such day;

24

- 317 (c) in any other case, 196 days before the first claim day;

and in any case ending not later than the day on which that person attains the age of 65 years<sup>6</sup>.

1 For these purposes, 'relevant loss of faculty' means the loss of faculty which results in the disablement: Social Security Contributions and Benefits Act 1992 s 122(1). For the meaning of 'claimant' see PARA 19 note 5 ante.

2 See *ibid* s 68(6), Sch 6 para 1. There is further provision for the making of regulations defining the general principles upon which assessment is to be made: see Sch 6 paras 2, 3.

3 *le ibid* s 68 (as amended).

4 le if his entitlement to benefit falls to be determined in accordance with *ibid* s 68(3)(b), as modified by regulation under s 68(11)(b).

5 le *ibid* s 68 (as amended).

6 Social Security Contributions and Benefits Act 1992 s 68(6), Sch 6 para 4 (amended by the Social Security (Severe Disablement Allowance and Invalid Care Allowance) Amendment Regulations 1994, SI 1994/2556).

An assessment of any person's disablement for the purposes of the Social Security Contributions and Benefits Act 1992 s 68 (as amended) must state the degree of disablement in the form of a percentage and specify the period taken into account by the assessment: Sch 6 para 5(1). For the purposes of any such assessment (1) a percentage which is not a whole number must be rounded to the nearest whole number or, if it falls equally near two whole numbers, rounded up to the higher; and (2) a percentage between five and 100 which is not a multiple of 10 must be treated, if it is a multiple of five, as being the next higher percentage which is a multiple of 10 and, in any other case, as being the nearest percentage which is a multiple of 10: Sch 6 para 5(2). If on the assessment the person's disablement is found to be less than five per cent, that degree of disablement is disregarded for the purposes of s 68 (as amended) and accordingly, the assessment must state that he is not disabled: Sch 6 para 5(3).

Where several conditions each contribute towards the total disablement, it is only the final aggregate that can be rounded up, not each component's score: see Decision CS/73/1992. As to multiple disablements generally see Decision R(S)4/89.

## **UPDATE**

### **92-99 Severe Disablement Allowance**

Subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958 art 4), the Social Security Contributions and Benefits Act 1992 ss 68, 69 are repealed: Welfare Reform and Pensions Act 1999 s 65, Sch 13 Pt IV.

### **95 Assessment of extent of disablement**

TEXT AND NOTES 1, 2--Subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958 art 4), the Social Security and Contributions Act 1992 Sch 6 para 1 is repealed in so far as it applied to such an allowance: Welfare Reform and Pensions Act 1999 Sch 13 Pt IV.

NOTE 1--Definition of 'relevant loss of faculty' (in relation to severe disablement allowance) omitted: Social Security and Contributions Act 1992 s 122(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 13 Pt IV (amendment subject to a saving: see TEXT AND NOTES 1, 2)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(2) SEVERE DISABLEMENT ALLOWANCE/96. Rate of payment.

## 96. Rate of payment.

Severe disablement allowance is payable at a specified weekly rate<sup>1</sup>. In addition, a claimant may be entitled to the following increases in allowance:

- 318 (1) an age-related addition: if a person was under the age of 60 years on the day on which he qualified for severe disablement allowance, the weekly rate of his severe disablement allowance may be increased by an age related addition at the appropriate weekly rate<sup>2</sup>, that is to say:
- 25
29. (a) the higher rate, if he was under the age of 40 years on the day on which he qualified;
30. (b) the middle rate, if he was between the ages of 40 and 50 years on that day; and
31. (c) the lower rate, if he was between the ages of 50 and 60 years on that day<sup>3</sup>.
- 26
- 319 (2) a dependant increase: the weekly rate of a severe disablement allowance may, in such circumstances as may be prescribed, be increased for child or adult dependants by a specified appropriate amount<sup>4</sup>.

1 See the Social Security Contributions and Benefits Act 1992 s 68(7). The amount so specified is contained in Sch 4 Part III para 2 (subject to frequent amendment) and is currently set at £36.95. The amount of severe disablement allowance payable for any relevant day is one seventh of the weekly rate: s 68(8) (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 Pt I para 18(2)).

2 See those rates specified in the Social Security Contributions and Benefits Act 1992 s 68(7), Sch 4 Pt III para 3 (as amended).

3 Ibid s 69(1). For the purposes of s 69 the day on which a person qualified for severe disablement allowance is his first day of incapacity for work in the period of not less than 196 consecutive days mentioned in s 68(2)(b) or (3)(b) (see PARAS 93-94 ante), as the case may be, which preceded the first day in his current period of entitlement: s 69(2). There are, however, provisions permitting an earlier day to be counted in certain specific instances: see the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, regs 10A, 10B (added by SI 1990/2209; substituted by SI 1991/1747); and the Interpretation Act 1978 s 17(2)(b). For the purposes of the Social Security Contributions and Benefits Act 1992 s 69 a person's 'current period of entitlement' is a current period (1) which consists of one or more consecutive days on which he is or has been entitled to a severe disablement allowance; and (2) which begins immediately after the last period of one or more consecutive days for which he was not entitled to such an allowance: s 69(3). There is further provision for the making of regulations in relation to qualification for severe disablement allowance: see s 69(4).

4 Ibid s 90. The amounts so specified are set out in Sch 4 Pt IV (subject to frequent amendment). These increases are governed by the provisions of the Social Security Contributions and Benefits Act 1992 Part IV (ss 80-93) (as amended) (see PARA 121 et seq post) and the Social Security (Incapacity Benefit - Increases for Dependents) Regulations 1994, SI 1994/2945, applied for these purposes by the Social Security (Dependency) Regulations 1977, SI 1977/343, reg 12(1) (substituted by SI 1994/2945).

## UPDATE

### 92-99 Severe Disablement Allowance

Subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958 art 4), the Social Security Contributions and Benefits Act 1992 ss 68, 69 are repealed: Welfare Reform and Pensions Act 1999 s 65, Sch 13 Pt IV.

## **96 Rate of payment**

NOTE 1--Amount specified now £51.05: 1992 Act Sch 4 Pt III para 2 (amended by the Social Security Benefits Up-rating Order 2008, SI 2008/632).

NOTES 2, 4--Subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958 art 4), Social Security Contributions and Benefits Act 1992 Sch 4 Pt III para 3 is repealed, and Sch 4 Pt IV amended, by the Welfare Reform and Pensions Act 1999 Sch 13 Pt IV.

TEXT AND NOTE 4--Social Security Contributions and Benefits Act 1992 s 90 repealed: Welfare Reform Act 2009 Sch 7 Pt 2.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(2) SEVERE DISABLEMENT ALLOWANCE/97. Limitations and disentitlements.

## **97. Limitations and disentitlements.**

As a claimant for severe disablement allowance must be incapable of work<sup>1</sup> (under either the age condition<sup>2</sup> or the disability condition<sup>3</sup>), any limitations or disentitlements contained in the general rules as to incapacity for work dealt with elsewhere in this title<sup>4</sup> will apply equally for the purposes of the severe disablement allowance provisions. In addition, it is provided that (1) a person is not to be treated as incapable of work for any day on which he attends a training course (in respect of which a training allowance<sup>5</sup> is paid)<sup>6</sup>; and (2) for the purpose of determining whether a person has been incapable of work for a period of not less than 196 consecutive days, a day is not to be treated as a day on which that person was incapable of work if that was a day on which he was undergoing imprisonment or detention in legal custody, and which was part of a period of imprisonment or detention of more than six weeks<sup>7</sup>.

A person is not entitled to severe disablement allowance if:

- 320 (a) he is under the age of 16; or
- 321 (b) he is receiving full time education<sup>8</sup>; or
- 322 (c) he does not satisfy the prescribed conditions as to residence in Great Britain or as to presence there<sup>9</sup>; or
- 323 (d) he has attained the age of 65 years and was not entitled to severe disablement allowance immediately before he attained that age and is not treated by regulations as having been so entitled<sup>10</sup>.

A person is not entitled to the allowance for any day which as between him and his employer falls within a period of entitlement for the purposes of statutory sick pay<sup>11</sup>.

In addition to the above disentitlements, there are two circumstances in which the amount of severe disablement allowance is to be reduced. First, in any case where a severe disablement allowance is payable to a woman in respect of one or more relevant days in a week and an amount of statutory maternity pay becomes payable to her on any day in that week, the amount of severe disability allowance (including any increase for a child or adult dependant<sup>12</sup>) so payable is reduced by the amount of the statutory maternity pay, and only the balance (if any) is payable<sup>13</sup>. Secondly, where the amount of a councillor's allowance to which a person is entitled in respect of a week exceeds the specified sum<sup>14</sup>, then an amount equal to the excess is deducted from the amount of any severe disablement allowance to which he is entitled in respect of that week, and only the balance remaining (if any) is payable<sup>15</sup>.

1 As to the meaning of 'incapable of work' see PARA 65 et seq ante.

2 See PARA 93 ante.

3 See PARA 94 ante.

4 Ie the Social Security Contributions and Benefits Act 1992 Pt XIA (ss 171A-171G) (added by the Social Security (Incapacity for Work) Act 1994 ss 5, 6(1)): see PARA 65 et seq ante.

5 Ie a training allowance pursuant to the arrangements made under the Employment and Training Act 1973 s 2(1) (as substituted) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3) (as amended).

6 See the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 7(1) (substituted by SI 1994/2947); and see generally the Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2946.

7 See the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 7(2) (substituted by SI 1994/2947).

8 A person is treated as 'receiving full-time education' for the purposes of severe disablement allowance for any period during which (1) he is not less than 16 or more than 19 years of age; and (2) he attends for not less than 21 hours per week a course of education (so, however, that in calculating the number of hours no account is to be taken of any instruction or tuition which is not suitable for persons of the same age and sex who do not suffer from a physical or mental disability): see the Social Security Contributions and Benefits Act 1992 s 68(11) (cb) (substituted by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 Pt 1 para 18(3)); and the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 8(1). Any temporary disruption of the education may be disregarded: see reg 8(2). A person over the age of 19 years is not to be treated as receiving full time education: reg 8(3). As to when a person attains a particular age see PARA 19 note 11 ante.

9 The prescribed conditions as to residence in Great Britain or as to presence there are that (1) on that day (a) he is ordinarily resident in Great Britain and his right to reside or remain in Great Britain is not subject to any limitation or condition, and (b) he is present in Great Britain and has been so present for a period of (or periods amounting in aggregate to) not less than 26 weeks in the 52 weeks immediately preceding that day; and (2) where that day falls within a period in which the person receives tax free emoluments (ie emoluments which are exempt from tax under any of the provisions listed in the Child Benefit (General) Regulations 1976, SI 1976/965, reg 9(1)) or is the spouse of a person receiving such emoluments, that period is immediately preceded by a period of four years during which the person receiving the emoluments was present in Great Britain for not less than 156 weeks in aggregate: see the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 3(1), (1A) (substituted by SI 1992/704; amended by SI 1996/30); and the Interpretation Act 1978 s 17(2)(b). For the meaning of 'Great Britain' see PARA 15 note 4 ante.

Where a person has been entitled to a severe disablement allowance (or the previous non-contributory invalidity pension) for any day, the conditions as to residence in Great Britain or as to presence there do not apply to that person in respect of any subsequent day of incapacity falling within the same period of incapacity for work: Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 3(3) (amended by SI 1994/2947). Specific provision is made in relation to residence of refugees, immigrants, EC nationals and members of the forces: see the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 3(2) (as amended). These provisions may be subject to modification under the Social Security Benefit (Pensions Abroad) Regulations 1975, SI 1975/563.

10 Social Security Contributions and Benefits Act 1992 s 68(4) (amended by the Social Security (Severe Disablement Allowance and Invalid Care Allowance) Amendment Regulations 1994, SI 1994/2556, reg 2(1), (2)). In relation to head (d) in the text, a person who has attained the age of 65 years is to be treated as having been entitled to a severe disablement allowance immediately before attaining that age if immediately before attaining it (1) he would have satisfied the conditions of entitlement to that allowance or a non-contributory invalidity pension but for the provisions of the Social Security (Overlapping Benefits) Regulations 1979, SI 1979/597; or (2) he was entitled to a non-contributory invalidity pension: Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 4 (amended by SI 1994/2556); Interpretation Act 1978 s 17(2) (b). As to the receipt of the allowance by those aged over 65 years generally see PARA 98 post.

11 Social Security Contributions and Benefits Act 1992 s 68(5). As to statutory sick pay generally see EMPLOYMENT vol 39 (2009) PARA 498 et seq.

12 See PARA 96 ante.

13 Social Security Contributions and Benefits Act 1992 s 68(9).

14 Ie the sum prescribed under the Social Security (Incapacity Benefit) Regulations 1994, SI 1994/2496, reg 8 (as amended): see PARA 62 note 22 ante.

15 Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 8A (added by SI 1989/1687; amended by SI 1994/2947).

## UPDATE

### 92-99 Severe Disablement Allowance

Subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958 art 4), the Social Security Contributions and Benefits Act 1992 ss 68, 69 are repealed: Welfare Reform and Pensions Act 1999 s 65, Sch 13 Pt IV.

## **97 Limitations and disentitlements**

TEXT AND NOTES 1-7--In addition, a person is to be treated as incapable of work on any day in a period, consisting of a cumulative number of days of incapacity for work not exceeding 91 days in total for which he makes a claim for severe disablement allowance, beginning within a linking term and ending on a day not later than 13 weeks from the end of that linking term in respect of which he has been determined to be a person who is a welfare to work beneficiary: SI 1984/1303 reg 7(1B) (added by SI 1998/2231). For the meaning of 'linking term' and 'welfare to work beneficiary', see the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A; and PARA 71. Also, for the purposes of severe disablement allowance, a person is to be treated as incapable of work on any day where he is treated as incapable of work under the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 10A (see PARA 71): SI 1984/1303 reg 7(1C) (added by SI 2000/678).

NOTE 9--SI 1984/1303 further amended: SI 2000/636, SI 2006/2378.

SI 1976/965 now replaced by the Child Benefit (General) Regulations 2006, SI 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2009/3268).

SI 1975/563 amended: SI 2000/2876, SI 2001/2618, SI 2005/1551, SI 2005/2877, SI 2010/788.

NOTE 14--Reference to SI 1994/2496 should be to SI 1994/2946.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(2) SEVERE DISABLEMENT ALLOWANCE/98. Severe disablement allowance after the age of 65 years.

## **98. Severe disablement allowance after the age of 65 years.**

A person who has attained the age of 65 years and was entitled to a severe disablement allowance immediately before he attained that age may continue to be so entitled even though he does not still satisfy the age condition<sup>1</sup> or the disability condition<sup>2</sup>, if he satisfies the other requirements for entitlement to severe disablement allowance<sup>3</sup>. To this extent, the allowance may operate as a form of non-contributory retirement pension for those who have been incapable of work.

1    Ie the Social Security Contributions and Benefits Act 1992 s 68(2): see PARA 93 ante.

2    Ie ibid s 68(3): see PARA 94 ante.

3    See ibid s 68(11)(a) (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 Pt I para 18(3)); and the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 5 (amended by SI 1994/2556); Interpretation Act 1978 s 17(2)(b). As to the other requirements for entitlement to severe disablement allowance see PARA 92 ante. The reference within the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 5 (as amended) to the age of 65 years was substituted (as from October 1994) by the Social Security (Severe Disablement Allowance and Invalid Care Allowance) Amendment Regulations 1994, SI 1994/ 2556, for a reference to attaining retiring age because the former regulations differentiated between the sexes and were contrary to the principle of equal treatment for men and women on matters of social security: EC Council Directive 79/7 (OJ L6 10.1.79, p 24). See also PARA 92 note 2 ante. It is now specifically provided that a woman who attained the age of 65 years before 28 October 1994 is entitled to the allowance if she would have been entitled to a severe disablement allowance (or, if attaining that age before 29 November 1984, to a non-contributory invalidity pension) but for the pensionable age provision (ie the Social Security Contributions and Benefits Act 1992 s 68(4)(d) or the corresponding condition in respect of non-contributory invalidity pension), and otherwise satisfies the requirements for the allowance (other than the age and disability conditions); and for these purposes the previous condition for entitlement to a non-contributory invalidity pension that the claimant, if she were married or cohabiting with a man, be incapable of performing household duties ('the household duties test') is to be excluded: see the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 4A (added by SI 1994/2556). A man who attained the age of 65 years before 28 October 1994 and was entitled to either the allowance or the old non-contributory invalidity pension when he attained that age continues to be entitled to the allowance if he otherwise satisfies the requirement for the allowance (other than the age and disability conditions): Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 5A (added by SI 1994/2556).

## **UPDATE**

### **92-99 Severe Disablement Allowance**

Subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958 art 4), the Social Security Contributions and Benefits Act 1992 ss 68, 69 are repealed: Welfare Reform and Pensions Act 1999 s 65, Sch 13 Pt IV.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(2) SEVERE DISABLEMENT ALLOWANCE/99. Discontinuous claims.

## **99. Discontinuous claims.**

A person who has previously been entitled to a severe disability allowance for any day may be entitled to such an allowance on the relevant day notwithstanding that he does not satisfy the requirement for qualifying for severe disablement allowance (under either the age or disability conditions) of incapacity for work for the normally required 196 consecutive days<sup>1</sup>, if the relevant day and the earlier day fall within the same period of incapacity for work and if he satisfies the other requirements for entitlement to such an allowance<sup>2</sup>. Thus, once the person has so qualified the claim can, up to a point, be discontinuous.

In the case of young persons, a person who was incapable of work (1) for not less than 196 consecutive days commencing on or before he attained the age of 20 years, and (2) for not less than 196 consecutive days immediately preceding the relevant day, but who was capable of work for a period which does not, or for periods which in the aggregate do not, exceed 182 days where that period or those periods occurred after the 196 days referred to in head (1) above but before the 196 days referred to in head (2) above, and after he attained the age of 15 years 24 weeks, is treated for the purposes of the age condition for qualification for severe disability allowance<sup>3</sup>, and for that purpose only, as incapable of work on each day within that period or periods<sup>4</sup>.

Similarly in order to encourage persons in receipt of severe disablement allowance to attempt employment, it is provided that where (a) a person who is engaged and normally engaged in remunerative work ceases so to be engaged; and (b) he is entitled to a disability working allowance for the week in which there falls the last day on which he is so engaged; and (c) he qualified for a disability working allowance for that week by virtue of a severe disability allowance having been payable to him; and (d) the first day after he ceases to be so engaged is a day on which he is incapable of work and falls not later than the end of the period of two years beginning with the last day for which he was entitled to a severe disablement allowance, any day since that day which fell within a week for which he was entitled to a disability working allowance is treated for the purposes of any claim for a severe disablement allowance for a period commencing after he ceases to be so engaged as having been a day on which he was both incapable of work and disabled; thus such a person requalifies immediately for severe disablement allowance<sup>5</sup>. Further, there is equivalent provision allowing a person in receipt of the allowance to undertake training for work<sup>6</sup> for a period of up to two years while retaining the ability if necessary to requalify immediately for the allowance<sup>7</sup>.

1 See PARAS 93-94 ante.

2 Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 6 (amended by SI 1994/2947); Interpretation Act 1978 s 17(2)(b). As to the calculation of periods of incapacity for work for these purposes see the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 2(3) (substituted by SI 1994/2947); the Social Security Contributions and Benefits Act 1992 s 30C (added by the Social Security (Incapacity for Work) Act 1994 s 3(1)); and PARA 63 ante.

3 Ie for the purposes of s 68(2)(b): see PARA 93 ante.

4 Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 7(3); Interpretation Act 1978 s 17(2)(b).

5 See the Social Security Contributions and Benefits Act 1992 s 68(10).

6 For these purposes, 'training for work' means training for work in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (as substituted) (see EMPLOYMENT vol 40 (2009) PARA 563) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3) (as amended) or training of such other description as may be prescribed: Social Security Contributions and Benefits Act 1992 s 68(10A) (added by the Social Security (Incapacity for Work) Act 1994 s 9(1), (2)).

7 Social Security Contributions and Benefits Act 1992 s 68(10A) (added by the Social Security (Incapacity for Work) Act 1994 s 9(1), (2)).

## **UPDATE**

### **92-99 Severe Disablement Allowance**

Subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958 art 4), the Social Security Contributions and Benefits Act 1992 ss 68, 69 are repealed: Welfare Reform and Pensions Act 1999 s 65, Sch 13 Pt IV.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(3) INVALID CARE ALLOWANCE/100. Entitlement to invalid care allowance.

### **(3) INVALID CARE ALLOWANCE**

#### **100. Entitlement to invalid care allowance.**

A person is entitled to an invalid care allowance for any day on which he is engaged in caring for a severely disabled person if:

- 324 (1) he is regularly and substantially engaged in caring for that person<sup>1</sup>; and
- 325 (2) he is not gainfully employed<sup>2</sup>; and
- 326 (3) the severely disabled person is a prescribed relative or other person<sup>3</sup>.

For these purposes, a 'severely disabled person' means a person in respect of whom there is payable either an attendance allowance<sup>4</sup>, or a disability living allowance (at the higher or middle rate)<sup>5</sup> or one of certain other prescribed benefits paid out of public funds<sup>6</sup>.

Invalid care allowance is payable at a specified weekly rate<sup>7</sup>, with additions where appropriate for adult and child dependants<sup>8</sup>.

1 A person is treated as engaged and as regularly and substantially engaged in caring for a severely disabled person on every day in a week if, and is not treated as regularly and substantially engaged in caring for such a person on any day in a week unless, as at that week he is, or is likely to be, engaged and regularly engaged for at least 35 hours a week in so caring: see the Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 4(1) (amended by SI 1993/1851). Where a person is caring for two or more severely disabled people in a week he is treated as engaged and regularly and substantially engaged in caring for a severely disabled person only where he is so engaged and regularly engaged for at least 35 hours in that week in caring for any one severely disabled person, considered without reference to any other severely disabled person for whom he is caring: Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 4(1A) (added by SI 1993/1851) (reversing the effects of Decision R(G)3/93). Temporary cessation of care may be disregarded as long as care has been provided for 14 out of the last 26 weeks and would have been provided for at least 22 of those weeks but for the fact that either he or the person for whom he was caring was undergoing medical or other treatment as an in-patient in a hospital or similar institution: see the Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 4(2).

Where there is a fluctuating pattern of care, averaging between weeks is not permitted: Decision R(G)3/91.

2 A person is not treated as gainfully employed on any day in a week unless his earnings in the immediately preceding week have exceeded £50 and is treated as being gainfully employed on every day in a week if his earnings in the immediately preceding week have exceeded £50: Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 8(1) (amended by SI 1993/316; and SI 1996/2744). For these purposes there is to be disregarded a person's earnings (1) for any week of temporary cessation of care (see note 1 supra); and (2) in the week immediately preceding the week in respect of which that person (if his earnings in the immediately preceding week were disregarded) would first become entitled to an invalid care allowance in respect of a severely disabled person: reg 8(2) (amended by SI 1995/2935; SI 1996/2744).

3 Social Security Contributions and Benefits Act 1992 s 70(1). For the purposes of head (3) in the text, where a severely disabled person is being cared for by another person, that disabled person is treated as a prescribed person, whether he is related to the person caring for him or not: Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 6 (substituted by SI 1981/655; amended by SI 1996/2744).

4 See PARA 112 et seq post.

5 See PARA 102 et seq post.

6 Social Security Contributions and Benefits Act 1992 s 70(2). For the purposes of s 70 (as amended) the prescribed payments out of public funds which constitute the persons in respect of whom they are payable as

severely disabled persons are (1) a payment under s 104 (increase of disablement pension where constant attendance needed); (2) a payment such as is referred to in the Industrial Injuries and Diseases (Old Cases) Act 1975 s 7(3)(b) (repealed) (increase in specified allowance for constant attendance); (3) a payment under the Social Security (Industrial Injuries) (Benefit) Regulations 1975, reg 44 (revoked) in respect of the need of constant attendance; and (4) a payment by way of an allowance in respect of constant attendance on account of disablement for which a person is in receipt of war pension, being a payment the weekly rate of which is not less than the amount specified in the Social Security Contributions and Benefits Act 1992 s 104, Sch 4 Pt V para 2(a) (as amended): Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 3(1) (amended by SI 1996/2744). For the meaning of 'war disablement pension' for these purposes see the Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 3(2). As to war pensions generally see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 595 et seq.

7 See the Social Security Contributions and Benefits Act 1992 s 70(9), Sch 4 Pt III para 4 (subject to frequent amendment).

8 See *ibid* s 90. The amounts so specified are set out in Sch 4 Part IV para 9 (subject to frequent amendment). These increases are governed by the provisions of the Social Security Contributions and Benefits Act 1992 Part IV (ss 80-93) (as amended) (see PARA 121 et seq post) and the Social Security (Incapacity Benefit - Increases for Dependents) Regulations 1994, SI 1994/2945, applied for these purposes by the Social Security (Dependency) Regulations 1977, SI 1977/343, reg 12(1) (substituted by SI 1994/2945).

The provisions of the Social Security (General Benefit) Regulations 1982, SI 1982/1408 (as amended) (relating to increase of benefit for a wife, imprisonment, interim payments, arrears, repayments, set-off of benefit and rounding of sums) are specifically applied, with any necessary modifications, to invalid care allowance: see the Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 14 (amended by SI 1995/829).

## UPDATE

### 100-101 [Carer's Allowance]

Invalid care allowance is now known as carer's allowance: Regulatory Reform (Carer's Allowance) Order 2002, SI 2002/1457, reg 2, Schedule.

### 100 Entitlement to [carer's] allowance

TEXT AND NOTES--References to invalid care allowance are now to carer's allowance: Social Security Contributions and Benefits Act 1992 s 70(1), (9) (amended by the Regulatory Reform (Carer's Allowance) Order 2002, SI 2002/1457).

NOTE 2--For '£50' read '£95': SI 1976/409 reg 8(1) (amended by SI 2002/2497, SI 2007/2618).

NOTE 4--See *Pridding v Secretary of State for Work and Pensions* [2002] EWCA Civ 306, [2002] 3 CPLR 315, (carer no longer entitled to invalid care allowance when severely disabled person's entitlement to attendance allowance ceased 28 days after hospitalisation).

TEXT AND NOTE 8--Subject to savings (see SI 2003/938) increases in benefits in respect of children under the Social Security Contributions and Benefits Act 1992 s 90 abolished and replaced; see Tax Credits Act 2002 s 1; and PARA 227A.1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(3) INVALID CARE ALLOWANCE/101. Exceptions and limitations to entitlement.

### **101. Exceptions and limitations to entitlement.**

A person is not entitled to an invalid care allowance:

- 327 (1) if he is under the age of 16 or receiving full-time education<sup>1</sup>;
- 328 (2) unless he satisfies prescribed conditions as to residence or presence in Great Britain<sup>2</sup>;
- 329 (3) if he has attained the age of 65 years<sup>3</sup>, unless he was so entitled (or is treated as so entitled<sup>4</sup>) immediately before attaining that age<sup>5</sup>.

No person is entitled for the same day to more than one invalid care allowance; and where two or more persons would be entitled for the same day to such an allowance in respect of the same severely disabled person, one of them only is entitled and it is such one of them (a) as they may jointly elect in the prescribed manner<sup>6</sup>; or (b) as may, in default of such an election, be determined by the Secretary of State in his discretion<sup>7</sup>.

1 Social Security Contributions and Benefits Act 1992 s 70(3). For the purposes of s 70(3) a person is treated as 'receiving full-time education' for any period during which he attends a course of education at a university, college, school or other educational establishment for 21 hours or more a week: Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 5(1) (substituted by SI 1992/470; amended by SI 1996/2744). In calculating the hours of attendance for these purposes (1) the time spent receiving instruction or tuition, undertaking supervised study, examination or practical work or taking part in any exercise, experiment or project for which provision is made in the curriculum of the course are all to be included; but (2) any time occupied by meal breaks or spent on unsupervised study, whether undertaken on or off the premises of the educational establishment is excluded: Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 5(2) (substituted by SI 1992/470). In determining the duration of a period of full-time education, a person who has started on a course of education is treated as attending it for the usual number of hours per week throughout any vacation or any temporary interruption of his attendance until the end of the course or such earlier date as he abandons it or is dismissed from it: Social Security (Invalid Care Allowance) Regulations, SI 1976/409, reg 5(3).

2 Social Security Contributions and Benefits Act 1992 s 70(4). The prescribed conditions as to residence or presence in Great Britain for the purposes of s 70(4) in relation to any person in respect of any day are (a) that he is ordinarily resident in Great Britain; and his right to reside or remain is not subject to any limitation or condition; and (b) that he is present in Great Britain; and (c) that he has been so present for a period of, or periods amounting in the aggregate to, not less than 26 weeks in the 12 months immediately preceding that day: Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 9(1) (amended by SI 1996/30; and SI 1996/2744). Specific provision is made in relation to residence of refugees, immigrants, EC nationals and members of the forces: see the Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 9(1A) (added by SI 1996/30), reg 9(2) (amended by SI 1991/2742; and SI 1996/2744), reg 9(3); and see Decision CG/15/1991.

3 The common age for men and women of 65 years was substituted by the Social Security (Severe Disablement Allowance and Invalid Care Allowance) Amendment Regulations 1994, SI 1994/2556, as from 28 October 1994; for the position in relation to women and men aged 65 years before that date see the Social Security (Invalid Care Allowance) Regulations, SI 1976/409, regs 10A, 11A (added by SI 1994/2556). See also PARA 92 note 2 ante. As to when a person attains a particular age see PARA 19 note 11 ante.

4 A person who has attained the age of 65 years is treated, for the purposes of the Social Security Contributions and Benefits Act 1992 s 70(5) (as amended), as having been entitled to an invalid care allowance immediately before attaining that age if, immediately before attaining it he would have satisfied the conditions for entitlement to the allowance but for the provisions of the Social Security (Overlapping Benefits) Regulations 1979, SI 1979/597: Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 10 (amended by SI 1994/2556; and SI 1996/2744).

5 Social Security Contributions and Benefits Act 1992 s 70(5) (amended by the Social Security (Severe Disablement Allowance and Invalid Care Allowance) Amendment Regulations 1994, SI 1994/2556, reg 2(1), (3)). However, where a person is entitled to an invalid care allowance immediately before he attains the age of 65 years he is not disentitled to that allowance after he attains that age by reason only of the fact that he is not caring for a severely disabled person or no longer satisfies the ordinary conditions for entitlement set out in s 70(1)(a), (b): see s 70(6) (amended by the Social Security (Severe Disablement Allowance and Invalid Care Allowance) Amendment Regulations 1994, SI 1994/2556, reg 2(1), (3)); and the Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 11 (amended by SI 1994/2556; and SI 1996/2744).

6 Social Security Contributions and Benefits Act 1992 s 70(7). As to qualification for invalid care allowance where two or more persons are being cared for by the claimant see PARA 100 note 1 ante. As to the Secretary of State see PARA 1 ante.

7 Such an election is to be made by notice in writing to the Secretary of State, the notice being signed by those potentially entitled and specifying one of them as the person to be entitled: Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 7(1) (amended by SI 1996/2744). Such an election is not effective to confer entitlement to invalid care allowance either for the day on which the election is made or for any earlier day if such day is one for which an invalid care allowance has been paid in respect of the severely disabled person in question and has not been repaid or recovered: Social Security (Invalid Care Allowance) Regulations 1976, SI 1976/409, reg 7(2).

## **UPDATE**

### **100-101 [Carer's Allowance]**

Invalid care allowance is now known as carer's allowance: Regulatory Reform (Carer's Allowance) Order 2002, SI 2002/1457, reg 2, Schedule.

### **101 Exceptions and limitations to entitlement**

NOTE 1--Supervised study within the meaning of 1976 Regulations reg 5(1) may be work without the physical presence of a supervisor that is directed to the curriculum of the course: *Flemming v Secretary of State for Work and Pensions* [2002] EWCA Civ 641, [2002] 1 WLR 2322.

NOTE 2--For 'his right to reside or remain ... any limitation or condition' read 'he is not a person subject to immigration control within the meaning of the Immigration and Asylum Act 1999 s 115(9) or s 115 does not apply to him for the purposes of entitlement to invalid care allowance by virtue of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, SI 2000/636, reg 2': SI 1976/409 reg 9(1) (amended by SI 2000/636). SI 1976/409 reg 9(1A) omitted: SI 2000/636. SI 1976/409 reg 9(3) amended: SI 2005/2877.

TEXT AND NOTES 3-5--Head (3) omitted. Social Security Contributions and Benefits Act 1992 s 70(5) repealed: SI 2002/1457.

NOTE 5--Social Security Contributions and Benefits Act 1992 s 70(6) repealed: SI 2002/1457.

NOTE 6--No appeal lies against a decision as to the exercise of the discretion under the Social Security Contributions and Benefits Act 1992 s 70(7): Social Security Act 1998 s 12(1), Sch 2 para 3.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(4) DISABILITY LIVING ALLOWANCE/102. Introduction.

## **(4) DISABILITY LIVING ALLOWANCE**

### **102. Introduction.**

Disability living allowance was introduced as from April 1992, replacing the previous attendance allowance and mobility allowance<sup>1</sup>. Disability living allowance consists of a care component and a mobility component<sup>2</sup>; the care component is payable at three rates (higher, middle and lower rates) and the mobility component at two rates (higher and lower rates)<sup>3</sup>. A person's entitlement to a disability living allowance may be an entitlement to either component or to both of them; a person may be awarded either component for a fixed period or for life, but if his award of a disability living allowance consists of both components, he may not be awarded the components for different fixed periods<sup>4</sup>. Although much of the drafting in relation to disability allowance is new, in particular the new lower rates for each component which are aimed at extending benefit to some disabled people who did not qualify under the old allowances, the drafting of the 'day' and 'night' conditions<sup>5</sup> for the higher and middle rates of the care component and of the conditions for the higher rate of the mobility component is the same as that for the old allowances and thus the case law on these old provisions continues to be applicable.

There is no requirement that a claimant be incapable of work in order to be eligible for disability living allowance; indeed, if a disabled person is in employment for more than 16 hours per week on a low wage he or she may be able to claim disability working allowance as well as disability living allowance<sup>6</sup>.

A specialised form of adjudications applies for disability benefits<sup>7</sup>, under which, in particular, appeals on matters relating to entitlement (including periods and rates of entitlement) are heard by disability appeal tribunals<sup>8</sup>. A person awarded disability living allowance may be required to attend for, or submit himself to, a medical examination and benefit may be withheld if he fails to comply<sup>9</sup>.

1 For transitional provisions see the Social Security (Introduction of Disability Living Allowance) Regulations 1991, SI 1991/2891. Mobility allowance has been repealed entirely; attendance allowance has been retained, but only in the case of claims first made after the age of 65 years: see PARA 112 post.

2 Social Security Contributions and Benefits Act 1992 s 71(1).

3 See PARAS 104, 106 post.

4 Social Security Contributions and Benefits Act 1992 s 71(2), (3). The weekly rate of a person's disability living allowance for a week for which he has only been awarded one component is the appropriate weekly rate for that component determined in accordance with prescribed regulations: s 71(4). The weekly rate of a person's disability allowance for a week for which he has been awarded both components is the aggregate of the appropriate weekly rates for the two components as so determined: s 71(5). The various rates are prescribed by regulations and subject to periodic increase: see the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 4 (amended by SI 1993/1939; and SI 1997/543); and PARAS 104, 106 post.

5 See the Social Security Contributions and Benefits Act 1992 s 72(1); and PARA 104 post.

6 See PARA 218 post.

7 See PARA 374 et seq post.

8 See the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 27. Appeals on any other aspect of disability living allowance are heard by social security appeal tribunals: see the Social Security

Administration Act 1992 s 33(1). An appeal to a disability appeal tribunal is in the nature of a rehearing, so that the tribunal may take into account matters arising after the date of the claim, and in particular deterioration of the condition: Decision CDLA/002/1993. As to disability appeal tribunals see PARA 378 post.

9 See PARA 376 note 2 post.

## **UPDATE**

### **102 Introduction**

TEXT AND NOTE 4--For 'for life' read 'for an indefinite period': Social Security Contributions and Benefits Act 1992 s 71(3) (amended by Welfare Reform and Pensions Act 1999 s 67(1)).

NOTE 4--SI 1991/2890 reg 4 further amended: SI 2008/632.

TEXT AND NOTE 6--Subject to savings (see SI 2003/962) disability working allowance (disabled person's tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(4) DISABILITY LIVING ALLOWANCE/103. Claims and awards.

### **103. Claims and awards.**

A person is not entitled to a disability living allowance:

- 330 (1) unless he satisfies prescribed conditions as to residence and presence in Great Britain<sup>1</sup>;
- 331 (2) for any period preceding the date on which a claim for it is made, or treated as made, by him or on his behalf <sup>2</sup>.

In addition, a person may be awarded either component for a fixed period or for life, but if his award of a disability living allowance consists of both components, he may not be awarded the components for different fixed periods<sup>3</sup>.

1 Social Security Contributions and Benefits Act 1992 s 71(6). For the purposes of s 71(6), the prescribed conditions as to residence and presence in Great Britain in relation to any person on any day are that (1) on that day (a) he is ordinarily resident in Great Britain (see Decision R(M)1/85) and his right to reside or remain in Great Britain is not subject to limitation or condition; (b) he is present in Great Britain; and (c) he has been so present for a period of, or for periods amounting in the aggregate to, not less than 26 weeks in the 52 weeks immediately preceding that day; and (2) where that day falls within a period in which that person (a) receives tax free emoluments, or (b) is the spouse or child of a person who receives them, that period is immediately preceded by a period of four years during which the claimant was present in Great Britain for not less than 156 weeks in aggregate: see the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 2(1) (amended by SI 1993/1939; and SI 1996/30). Specific provision is made in relation to residence of refugees, immigrants, EC nationals and members of the forces and to temporary absence: see the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 2(1A) (added by SI 1996/30), 2(2) (amended by SI 1993/1939). For the purposes of the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 2(1) (as amended), 'tax free emoluments' means emoluments which are exempt from tax under any of the provisions listed in the Child Benefit (General) Regulations 1976, SI 1976/965, reg 9 (as amended): Social Security (Disability Living Allowance) Regulations, SI 1991/2890, reg 2(3). For the meaning of 'Great Britain' see PARA 15 note 4 ante.

2 See the Social Security Contributions and Benefits Act 1992 s 76(1). Notwithstanding s 76(1), provision may be made by regulations for a person to be entitled to a component of a disability living allowance for a period preceding the date on which a claim for such an allowance is made or treated as made by him or on his behalf if he has previously been entitled to that component: s 76(2). An exception to s 76(1) was formerly made in the case of claimants who had previously been entitled to a component of disability living allowance: see the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 5 (revoked by SI 1997/793, as from 1 September 1997).

3 Social Security Contributions and Benefits Act 1992 s 71(3).

### **UPDATE**

### **103 Claims and awards**

NOTE 1--For 'his right to reside or remain ... any limitation or condition' read 'he is not a person subject to immigration control within the meaning of the Immigration and Asylum Act 1999 s 115(9) or s 115 does not apply to him for the purposes of entitlement to invalid care allowance by virtue of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, SI 2000/636, reg 2': SI 1991/2890 reg 2(1) (amended by SI 2000/636). SI 1991/2890 reg 2(1) further amended: SI 2006/2378. SI 1991/2890 reg 2(1A) omitted: SI 2000/636. SI 1991/2890 reg 2(2) further amended: SI 2005/2877.

No appeal lies against a decision whether to certify, in accordance with regulations made under the Social Security Contributions and Benefits Act 1992 s 71(6), that it is consistent with the proper administration of that Act to treat a person as though he were present in Great Britain: Social Security Act 1998 s 12(1), Sch 2 para 5.

SI 1976/965 now replaced by the Child Benefit (General) Regulations 2006, SI 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2009/3268).

See *R v Chief Adjudication Officer, ex p B* [1999] 1 WLR 1695, CA (asylum-seeker not entitled to receive award of disability living allowance after date on which SI 1996/30 came into force); *M (A Minor) v Secretary of State for Social Security* [2001] UKHL 35, [2001] 4 All ER 41, [2001] 1 WLR 1453.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(4) DISABILITY LIVING ALLOWANCE/104. The care component.

#### 104. The care component.

A person is entitled to the care component of a disability living allowance for any period throughout which:

- 332 (1) he is so severely disabled physically or mentally<sup>1</sup> that (a) he requires<sup>2</sup>, in connection with his bodily functions<sup>3</sup>, attention<sup>4</sup> from another person for a significant portion of the day<sup>5</sup> (whether during a single period or a number of periods); or (b) he cannot prepare a cooked main meal<sup>6</sup> for himself if he has the ingredients; or
- 333 (2) he is so severely disabled physically or mentally<sup>7</sup> that by day (the day condition), he requires from another person (a) frequent attention<sup>8</sup> throughout the day in connection with his bodily functions<sup>9</sup>; or (b) continual supervision<sup>10</sup> throughout the day in order to avoid substantial danger<sup>11</sup> to himself or others; or
- 334 (3) he is so severely disabled physically or mentally<sup>12</sup> that at night<sup>13</sup> (the night condition) (a) he requires from another person prolonged or repeated attention<sup>14</sup> in connection with his bodily functions<sup>15</sup>; or (b) in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him<sup>16</sup>.

1 The phrase 'severely disabled physically or mentally' relates to a condition of body or mind that can be defined medically; it does not include anti-social behaviour unrelated to serious mental illness: see Decision R(A)2/92.

2 The condition would appear to be that the person reasonably requires the attention or supervision in question, not that it must be shown that he medically requires it: see *R v Secretary of State for Social Services, ex p Connolly* [1986] 1 All ER 998, [1986] 1 WLR 421, CA; Decision R(A)3/86. Where needs are irregular, regard must be given to the person's requirements over a period of time: see Decision R(A)2/74. Evidence of practicable precautions that could be taken by the person (to avoid the need for attention or supervision) may negate a claim, but if this is to be so the adjudicating authority must specify those precautions and explain how they are practicable and compatible with the evidence of the person's condition: see Decisions R(A)1/87; and R(A)5/90.

3 'Bodily functions' include 'breathing, hearing, seeing, eating, drinking, walking, sitting, sleeping, getting in or out of bed, dressing, undressing, eliminating waste products, and the like, all of which an ordinary person, who is not suffering from any disability, does for himself'; they do not, however, include cooking, shopping or any other normal domestic duties: see *R v National Insurance Comr, ex p Secretary of State for Social Services* [1981] 2 All ER 738 at 741, [1981] 1 WLR 1017 at 1022, CA, per Lord Denning MR. However, what might normally constitute ordinary domestic duties may, untypically, constitute attention in connection with bodily functions if closely related to the person's disability: see Decision R(A)1/87 (cooking, where the person needed a strictly controlled diet); Decision R(A)1/91 (abnormal amounts of laundry due to incontinence or a severe skin complaint); but cf Decisions CA/124/93; and CSDLA/98/94, where the commissioner declined to follow Decision R(A)1/91; and *Cockburn v Chief Adjudication Officer* [1997] 3 All ER 844, [1997] 1 WLR 799, HL (where additional laundry due to incontinence was held not to be attention in connection with bodily function).

4 'Attention' indicates 'something more than a personal service, something involving care, consideration and vigilance for the person being attended. The very word suggests a service of a close and intimate nature': see *R v National Insurance Comr, ex p Secretary of State for Social Services* [1981] 2 All ER 738 at 741, [1981] 1 WLR 1017 at 1022, CA, per Dunn LJ; and *Mallinson v Secretary of State for Social Security* [1994] 2 All ER 295, [1994] 1 WLR 630, HL (assistance provided to a blind person in connection with bathing, eating and walking in unfamiliar surroundings held to be attention in connection with bodily functions). The attention may be that reasonably required to enable the person to live a normal social life, not just that reasonably required to maintain life itself: *Secretary of State for Social Security v Fairey* [1997] 3 All ER 844, [1997] 1 WLR 799, HL. 'Attention' is in general a more active concept than 'supervision' (see Decision R(A)1/83); however, the two are not mutually exclusive in the legislation and in a given case it may be necessary to consider them together (eg

where the person is supervised, with a view to assistance if necessary, as in the case of a person suffering from epilepsy) (see *Mallinson v Secretary of State for Social Security* supra).

5 A 'significant' portion of the day may be composed of several short periods, and is not subject to any hard and fast rules: see Decision CSDLA/29/94 (doubting Decision CDLA/58/93).

6 The inclusion of this 'cooked meal' test in the new lower rate provision is of interest, as it had consistently been held that (in the absence of exceptional circumstances) cooking for a disabled person did not normally constitute the necessary 'attention' for the old attendance allowance: see *Woodling v Secretary of State for Social Services* [1984] 1 All ER 593, [1984] 1 WLR 348, HL. For the meaning of the new 'cooked meal' test see Decision CDLA/85/1994; and *R v Secretary of State for Social Security, ex p Armstrong* (1996) 32 BMLR 32, [1996] TLR 400, CA.

7 See note 1 supra.

8 See note 4 supra.

9 See note 3 supra.

10 Supervision may be precautionary and anticipatory; thus, in the case for example of a person with epilepsy, another person may 'supervise' by simply being present and watching over him in between attacks: *Moran v Secretary of State for Social Services* (1987) Times, 14 March, CA, applied in Decision R(A)4/92, where it was held (again in the context of epilepsy) that it is enough if the supervision reduces the danger of a sudden attack, even if it cannot eliminate it. See also Decision R(A)2/75 (cerebral palsy and asthma attacks); and Decision CDLA/4/1994 (effect of warning of diabetic attacks). The requirement of supervision is that the supervision be continual, not necessarily continuous: see Decision R(A)1/73; and R(A)4/74. Where attacks are unpredictable, their relative infrequency is irrelevant so long as there remains a substantial danger which cannot be ignored: see Decision R(A)3/90; and *Moran v Secretary of State for Social Services* supra.

11 In applying this test of substantial danger, an adjudicating authority should consider four matters: (1) the claimant's medical condition must be such that there is a substantial danger to himself or to someone else; (2) that danger must not be too remote a possibility (the fact that an incident may be isolated or infrequent being immaterial); (3) supervision by a third party must be necessary to avoid the danger; (4) supervision must be continual: Decision R(A)1/83. The question is whether the danger is such that a reasonable person would seek to guard against it: Decisions R(A)2/89; R(A)6/89. Precautions that may be expected of the person himself to minimise or avoid the danger may be relevant but must be clearly specified (see Decision R(A)5/90); they must be reasonable (see Decision R(A)3/90). Where a person is a danger to himself (eg through schizophrenia), it is not sufficient for the adjudicating authority to say that the danger could be avoided by making the person an in-patient: Decisions R(A)2/91; R(A)3/92.

It is important for the adjudicating authorities to look at the facts of each particular case, rather than making assumptions based on what may be thought generally to be true about the kind of disability in question: Decision R(A)2/83. There is no presumption either way based on the nature of the disability: see Decision R(A)3/90, where it was held there was no presumption that epileptic claimants cannot claim unless there are complicating medical conditions.

In order to constitute 'avoiding' substantial danger, it is enough to show that the supervision effects a real reduction in the danger, even if it does not eliminate it completely: Decision R(A)3/92.

Where the ground of the claim is that the claimant is liable to fall, the adjudicating authority should consider the following: (a) whether the situations in which the claimant may fall are predictable or unpredictable; (b) if the falling is predictable, whether the claimant can reasonably be expected to avoid the risk, or place himself at such risk only when adequately supervised; (c) if the falling is unpredictable, whether the falling will give rise to substantial danger to the claimant; and (d) whether the substantial danger is too remote: Decision R(A)3/89. A decision to live alone, though not determinative, may be a strong indication that supervision in case of falls is not really required: Decision CDLA/899/1994.

12 See note 1 supra.

13 'Night' is not statutorily defined. Night does not mean the period between sunrise and sunset but has been interpreted as meaning the period of inactivity in the dark hours beginning with the time when, in accordance with its domestic routine, the household closes down for the night: see *R v National Insurance Comr, ex p Secretary of State for Social Services* [1974] 3 All ER 522, [1974] 1 WLR 1290, DC. Whether particular activities of the disabled person for which he requires attention, eg going to bed and getting up, take place in the day or the night is a question of fact to be determined in the light of the circumstances of each case: cf *R v National Insurance Comr, ex p Secretary of State for Social Services* [1974] 3 All ER 522, [1974] 1 WLR 1290, DC. There is no separate concept of a 'child's night'; thus, attention given after the child has gone to bed but before the household has closed down would seem not to be given at 'night' for these purposes: see Decision R(A)1/78.

14 See note 4 supra.

15 See note 3 supra.

16 Social Security Contributions and Benefits Act 1992 s 72(1). The test set out in s 72(1)(c)(ii) (see head (3) (b) in the text) requires active supervision, a wakeful and watchful presence; the effect of this provision was to negate the decision in *Moran v Secretary of State for Social Services* (1987) Times, 14 March, CA, in its application to the night condition, so that it is no longer enough that the carer is simply available during the night, possibly asleep nearby.

## UPDATE

### 104 The care component

NOTE 4--See also *Stewart v Secretary of State for Social Security* 2000 SLT 826, IH (mother providing son with assistance in connection with his bed-wetting); *Batty v Secretary of State for Work and Pensions* [2005] All ER (D) 189 (Dec), CA (colleagues bringing hot drinks for disabled worker).

NOTE 6--As to the application of the cooking test, see *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44, [2003] 4 All ER 162.

TEXT AND NOTE 16--In its application to a person in relation to so much of a period as falls before the day on which he reaches the age of 16, the 1992 Act s 72(1) has effect subject to the following modifications (1) the condition mentioned in s 72(1)(a)(ii) (see head (1)(b) in the text) does not apply, and (2) none of the other conditions mentioned in s 72(1) will be taken to be satisfied unless (a) he has requirements of a description mentioned in the condition substantially in excess of the normal requirements of persons of his age, or (b) he has substantial requirements of such a description which younger persons in normal physical and mental health may also have but which persons of his age and in normal physical and mental health would not have: 1992 Act s 72(1A) (added by Welfare Reform Act 2007 s 52(2)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(4) DISABILITY LIVING ALLOWANCE/105. Special provisions relating to the care component.

### **105. Special provisions relating to the care component.**

A person is not entitled to the care component of a disability living allowance unless:

- 335 (1) he has satisfied or is likely to satisfy one or other of the entitlement conditions<sup>1</sup> for the period of three months immediately preceding the date on which the award of that component would begin or such other period of three months as may be prescribed<sup>2</sup>; and
- 336 (2) he is likely to continue to satisfy one or other of those conditions throughout the period of six months beginning with that date or, if his death is expected within the period of six months beginning with that date, the period so beginning and ending with his death<sup>3</sup>.

During the time when a person is under 16 years of age, the condition that he cannot prepare a cooked main meal for himself if he has the ingredients<sup>4</sup> does not apply, and, in relation to any of the other care component conditions<sup>5</sup>, it must be shown that either he has such requirements substantially in excess of the normal requirements of persons of his age or he has substantial requirements of any such description which younger persons in normal physical and mental health may also have but which persons of his age and in normal physical and mental health would not have<sup>6</sup>.

A person is in general not entitled to the care component if he is being maintained free of charge while undergoing medical or other treatment as an in-patient in a hospital or similar institution under National Health Service legislation<sup>7</sup> or maintained or administered by the Defence Council<sup>8</sup>; or in circumstances in which the cost is, or may be<sup>9</sup>, borne wholly or partly out of public or local funds, in pursuance of those enactments or of any other enactment relating to persons under a disability or to young persons or to education or training<sup>10</sup>.

Special provision is made for persons suffering from renal failure and undergoing renal dialysis, deeming them to satisfy certain of the care component conditions<sup>11</sup> in prescribed circumstances<sup>12</sup>.

1    Ie those conditions set out in the Social Security Contributions and Benefits Act 1992 s 72(1)(a)-(c): see PARA 104 ante.

2    The period so prescribed for the purposes of *ibid* s 72(2)(a)(ii) is a period of three months ending on the day on which the person was last entitled to the care component or to attendance allowance where that day falls not more than two years before the date on which entitlement to the care component would begin (or would have begun but for any regulations made under the Social Security Administration Act 1992 s 5(1)(k): see PARA 330 post): see the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890 reg 6(1) (amended by SI 1993/1939). Specific provision is made in relation to this exception in the case of persons aged over 65 years: see the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890 reg 6(2)-(4) (amended by SI 1993/1939).

3    Social Security Contributions and Benefits Act 1992 s 72(2). For the qualification of these rules in relation to terminally ill persons see PARA 110 post.

4    Ie *ibid* s 72(1)(a)(ii): see PARA 104 ante.

5    Ie those conditions set out in *ibid* s 72(1)(a)(i), (b), (c): see PARA 104 ante.

6 Ibid s 72(6). As to the special provisions relating to those aged over 65 years see PARA 111 post. Where a claim is made for a disability living allowance by a child, the Secretary of State must appoint an adult living with the child (normally a parent) to exercise the child's rights and to receive and deal with the sums payable: see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 43 (amended by SI 1991/2741); Interpretation Act 1978 s 17(2)(b).

7 He is under the National Health Service Act 1977 (Scotland) or the National Health Service and Community Care Act 1990: see generally HEALTH SERVICES.

8 See the Social Security Contributions and Benefits Act 1992 s 72(8)(a); and the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 8(1) (substituted by SI 1992/2869). For the purposes of the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 8(1) (as substituted), a person may only be regarded as not being maintained free of charge in a hospital or similar institution during any period when his accommodation and services are provided under the National Health Service Act 1977 s 65 (as substituted and amended), the National Health Service (Scotland) Act 1978 s 58, Sch 7A para 14 or the National Health Service and Community Care Act 1990 Sch 2 para 14 : Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 8(2) (amended by SI 1992/2869).

9 It is sufficient that the cost of accommodation could be so borne; it is not necessary to show that it was: Decision R(A)3/83. If the legislation itself does not in fact apply in an individual's case, then the exclusion from the allowance does not apply to that person: see *Steane v Chief Adjudication Officer* [1996] 4 All ER 83, [1996] 1 WLR 1195, HL.

10 Social Security Contributions and Benefits Act 1992 s 72(8)(b). As to the prescribed legislation, the conditions of its application and exceptions in relation to s 72(8)(b) see the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, regs 9, 9A, 10, Sch 3 (as amended).

11 He is those conditions set out in the Social Security Contributions and Benefits Act 1992 s 72(1): see PARA 104 ante.

12 See the Social Security Contributions and Benefits Act 1992 s 72(7); and the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 7 (amended by SI 1993/1979).

## UPDATE

### 105 Special provisions relating to the care component

TEXT AND NOTE 3--The modifications mentioned in the 1992 Act s 72(1A) (see PARA 104) have effect in relation to the application of s 72(1) for the purposes of s 72(2), but only (1) in the case of a person who is under the age of 16 on the date on which the award of the care component would begin, and (2) in relation to so much of any period mentioned in s 72(2) as falls before the day on which he reaches the age of 16: s 72(2A) (added by Welfare Reform Act 2007 s 52(3)).

TEXT AND NOTE 6--1992 Act s 72(6) repealed: Welfare Reform Act 2007 s 52(5), Sch 8.

NOTE 6--SI 1987/1968 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257).

TEXT AND NOTES 8, 10--Regulations may provide that no amount in respect of a disability living allowance which is attributable to entitlement to the care component will be payable in respect of a person for a period when he is a resident of a care home in circumstances in which any of the costs of any qualifying services provided for him are borne out of public or local funds under a specified enactment: 1992 Act s 72(8) (s 72(8)-(13) substituted by subsequent s 72(8)-(13), by Welfare Reform Act 2007 s 60(2)). The reference in s 72(8) to a care home is to an establishment that provides accommodation together with nursing or personal care: s 72(9). The following are qualifying services for the purposes of s 72(8) (1) accommodation, (2) board, and (3) personal care: s 72(10). The reference in s 72(8) to a specified enactment is to an enactment which is, or is of a description, specified for the purposes of s 72(8) by regulations: s 72(11). The power to specify an enactment for the purposes of s 72(8)

includes power to specify it only in relation to its application for a particular purpose: s 72(12). In s 72, 'enactment' includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament: s 72(13).

NOTE 8--The period during which a person is maintained free of charge while undergoing medical or other treatment as an in-patient begins on the day after the day he enters a hospital or similar institution and ends on the day before the day he leaves: SI 1991/2890 reg 8(2A) (added by SI 1999/1326; and amended by SI 2000/1401).

NOTE 10--SI 1991/2890 reg 9 substituted: SI 2007/2875. SI 1991/2890 reg 9A, Sch 3 revoked: SI 2001/3767. SI 1991/2890 reg 10 further amended: SI 2000/1401, SI 2002/208, SI 2002/3019, SI 2003/2259, SI 2007/2875.

TEXT AND NOTE 12--1992 Act s 72(7) amended: Welfare Reform Act 2007 s 52(6). 1992 Act s 72(1A) (see PARA 104) has effect subject to regulations made under s 72(7) (except as otherwise prescribed): s 72(7A) (added by 2007 Act s 52(7)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(4) DISABILITY LIVING ALLOWANCE/106. The mobility component.

## 106. The mobility component.

A person is entitled to the mobility component of a disability living allowance for any period in which he is over the age of five years and throughout which:

- 337 (1) he is suffering from physical disablement<sup>1</sup> such that he is either unable to walk or virtually unable to do so<sup>2</sup>; or
- 338 (2) he is both blind<sup>3</sup> and deaf<sup>4</sup> and is, by reason of the combined effect thereof, unable, without the assistance of another person, to walk to any intended or required destination while out of doors<sup>5</sup>; or
- 339 (3) he is severely mentally impaired<sup>6</sup>, displays severe behavioural problems<sup>7</sup> and satisfies the day and night conditions<sup>8</sup> for the care component<sup>9</sup>; or
- 340 (4) he is able to walk but is so severely disabled physically or mentally<sup>10</sup> that, disregarding any ability he may have to use routes which are familiar to him on his own, he cannot take advantage of the faculty out of doors without guidance or supervision<sup>11</sup> from another person most of the time<sup>12</sup>.

A person is not entitled to the mobility component for a period unless during most of that period his condition will be such as permits him from time to time to benefit from enhanced facilities for locomotion<sup>13</sup>.

1 The cause of the inability to walk must be physical, not mental or functional; thus the following have been held not to qualify: agoraphobia (Decision R(M)1/80); hysteria (Decision R(M)1/88, affd on appeal in *Harrison v Secretary of State for Social Services* (1987), CA, reported as an appendix to Decision R(M)1/88). Down's syndrome does, however, qualify: see Decision R(M)2/78, affd in Decision R(M)3/86.

It is the physical inability to walk that must be impaired; the claimant must show he is unable to move a foot rather than that he lacks the power to direct his movement to a desired destination; blindness is a physical condition, but the need for guidance that it may produce is not in itself sufficient if the actual walking ability remains unimpaired: *Lees v Secretary of State for Social Services* [1985] AC 930, [1985] 2 All ER 203, HL (also reported as an appendix to Decision R(M)1/84); cf, however, Decision R(M)2/81, where a blind person who also suffered from a problem of balance and direction which directly affected his ability to walk was held to qualify (though note the discussion in Decision R(M)1/86 as to whether this case, and also Decision R(M)1/83 concerning supervision due to mental retardation, may be affected by the decision in *Lees v Secretary of State for Social Services* supra). Behavioural problems affecting walking are unlikely to qualify under this head: Decision R(M)3/86. Note, however, that a person suffering from blindness or from mental or behavioural problems, though failing under this head, may now qualify for the lower rate of mobility component under the Social Security Contributions and Benefits Act 1992 s 73(1)(d) (see head (4) in the text), or (in a severe case) for the higher rate under s 73(1)(b) or (c) (see heads (2)-(3) in the text).

2 Social Security Contributions and Benefits Act 1992 s 73(1)(a). As to the meaning of 'unable to walk or virtually unable to do so' see PARA 107 post.

3 A person is to be considered to be blind only where the degree of disablement resulting from the loss of vision amounts to 100%: Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 12(2)(a) (amended by SI 1993/1939).

4 A person is to be considered to be deaf only where the degree of disablement resulting from loss of hearing (when using any artificial aid which he habitually uses or which is suitable in his case) amounts to not less than 80% on a scale where 100% represents absolute deafness: Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 12(2)(b) (amended by SI 1993/1939; and SI 1994/1779). In the case of blindness and deafness, these percentages are to be construed in the same way as for industrial injury benefit: Decision CDLA/192/1994. As to industrial injury benefit see PARA 126 et seq post.

5 See the Social Security Contributions and Benefits Act 1992 s 73(1)(b), (2); and the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 12(3) (amended by SI 1993/1939).

6 A person is 'severely mentally impaired' if he suffers from a state of arrested development or incomplete physical development of the brain, which results in severe impairment of intelligence and social functioning: see the Social Security Contributions and Benefits Act 1992 s 73(6); and the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 12(5) (amended by SI 1993/1939). This definition (with its emphasis on the development of the brain initially) does not cover Alzheimer's disease: see Decisions CDLA/156/1994; and CDLA/393/1994 (whether schizophrenia arose while brain still developing).

7 A person suffers from 'severe behavioural problems' if he exhibits disruptive behaviour which (1) is extreme; (2) regularly requires another person to intervene and physically restrain him in order to prevent him causing physical injury to himself or another, or damage to property; and (3) is so unpredictable that he requires another person to be present and watching over him whenever he is awake: see the Social Security Contributions and Benefits Act 1992 s 73(6); and Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 12(6) (amended by SI 1993/1939).

8 See the Social Security Contributions and Benefits Act 1992 s 72(1)(b), (c): see PARA 104 ante.

9 Social Security Contributions and Benefits Act 1992 s 73(1)(c), (3). A person who is to be taken for the purposes of s 72 to satisfy or not to satisfy a condition mentioned in s 72(1)(b), (c) is to be taken to satisfy or not to satisfy it for the purposes of s 73(3)(c): s 73(7).

10 The inclusion of mental disablement here may mean that a person who fails to qualify under head (1) in the text for a higher rate allowance because the disablement is not physical (see note 1 supra) may qualify for a lower rate allowance under this head: see Decision CDLA/42/94 (anxiety and agoraphobia limiting the faculty of walking, though physically capable).

11 For the interpretation of 'supervision' in the context of the care component see PARA 104 note 10 ante. It has been held that supervision, in this context, can include encouragement or reassurance (in the case of a mental condition): Decision CDLA/42/94. Inability to ask for directions, however, does not in itself show a need for supervision: Decision CDLA/240/1994.

12 Social Security Contributions and Benefits Act 1992 s 73(1)(d). This provision is not concerned with supervision to avoid danger to the claimant (eg through a tendency to fall); such supervision is provided for by s 72(1)(b) (the 'day condition' for the care component: see PARA 104 ante): Decision CDLA/757/1994.

13 Social Security Contributions and Benefits Act 1992 s 73(8). 'Benefit' is to be construed widely; persons who are comatose, or so severely deranged as to need supervision and restraint of a high order, will be excluded from entitlement, but otherwise most claimants will be able to show potential benefit from increased mobility, if only 'from time to time': Decision R(M)2/83.

## UPDATE

### 106 The mobility component

TEXT AND NOTE 1--For 'the age of five years' read 'the relevant age': Social Security Contributions and Benefits Act 1992 s 73(1) (amended by Welfare Reform and Pensions Act 1999 s 67(3)). 'The relevant age' means (1) in relation to the conditions mentioned in the Social Security Contributions and Benefits Act 1992 s 73(1)(a), (b) or (c) (see TEXT heads (1)-(3)), the age of three; (2) in relation to the conditions mentioned in s 73(1)(d) (see TEXT head (4)), the age of five: s 73(1A) (added by Welfare Reform and Pensions Act 1999 s 67(3)).

NOTE 6--A high intelligence quotient is not sufficient to deprive an autistic child of entitlement to disability living allowance as a person suffering from 'severe impairment of intelligence' within the meaning of SI 1991/2890 reg 12(5): *Megarry v Chief Adjudication Officer* (1999) Times, 11 November, CA.

NOTE 10--For the purposes of head (4), a person who is able to walk is to be taken not to satisfy the condition of being so severely disabled physically or mentally that he cannot take advantage of the faculty out of doors without guidance or supervision from another person most of the time if he does not take advantage of the faculty in such

circumstances because of fear or anxiety (SI 1991/2890 reg 12(7) (added by SI 2002/648)), but this does not apply where the fear or anxiety is a symptom of a mental disability; and so severe as to prevent the person from taking advantage of the faculty in such circumstances (SI 1991/2890 reg 12(8) (added by SI 2002/648)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(4) DISABILITY LIVING ALLOWANCE/107. The meaning of 'unable to walk' or 'virtually unable to walk'.

**107. The meaning of 'unable to walk' or 'virtually unable to walk'.**

A person is to be taken to satisfy the condition of being unable to walk or virtually unable to walk<sup>1</sup> only in the following circumstances:

- 341 (1) his physical condition as a whole is such that, without having regard to circumstances peculiar to that person as to the place of residence or as to the place of, or nature of, employment (a) he is unable to walk<sup>2</sup>; or (b) his ability to walk out of doors is so limited, as regards the distance over which or the speed at which or length of time for which or manner in which he can make progress on foot without severe discomfort<sup>3</sup>, that he is virtually unable to walk<sup>4</sup>; or (c) the exertion required to walk would constitute a danger to his life or would be likely to lead to a serious deterioration in his health<sup>5</sup>; or
- 342 (2) he has both legs amputated at levels which are either through or above the ankle, or he has one leg so amputated and is without the other leg, or is without both legs to the same extent as if it, or they, had been so amputated<sup>6</sup>.

Except in the case set out in head (2) above, a person is to be taken not to be unable or virtually unable to walk if he:

- 343 (i) is not unable or virtually unable to walk with a prosthesis or artificial aid which he habitually wears or uses; or
- 344 (ii) would not be unable or virtually unable to walk if he wore or used a prosthesis or an artificial aid which is suitable in his case<sup>7</sup>.

1    le within the Social Security Contributions and Benefits Act 1992 s 73(1)(a): see PARA 106 ante.

2    'Walk' means to advance so that at least one foot is always on the ground; thus, a one legged person progressing with the aid of crutches is unable to walk, but in such a case the crucial question is whether it is reasonable to expect him to use a prosthesis (see note 7 infra): Decision R(M)2/89. In general, the concept of 'walking' relates to the physical ability to do so, not the power to direct the resulting movements: *Lees v Secretary of State for Social Services* [1985] AC 930, [1985] 2 All ER 203, HL (also reported as an appendix to Decision R(M)1/84).

3    Severe discomfort is not synonymous with severe pain or distress and may include breathlessness: *Cassinelli v Secretary of State for Social Services* [1991] TLR 562, CA. It must, however, arise from the walking itself and not from some other factor such as mental retardation: Decision R(M)1/83. Severe discomfort is not a condition of entitlement; there may be limits on the ability to walk outdoors which do not involve discomfort, though any extended walking accomplishment must be ignored if it can only be attained with severe discomfort: Decision R(M)1/81.

4    'Virtually unable to walk' means unable to walk to any appreciable extent or practically unable to walk; the statutory test requires consideration of walking outdoors on a normal pavement or road which, though not involving climbing, must include normal inclines and other hazards: Decision R(M)1/91 (approving and applying Decision R(M)1/78; and Decision R(M)3/78). Applying the test is a question of fact and judgment; in particular, no distance limit is laid down, though if the claimant can walk more than about 25 yards he is likely to be found not virtually unable to walk unless there are other definable difficulties: Decision CDLA/1042/95. If the person can physically walk a considerable distance, he will not qualify solely on the ground that he needs supervision because of fear, for example, of a seizure: Decision R(M)1/78. On the other hand, a need for physical support while walking (as opposed to precautionary support or guidance) may be taken into account, though subject to the further question whether the person could substitute for that physical support the use of an artificial aid

suitable in his case (see note 7 infra): Decision R(M)1/90. Note that a need for precautionary support or guidance may now entitle the claimant to the lower rate of the mobility component: see PARA 106 ante.

5 Whether there is the necessary danger or deterioration is a question of fact, but the tribunal should look at the exertion required by the walking itself without regard to extraneous circumstances; the test does not extend to conditions or symptoms (eg fits or attacks) which might intervene during the course of walking without there being any connection or relationship with the walking: Decision R(M)3/78.

6 Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 12(1) (amended by SI 1993/1939).

7 Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 12(4) (amended by SI 1993/1939). Consideration must be given to the following matters in order: (1) to any artificial aid or prosthesis habitually used (and the claimant's walking ability without severe discomfort while using it); and (2) to any alternative aid or prosthesis which exists, where the essential point is its suitability in his case: Decision R(M)2/89. However, this speculative exercise is not to be taken further and applied to any further treatment that the claimant could have; thus, the claimant must be considered in the light of his existing condition, not as he might be after a further operation (even if he has refused it): Decision CM/084/1993 (a starred decision, which may be reported).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(4) DISABILITY LIVING ALLOWANCE/108. Special provisions relating to the mobility component.

### **108. Special provisions relating to the mobility component.**

A person is not entitled to the mobility component of a disability living allowance unless (1) throughout the period of three months immediately preceding the date on which the award of that component would begin (or such other period as may be prescribed) he has satisfied or is likely to satisfy one or other of the prescribed entitlement conditions<sup>1</sup>; and (2) he is likely to continue to satisfy such condition throughout the period of six months beginning with that date (or, if death is expected within six months, the period so beginning and ending with his death)<sup>2</sup>.

A person is not entitled to the mobility component while under the age of five years<sup>3</sup>. During the time when a person is under the age of 16 years, he is not entitled to the lower rate mobility component<sup>4</sup> unless (a) he requires substantially more guidance or supervision from another person than persons of his age in normal physical and mental health would require; or (b) persons of his age in normal physical and mental health would not require such guidance or supervision<sup>5</sup>.

The mobility component is not payable to any person who would otherwise be entitled to it in respect of any period (i) during which that person has the use of an invalid carriage or other vehicle provided by the Secretary of State<sup>6</sup> which is a vehicle propelled by petrol engine or by electric power supplied for use on the road and to be controlled by the occupant; or (ii) in respect of which that person has received or is receiving a grant or other analogous payment towards the costs of running a private car<sup>7</sup>.

However, the component may still be payable if the Secretary of State has issued a certificate to the effect that he is satisfied (A) that the person in question either has purchased or taken on hire or hire purchase or intends to do so, a private car or similar vehicle for a consideration which is more than nominal, on or about a date (not being earlier than 13 January 1982) specified in the certificate; (B) that that person intends to retain possession of the car at least during, and learn to drive it within, the period of six months or such greater or lesser length of time as may be specified in the certificate beginning on the date mentioned above; and (C) that that person will use disability living allowance by virtue of entitlement to the mobility component in whole or in part during that period towards meeting the expenses of acquiring the car<sup>8</sup>. Where arrangements have been made through the charity 'Motability' for a person receiving the higher rate of the mobility component to have a vehicle on hire or hire purchase, the Secretary of State may arrange for payment to be made on behalf of that person directly in settlement of sums due under those arrangements<sup>9</sup>.

Except in certain cases<sup>10</sup>, it is a condition for the receipt of disability living allowance which is attributable to the entitlement to the mobility component for any period in respect of any person, that during that period he is not maintained free of charge while undergoing medical or other treatment as an in-patient in a hospital or similar institution<sup>11</sup>.

1    le the Social Security Contributions and Benefits Act 1992 s 73(1)(a)-(d): see PARA 106 ante.

2    Social Security Contributions and Benefits Act 1992 s 73(9). For the qualification of these rules in relation to persons who are terminally ill see PARA 110 post. The period prescribed for the purposes of s 73(9)(a)(ii) (such other period as may be prescribed) is a period of three months ending on the day on which the person was last entitled to the mobility component or to mobility allowance, where that day falls not more than two years before the date on which entitlement to the mobility component would begin or would have begun but for any regulations made under the Social Security Administration Act 1992 s 5(1)(k) (which enables regulations to

provide for the day on which entitlement to benefit is to begin or end: see PARA 330 post): Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 11 (amended by SI 1993/1939).

3 See the Social Security Contributions and Benefits Act 1992 s 73(1). For special provision relating to those over age 65 years see PARA 111 post.

4 le the mobility component awarded under ibid s 73(1)(d): see PARAS 106, 109 ante.

5 Ibid s 73(4). Where a claim is made for a disability living allowance by a child, the Secretary of State must appoint an adult living with the child (normally a parent) to exercise the child's rights and to receive and deal with the sums payable: see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 43(1) (amended by SI 1991/2741); Interpretation Act 1978 s 17(2)(b).

6 le a vehicle provided by the Secretary of State under the National Health Service Act 1977 s 5(2)(a), Sch 2 (as amended) or the National Health Service (Scotland) Act 1978 s 46 (as amended). As to the Secretary of State see PARA 1 ante.

7 See the Social Security Contributions and Benefits Act 1992 ss 73(13), 74; and the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 42(1) (amended by SI 1991/2741). A person who has notified the Secretary of State that he no longer wishes to use such an invalid carriage or other vehicle and has signed an undertaking that he will not use it while it remains in his possession awaiting collection, will be treated as not having the use of that invalid carriage or other vehicle: see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 42(2).

Persons who were in possession of an invalid carriage (or other vehicle provided in pursuance of the Health Services and Public Health Act 1968 s 33 (repealed)) on 1 January 1976 (or had claimed one by then, or were in possession at prescribed times between 1 January 1970 and 31 March 1978) may be issued a certificate by the Secretary of State deeming them to satisfy the condition for the higher rate, of being unable or virtually unable to walk: see the Social Security Contributions and Benefits Act 1992 s 74(1), 2(a); and the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 13, Sch 2.

8 Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 42(4) (amended by SI 1991/2741). The Secretary of State may cancel the certificate if the person parts with possession of the car, or for any other reason: see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 42(4) (as so amended).

9 See the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 44(1) (amended by SI 1991/2741). Provision is made for the termination of such arrangements: see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, regs 44, 45, 46 (amended by SI 1991/2741; and SI 1990/2208).

10 le those cases set out in the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 12B (added by SI 1996/1436; amended by SI 1996/1767).

11 See the Social Security (Disability Living Allowance) Regulations, SI 1991/2890, reg 12A (added by SI 1996/1436). For these purposes, the qualifying hospitals or similar institutions are those under the National Health Service Act 1977, or the National Health Service and Community Care Act 1990 or one maintained or administered by the Defence Council: see the Social Security (Disability Living Allowance) Regulations, SI 1991/2890, reg 12A (added by SI 1996/1436). For the purposes of the Social Security (Disability Living Allowance) Regulations, SI 1991/2890, reg 12A (as added), a person can only be regarded as not being maintained free of charge in a hospital or similar institution during any period when his accommodation and services are provided under the National Health Service Act 1977 s 65 (as substituted and amended), the National Health Service (Scotland) Act 1978 s 58, Sch 7A para 14 or the National Health Service and Community Care Act 1990 Sch 2 para 14 (repealed): see the Social Security (Disability Living Allowance) Regulations, SI 1991/2890, reg 12A(2) (added by SI 1996/1436).

## UPDATE

### 108 Special provisions relating to the mobility component

TEXT AND NOTES--SI 1987/1968 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257).

TEXT AND NOTES 2, 5--In its application to a person in relation to so much of a period as falls before the day on which he reaches the age of 16, the 1992 Act s 73(1) has effect subject to the modification that the condition mentioned in s 73(1)(d) will not be taken

to be satisfied unless (1) he requires substantially more guidance or supervision from another person than persons of his age in normal physical and mental health would require, or (2) persons of his age in normal physical and mental health would not require such guidance or supervision: s 73(4A) (substituted, for s 73(4) as originally enacted, by Welfare Reform Act 2007 s 53(2)). The 1992 Act s 73(4A) has effect subject to regulations made under s 73(5) (except as otherwise prescribed): s 73(5A) (added by 2007 Act s 53(4)). The modifications mentioned in the 1992 Act s 73(4A) will have effect in relation to the application of s 73(1) for the purposes of s 73(9), but only (a) in the case of a person who is under the age of 16 on the date on which the award of the mobility component would begin, and (b) in relation to so much of any period mentioned in s 73(9) as falls before the day on which he reaches the age of 16: s 73(9A) (added by 2007 Act s 53(5)).

TEXT AND NOTE 2--1992 Act s 73(9) amended: Welfare Reform Act 2007 Sch 7 para 2(2).

NOTE 7--1992 Act s 73(13) amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 145.

NOTE 11--National Health Service and Community Care Act 1990 Sch 2 repealed: National Health Service (Consequential Provisions) Act 2006 Sch 4.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(4) DISABILITY LIVING ALLOWANCE/109. Rates of assessment.

### 109. Rates of assessment.

For both the care and mobility components of disability living allowance different rates of assessment are prescribed<sup>1</sup>:

- 345 (1) in the case of the care component there are three rates of assessment: the highest rate, the middle rate and the lowest rate<sup>2</sup>. The weekly rate of the care component payable to a person for each week in the period for which he is awarded that component is:
- 27
32. (a) the highest rate, if (i) throughout the period of three months immediately preceding the date on which the award of that component would begin (or such other period as may be prescribed) he has satisfied or is likely to satisfy both of the prescribed conditions of entitlement<sup>3</sup> to the care component; and (ii) he is likely to continue to satisfy those conditions throughout the period of six months beginning with that date or (if his death is expected within the period of six months beginning with that date) the period so beginning and ending with his death<sup>4</sup>;
33. (b) the middle rate, if he satisfies or is likely to satisfy one or other of the prescribed conditions of entitlement to the care component<sup>5</sup> throughout both periods mentioned in head (a) above<sup>6</sup>;
34. (c) the lowest rate in any other case<sup>7</sup>.
- 28
- 346 (2) in the case of the mobility component there are two weekly rates of assessment: the higher rate and the lower rate<sup>8</sup>. The weekly rate of the care component payable to a person for each week in the period for which he is awarded that component is:
- 29
35. (a) the higher rate, if throughout the period of three months immediately preceding the date on which the award of that component would begin (or such other period as may be prescribed) he has satisfied or is likely to satisfy one or other of the prescribed conditions of entitlement<sup>9</sup> to the mobility component and he is likely to continue to satisfy one or other of those conditions throughout the period of six months beginning with that date or (if his death is expected within the period of six months beginning with that date) the period so beginning and ending with his death<sup>10</sup>;
36. (b) in any other case a person will only be entitled to the lower rate<sup>11</sup>.
- 30

A payment to or in respect of any person which is attributable to his entitlement to the mobility component, and the right to receive such a payment, are to be disregarded in applying any enactment or instrument under which regard is to be had to a person's means<sup>12</sup>.

1 See the Social Security Contributions and Benefits Act 1992 ss 72(4), 73(10).

2 See *ibid* s 72(3).

3 Ie those conditions set out in *ibid* s 72(1)(b), (c) (the day and night conditions): see PARA 104 ante.

4 See *ibid* s 72(2), (4)(a).

5     le one or other of the conditions set out in *ibid* s 72(1)(b), (c) (the day and night conditions): see PARA 104 ante.

6     *Ibid* s 72(4)(b).

7     *Ibid* s 72(4)(c).

8     See *ibid* s 73(10).

9     le those conditions set out in the Social Security Contributions and Benefits Act 1992 s 73(1)(a)-(c): see PARA 106 ante.

10    See *ibid* s 73(9), (11)(a).

11    *Ibid* s 73(11)(b).

12    *Ibid* s 73(14). There is, however, a power to prescribe exceptions to this provision, but to date no such general exceptions have been so prescribed: see s 73(14).

## **UPDATE**

### **109 Rates of assessment**

NOTE 10--1992 Act s 73(9) amended: Welfare Reform Act 2007 Sch 7 para 2(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(4) DISABILITY LIVING ALLOWANCE/110. Disability living allowance claims by persons who are terminally ill.

### **110. Disability living allowance claims by persons who are terminally ill.**

Where a claim is made for a disability living allowance by a person who is terminally ill<sup>1</sup>, special rules apply, to the following effect:

- 347 (1) the normal requirement of presence in Great Britain for not less than 26 of the 52 preceding weeks<sup>2</sup> does not apply<sup>3</sup>;
- 348 (2) he is deemed to satisfy the day and night conditions for the higher rate of the care component<sup>4</sup> for the period of three months immediately preceding the date of the claim or, if later, the first date on which he is terminally ill<sup>5</sup> and to satisfy or be likely to satisfy those conditions for the remainder of his life beginning with that date<sup>6</sup>;
- 349 (3) he may qualify for the mobility component<sup>7</sup> immediately, without having to show that he has suffered from the relevant condition<sup>8</sup> for the three months preceding the claim<sup>9</sup>;
- 350 (4) a claim may be made on his behalf by another, which is treated as made by the terminally ill person notwithstanding that it is made without his knowledge or authority<sup>10</sup>.

1 A person is 'terminally ill' at any time if at that time he suffers from a progressive disease and his death in consequence of that disease can reasonably be expected within six months: Social Security Contributions and Benefits Act 1992 s 66(2)(a), applied by ss 73(5), 73(12). See also PARA 62 note 8 ante.

2 See the Social Security Contributions and Benefits Act 1992 s 71(6); the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 2(1)(a)(iii) (as amended); and PARA 103 note 1 ante (note the requirements of ordinary residence and presence in Great Britain must still be met). For the meaning of 'Great Britain' see PARA 15 note 4 ante.

3 Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 2(4). This concession (which did not appear in the old attendance allowance scheme) effectively negates the decision in Decision R(A)1/94 (child born terminally ill not entitled to attendance allowance until 26 weeks after his birth).

4 I.e. the Social Security Contributions and Benefits Act 1992 s 72(1)(b), (c): see PARA 104 ante.

5 This is normally a requirement (see PARA 105 note 2 ante); its suspension means that the person suddenly found to be terminally ill may qualify for the care component immediately.

6 Social Security Contributions and Benefits Act 1992 s 72(5).

7 See PARA 106 ante.

8 I.e. those conditions set out in the Social Security Contributions and Benefits Act 1992 s 73(1)(a)-(d): see PARA 106 ante.

9 Ibid s 73(12).

10 Ibid s 76(3).

### **UPDATE**

### **110 Disability living allowance claims by persons who are terminally ill**

NOTE 1--1992 Act s 73(5) amended: Welfare Reform Act 2007 s 53(3), Sch 8.

TEXT AND NOTE 6--For 'for the remainder ... that date' read 'for so much of the period for which he is terminally ill as does not fall before the date of the claim': Social Security Contributions and Benefits Act 1992 s 72(5) (amended by Welfare Reform and Pensions Act 1999 s 67(2); and Welfare Reform Act 2007 s 52(4)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(4) DISABILITY LIVING ALLOWANCE/111. Disability living allowance for persons aged 65 or over.

### **111. Disability living allowance for persons aged 65 or over.**

In general<sup>1</sup>, no person is entitled to either component of a disability living allowance for any period after he attains the age of 65 years otherwise than by virtue of an award made before he attains that age<sup>2</sup>. That apart, a person first satisfying the entitlement conditions after reaching the age of 65 years will (1) only qualify, if at all, for attendance allowance<sup>3</sup> (which has no equivalent of the lower rate of the care component); and (2) receive no assistance in relation to mobility needs.

Further special rules apply in the case of persons aged over 65 years where the person has an award of disability living allowance made before he attained that age and, upon a written application for that award to be reviewed, an adjudicating authority is satisfied that the decision awarding the allowance ought to be both reviewed and revised<sup>4</sup>. Such a revision may take place on the ground that there has been a relevant change in circumstances since the decision was given<sup>5</sup>. However, where an existing award is either reviewed after the recipient attains the age of 65 years or is the subject of a renewal claim<sup>6</sup> there are restrictions on what the person may continue to qualify for:

- 351 (a) where a person was entitled on the previous award or on the award under review to the care component (i) payable at the lowest rate, that person is not precluded, solely by reason of the fact that he is aged 65 years or over, from entitlement to the care component; (ii) at the middle or highest rate, that person is not precluded, solely by reason of his being aged 65 years or over, from entitlement to the care component payable at the middle or highest rate; but in both cases this is subject to serving a six month (rather than the usual three month<sup>7</sup>) qualifying period<sup>8</sup>;
- 352 (b) where a person on or after attaining the age of 65 years is entitled to the mobility component payable at the higher rate<sup>9</sup> he is not precluded from entitlement to the mobility component, by reason solely of his age, by virtue of having satisfied or being likely to satisfy one or other of the first three conditions of entitlement to such component<sup>10</sup>;
- 353 (c) where a person on or after attaining the age of 65 years is entitled to the mobility component payable at the lower rate<sup>11</sup>, he is not precluded, solely by reason of his age, from entitlement to that component but it is fixed at the lower rate<sup>12</sup>;
- 354 (d) where a person on or after attaining the age of 65 years is entitled to the mobility component, he is not precluded from entitlement pursuant to the relevant provisions<sup>13</sup>, provided he has satisfied such conditions throughout the period of six months immediately preceding the date on which the award of that component would begin<sup>14</sup>.

1    Ie except to the extent to which regulations provide otherwise: see the Social Security Contributions and Benefits Act 1992 s 75(1).

2    Ibid s 75(1). Regulations may provide in relation to persons who are entitled to a component of a disability living allowance by virtue of s 75(1) that any provision of the Act which relates to disability living allowance, other than s 74, so far as it so relates, and any provision of the Social Security Administration Act 1992 which is relevant to disability living allowance (1) may have effect subject to modifications, additions or amendments; or (2) may not have effect: Social Security Contributions and Benefits Act 1992 s 75(2). The Social Security

(Disability Living Allowance) Regulations 1991, SI 1991/2890 (as amended), provide that a person is not precluded from entitlement to either component of a disability allowance by reason only that he has attained the age of 65 years, if (1) he made a claim for disability living allowance before he attained the age of 65 years, which was not determined before he attained that age; and (2) he did not at the time he made the claim have an award of disability living allowance for a period ending on or after the day he attained the age of 65 years; in determining the claim of a person to whom this applies, where the person otherwise satisfies the conditions of entitlement to either or both components of disability living allowance for a period commencing before his sixty-fifth birthday (other than the requirements of the Social Security Contributions and Benefits Act 1992 s 73(9)(a) (three month qualifying period), the determination must be made without regard to the fact that he is aged 65 years or over at the time the claim is determined: see the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 3(1), (2), (3) (amended by SI 1993/1939; further prospectively amended as from 6 October 1997 by SI 1997/349). As to when a person attains a particular age see PARA 19 note 11 ante.

3 See PARA 112 et seq post.

4 See the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 3(4), Sch 1 (amended by SI 1993/1939).

5 See the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 3(4), Sch 1 para 1 (amended by SI 1993/1939).

6 A 'renewal claim' is a claim made for a disability living allowance where the person making the claim had (a) within the period of 12 months immediately preceding the date the claim was made, been entitled under an earlier award to the relevant component (or to an attendance allowance); and (b) attained the age of 65 years before that entitlement ended: see the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 3(4), Sch 1 paras 3(3), 5(3) (amended by SI 1993/1939).

7 See PARA 105 ante.

8 See the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 3(4), Sch 1 para 3(1), (2) (amended by SI 1993/1939).

9 See PARAS 106, 109 ante.

10 See the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 3(4), Sch 1 para 5(1), (2) (amended by SI 1993/1939).

11 See PARAS 106, 109 ante.

12 See the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 3(4), Sch 1 para 6(1), (2) (amended by SI 1993/1939).

13 Ie pursuant to the Social Security Contributions and Benefits Act 1992 s 72(1)(b) or (c): see PARA 104 ante.

14 See the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890, reg 3(4), Sch 1 para 7(1), (2) (amended by SI 1993/1939); and the Social Security Contributions and Benefits Act 1992 s 72(2)(a).

## UPDATE

### 111 Disability living allowance for persons aged 65 or over

TEXT AND NOTE 2--In 1992 Act s 75(1) for 'the age of 65 years' read 'pensionable age': Pensions Act 2007 Sch 1 para 42 (this amendment has effect as from 6 April 2024: see s 13(3)).

NOTE 2--1992 Act s 73(9)(a) amended: Welfare Reform Act 2007 Sch 7 para 2(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(5) ATTENDANCE ALLOWANCE/112. In general.

## **(5) ATTENDANCE ALLOWANCE**

### **112. In general.**

Historically, attendance allowance was the principal benefit aimed at providing for the care needs of people with disabilities, but it has now been largely superseded by the care component of disability living allowance<sup>1</sup>. Attendance allowance has, however, been retained as a benefit providing care needs for those who claim it who are above the age of 65 years<sup>2</sup>. One important effect of this arrangement (rather than simply extending the care component of disability living allowance to a person of any age) is that, for a person claiming who is over the age of 65 years, the disability must be sufficiently serious to qualify for the equivalent of the higher or middle rates of disability living allowance<sup>3</sup>, because there is no equivalent in attendance allowance of the lower rate of disability living allowance (for which it is easier to qualify)<sup>4</sup>.

A person awarded attendance allowance may be required to attend for, or submit himself to, a medical examination and benefit may be withheld if he fails to comply<sup>5</sup>.

1 See PARA 104 ante. As to disability living allowance generally see PARAS 102-111 ante.

2 The general rule is that a person can only receive the care component of disability living allowance past the age of 65 years if he was already in receipt of it on reaching that age: see the Social Security Contributions and Benefits Act 1992 s 75. For the complex rules on retaining the care component past the age of 65 years, and the position where the care needs later change see PARA 111 ante.

3 See PARA 109 ante.

4 For the different rates of care component see PARAS 104, 109 ante. The inception of disability living allowance and its restriction in the case of those claiming aged over 65 years also has the effect that the mobility component can only continue to be paid to those already in receipt of it (see PARA 111 ante). Unlike attendance allowance, however, the old mobility allowance has been withdrawn completely, and so there is now no provision at all for those whose mobility needs arise after they have attained the age of 65 years.

The tests for attendance allowance (the 'day attendance condition' and the 'night attendance condition': see PARA 113 post) are long-standing, with much case law on them; however, they were taken over directly into the law on a higher and middle rate care component of disability living allowance, now the principal benefit, as to which see PARAS 102-111 ante.

5 See PARA 376 note 2 post.

## **UPDATE**

### **112 In general**

NOTE 2--1992 Act s 75 amended: Pensions Act 2007 Sch 1 para 42 (this amendment has effect as from 6 April 2024: see s 13(3)).

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### 113. Entitlement.

A person is entitled to an attendance allowance if (1) he is aged 65 years or over; (2) he is not entitled to the care component of disability living allowance<sup>1</sup>; (3) he satisfies the prescribed conditions as to residence and presence in Great Britain<sup>2</sup>; and (4) he satisfies either of the following conditions:

- 355 (a) he is so severely disabled physically or mentally that, by day, he requires from another person either frequent attention throughout the day in connection with his bodily functions or continual supervision throughout the day in order to avoid substantial danger to himself or others (the day attendance condition)<sup>3</sup>;
- 356 (b) he is so severely disabled physically or mentally that, at night, he requires from another person prolonged or repeated attention in connection with his bodily functions or in order to avoid substantial danger to himself or others he requires another person to be awake for a prolonged period or at frequent intervals for the purpose of watching over him (the night attendance condition)<sup>4</sup>.

1 See PARA 104 ante.

2 The prescribed conditions as to residence and presence in Great Britain in relation to any person on any day are that (1) on that day he is ordinarily resident in Great Britain and his right to reside or remain in Great Britain is not subject to any limitation or condition, he is present in Great Britain, and has been so present for a period of (or for periods amounting in aggregate to) not less than 26 weeks in the 52 weeks immediately preceding that day; and (2) where that day falls within a period in which that person receives tax free emoluments or is the spouse of a person who receives tax free emoluments, that period is immediately preceded by a period of four years during which the claimant was present in Great Britain for not less than 156 weeks in aggregate: see the Social Security (Attendance Allowance) Regulations 1991, SI 1991/2740, reg 2(1) (amended by SI 1996/30); and the Interpretation Act 1978 s 17(2)(b). Where a person is terminally ill and makes a claim for attendance allowance expressly on the ground that he is such a person, reg 2(1) (as amended) applies to him as if reg 2(1)(a)(iii) (as amended) (26 weeks' presence in Great Britain) was omitted: reg 2(3). For the meaning of 'terminally ill' see PARA 115 note 1 post.

Specific provision is made in relation to residence of refugees, immigrants, EC nationals and members of the forces: see the Social Security (Attendance Allowance) Regulations 1991, SI 1991/2740, reg 2(1A) (added by SI 1996/30), reg 2(2). The expression 'tax free emoluments' means emoluments which are exempt from tax under any of the provisions listed in the Child Benefit (General) Regulations 1976 reg 9(1) (as amended): Social Security (Attendance Allowance) Regulations 1991, SI 1991/2740, reg 2(4). For the meaning of 'Great Britain' see PARA 15 note 4 ante.

3 Social Security Contributions and Benefits Act 1992 s 64(1), (2). A person is not entitled to an attendance allowance for any period preceding the date on which he makes or is treated as making a claim for it: s 65(4).

4 Social Security Contributions and Benefits Act 1992 s 64(1), (3).

### UPDATE

#### 113 Entitlement

TEXT AND NOTES--In 1992 Act s 64(1) for 'is aged 65 or over' read 'has attained pensionable age': Pensions Act 2007 Sch 1 para 41 (this amendment has effect as from 6 April 2024: see s 13(3)).

NOTE 2--For 'his right to reside or remain ... any limitation or condition' read 'he is not a person subject to immigration control within the meaning of the Immigration and

Asylum Act 1999 s 115(9) or s 115 does not apply to him for the purposes of entitlement to invalid care allowance by virtue of the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, SI 2000/636, reg 2<sup>1</sup>: SI 1991/2740 reg 2(1) (amended by SI 2000/636). SI 1991/2740 reg 2(1) further amended: SI 2006/2378. SI 1991/2740 reg 2(2) amended: SI 2005/2877.

No appeal lies against a decision whether to certify, in accordance with regulations made under the Social Security Contributions and Benefits Act 1992 s 64(1), that it is consistent with the proper administration of the Social Security Contributions and Benefits Act 1992 to treat a person as though he were present in Great Britain: Social Security Act 1998 s 12(1), Sch 2 para 5.

NOTES 3, 4--Circumstances may be prescribed in which a person is to be taken to satisfy or not to satisfy such of the conditions mentioned in the Social Security Contributions and Benefits Act 1992 s 64(2) and (3) as may be prescribed: s 64(4) (added by the Welfare Reform and Pensions Act 1999 s 66(1)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(5) ATTENDANCE ALLOWANCE/114. Period and rate of allowance.

#### **114. Period and rate of allowance.**

The period for which a person is entitled to an attendance allowance is:

- 357 (1) a period throughout which he has satisfied or is likely to satisfy the day or the night attendance condition<sup>1</sup> or both; and
- 358 (2) a period preceded immediately, or within two years, by one of not less than six months throughout which he satisfied, or is likely to satisfy, one or both of those conditions<sup>2</sup>.

Attendance allowance is payable at two rates: the weekly rate of attendance allowance payable to a person for any period is the higher rate<sup>3</sup> if, both as regards that period and as regards the immediately preceding period of six months required<sup>4</sup>, he has satisfied or is likely to satisfy both the day and the night attendance conditions, and is at the lower rate in any other case<sup>5</sup>.

1 See PARA 113 ante.

2 Social Security Contributions and Benefits Act 1992 s 65(1); Social Security (Attendance Allowance) Regulations 1991, SI 1991/2740, reg 3; Interpretation Act 1978 s 17(2)(b). For these purposes, a person who suffers from renal failure and is undergoing (two or more times a week) renal dialysis treatment of a type which normally requires the attendance of or supervision by another person, during the period of dialysis, or which, because of the particular circumstances of his case, in fact requires another person, during the period of dialysis, to attend in connection with the bodily functions of the person undergoing renal dialysis or to supervise that person in order that he avoids substantial danger to himself, either by day or by night, is deemed to satisfy or be likely to satisfy the equivalent day or night attendance condition; or if he is undergoing such treatment both day and night he is deemed to satisfy either the day or the night attendance condition but not both: see the Social Security Contributions and Benefits Act 1992 s 65(2); the Social Security (Attendance Allowance) Regulations 1991, SI 1991/2740, reg 5(1), (2); and the Interpretation Act 1978 s 17(2)(b). This provision does not however apply to a person undergoing such treatment where that treatment is provided under the National Health Service Act 1977, is in a hospital or similar institution, is out-patient treatment and takes place with the assistance or supervision of any member of staff of the hospital or similar institution: see the Social Security (Attendance Allowance) Regulations 1991, SI 1991/2740, reg 5(3). Regulation 5(3) does not apply for the purposes of determining whether a person is to be taken to satisfy either of the day or night attendance conditions (ie those set out in the Social Security Contributions and Benefits Act 1992 s 64(1)(a), (b); see PARA 113 ante) during the period of six months referred to in s 65(1)(b): Social Security (Attendance Allowance) Regulations 1991, SI 1991/2740, reg 5(4); Interpretation Act 1978 s 17(2)(b).

3 Ie that specified in the Social Security Contributions and Benefits Act 1992 s 65(3), Sch 4 Pt III para 1 (subject to frequent amendment).

4 See *ibid* s 65(1)(b).

5 *Ibid* s 65(3). Both the higher and lower rates are fixed amounts as set out in Sch 4 Pt III para 1; the rates are the same as the higher and middle rates for the care component of disability living allowance. Except in so far as regulations otherwise provide and subject to s 66(1), a claim for attendance allowance may be made during the period of six months immediately preceding the period for which the person to whom the claim relates is entitled to the allowance and an award may be made in pursuance of a claim so made, subject to the condition that, throughout that period of six months, that person satisfies (1) both the day and night attendance conditions; or (2) if the award is at the lower rate, one of those conditions: s 65(6).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(5) ATTENDANCE ALLOWANCE/115. Attendance allowance for the terminally ill.

### **115. Attendance allowance for the terminally ill.**

If a terminally ill person<sup>1</sup> makes a claim<sup>2</sup> expressly on the ground that he is such a person then:

- 359 (1) he is taken (a) to satisfy, or to be likely to satisfy, both the day attendance condition and the night attendance condition<sup>3</sup> for the remainder of his life, beginning with the date of the claim or, if later, the first date on which he is terminally ill; and (b) to have satisfied those condition for the period of six months immediately preceding that date; and
- 360 (2) the period for which he is entitled to attendance allowance is the remainder of the person's life, beginning with that date<sup>4</sup>.

1 For the purposes of the Social Security Contributions and Benefits Act 1992 s 66(1), a person is terminally ill at any time if at the time he suffers from a progressive disease and his death in consequence of it can reasonably be expected within six months: s 66(2)(a). As to the review of the decision of an adjudication officer that a person is or was terminally ill for these purposes see the Social Security Administration Act 1992 s 30(4); and PARA 376 post. As to applications for review under s 30 (as amended) of a decision relating to attendance allowance on the ground that the person is or was terminally ill see s 32(5); and PARA 376 post. As to review by an adjudication officer of a decision of a social security appeal tribunal, a disability appeal tribunal or a commissioner that a person is or was terminally ill see s 35(1); and PARA 377 post. For the meaning of 'commissioner' see PARA 30 note 3 ante.

2 For the purposes of the Social Security Contributions and Benefits Act 1992 s 66(1), where a person purports to make a claim for an attendance allowance on behalf of another, that other is to be regarded as making the claim, notwithstanding that it is made without his knowledge or authority: s 66(2)(b).

3 See *ibid* s 64; and PARA 113 ante.

4 *Ibid* s 66(1).

### **UPDATE**

### **115 Attendance allowance for the terminally ill**

TEXT AND NOTES--In head (1)(a) for 'for the remainder ... terminally ill' read 'for so much of the period for which he is terminally ill as does not fall before the date of the claim'; in head (1)(b) for 'that date' read 'the date of the claim or, if later, the first date on which he is terminally ill'; and in head (2) for 'remainder ... that date' read 'so much of the period for which he is terminally ill as does not fall before the date of the claim': Social Security Contributions and Benefits Act 1992 s 66(1) (amended by the Welfare Reform and Pensions Act 1999 s 66(2)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(5) ATTENDANCE ALLOWANCE/116. Exclusions.

## **116. Exclusions.**

A person who is undergoing treatment for renal failure<sup>1</sup> where the treatment is provided under the National Health Service Act 1977, is in a hospital or other similar institution, is out-patient treatment and takes place with the assistance or supervision of any member of staff of the hospital or similar institution, is deemed not to satisfy the day or night attendance conditions<sup>2</sup> or both<sup>3</sup>.

Except in certain situations and subject to modifications<sup>4</sup>, a person may not be paid any amount in respect of an attendance allowance for any period where throughout that period he is a person for whom accommodation is provided in pursuance of the National Assistance Act 1948 or in circumstances where the cost of the accommodation is or may be borne wholly or partly out of public or local funds in pursuance of that Act or of any other enactment relating to persons under a disability<sup>5</sup>.

Subject to certain provisions<sup>6</sup>, it is a condition for the receipt of an attendance allowance for any period in respect of any person that during that period he is not maintained free of charge while undergoing medical treatment as an in-patient in a hospital or similar institution<sup>7</sup>.

<sup>1</sup> As to the meaning of 'renal failure' see PARA 114 note 2 ante.

<sup>2</sup> Ie those conditions set out in the Social Security Contributions and Benefits Act 1992 s 64(1)(a), (b): see PARA 113 ante.

<sup>3</sup> See the Social Security Contributions and Benefits Act 1992 s 67(1); and the Social Security (Attendance Allowance) Regulations 1991, SI 1991/2740, reg 5(3). This provision does not however apply for the purpose of determining whether a person is to be taken to satisfy either of the day or night attendance conditions (see note 2 supra) during the period of six months referred to in the Social Security Contributions and Benefits Act 1992 s 65(1)(b) (qualifying period for attendance allowance): Social Security (Attendance Allowance) Regulations 1991, SI 1991/2740, reg 5(4); Interpretation Act 1978 s 17(2)(b).

<sup>4</sup> Ie (1) those exceptions specified in the Social Security (Attendance Allowance) Regulations 1991, SI 1991/2740, regs 7(2), (3), 8 (as amended); and (2) subject to modification set out in reg 7A (as added).

<sup>5</sup> See the Social Security Contributions and Benefits Act 1992 s 67(2); and the Social Security (Attendance Allowance) Regulations 1991, SI 1991/2740, reg 7 (amended by SI 1992/2869; SI 1992/3147; SI 1993/518; SI 1994/1779; SI 1995/2162). These regulatory provisions are *in pari materia* to those relating to the care component of disability living allowance, as to which see PARA 105 ante.

<sup>6</sup> Ie those cases set out in the Social Security (Attendance Allowance) Regulations 1991, SI 1991/2740, reg 8 (as added).

<sup>7</sup> See *ibid* reg 6(1) (substituted by SI 1992/2869). For these purposes, the qualifying hospitals or similar institutions are those under the National Health Service Act 1977 or the National Health Service and Community Care Act 1990 or one maintained or administered by the Defence Council: see the Social Security (Attendance Allowance) Regulations, SI 1991/2740, reg 6 (as so substituted). For the purposes of reg 6(1) (as substituted), a person can only be regarded as not being maintained free of charge in a hospital or similar institution during any period when his accommodation and services are provided under the National Health Service Act 1977 s 65 (as substituted and amended), the National Health Service (Scotland) Act 1978 s 58, Sch 7A para 14 or the National Health Service and Community Care Act 1990 Sch 2 para 14: see the Social Security (Attendance Allowance) Regulations, SI 1991/2740, reg 6(2) (amended by SI 1992/2869).

## **UPDATE**

## **116 Exclusions**

NOTE 4--SI 1991/2740 reg 7A revoked: SI 2001/3767.

NOTE 5--Regulations may provide that an attendance allowance will not be payable in respect of a person for a period when he is a resident of a care home in circumstances in which any of the costs of any qualifying services provided for him are borne out of public or local funds under a specified enactment: 1992 Act s 67(2) (s 67(2) substituted by subsequent s 67(2)-(7), by Welfare Reform Act 2007 s 60(1)). The reference in the 1992 Act s 67(2) to a care home is to an establishment that provides accommodation together with nursing or personal care: s 67(3). The following are qualifying services for the purposes of s 67(2) (1) accommodation, (2) board, and (3) personal care: s 67(4). The reference in s 67(2) to a specified enactment is to an enactment which is, or is of a description, specified for the purposes of s 67(2) by regulations: s 67(5). The power to specify an enactment for the purposes of s 67(2) includes power to specify it only in relation to its application for a particular purpose: s 67(6). In s 67, 'enactment' includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament: s 67(7).

SI 1991/2740 reg 7 substituted: SI 2007/2875.

NOTE 6--SI 1991/2740 reg 8 further amended: SI 2000/1401, SI 2003/2259, SI 2007/2875.

NOTE 7--A period during which a person is maintained free of charge while undergoing medical or other treatment as an in-patient begins on the day after the day he enters a hospital or similar institution and ends on the day before the day he leaves: SI 1991/2740 reg 6(2A) (added by SI 1999/1326; and amended by SI 2000/1401).

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## **(6) GUARDIAN'S ALLOWANCE**

### **117. Conditions of entitlement.**

A person is entitled to a guardian's allowance in respect of a child<sup>1</sup> if:

- 361 (1) he is entitled to child benefit in respect of that child<sup>2</sup>; and
- 362 (2) Either:
  - 31 37. (a) both of the child's parents are dead; or
  - 38. (b) one of the child's parents is dead and the person claiming a guardian's allowance shows that he was at the date of the death unaware of, and has failed after all reasonable efforts to discover, the whereabouts of the other parent<sup>3</sup>; or
  - 39. (c) one of the child's parents is dead and the other is in prison<sup>4</sup>; and
- 32 363 (3) Either:
  - 33 40. (a) the beneficiary would be treated for the purposes of child benefit<sup>5</sup> as having the child living with him; or
  - 41. (b) the requisite contributions are being made to the cost of providing for the child<sup>6</sup>.
- 34

No person is entitled to a guardian's allowance in respect of a child of which he or she is the parent<sup>7</sup>. However, where a person has adopted a child and was entitled to a guardian's allowance in respect of the child immediately before the adoption, the entitlement does not terminate<sup>8</sup>.

1 For the meaning of 'child' see PARA 19 note 11 ante.

2 Social Security Contributions and Benefits Act 1992 s 77(1)(a). As to entitlement to child benefit generally see PARA 237 et seq post.

3 The interpretation of 'knowing the whereabouts of the other parent' has caused difficulties for tribunals; it is not necessary to know detailed whereabouts (in the sense of an address or residence) and thus a claim failed where the father attended the mother's funeral and was seen there by the person claiming the allowance: see Decision R(G)2/83. A key factor may be the ability to communicate in some way, to some extent, with the other parent and thus, actual contact with the other parent may defeat a claim: see Decision CG/60/92. If no such contact is made, it may be necessary to consider the means available to the claimant for establishing contact: Decision CSG/8/92. 'Reasonable efforts' means steps which would be reasonably expected to be made by a person who wanted to find that other person: Decision R(G)2/83. Where facts come to light after the claim, they are to be taken into consideration; if the other parent's whereabouts are discovered there is no entitlement to the allowance even if there are no practicable means of requiring that parent to contribute: Decision R(G)3/68.

4 Social Security Contributions and Benefits Act 1992 s 77(1)(b), (2). A surviving parent is to be treated as being in prison if he is serving a sentence of imprisonment of not less than five years, or of imprisonment for life or is in legal custody as a person sentenced or ordered to be kept in custody during Her Majesty's pleasure or until the directions of Her Majesty are known: Social Security (Guardian's Allowance) Regulations 1975, SI 1975/515, reg 5(1); Interpretation Act 1978 s 17(2)(b). For the purposes of calculating the period of five years referred to in the Social Security (Guardian's Allowance) Regulations 1975, SI 1975/515, reg 5: (1) no account is taken of any period of the sentence served before the death of the deceased parent; (2) no account is taken of any reduction in the period of the sentence by virtue of any enactment providing for it to be treated as reduced in respect of any period of custody before sentence; (3) any continuous period (other than a period before the

death of the deceased parent) immediately preceding the imposition of the sentence, being a period throughout which the offender was in custody and not serving a sentence of imprisonment, is aggregated with the sentence; (4) consecutive sentences are aggregated, so however that there is excluded from aggregation with a later sentence such period (if any) of an earlier sentence (not being a sentence of five years or more) as was served before the imposition of the earlier sentence; in each case so however that nothing is construed so as to permit payment of guardian's allowance in respect of any period before the date of sentence: see reg 5(2). Further provisions as to calculation of the period of imprisonment are contained in reg 5(3), (4). Where a surviving parent contributes towards the cost of providing for his child, the weekly rate of any guardian's allowance payable is reduced by an amount equal to the rate of that contribution for the calendar week ending last before the week for which the allowance is payable: reg 5(6). For the purposes of reg 5(6), if the surviving parent normally so contributes at the weekly rate specified in relation to guardian's allowance in the Social Security Contributions and Benefits Act 1992 Sch 4 Pt III (subject to frequent amendment) he is treated as continuously so contributing at that rate notwithstanding that for occasional weeks he does not so contribute at that rate or at all: Social Security (Guardian's Allowance) Regulations 1975, SI 1975/515, reg 5(7).

There is provision for requiring the surviving parent in prison to pay into the National Insurance Fund an amount equal to the guardian's allowance paid thereunder: see reg 5(8). The general requirement is of imprisonment; no allowance is payable on the basis that the surviving parent is subject to some form of restriction order under the mental health legislation (even though that order was made as a result of criminal proceedings): Decision R(G)2/80.

5 As to child benefit generally see the Social Security Contributions and Benefits Act 1992 Pt IX (ss 141-147) (as amended); and PARA 237 et seq post.

6 Ibid s 77(4), (5). The condition set out in head (3)(b) in the text is to be treated as satisfied if, but only if, (1) such contributions are being made at a weekly rate not less than the amount of the guardian's allowance by the beneficiary (or, where the beneficiary is one of two spouses residing together, by them together); and (2) except in prescribed cases, the contributions are over and above those required for the purposes of receiving child benefit pursuant to s 143(1)(b) (see PARA 240 post): s 77(6). For the meaning of 'beneficiary' see PARA 21 note 2 ante.

Section 77 provides for the making of regulations for modification of the ordinary criteria for guardian's allowance in cases of illegitimacy, adoption, divorce and provision relating to persons treated as in prison: see s 77(8).

7 Ibid s 77(10). Where, however, there has been an adoption (which in law substitutes the adoptive parent for the natural parent) and the adoptive parent dies, a natural parent who then takes over looking after the child can claim the allowance: *Secretary of State for Social Services v S* [1983] 3 All ER 173, [1983] 1 WLR 1110, CA.

8 Social Security Contributions and Benefits Act 1992 s 77(11); and see the Social Security (Guardian's Allowance) Regulations 1975, SI 1975/515, reg 2(3) (substituted by SI 1985/1327); and the Interpretation Act 1978 s 17(2)(b).

## UPDATE

### 117-120 Guardian's Allowance

SI 1975/515 replaced by Guardian's Allowance (General) Regulations 2003, SI 2003/495 (amended by SI 2005/2919, SI 2006/204, SI 2009/3268).

As to the transfer of functions in relation to guardian's allowance see the Tax Credits Act 2002 Pt 2 (ss 49-57, Sch 4); and PARA 257A.

### 117 Conditions of entitlement

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 s 77 further amended so as to include reference to qualifying young persons: Child Benefit Act 2005 Sch 1 para 4. As to qualifying young persons see PARA 238.

TEXT AND NOTES 2, 4--Subject to savings (see SI 2003/938) Social Security Contributions and Benefits Act 1992 s 77(1) amended: Tax Credits Act 2002 Sch 6.

NOTE 4--A surviving parent is to be treated as being in prison if he is serving a custodial sentence of not less than two years, or if he is detained in a hospital by order of the court under the Mental Health Act 1983 following conviction, or the Criminal Procedure (Insanity) Act 1964 or the Criminal Appeal Act 1968 following a verdict of not guilty by reason of insanity or a finding that he was under a disability: see SI 1975/515 reg 5(1)-(4) (amended by SI 2002/492).

NOTE 6--Social Security Contributions and Benefits Act 1992 s 77(6), (8) amended: Civil Partnership Act 2004 Sch 24 para 34.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(6) GUARDIAN'S ALLOWANCE/118. Residence requirements.

### **118. Residence requirements.**

There is no entitlement to a guardian's allowance in respect of a child unless at least one of the child's parents satisfies, or immediately before his death satisfied, the following conditions:

- 364 (1) one at least of the child's parents was born in the United Kingdom<sup>1</sup>; or
- 365 (2) at the date of the death of the parent (or other person) whose death gives rise to the claim for guardian's allowance, one at least of the child's parents had been present in Great Britain for at least 52 weeks in the aggregate out of any period of two years after attaining the age of 16 years<sup>2</sup>.

In addition, the requirement that the claimant be entitled to child benefit in respect of the child<sup>3</sup> means that the residence requirements for that benefit, that is to say child benefit, (relating to both the claimant and the child) must also be satisfied<sup>4</sup>.

1 For the meaning of 'child' see PARA 19 note 11 ante; and for the meaning of 'United Kingdom' see PARA 15 note 4 ante.

2 See the Social Security Contributions and Benefits Act 1992 s 77(3); and the Social Security (Guardian's Allowance) Regulations 1975, SI 1975/515, reg 6(1) (substituted by SI 1977/342); Interpretation Act 1978 s 17(2)(b). For the purposes of head (2) in the text, notwithstanding that on any day a person was absent from Great Britain he is treated as though he had been present in Great Britain if his absence was by reason only of the fact that on that day (1) he was abroad in his capacity as a serving member of the forces (within the meaning of the definition in the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 1(2) (as amended)) or an airman or mariner (within the meaning of regs 81, 86); or (2) he was in prescribed employment in connection with continental shelf operations (within the meaning of reg 85): see the Social Security (Guardian's Allowance) Regulations 1975, SI 1975/515, reg 6(2) (substituted by SI 1977/342). Where a child is adopted, it is the adoptive parent who must satisfy these conditions, not the natural parents: see the Social Security (Guardian's Allowance) Regulations, SI 1975/515, reg 6(3)(a). In the case of an illegitimate child (other than one to whom reg 6(3)(a) applies (adopted child) a condition in relation to an illegitimate child must be satisfied by the mother, but where a person has been established (within reg 3(1): see PARA 119 post) as the father, a condition may be satisfied by either the mother or the father: reg 6(3)(b).

3 See PARA 117 ante.

4 See those requirements set out in the Social Security Contributions and Benefits Act 1992 s 146: see PARA 250 post.

## **UPDATE**

### **117-120 Guardian's Allowance**

SI 1975/515 replaced by Guardian's Allowance (General) Regulations 2003, SI 2003/495 (amended by SI 2005/2919, SI 2006/204, SI 2009/3268).

As to the transfer of functions in relation to guardian's allowance see the Tax Credits Act 2002 Pt 2 (ss 49-57, Sch 4); and PARA 257A.

### **118 Residence requirements**

NOTE 2--Social Security Contributions and Benefits Act 1992 s 77(3) amended: Child Benefit Act 2005 Sch 1 para 4(4).

1979 Regulations regs 1(2), 81, 85, 86 now Social Security (Contributions) Regulations 2001, SI 2001/1004, regs 1(2), 111, 114, 115.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(6) GUARDIAN'S ALLOWANCE/119. Modifications in respect of adopted children, illegitimate children and children of divorced parents.

### **119. Modifications in respect of adopted children, illegitimate children and children of divorced parents.**

In cases where a child has been adopted in pursuance of an order made in the United Kingdom, the Channel Islands or the Isle of Man or by an overseas adoption within the meaning of the Adoption Act 1968<sup>1</sup>, the provisions of the Social Security Contributions and Benefits Act 1992 are modified as follows;

- 366 (1) in the case of a child adopted by two spouses jointly, references to the child's parents are read as references to those spouses; and
- 367 (2) in the case of a child adopted by one person only, the conditions of entitlement<sup>2</sup> apply on the death of that person<sup>3</sup>.

Where a child is illegitimate<sup>4</sup> and a person has been found by a court of competent jurisdiction to be the father of the child, or there is no such finding but in the opinion of the determining authority the paternity of the child has been admitted or established, then the guardian's allowance conditions of entitlement<sup>5</sup> operate as if the mother and father of the child were the child's parents<sup>6</sup>; otherwise, those conditions apply on the death of the mother<sup>7</sup>.

Where the marriage of a child's parents was terminated by divorce<sup>8</sup> and where at the death of one of the parents the child was not resident with, or being maintained by, the other parent (and there was no residence order in favour of that other parent or order imposing any liability on him for the child's maintenance), then the conditions of entitlement<sup>9</sup> apply on the death of one of the child's parents<sup>10</sup>.

1    le within the meaning of the Adoption Act 1968 s 4(3). As to adoption generally see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 323 et seq. For the meaning of 'child' see PARA 19 note 11 ante; and for the meaning of 'Great Britain' see PARA 15 note 4 ante.

2    le those conditions set out in the Social Security Contributions and Benefits Act 1992 s 77(2): see PARA 117 ante.

3    Social Security (Guardian's Allowance) Regulations 1975, SI 1975/515, reg 2(1), (2) (substituted by SI 1985/1327); Interpretation Act 1978 s 17(2)(b).

4    Given the presumption of legitimacy, where there was a subsisting marriage a child will only be considered to have been illegitimate for these purposes if that fact is established on a balance of probabilities: Decision R(G)2/81.

5    See note 2 supra.

6    Social Security (Guardian's Allowance) Regulations 1975, SI 1975/515, reg 3(1); Interpretation Act 1978 s 17(2)(b).

7    See the Social Security (Guardian's Allowance) Regulations 1975, SI 1975/515, reg 3(2); and the Interpretation Act 1978 s 17(2)(b).

8    For these purposes, a voidable marriage which has been annulled is to be treated as if it had been a valid marriage which was terminated by divorce at the date of the annulment: Social Security (Guardian's Allowance) Regulations 1975, SI 1975/515, reg 4(3).

9    See note 2 supra.

10 See the Social Security (Guardian's Allowance) Regulations 1975, SI 1975/515, reg 4(1). Where a child has been adopted by two spouses jointly, these provisions apply as if the child's parents were the spouses who adopted him: see reg 4(2).

## **UPDATE**

### **117-120 Guardian's Allowance**

SI 1975/515 replaced by Guardian's Allowance (General) Regulations 2003, SI 2003/495 (amended by SI 2005/2919, SI 2006/204, SI 2009/3268).

As to the transfer of functions in relation to guardian's allowance see the Tax Credits Act 2002 Pt 2 (ss 49-57, Sch 4); and PARA 257A.

### **119 Modifications in respect of adopted children, illegitimate children and children of divorced parents**

TEXT AND NOTES 9, 10--For 'there was no residence order ... child's maintenance' read 'there was neither (1) an order of a court granting custody of the child to that other parent or imposing any liability on him for the child's maintenance; nor (2) a maintenance assessment as defined in the Child Support Act 1991 s 54 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 554) in force in respect of that other parent and the child': 1975 Regulations reg 4(1); SI 1998/1811.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/4. NON-CONTRIBUTORY BENEFITS/(6) GUARDIAN'S ALLOWANCE/120. Amount and payment.

## **120. Amount and payment.**

Guardian's allowance in respect of a child is payable at a specified weekly rate<sup>1</sup>.

Where a husband and wife are residing together and they would each be entitled to a guardian's allowance in respect of the same child, only the wife is to be entitled, but payment may be made either to her or to him unless she elects in the prescribed manner that payment is not to be made to him<sup>2</sup>.

<sup>1</sup> Social Security Contributions and Benefits Act 1992 s 77(7). The rate so specified is currently £11.15: see s 77(7), Sch 4 Pt III para 5 (subject to frequent amendment). The allowance may be claimed as well as child benefit for the same child, but if any amount is received as extra child benefit (ie the weekly rate for the only, elder or eldest child of a lone parent, known as 'one parent benefit': see PARA 255 post) that extra must be deducted: see the Social Security (Overlapping Benefits) Regulations 1979, SI 1979/597, reg 8(1) (substituted by SI 1991/547); the the Social Security (Overlapping Benefits) Regulations 1979, SI 1979/597, reg 8(3) (substituted by SI 1996/1803). However, a person may receive one parent benefit in respect of one child and the guardian's allowance in full in respect of another: Decision R(F)2/89.

<sup>2</sup> Social Security Contributions and Benefits Act 1992 s 77(9). Such an election may be made by giving notice in writing to the Secretary of State at an office of the Department of Social Security on an approved form, or in such other manner (being in writing) as he may accept as sufficient in the circumstances of any particular case or class of cases: Social Security (Guardian's Allowance) Regulations 1975, SI 1975/515, reg 6A (added by SI 1977/342; amended by SI 1988/1843); Interpretation Act 1978 s 17(2)(b).

## **UPDATE**

### **117-120 Guardian's Allowance**

SI 1975/515 replaced by Guardian's Allowance (General) Regulations 2003, SI 2003/495 (amended by SI 2005/2919, SI 2006/204, SI 2009/3268).

As to the transfer of functions in relation to guardian's allowance see the Tax Credits Act 2002 Pt 2 (ss 49-57, Sch 4); and PARA 257A.

## **120 Amount and payment**

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 s 77(7), (9) amended so as to include reference to qualifying young persons (see PARA 238): Child Benefit Act 2005 Sch 1 para 4.

NOTE 1--SI 1979/597 reg 8(3) amended: SI 1999/820, SI 2000/799, SI 2003/136, SI 2004/565. Current rate is £14.10: Social Security Contributions and Benefits Act 1992 Sch 4 Pt III para 5 (amended by SI 2009/797).

NOTE 2--As to electronic elections see SI 1975/515 reg 6B (added by SI 2002/1789).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/5. INCREASES FOR DEPENDANTS/121. Meaning of 'dependency'.

## 5.

### 121. Meaning of 'dependency'.

Provision is made in Part IV of the Social Security Contributions and Benefits Act 1992<sup>1</sup> for certain benefits to be increased by amounts in respect of child and adult dependants<sup>2</sup>.

Regulations may provide:

- 368 (1) for determining the circumstances in which a person is or is not to be taken<sup>3</sup> to be wholly or mainly, or to a substantial extent, maintaining, or to be contributing at any weekly<sup>4</sup> rate to the maintenance of, another person or to be, or have been, contributing at any weekly rate to the cost of providing for a child<sup>5</sup>;
- 369 (2) for the purposes of the provisions relating to an increase of benefit<sup>6</sup> in respect of a wife or other adult dependant, that where:
  - 35 42. (a) a person is partly maintained by each of two or more beneficiaries<sup>7</sup>, each of whom would be entitled to such an increase in respect of that person if he were wholly or mainly maintaining that person; and
  - 43. (b) the contributions made by those two or more beneficiaries towards the maintenance of that person amount in the aggregate to sums which would, if they had been contributed by one of those beneficiaries, have been sufficient to satisfy the requirements of regulations under these provisions,
  - 36 370 that person is to be taken to be wholly or mainly maintained by such of those beneficiaries as may be prescribed<sup>8</sup>;
  - 371 (3) for any sum or sums paid by a person by way of contribution towards either or both of the following, that is to say the maintenance of his or her spouse and the cost of providing for one or more children, to be treated for the purposes of any specified statutory provisions<sup>9</sup> as such contributions, of such respective amounts equal in the aggregate to that sum or those sums, in respect of such persons, as may be determined in accordance with the regulations so as to secure as large a payment as possible by way of benefit in respect of the dependants<sup>10</sup>.

Although the term 'dependant' is not specifically defined, there is a general linkage in the case of a child to entitlement to child benefit<sup>11</sup>, and in the case of either a child or an adult it is specifically provided that a beneficiary is not to be deemed to be maintaining another person unless that beneficiary:

- 372 (i) when unemployed or incapable of work or entitled to a Category A or B retirement pension<sup>12</sup>, contributes towards the maintenance of that person an amount not less than the amount of increase of benefit received in respect of that person; and
- 373 (ii) when in employment or not incapable of work or not entitled to such a pension, contributed more than half of the actual cost of maintenance of that person<sup>13</sup>.

The question whether a particular person is wholly or mainly maintaining another person living with him in a single household (when the household income will normally be mixed) is governed not by legislation but by the 'family fund test' which has been evolved through commissioners' decisions<sup>14</sup> and is to apply unless there are wholly exceptional circumstances<sup>15</sup>. The test requires the apportionment of the household's weekly income among its members<sup>16</sup>.

1    Ie the Social Security Contributions and Benefits Act 1992 Pt IV (ss 80-93) (as amended): see PARA 122 et seq, 590 et seq post.

2    As to child dependant increases and adult dependant increases see PARAS 122-123, 590-592 post.

3    Ie for the purposes of the Social Security Contributions and Benefits Act 1992 Pts II-V (ss 20-111) (as amended): see PARA 54 et seq ante, 122 et seq, 561 et seq post.

4    For the meaning of 'week' see PARA 32 note 7 ante.

5    Social Security Contributions and Benefits Act 1992 s 114(1). For the meaning of 'child' see PARA 19 note 11 ante.

6    Ie under ibid Pts II-V (as amended): see PARA 54 et seq ante, 122 et seq post.

7    For the meaning of 'beneficiary' see PARA 21 note 2 ante.

8    Social Security Contributions and Benefits Act 1992 s 114(2). For the meaning of 'prescribed' see PARA 19 note 3 ante.

9    Ie for the purposes of ibid s 56 (see PARA 54 ante); ss 81-84 (as amended) (see PARAS 122-125, 590-592 post); and s 106, Sch 7 paras 5, 6 (see PARA 162 post): s 114(4). Section 114(4) is prospectively amended by the Pensions Act 1995 s 126(c), Sch 4 paras 18(f), 20 with effect from 6 April 2010 to substitute for the reference to the Social Security Contributions and Benefits Act 1992 s 84 (as amended) a reference to s 83A (as prospectively substituted); see further PARA 593 post. Section 114(4) also refers to s 86 (repealed); quare whether the reference should now be to s 86A (as added): see PARA 123 post.

10   Ibid s 114(3). As to the exercise of the power to make regulations under s 114 see the Social Security (Incapacity Benefit - Increases for Dependents) Regulations 1994, SI 1994/2945 (as amended). See also, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security Benefit (Dependency) Regulations 1977, SI 1977/343 (as amended); and the text and notes 11-13 infra.

11   As to child benefit see PARA 237 et seq post.

12   As to Category A and Category B retirement pensions see PARA 568 et seq post.

13   See the Social Security Benefit (Dependency) Regulations 1977, SI 1977/343, reg 2(1) (amended by SI 1989/1642; and SI 1996/1345). Where a person is maintained by two or more people, each of whom qualifies under these rules, that person is to be deemed to be wholly or mainly maintained by the person making the larger or largest contribution or (where that does not apply) by the elder or eldest person or (in any case) by the person designated in a written notice to the Secretary of State, signed by a majority of the other persons: see the Social Security Benefit (Dependency) Regulations 1977, SI 1977/343, reg 2(2). Such a notice may be revoked and replaced by the parties at any time: see reg 2(3). Maintenance paid in respect of a spouse and child or children is to be allocated between them by the adjudicating authorities for these purposes in such a way as to maximise the payment of dependency increases: see reg 3 (as amended).

14   As to commissioners' decisions generally see PARA 362 et seq post.

15   See Decision R(I)1/57.

16   The test, of some complexity, is set out in Decision R(S)12/83 para 10. The principal stages are:

14   (1) the weekly 'income' of the household must be ascertained (including earnings, benefits and any maintenance payments); this is to be net of income tax, contributions and other deductions;

15   (2) the amount of the family fund is assumed to be the aggregate cost of maintenance of the household; the cost of maintaining each member of the family is worked out by dividing the fund in the proportion of one for each child under 14 and two for each other member; this gives each member's 'unit cost';

- 16 (3) the net earnings of each member are treated as contributed by that member; pensions and contributory benefits are treated as the income of the person in respect of whom they are paid, but non-contributory and income-related benefits are not counted (Decision R(S)7/89);
- 17 (4) the net contribution of each member of the family (contribution minus unit cost) is then worked out, in particular the surplus (if any) contributed by the claimant;
- 18 (5) the claimant's and any other surpluses (and any contributions from outside the family) are then applied rateably in meeting the aggregate deficits of those with deficits. If the claimant's surplus (assuming there to be one) applied towards meeting the deficit of a member of the household amounts to more than half of his net unit cost, then he is wholly or mainly maintaining that person; if not, he is not;
- 19 (6) a complication arises if a contribution from outside (eg maintenance under a court order) is earmarked for a particular member, rather than for the household as a whole. Such amounts are to be applied to reducing the deficit of that member, before the claimant's surplus and any non-earmarked funds from outside are applied in meeting the various deficits. Child benefit is not to be considered as earmarked, but rather as a contribution by the parent receiving it (Decision CU/108/1993).

## **UPDATE**

### **121 Meaning of 'dependency'**

TEXT AND NOTES 5, 10--Social Security Contributions and Benefits Act 1992 s 114(1), (3) amended so as to include reference to qualifying young persons: Child Benefit Act 2005 Sch 1 para 7. As to qualifying young persons see PARA 238.

TEXT AND NOTES 8, 10--Social Security Contributions and Benefits Act 1992 s 114(2), (3) amended: Civil Partnership Act 2004 Sch 24 para 39.

NOTE 9--Social Security Contributions and Benefits Act 1992 s 114(4) further amended: Tax Credits Act 2002 Sch 3 para 34; Pensions Act 2007 Sch 1 para 16, Sch 7 Pt 2: 2007 Act s 4; Welfare Reform Act 2009 Sch 7 Pt 2.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/5. INCREASES FOR DEPENDANTS/122. Increase of benefit for child dependants.

## **122. Increase of benefit for child dependants.**

A beneficiary<sup>1</sup> in receipt of short-term incapacity benefit<sup>2</sup> (at the higher rate or where the beneficiary is over pensionable age)<sup>3</sup>, long-term incapacity benefit<sup>4</sup> or a Category A, B or C retirement pension<sup>5</sup> is in general entitled<sup>6</sup> to an increase in that benefit or pension<sup>7</sup> for any period in which he is entitled to child benefit<sup>8</sup> in respect of a child or children<sup>9</sup>.

In any case where a beneficiary is one of two persons who are spouses residing together or an unmarried couple<sup>10</sup>, and the other person had earnings<sup>11</sup> in any week<sup>12</sup>, no such increase in the amount of the benefit or pension is payable for the following week if the other person's earnings exceeded prescribed limits<sup>13</sup>.

A woman in receipt of a widowed mother's allowance<sup>14</sup> is entitled to a dependant's addition for qualifying children<sup>15</sup> in respect of whom she is for the time being entitled to child benefit<sup>16</sup>.

The weekly rate of a child's special allowance<sup>17</sup> for any period for which the beneficiary is entitled to child benefit in respect of two or more children with respect to whom the statutory conditions<sup>18</sup> are satisfied is to be increased in respect of each respectively of those children other than the elder or eldest by the specified amount<sup>19</sup>.

Where a beneficiary is entitled to receive, in respect of a particular child, payment of an amount by way of increase of benefit under these provisions, that amount is not payable unless either the beneficiary would be treated for the purposes of child benefit law<sup>20</sup> as having the child living with him or the requisite contributions are being made to the cost of providing for the child<sup>21</sup>. The requisite contributions must be made, at a weekly rate not less than the amount by way of increase of benefit referred to above, by the beneficiary or, where the beneficiary is one of two spouses residing together, by them together<sup>22</sup> and, except in prescribed cases<sup>23</sup>, the contributions must be over and above the applicable rate<sup>24</sup> of child benefit<sup>25</sup>. Regulations provide for a person to be treated (for qualifying purposes) as if he were or had been entitled to child benefit, or as if he were not or had not been so entitled<sup>26</sup>.

In the case of a severe disablement allowance<sup>27</sup> or invalid care allowance<sup>28</sup>, the weekly rates are increased for child dependants by a specified amount<sup>29</sup>.

1 For the meaning of 'beneficiary' see PARA 21 note 2 ante.

2 As to short-term incapacity benefit see PARA 62 ante.

3 For the meaning of 'pensionable age' see PARA 562 post.

4 As to long-term incapacity benefit see PARA 62 ante.

5 As to categories of retirement pensions see PARA 568 et seq et seq post.

6 For the meaning of 'entitled' see PARA 21 note 9 ante.

7 The amount of the increase is set out in the Social Security Contributions and Benefits Act 1992 Sch 4 Pt IV (subject to frequent amendment). As to the annual up-rating of benefits see PARA 17 ante.

8 It is entitlement that matters, not necessarily payability: Decision R(P)3/85, applying *Insurance Officer v McCaffrey* [1985] 1 All ER 5, [1984] 1 WLR 1353, HL. As to child benefit see PARA 237 et seq post.

9 Social Security Contributions and Benefits Act 1992 s 80(1), (2) (amended by the Social Security (Incapacity for Work) Act 1994 s 2(4); and the Jobseekers Act 1995 s 41(5), Sch 3). For the entitlement generally to child benefit see PARA 238 post. A backdated entitlement may suffice: Decision R(S)3/80.

10 'Unmarried couple' means a man and a woman who are not married to each other but are living together as husband and wife: Social Security Contributions and Benefits Act 1992 s 80(7); and see PARA 83 ante.

11 Except as may be prescribed, in *ibid* s 80 (as amended) and ss 82-86A (as amended and added) (see PARAS 122-123, 590-592 post), and in regulations under s 86A (as added), any reference to earnings includes a reference to payments by way of occupational or personal pension: s 89(1) (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 26). For the purposes of the above-mentioned provisions, the Secretary of State may by regulations provide, in relation to cases where payments by way of occupational or personal pension are made otherwise than weekly, that any necessary apportionment of the payments must be made in such manner and on such basis as may be prescribed: Social Security Contributions and Benefits Act 1992 s 89(2). 'Payments by way of occupational or personal pension' means, in relation to a person, periodical payments which, in connection with the coming to an end of an employment of his, fall to be made to him (1) out of money provided wholly or partly by the employer under arrangements made by the employer; or (2) out of money provided under an enactment or instrument having the force of law in any part of the United Kingdom or elsewhere; or (3) under a personal pension scheme as previously defined in the Social Security Act 1986 s 84(1) (definition repealed: see now the Pension Schemes Act 1993 s 1; and PARA 710 post); or (4) under a contract or trust scheme approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch III (ss 618-629) (as amended) (see PARAS 677-709 post); or (5) under a personal pension scheme approved under Pt XIV Ch IV (ss 630-655) (as amended) (see PARA 711 et seq post): Social Security Contributions and Benefits Act 1992 s 122(1). For the meaning of 'earnings' generally see PARA 33 ante; for the meaning of 'prescribe' see PARA 19 note 3 ante; and for the meaning of 'United Kingdom' see PARA 15 note 4 ante. As to the Secretary of State see PARA 1 ante. In exercise of the power so conferred, the Secretary of State has made the Social Security (Incapacity Benefit -Increases for Dependents) Regulations 1994, SI 1994/2945 (as amended); and the Social Security Benefit (Computation of Earnings) Regulations 1996, SI 1996/2745. In addition, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security Benefit (Dependency) Regulations 1977, SI 1977/343 (as amended), partly have effect as if so made.

12 For these purposes, 'week' means such period of seven days as may be prescribed: Social Security Contributions and Benefits Act 1992 s 80(7).

13 *Ibid* s 80(3), (4) (s 80(4) subject to frequent amendment). As to the up-rating of benefits see PARA 17 ante.

14 *Ie* payable by virtue of the Social Security Contributions and Benefits Act 1992 s 37(1)(a): see PARA 85 ante.

15 *Ie* children by virtue of whom she is entitled to the allowance under *ibid* s 37(2)(a), (b) or (c): see PARA 85 ante.

16 *Ibid* s 80(5). For the specified amount of the increase see Sch 4 Pt IV col 2 (as amended).

17 As to child's special allowance see 54 note 12 ante.

18 *Ie* the conditions specified in the Social Security Contributions and Benefits Act 1992 s 56(1)(b), (c): see PARA 54 ante.

19 *Ibid* s 80(6). For the specified amount of the increase see Sch 4 Pt IV col 2 (as amended).

20 *Ie* for the purposes of *ibid* Pt IX (ss 141-147) (as amended): see PARA 237 et seq post.

21 *Ibid* s 81(1), (2). Contributions must actually be in payment at the relevant time: Decision R(U)15/62. However, there is provision for a person to give a written undertaking to make such contributions from the increase in benefit: Social Security Benefit (Dependency) Regulations 1977, SI 1977/343, reg 5(1), (2) (reg 5(1) amended by SI 1984/1699).

22 Social Security Contributions and Benefits Act 1992 s 81(3)(a).

23 For the prescribed cases see the Social Security Benefit (Dependency) Regulations 1977, SI 1977/343, reg 5(5) (added by SI 1977/620) (requirement that contributions are to be over and above the applicable rate of child benefit does not apply where neither beneficiary nor spouse in fact entitled to child benefit).

24 *Ie* over and above the contributions required for satisfying the Social Security Contributions and Benefits Act 1992 s 143(1)(b): see PARA 240 post.

25 *Ibid* s 81(3)(b).

26 See the Social Security Benefit (Dependency) Regulations 1977, SI 1977/343, reg 4A (added by SI 1980/585; amended by SI 1984/1698; and SI 1989/523), and the Social Security Benefit (Dependency)

Regulations 1977, SI 1977/343, reg 4B (added by SI 1980/585; amended by SI 1984/1698; SI 1987/355; SI 1988/554; and SI 1989/523). By virtue of the Social Security Benefit (Dependency) Regulations 1977, SI 1977/343, reg 4A (as so added and amended), a person is treated as if he were entitled to child benefit in respect of a child for any period throughout which child benefit has been awarded to a parent of that child with whom that child is living and with whom that person is residing and either the child is being wholly or mainly maintained by that person or that person is also a parent of the child, or he, or his spouse with whom he is residing, would have been entitled to child benefit in respect of that child had the child been born at the end of the week immediately preceding the week in which birth occurred. In relation to incapacity benefit, there are equivalent provisions in the Social Security (Incapacity Benefit - Increases for Dependents) Regulations 1994, SI 1994/2945, regs 6-8.

27 As to severe disablement allowance see PARA 92 et seq ante.

28 As to invalid care allowance see PARAS 100-101 ante.

29 See the Social Security Administration Act 1992 s 90, Sch 4 Pt IV (as amended); and the Social Security Benefit (Dependency) Regulations 1977, SI 1977/343, reg 12 (as substituted).

## UPDATE

### 122 Increase of benefit for child dependants

TEXT AND NOTES--Subject to savings (see SI 2003/938), Social Security Contributions and Benefits Act 1992 ss 80, 81 repealed, s 90, Sch 4 Pt IV amended: Tax Credits Act 2002 Sch 6.

Social Security Contributions and Benefits Act 1992 ss 80, 81 (which continue to have effect in certain cases despite their repeal by the Tax Credits Act 2002) are to have effect as if the references in those provisions to a child or children included references to a qualifying young person or persons: see Welfare Reform Act 2009 s 37(1), (2).

NOTES--SI 1977/343 further amended so as to extend provisions to civil partnerships: SI 2005/2877.

NOTE 11--Reference to Social Security Contributions and Benefits Act 1992 s 80 omitted: s 89(1) (amended by 2002 Act Sch 6; Pensions Act 2007 Sch 1 para 15; and Welfare Reform Act 2007 Sch 3 para 9(8)). See also Welfare Reform Act 2009 s 37(4).

Except as may be prescribed, any reference to earnings now includes a reference to PPF periodic payments: Social Security Contributions and Benefits Act 1992 s 89(1A) (added by SI 2006/343; and amended by Pensions Act 2007 Sch 1 para 15; and Welfare Reform Act 2007 Sch 3 para 9(8)). See also Welfare Reform Act 2009 s 37(4). 'PPF periodic payments' means (1) any periodic compensation payments made in relation to a person, payable under the pension compensation provisions specified in the Pensions Act 2004 s 162(2), or (2) any periodic payments made in relation to a person payable under s 166, other than payments made to a surviving dependant of a person entitled to such compensation: Social Security Contributions and Benefits Act 1992 s 89(3) (added by SI 2006/343).

SI 1996/2745 amended: SI 2002/2469, SI 2002/2823, SI 2004/3168 (England), SI 2005/2919, SI 2005/2929 (Wales), SI 2007/2613, SI 2009/2678. SI 1994/2945 amended: SI 2003/937, SI 2005/2877, SI 2006/692, SI 2006/1069, SI 2006/2378.

NOTE 26--SI 1977/343 reg 4B substituted by SI 2000/1483, and amended by SI 2003/937.

TEXT AND NOTES 27-29--Social Security and Contributions Act 1992 s 90 amended so as to omit all reference to the rate of payment for severe disablement allowance: Welfare Reform and Pensions Act 1999 Sch 8 para 26.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/5. INCREASES FOR DEPENDANTS/123. Increases of benefit for adult dependants.

### **123. Increases of benefit for adult dependants.**

The weekly rate of a maternity allowance<sup>1</sup> is increased by a specified amount<sup>2</sup> for any period during which either:

- 374 (1) the beneficiary's<sup>3</sup> husband does not have weekly earnings<sup>4</sup> which exceed the amount of the increase, and either she and her husband are residing together or she is contributing to his maintenance at a weekly rate not less than that amount<sup>5</sup>; or
- 375 (2) a person who is neither the spouse of the beneficiary nor a child<sup>6</sup>, and in respect of whom such further conditions as may be prescribed<sup>7</sup> are fulfilled, has the care of a child or children in respect of whom the beneficiary is entitled<sup>8</sup> to child benefit<sup>9</sup>.

A beneficiary is not entitled under these provisions to an increase of benefit in respect of more than one person in the same period<sup>10</sup>.

The weekly rates of short-term and long-term incapacity benefit<sup>11</sup> are increased in prescribed circumstances<sup>12</sup> for adult dependants by the appropriate specified amount<sup>13</sup>. A person is not entitled under these provisions to an increase of benefit in respect of more than one person in the same period<sup>14</sup>.

The weekly rates of severe disablement allowance<sup>15</sup> and invalid care allowance<sup>16</sup> are increased for adult dependants by a prescribed amount<sup>17</sup>.

1 As to the state maternity allowance see PARAS 76-79 ante.

2 The amount of the adult dependant increase is set out in the Social Security Contributions and Benefits Act 1992 Sch 4 Pt IV col 3 (as amended). As to up-rating of benefits see PARA 17 ante.

3 For the meaning of 'beneficiary' see PARA 21 note 2 ante.

4 For the meaning of 'earnings' for these purposes see PARA 122 note 11 ante; and for the meaning of 'earnings' generally see PARA 33 ante. For the meaning of 'week' see PARA 122 note 12 ante.

5 Ibid s 82(2), (3) (s 82(2) substituted by the Jobseekers Act 1995 s 41(4), (5), Sch 2 para 24).

6 For the meaning of 'child' see PARA 19 note 11 ante.

7 The conditions are that the person (1) has the care of the child; (2) is residing with, employed by or maintained by the beneficiary; (3) is not absent from Great Britain; (4) is not undergoing imprisonment or detention in legal custody and (5) either has earnings less than the standard rate of increase or is employed by the beneficiary in caring for the child and is not residing with him: see the Social Security Benefit (Dependency) Regulations 1977, SI 1977/343, reg 10 (as amended). For the meaning of 'Great Britain' see PARA 15 note 4 ante; and for the meaning of 'prescribed' see PARA 19 note 3 ante.

8 For the meaning of 'entitled' see PARA 21 note 9 ante.

9 Social Security Contributions and Benefits Act 1992 s 82(2) (as substituted: see note 5 supra); s 82(4).

10 Ibid s 82(5).

11 As to incapacity benefit see PARA 59 et seq ante.

12 For the prescribed circumstances see the Social Security (Incapacity Benefit - Increases for Dependents) Regulations 1994, SI 1994/2945, regs 9-14 (as amended).

13 See the Social Security Contributions and Benefits Act 1992 s 86A(1) (s 86A added by the Social Security (Incapacity for Work) Act 1994 s 2(5)). The appropriate amount is specified in relation to benefit of that description in the Social Security Contributions and Benefits Act 1992 Sch 4 Pt IV col 3 (as amended). Regulations may provide that where the person in respect of whom an increase of benefit is claimed has earnings in excess of such amount as may be prescribed, there is to be no such increase of benefit: s 86A(2) (as so added).

14 Ibid s 88 (substituted by the Social Security (Incapacity for Work) Act 1994 Sch 1 para 25).

15 As to severe disablement allowance see PARA 92 et seq ante.

16 As to invalid care allowance see PARAS 100-101 ante.

17 See the Social Security Contributions and Benefits Act 1992 s 90, Sch 4 Pt IV (as amended); and the Social Security Benefit (Dependency) Regulations 1977, SI 1977/343, reg 12 (as substituted).

## **UPDATE**

### **123 Increases of benefit for adult dependants**

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 ss 82, 90 repealed: Welfare Reform Act 2009 s 15(1), Sch 7 Pt 2. For transitional provisions, see s 15(2), (3).

NOTE 12--SI 1994/2945 regs 9-14 further amended: SI 2000/678, SI 2003/937, SI 2005/2877, SI 2006/692, SI 2006/1069, SI 2006/2378.

TEXT AND NOTE 13--As from a day to be appointed 1992 Act s 86A repealed: Welfare Reform Act 2007 Sch 8.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/5. INCREASES FOR DEPENDANTS/124. Special cases; trade disputes and fluctuating earnings.

## **124. Special cases; trade disputes and fluctuating earnings.**

A beneficiary<sup>1</sup> is not entitled to an adult dependant increase<sup>2</sup> if the person in respect of whom he would be entitled<sup>3</sup> to it is or would be subject to the trade dispute disqualification<sup>4</sup> for jobseeker's allowance<sup>5</sup>.

Where a beneficiary has been awarded a dependency increase<sup>6</sup> but ceases to become entitled to it by reason only that the weekly earnings<sup>7</sup> of some other person ('the relevant earner') exceed the amount of the increase or, as the case may be, some other specified amount, then, if the beneficiary would otherwise have continued to be entitled to the increase if the excess of earnings were disregarded, the award continues in force but the increase is not payable for any week if the earnings relevant to that week<sup>8</sup> exceed the amount of the increase or, as the case may be, the specified amount<sup>9</sup>.

1 For the meaning of 'beneficiary' see PARA 21 note 2 ante.

2 Ie to an increase in any benefit under or by virtue of the Social Security Contributions and Benefits Act 1992 ss 82-88 (as amended) (see PARAS 23 ante, 590 et seq post) or an increase in benefit for an adult dependant by virtue of regulations under s 90 (see PARA 123 ante): s 91(1) (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 27).

3 For the meaning of 'entitled' see PARA 21 note 9 ante.

4 Ie he is prevented from being entitled to a jobseeker's allowance by the Jobseekers Act 1995 s 14 (as amended) (see PARA 301 post) or would be so prevented if he were otherwise entitled to that benefit: Social Security Contributions and Benefits Act 1992 s 91(2) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 27).

5 Social Security Contributions and Benefits Act 1992 s 91 (as amended: see notes 2, 4 supra).

6 Ie an increase in benefit under ibid Pt IV (ss 80-93) (as amended): see PARAS 122-123 ante, 590 et seq post.

7 For the meaning of 'earnings' see PARA 33 ante; and for the meaning of 'week' see PARA 32 note 7 ante.

8 For these purposes the earnings which are relevant to any week are those earnings of the relevant earner which would otherwise be taken into account in determining whether the beneficiary is entitled to the increase for the week in question: Social Security Contributions and Benefits Act 1992 s 92(2).

9 Ibid s 92(1).

### **UPDATE**

## **124 Special cases; trade disputes and fluctuating earnings**

NOTE 2--Subject to savings (see SI 2003/938), words 'for an adult dependant' omitted: Social Security Contributions and Benefits Act 1992 s 91(1) (amended by Tax Credits Act 2002 Sch 6).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/5. INCREASES FOR DEPENDANTS/125. Dependency increases on termination of employment after period of entitlement to disability working allowance.

### **125. Dependency increases on termination of employment after period of entitlement to disability working allowance.**

Where a person again becomes entitled<sup>1</sup> in certain circumstances to the higher rate of short-term incapacity benefit<sup>2</sup>, or to long-term incapacity benefit<sup>3</sup>, or to severe disablement allowance<sup>4</sup>, on the termination of a period of employment or training<sup>5</sup>, and when he was last entitled to that benefit or allowance it was increased in respect of a dependant<sup>6</sup>, then for the purpose of determining whether his benefit or allowance should be so increased for any period beginning with the day on which he again becomes entitled to his benefit or allowance, the increase in respect of that dependant is treated as having been payable to him on each day between the last day on which his benefit or allowance was previously payable and the day on which he again becomes entitled to it<sup>7</sup>.

1 For the meaning of 'entitled' see PARA 21 note 9 ante.

2 As to short-term incapacity benefit see PARA 62 ante.

3 As to long-term incapacity benefit see PARA 62 ante.

4 As to severe disablement allowance see PARA 92 et seq ante.

5 Ie by virtue of the Social Security Contributions and Benefits Act 1992 s 30C(5) or (6) (as added) or s 42 (as substituted) in the case of incapacity benefit or by virtue of s 68(10) or (10A) (as added) in the case of severe disablement allowance: see PARAS 63, 90, 99 ante.

6 Ie by virtue of (1) the Social Security Benefit (Dependency) Regulations 1977, SI 1977/343, reg 8(6); or (2) the Social Security (Savings for Existing Beneficiaries) Regulations 1984, SI 1984/1696, reg 2; or (3) the Social Security Benefit (Dependency) Amendment Regulations 1984, SI 1984/1698, reg 3; or (4) the Social Security Benefit (Dependency and Computation of Earnings) Amendment Regulations 1989, SI 1989/1690, reg 4 (as amended): Social Security Contributions and Benefits Act 1992 s 93(b) (as amended).

7 Ibid s 93 (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 28).

### **UPDATE**

### **125 Dependency increases on termination of employment after period of entitlement to [disabled person's tax credit]**

TEXT AND NOTES--As from a day to be appointed 1992 Act s 93 repealed: Welfare Reform Act 2007 Sch 8.

Subject to savings (see SI 2003/962) disability working allowance (disabled person's tax credit) abolished and replaced: see Tax Credits Act 2002 and PARA 227A. Words 'or to severe disablement allowance' and 'or allowance' omitted: Social Security Contributions and Benefits Act 1992 s 93 (amended by Welfare Reform and Pensions Act 1999 Sch 13 Pt IV (amendment subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958 art 4)).

NOTE 6--SI 1977/343 reg 8 amended: SI 2005/2877.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(1) IN GENERAL/126. The industrial injuries scheme.

## **6. INDUSTRIAL INJURIES BENEFIT**

### **(1) IN GENERAL**

#### **126. The industrial injuries scheme.**

The industrial injuries scheme came into operation on 5 July 1948<sup>1</sup>, taking the place of the workmen's compensation scheme (which dated back to 1897) and, in its place, providing a scheme of compulsory insurance against personal injury caused by accidents arising out of, and in the course of, employment and against prescribed diseases and injuries due to the nature of a person's employment. It differed from the previous scheme in being state-run and not dependent on loss of earnings. Title to benefit has never depended on the payment of qualifying contributions.

There were originally three benefits under the industrial injuries scheme: (1) injury benefit; (2) disablement benefit; and (3) death benefit. Injury benefit was an income replacement benefit payable during the initial period of incapacity for work, and historically set at a higher rate than ordinary sickness benefit (the 'industrial preference'). Disablement benefit relates to a measured loss of faculty from the accident and is payable whether or not the person is or remains incapable of work<sup>2</sup>. Injury benefit was abolished as from 6 April 1983; by that time the industrial preference had been reduced in value, and the benefit was replaced by entitlement to the modern income replacement benefits of statutory sick pay if still in work<sup>3</sup> and sickness benefit (now incapacity benefit<sup>4</sup>) if not still in work or if still incapable of work when statutory sick pay expires after 28 weeks of entitlement. Death benefit was payable to certain dependants, but was abolished as from 6 April 1988<sup>5</sup>.

The rate of disablement benefit is determined by the extent of the disablement<sup>6</sup>. The threshold for the disablement pension is set at 14 per cent<sup>7</sup>. The rate of the disablement pension may be increased by specified increases in relation to constant attendance<sup>8</sup> and exceptionally severe disablement<sup>9</sup>. However, further increases in relation to reduced earnings, unemployability and periods of approved hospital treatment have been abolished<sup>10</sup>.

The legal test for entitlement to disablement benefit is the same as that which applied for the purposes of the workmen's compensation scheme between 1897 and 1948 (accident arising out of, and in the course of, employment), during which time it was administered through the courts, producing a body of case law, rather than through the present system of appeal tribunals and commissioners<sup>11</sup>.

The Secretary of State<sup>12</sup> may promote research into the causes and incidence of accidents arising out of and in the course of employment, or injuries and diseases which are due to the nature of employment or which it is contemplated might be prescribed for the statutory purposes<sup>13</sup>, either by himself employing persons to conduct such research or by contributing to the expenses of, or otherwise assisting, other persons engaged in such research<sup>14</sup>. He may pay to persons so employed by him such salaries or remuneration, and such travelling and other allowances, as he may determine with the consent of the Treasury<sup>15</sup>.

1    Ie the day the National Insurance (Industrial Injuries) Act 1946 (repealed) came into force.

2    See PARA 141 et seq post.

3    As to statutory sick pay see EMPLOYMENT vol 39 (2009) PARA 498 et seq.

4 As to incapacity benefit see PARA 59 et seq ante.

5 See PARA 166 post.

6 As to the assessment of disablement see PARA 142 post.

7 See the Social Security Contributions and Benefits Act 1992 s 103(1); and PARA 141 post. For calculation purposes, however, a figure between 14 and 20% is treated as 20%: see s 103(3); and PARA 142 post.

8 See PARA 147 post.

9 See PARA 149 post.

10 See PARA 161 post. In relation to these (especially the reduced earnings allowance) there is now only entitlement, if at all, for those persons already receiving the benefit at the appropriate date of abolition. In addition, separate provisions still apply to 'old cases' (ie those entitled to workmen's compensation when it was abolished in 1948): see PARA 167 post.

11 While workmen's compensation cases are still authoritative on large parts of the current law, the emphasis in this title is on commissioners' decisions on the post-1948 legislation. However, pre-1948 court decisions have been included where they are still particularly useful on the interpretation of a particular aspect of the legislation.

12 As to the Secretary of State see PARA 1 ante.

13 Ie for the purposes of the Social Security Contributions and Benefits Act 1992 ss 108-110: see PARA 153 et seq post. For the meaning of 'prescribed' see PARA 19 note 3 ante.

14 Social Security Administration Act 1992 s 183(1).

15 Ibid s 183(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(1) IN GENERAL/127. The right to industrial injuries benefit.

### 127. The right to industrial injuries benefit.

Industrial injuries benefit<sup>1</sup> is payable where an employed earner<sup>2</sup> suffers personal injury<sup>3</sup> caused after 4 July 1948 by accident<sup>4</sup> arising out of<sup>5</sup> and in the course of his employment<sup>6</sup>, being employed earner's employment<sup>7</sup>. Industrial injuries benefit consists of the following benefits: (1) disablement benefit<sup>8</sup>; (2) reduced earnings allowance<sup>9</sup>; (3) retirement allowance<sup>10</sup>; and (4) industrial death benefit<sup>11</sup>. For the purposes of industrial injuries benefit, an accident arising in the course of an employed earner's employment is to be taken, in the absence of evidence to the contrary, also to have arisen out of that employment<sup>12</sup>.

Benefit is not payable in respect of an accident happening while the earner is outside Great Britain<sup>13</sup>, but this is subject to a power to amend by regulations<sup>14</sup>. Such an amendment now provides that where a person on or after 1 October 1986 sustains an accident arising out of, and in the course of, his employment or contracts a prescribed disease due to the nature of his employment, that employment is to be treated as employed earner's employment notwithstanding that he is employed outside Great Britain, and any benefit to which he would otherwise be entitled is payable from the date of his return to Great Britain, notwithstanding that the accident happened or the disease was contracted while he was outside it<sup>15</sup>.

For these purposes, 'work' in the context of 'incapable of work' or 'incapacity for work' means work which the person in question can reasonably be expected to do<sup>16</sup>. The general tests for incapacity for work which now apply elsewhere in the social security legislation<sup>17</sup> do not apply for the purposes of industrial injuries benefit<sup>18</sup>.

1 'Industrial injuries benefit' means benefit under the Social Security Contributions and Benefits Act 1992 Pt V (ss 94-111), Schs 6, 7 (but not Sch 8 (as amended)): s 122(1); and see the Social Security Administration Act 1992 s 191, which contains an identical definition.

2 For the meaning of 'employed earner' see PARA 32 ante. See also PARA 128 post.

3 See PARA 130 post.

4 See PARA 131 post. Regulations may make provision as to the day which, in the case of night workers and other special cases, is to be treated for the purposes of industrial injuries benefit as the day of the accident: Social Security Contributions and Benefits Act 1992 s 94(4).

5 See PARA 134 post.

6 For the meaning of 'employment' see PARA 32 note 1 ante. See also PARA 133 post.

7 Social Security Contributions and Benefits Act 1992 s 94(1). As to employed earner's employment see PARA 128 post.

8 See *ibid* s 94(2)(a). The disablement benefit is payable in accordance with ss 103-105, Sch 7 Pt I paras 2, 3 (as amended), Sch 7 Pts II, III: s 94(2)(a).

9 See *ibid* s 94(2)(b). The reduced earnings allowance is payable in accordance with Sch 7 Pt IV: s 94(2)(b).

10 See *ibid* s 94(2)(c). The retirement allowance is payable in accordance with Sch 7 Pt V (as amended): s 94(2)(c).

11 See *ibid* s 94(2)(d). The industrial death benefit is payable in accordance with Sch 7 Pt VI: s 94(2)(d).

12 *Ibid* s 94(3).

13 *Ibid* s 94(5).

14 See *ibid* s 119; and PARA 21 ante. There are also modifications in respect of mariners, airmen and employment on continental shelf operations: see ss 117, 120; and PARAS 23-24 ante.

15 Social Security Benefit (Persons Abroad) Regulations 1975, SI 1975/563, reg 10C(5) (reg 10C added by SI 1979/463; Social Security Benefit (Persons Abroad) Regulations 1975, SI 1975/563, reg 10C(5), (6) added by SI 1986/1545). This applies to any person in respect of whom Class 1 contributions are payable by virtue of the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 120 (as amended) and who is paying Class 2 (volunteer development workers) contributions under Case G of those regulations: Social Security Benefit (Persons Abroad) Regulations 1975, SI 1975/563, reg 10C(6) (as so added). As to contributions see PARA 31 et seq ante.

16 Social Security Contributions and Benefits Act 1992 s 94(6).

17 See *ibid* ss 171A-171G (as added); and PARA 65 et seq ante.

18 See *ibid* s 171G(1)(a) (as added); and PARA 65 ante.

## **UPDATE**

### **127 The right to industrial injuries benefit**

NOTE 15--1979 Regulations reg 120 now Social Security (Contributions) Regulations 2001, SI 2001/1004, reg 146 (amended by SI 2007/1838).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(1) IN GENERAL/128. Relevant employments.

## 128. Relevant employments.

In certain provisions<sup>1</sup>, 'employed earner's employment' is to be taken to include any employment by virtue of which a person is, or is treated by regulations as being for the purposes of industrial injuries benefit, an employed earner<sup>2</sup>. Any reference in the industrial injuries and diseases provisions<sup>3</sup> to an 'employed earner' or 'employed earner's employment' is to be construed, in relation to any time before 6 April 1975, as a reference respectively to an 'insured person' or 'insurable employment' within the meaning of the provisions relating to industrial injuries and diseases which were in force at that time<sup>4</sup>.

Regulations may provide that any prescribed employment must not be treated for the purposes of industrial injuries benefit as employed earner's employment notwithstanding that it would be so treated apart from the regulations<sup>5</sup>. The ordinary rules as to categorisation of earners<sup>6</sup> are modified in certain circumstances by regulations<sup>7</sup> so that particular employments are treated as employed earners' employments for industrial injuries purposes only<sup>8</sup> and others are excluded<sup>9</sup>. There are special rules governing mariners and airmen<sup>10</sup>.

In relation to (1) a person who is an employed earner<sup>11</sup> otherwise than by virtue of a contract of service<sup>12</sup> or apprenticeship; or (2) any other employed earner (a) who is employed for the purpose of any game or recreation and is engaged or paid through a club, or (b) in whose case it appears to the Secretary of State<sup>13</sup> there is special difficulty in the application of all or any of the provisions of Part V of the Social Security Contributions and Benefits Act 1992 relating to employers, regulations may provide for a prescribed person to be treated in respect of industrial injuries benefit and its administration as the earner's employer<sup>14</sup>.

1    In the Social Security Contributions and Benefits Act 1992 ss 94-95, 98-108: see s 95(1). For the purposes of those provisions an employment is an employed earner's employment in relation to an accident if (and only if) it is, or is treated by regulations as being, such an employment when the accident occurs: s 95(3).

2    Ibid s 95(1).

3    'Industrial injuries and diseases provisions' means (1) *ibid* ss 95-110; (2) any other provisions of the Social Security Contributions and Benefits Act 1992; and (3) any provisions of the Social Security Administration Act 1992 so far as they so relate: Social Security Contributions and Benefits Act 1992 s 95(5).

4    Ibid s 95(4).

5    Ibid s 95(2). At the date at which this volume states the law, no such regulations had been made. However, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Employed Earners' Employments for Industrial Injuries Purposes) Regulations 1975, SI 1975/467 (as amended) partly have effect under the Social Security Contributions and Benefits Act 1992 s 95(1), (2).

6    See PARA 32 *ante*.

7    See the Social Security (Employed Earners' Employments for Industrial Injuries Purposes) Regulations 1975, SI 1975/467 (as amended).

8    These include certain apprentices; certain members of fire brigades, salvage parties etc; mines inspectors or other nominated persons; special constables; employees on the continental shelf; certain taxi drivers or ferry operators: see *ibid* reg 2, Sch 1 Pt I (as amended).

9    These include certain employments by the earner's spouse or specified near relation; employment as a member of or as a civilian by a visiting force; and employment as a member of any international headquarters or defence organisation (except where there is a liability for contributions arising from such employment and

the person is ordinarily resident in the United Kingdom): see *ibid* Sch 1 Pt II (as amended). For the meaning of 'United Kingdom' see *PARA 15* note 4 *ante*.

10 See *ibid* regs 4-7, Sch 2.

11 *Ie* for the purposes of the Social Security Contributions and Benefits Act 1992 Pt V (ss 94-111), Schs 6-8: see s 96.

12 For the meaning of 'contract of service' see *PARA 32* note 4 *ante*.

13 As to the Secretary of State see *PARA 1* *ante*.

14 Social Security Contributions and Benefits Act 1992 s 96. At the date at which this volume states the law, no such regulations had been made. However, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Employed Earners' Employments for Industrial Injuries Purposes) Regulations 1975, SI 1975/467 (as amended) partly have effect under the Social Security Contributions and Benefits Act 1992 s 96. See in particular the Social Security (Employed Earners' Employments for Industrial Injuries Purposes) Regulations 1975, SI 1975/467, reg 8, Sch 3.

## **UPDATE**

### **128 Relevant employments**

NOTE 3--Head (3) also includes any provisions of the Social Security Act 1998 Pt I Ch II (ss 8-39) or the Social Security Contributions (Transfer of Functions, etc) Act 1999 Pt II (ss 8-19): Social Security Contributions and Benefits Act 1992 s 95(5) (amended by the Social Security Act 1998 Sch 7 para 63 and the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 4).

NOTE 8--For 'fire brigades' read 'fire and rescue authorities': SI 1975/467 Sch 1 (amended by SI 2004/3168 (England), SI 2005/2929 (Wales)).

NOTE 9--SI 1975/467 Sch 1 Pt II further amended: SI 2005/2877.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(1) IN GENERAL/129. Establishing an industrial accident.

### **129. Establishing an industrial accident.**

The definition of an industrial accident has given rise to a particularly large body of case law, both under the modern social security legislation and under the workmen's compensation legislation which it replaced<sup>1</sup>. Two points may be made with regard to the approach to be adopted by an adjudicating authority. The first is that, in spite of the volume of the case law, the decision as to whether there has been an industrial accident is ultimately one of fact<sup>2</sup>. This does not mean that there are no principles in this area<sup>3</sup>, but it does mean that the full facts of a case must be considered in the light of the statutory wording<sup>4</sup>. The second is that, although it is necessary to break the definition down into its component parts for the purpose of analysis, a decision may ultimately have to be taken on the application of the particular facts to the composite phrase 'accident arising out of and in the course of employment'<sup>5</sup>.

A claimant<sup>6</sup> may be aided in proving the double requirement that the accident arose out of and in the course of the employment by a statutory presumption that an accident arising in the course of an employed earner's employment is to be taken, in the absence of evidence to the contrary, also to have arisen out of that employment<sup>7</sup>. Given the wording<sup>8</sup>, however, this means that if there is indeed evidence to the contrary the presumption disappears and that evidence must be considered with all the other evidence available<sup>9</sup>.

Where, in connection with any claim<sup>10</sup> for industrial injuries benefit<sup>11</sup>, it is determined that the relevant accident<sup>12</sup> was or was not an industrial accident, an express declaration of that fact must be made and recorded and, subject as follows, a claimant is entitled to have the question whether the relevant accident was an industrial accident determined notwithstanding that his claim is disallowed on other grounds<sup>13</sup>. Subject to certain provisions<sup>14</sup>, any person suffering personal injury by accident is entitled, if he claims the accident was an industrial accident, to have that question determined, and a declaration made and recorded accordingly, notwithstanding that no claim for benefit has been made in connection with which the question arises<sup>15</sup>. The adjudication officer, social security appeal tribunal or commissioner<sup>16</sup>, as the case may be, may refuse to determine the question whether an accident was an industrial accident if satisfied that it is unlikely to be necessary to determine the question for the purposes of any claim for benefit; but any such refusal of an adjudication officer or social security appeal tribunal is subject to appeal to a social security appeal tribunal or commissioner, as the case may be<sup>17</sup>. Any such declaration that an accident was or was not an industrial accident is conclusive for the purposes of any claim for industrial injuries benefit in respect of that accident<sup>18</sup>.

For these purposes<sup>19</sup>, an accident whereby a person suffers personal injury is deemed, in relation to him, to be an industrial accident if:

- 376 (1) it arises out of and in the course of his employment<sup>20</sup>;
- 377 (2) that employment is employed earner's employment<sup>21</sup>;
- 378 (3) payment of benefit is not precluded because the accident happened while he was outside Great Britain<sup>22</sup>.

A decision under these provisions is final except that it may be reviewed<sup>23</sup> if, but only if, the adjudication officer or social security appeal tribunal, as the case may be, is satisfied that the decision was given in consequence of wilful non-disclosure or misrepresentation of a material fact<sup>24</sup>.

- 1 For the decisions under the old scheme see Willis's Workmen's Compensation (37th Edn, 1945).
- 2 *Nancollas v Insurance Officer* [1985] 1 All ER 833, CA.
- 3 See *Smith v Stages* [1989] AC 928 at 947-948, [1989] 1 All ER 833 at 845, HL, per Lord Lowry, considering *Nancollas v Insurance Officer* [1985] 1 All ER 833, CA; *Faulkner v Chief Adjudication Officer* [1994] PIQR P244, CA.
- 4 See Decision R(I) 1/93.
- 5 See Decision CSI 2/48.
- 6 For the meaning of 'claimant' see PARA 19 note 5 ante.
- 7 See the Social Security Contributions and Benefits Act 1992 s 94(3); and PARA 127 ante.
- 8 Ie 'in the absence of evidence to the contrary', not 'unless the contrary is proved'.
- 9 *R v National Insurance (Industrial Injuries) Comr, ex p Richardson* [1958] 2 All ER 689, [1958] 1 WLR 851, DC; Decisions R(I)16/61; and R(I)6/82. The contrary evidence must be more than speculation, but need not amount to proof: Decisions R(I)1/64; and CI/207/1987. For example, an unexplained fall while at work might attract the presumption (Decisions CI127/50; and R(I)64/51), but it might be rebutted in such a case by evidence of an illness or condition which could have caused the fall such as epilepsy (Decisions CI68/49; R(I)12/51; and R(I)5/63). Evidence in rebuttal could also come from the fact that the employee was doing something for his own benefit (Decisions R(I)24/51; R(I)68/52; R(I)24/56; and R(I)1/59) or was drunk (Decision R(I)5/59).
- 10 For the meaning of 'claim' see PARA 19 note 5 ante.
- 11 For the meaning of 'industrial injuries benefit' see PARA 127 note 1 ante.
- 12 'Relevant accident' means the accident in respect of which industrial injuries benefit is claimed or payable: Social Security Contributions and Benefits Act 1992 s 122(1); Social Security Administration Act 1992 s 192(2).
- 13 Ibid s 44(1).
- 14 Ie ibid ss 44(3), 60: see s 44(2); and see PARAS 333, 379 post.
- 15 Ibid s 44(2). The Social Security Administration Act 1992 Pt II (ss 17-70) (as amended) applies for that purpose as if the question had arisen in connection with a claim for benefit: s 44(2).
- 16 For the meaning of 'commissioner' see PARA 30 note 3 ante.
- 17 Social Security Administration Act 1992 s 44(3).
- 18 Ibid s 44(4). This is subject to Pt II (as amended) as to appeal and review: see s 44(4). Where s 44(4) applies (1) in relation to a death occurring before 11 April 1988; or (2) for the purposes of the Social Security Contributions and Benefits Act 1992 s 60(2) (as amended), it has effect as if at the end there were added the words 'whether or not the claimant is the person at whose instance the declaration was made': Social Security Administration Act 1992 s 44(5).
- 19 Ie for the purposes of ibid s 44, but subject to s 60(3): see s 44(6).
- 20 Ibid s 44(6)(a).
- 21 Ibid s 44(6)(b). As to employed earner's employment see PARA 128 ante.
- 22 Ibid s 44(6)(c). As to preclusion under the Social Security Contributions and Benefits Act 1992 s 94(5) see PARA 127 ante.
- 23 Ie the Social Security Administration Act 1992 ss 25-29 (as amended) apply to a decision under s 44 that an accident was or was not an industrial accident as they apply to a decision under ss 21-23: see s 44(7).
- 24 Ibid s 44(7).

## UPDATE

## 129 Establishing an industrial accident

TEXT AND NOTES--Where, in connection with any claim for industrial injuries benefit, it is decided that the relevant accident was or was not an industrial accident (1) an express declaration of that fact must be made and recorded, and (2) subject to the Social Security Act 1998 s 29(3), a claimant is entitled to have the issue whether the relevant accident was an industrial accident decided notwithstanding that his claim is disallowed on other grounds: s 29(1). For the meaning of 'claimant' see PARA 356A.1. Subject to ss 29(3) and 30, any person suffering personal injury by accident is entitled, if he claims the accident was an industrial accident (a) to have that issue decided, and (b) to have a declaration made and recorded accordingly, notwithstanding that no claim for benefit has been made in connection with which the issue arises: s 29(2). The 1998 Act Pt I Ch II (ss 8-39: see PARA 356A) applies for that purpose as if the issue had arisen in connection with a claim for benefit: s 29(2). The Secretary of State, the First-tier Tribunal or the Upper Tribunal (as the case may be) may refuse to decide the issue whether an accident was an industrial accident if satisfied that it is unlikely to be necessary to decide the issue for the purposes of any claim for benefit, and Pt I Ch II applies as if any such refusal were a decision on the issue: s 29(3) (amended by SI 2008/2833). Subject to the 1998 Act ss 9-15 (see PARA 356A), any declaration under s 29 that an accident was or was not an industrial accident is conclusive for the purposes of any claim for industrial injuries benefit in respect of that accident: s 29(4). Section 29(4) is modified in relation to deaths occurring before 11 April 1988, or for the purposes of the Social Security Contributions and Benefits Act 1992 s 60(2) (see PARA 565): see the Social Security Act 1998 s 29(5).

For the purposes of s 29 (but subject to s 30), an accident whereby a person suffers personal injury is deemed, in relation to him, to be an industrial accident if (i) it arises out of and in the course of his employment, (ii) that employment is employed earner's employment for the purposes of the Social Security Contributions and Benefits Act 1992 Pt V (ss 94-122), and (iii) payment of benefit is not under s 94(5) (see PARA 127) precluded because the accident happened while he was outside Great Britain: Social Security Act 1998 s 29(6).

A decision under s 29 is final except that ss 9 (see PARA 356A.2) and s 10 (see PARA 356A.2) apply to a decision under s 29 that an accident was or was not an industrial accident as they apply to a decision under s 8 (see PARA 356A.1) if, but only if, the Secretary of State is satisfied that the decision under s 29 was given in consequence of any wilful non-disclosure or misrepresentation of a material fact: s 29(7).

A decision (given under s 29(2) or otherwise) that an accident was an industrial accident is to be taken as determining only that heads (i)-(iii) are satisfied in relation to the accident: s 30(1). Subject to s 30(3), (4), no such decision is to be taken as importing a decision as to the origin of any injury or disability suffered by the claimant, whether or not there is an event identifiable as an accident apart from any injury that may have been received: s 30(2). A decision that, on a particular occasion when there was no event so identifiable, a person had an industrial accident by reason of an injury is to be treated as a decision that, if the injury was suffered by accident on that occasion, the accident was an industrial accident: s 30(3). A decision that an accident was an industrial accident may be given, and a declaration to that effect be made and recorded in accordance with s 29, without its having been found that personal injury resulted from the accident: s 30(4). This has effect subject to the discretion under s 29(3) to refuse to decide the issue if it is unlikely to be necessary for the purposes of a claim for benefit: s 30(5).



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(1) IN GENERAL/130. Meaning of 'personal injury'.

### **130. Meaning of 'personal injury'.**

The first requirement of the right to benefit is that the claimant must have suffered personal injury<sup>1</sup>. This normally excludes damage to any form of artificial prosthesis, such as an artificial leg<sup>2</sup> or spectacles<sup>3</sup>. Where, however, the prosthesis is a part of the living body (as with an artificial hip), damage to it may constitute personal injury<sup>4</sup>. There must normally be some physiological injury or change for the worse<sup>5</sup>, so that an increase simply in a level of pain will not be sufficient<sup>6</sup>. Personal injury can include nervous shock<sup>7</sup>. However, as with cases of more subtle physiological changes, there may be substantial difficulties in such cases in showing that there was in fact an accident or that it was linked to the employment<sup>8</sup>.

1 See PARA 127 ante.

2 Decision R(I)7/56.

3 Decision R(I)1/82.

4 Decision R(I)8/81.

5 *Oates v Earl Fitzwilliam's Collieries Co* [1939] 2 All ER 498, 32 BWCC 82, CA; Decision CI27/49; *Jones v Secretary of State for Social Services* [1972] AC 944, [1972] 1 All ER 145, HL.

6 Decisions R(I)19/60; and R(I)1/76.

7 *Yates v South Kirkby, etc Collieries Ltd* [1910] 2 KB 538, 3 BWCC 418, CA; Decisions R(I)49/52; and R(I)22/59. Purely mental shock may be insufficient: see *Re Drake* [1945] 1 All ER 576.

8 In Decision CI/054/94 severe psychological shock suffered by the claimant when he saw the Piper Alpha disaster (in which his brother died) on television while at home on sick leave did not arise out of and in the course of employment.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(1) IN GENERAL/131. Meaning of 'accident'.

### 131. Meaning of 'accident'.

An accident is an unlooked-for mishap or an untoward event which is not expected or designed<sup>1</sup>. 'Unexpected' in this context means unexpected by the person injured, and so the definition may include a deliberate assault by another person<sup>2</sup>. However, a self-inflicted injury such as suicide is unlikely to qualify<sup>3</sup>, unless there is a condition of nervous or mental derangement as a result of the accident or shock resulting from it which, as a matter of causation, can be said to have led to the suicide<sup>4</sup>.

The normal case will be where the accident is an event which causes injury to the claimant, but the definition also covers cases<sup>5</sup> of physiological or pathological changes for the worse which occur while the person is at work (such as a fit or a heart attack) where the accident actually is the injury<sup>6</sup>. In such a case (unless there is evidence of further injury, for example through falling as a result of the attack) the difficulty is not whether there was an accident, but whether it arose out of the employment as a matter of causation; if not, it will not be an industrial accident even though it occurred during working hours<sup>7</sup>.

Whatever the kind of accident, a causal link must be shown between the accident and the injury, at least to the extent of the accident having been a contributory cause, if not the sole cause<sup>8</sup>. The significance of this is that there can be an accident even where the injury was partly due to some existing weakness or susceptibility<sup>9</sup>. Further, a non-industrial injury may qualify if it came about as a result of a previous industrial action, provided the causal link remains<sup>10</sup>. Where there are successive accidents, each apparently linked to the employment, each must be looked at in isolation to see whether it qualifies as an industrial accident, although on the facts one may have a bearing on the other<sup>11</sup>.

1 This is the definition given in *Fenton v J Thorley & Co Ltd* [1903] AC 443 at 448, 19 TLR 684 at 685, HL, per Lord Macnaghten, which has been frequently cited and adopted. See eg Decision CI/365/89. The fact that the event in question was caused by the carelessness does not prevent it being accidental for these purposes: *Fenton v J Thorley & Co Ltd* supra at 453 and at 686 per Lord Lindley; *Harris v Associated Portland Cement Manufacturers Ltd* [1939] AC 71, [1938] 4 All ER 831, HL.

2 *Trim Joint District School Board of Management v Kelly* [1914] AC 667, 7 BWCC 274, HL; Decision R(I)30/58.

3 Decisions R(I)38/51; R(I)19/52; and R(I)23/57.

4 Decisions R(I)2/57; and R(I)36/60. In the latter case, there was still the causal link when the state of depression caused by the accident led to suicide four months later. However, if there is no actual derangement and the person later commits suicide simply because he cannot face the physical consequences of the accident the chain of causation may be broken: *Dixon v Sutton Heath and Lea Green Colliery Ltd (No 2)* (1930) 23 BWCC 135, CA; Decision CI172/50.

5 Sometimes referred to as 'internal accidents' eg caused by heavy lifting: Decision R(I)11/80.

6 *Jones v Secretary of State for Social Services* [1972] AC 944, [1972] 1 All ER 145, HL.

7 Decision R(I)6/82. Where the event in question was in fact the culmination of a series of events (eg frequent heavy lifting) leading up to the internal change, there may be the further complication of distinguishing between an accident and a process: see PARA 132 post.

8 Decisions R(I)14/51; and R(I)12/58. Independent fault on the part of the claimant himself may be construed as the effective cause and so disentitle him: Decision R(I)4/58 (burns caused by claimant lighting a cigarette while covered in inflammable liquid from an accident at work).

9 Decisions R(I)2/52; R(I)14/51; and R(I)19/63. The 'eggshell skull' principle may be applied here, as in the law of tort: Decision R(I)6/91; and see NEGLIGENCE vol 78 (2010) PARA 62 et seq.

10 Decisions R(I)59/51; and R(I)3/56.

11 Decision CI/105/1990.

## **UPDATE**

### **131 Meaning of 'accident'**

NOTE 1--Identification of an accident or accidents causing injury to a claimant is crucial to the establishment of entitlement to industrial injury benefit under the Social Security Contributions and Benefits Act 1992 s 94(1): *Chief Adjudication Officer v Faulds* [2000] 1 WLR 1035, HL.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(1) IN GENERAL/132. 'Accident' distinguished from process.

### **132. 'Accident' distinguished from process.**

A particular difficulty may arise where there has been the onset of a condition or disease over a period of time, because the claimant must show that there was an incident or series of incidents that can fairly be termed an accident causing that condition or disease. If that can be shown, there is an injury by accident, which may give rise to an entitlement to benefit<sup>1</sup>. If, however, that cannot be shown, the case falls into the category of a 'process', which is not covered by the industrial injury scheme<sup>2</sup>. In the latter case, the claimant will only succeed if the disease is a prescribed one for the purposes of the separate industrial disease provisions, and he satisfies any further conditions imposed by those provisions<sup>3</sup>.

The distinction between an accident and a process is fundamental to the scheme, but has not been without problems. A claimant may be helped by either or both of two principles. The first is that it may be sufficient that the event relied on was merely the last in a chain of events or deteriorations<sup>4</sup>. The second is that there may be no need to date a specific occurrence, provided that it is clear that it must have happened and had the necessary causative effect<sup>5</sup>. In spite of this, the adjudicating authorities may need to take difficult decisions on marginal facts<sup>6</sup>. The considerable amount of case law on this point may offer some guidance<sup>7</sup> but ultimately the decision has to be taken in the light of all the facts of the particular case, and not as a result of supposed rules of law established by previous decisions<sup>8</sup>.

An example of the problems in this area concerns the controversy over passive smoking, especially in offices. Normally, the harm resulting from contact over a period of time with smokers will be viewed as a process and so a claim will fail<sup>9</sup>. If, however, it can be proved that the harm in fact occurred through one or more definable occurrences of ingestion of smoke on specific occasions, this may tip the balance and constitute an accident (or series of accidents) giving rise to entitlement<sup>10</sup>. In this instance the distinction is particularly important because it has been held that passive smoking damage does not come under the prescribed disease of occupational asthma<sup>11</sup>, and so if an accident cannot be shown there will be no entitlement to benefit at all.

1 As to the right to industrial injuries benefit see PARA 127 ante.

2 See *Roberts v Dorothea Slate Quarries Co Ltd* [1948] 2 All ER 201 at 205, 41 BWCC 154 at 160-161, HL, per Lord Porter; Decision CI257/49.

3 See PARA 150 et seq post.

4 Decision R(I)54/53 (coronary thrombosis caused by particularly heavy lifting, although probably developing over a period of work); Decision R(I)18/54 (wearing a pad over a period of time producing a sudden numbness in the leg).

5 Decision CI46/59 (may need to fix a reasonable date if otherwise unascertainable); Decision CI196/50 (tuberculosis could have been caused by one massive infection, rather than exposure over a period); Decision R(I)24/54 (repeated pricks to hands causing traumatic cysts); Decision R(I)43/55 (psychoneurotic condition caused by exposure to repeated explosions qualified as injury by a series of accidents). See also Decision CI/278/1993. On this basis, mental injury caused by work-related stress may be caused by accident, especially if the onset is relatively quick although not datable: Decision CI/554/1992.

6 The period of onset may be an important factor here, with a relatively short period pointing to an accident rather than a process (see eg Decisions R(I)18/54; R(I)43/61; and R(I)4/62, all of which were successful and which concerned onset periods of two months, three days and two weeks respectively). However, it is always possible to point to seemingly inconsistent cases on this point (see eg Decisions R(I)42/51 and R(I)19/56, which were unsuccessful and concerned onset periods of two months and three days respectively), and ultimately the

inquiry must be a general one, taking into account all the circumstances and not just the onset period: *R v Industrial Injuries Comr, ex p Starr*, reported as an appendix to Decision R(I)11/74.

7 An accident was established in the following cases: *Fife Coal Co Ltd v Young* [1940] AC 479, [1940] 2 All ER 85, HL (dropped foot through continual kneeling); Decision CI 29/49 (strained heart due to heavy lifting); Decision CI 159/50 (trainee nurse catching polio from infected child); Decision R(I)3/51 (fibrositis caused by two drenchings from rain at work); Decision R(I)31/52 (fibrositis from severe draught during a single morning); Decision CI/72/1987 (orchestra oboe player contracting throat hernia). However, there was no accident, only a process, in the following cases: Decision CI 257/49 (grinder contracting Raynaud's phenomenon); Decision CI 83/50 (doctor contracting tuberculosis through treating infected patients); Decision CI 125/50 (glazier developing disease of the hand); Decision CI 244/50 (draught through ventilator in bus driver's cab causing conjunctivitis after three months); Decision R(I)25/56 (leather stitcher contracting osteo-arthritis); Decision R(I)7/66 (death due to prolonged exposure to nitroglycerine); and Decision R(I)11/74 (damaged elbow due to work with machinery over five months).

8 *Nancollas v Insurance Officer* [1985] 1 All ER 833, CA; and see PARA 129 note 2 ante.

9 Decision CI/156/1993.

10 Decision R(I)6/91.

11 Decision CI/073/1994.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(1) IN GENERAL/133. Accident arising in the course of employment.

### **133. Accident arising in the course of employment.**

In order for an accident to qualify as an industrial accident for the purposes of industrial injuries benefit, the first requirement is that it must have arisen in the course of employment<sup>1</sup>. This will be so in relation to an accident if it occurs while he is doing what an employee so employed may reasonably do within the time during which he is employed, and at a place where he may reasonably be during that time to do that thing<sup>2</sup>. Several factors may have to be considered in any one case, such as time, place, occupation, actions at the time of the accident and whether the employee was acting under orders<sup>3</sup>. As elsewhere in the industrial injuries scheme, there is a large body of guiding case law (under both the existing scheme and the previous workmen's compensation legislation) but ultimately each case must be decided as a question of fact<sup>4</sup>; excessive reliance on previous, apparently similar, reported cases without applying them fully to the findings of fact may be an error of law<sup>5</sup>.

The place of work will normally cover the actual workplace and the access to it<sup>6</sup>, but may not include accidents in a 'public zone', that is an area to which in practice the public have access<sup>7</sup>. Problems may arise with employees who have no normal workplace, work out in the community<sup>8</sup> or are on call<sup>9</sup>.

With regard to the time of the work, an employee may be in the course of employment not only during actual working hours, but also for a certain period before and afterwards<sup>10</sup>.

Even with a relatively wide interpretation of place and time of employment there could still be harsh distinctions drawn if too literal an approach were taken as to what the course of the employment itself covers, and so it has long been recognised that there must be included certain activities which are reasonably incidental to the employment itself<sup>11</sup>. Thus, an employee will not take himself out of the course of the employment merely by talking to a friend or smoking in the general context of the employment<sup>12</sup>. This is particularly important in relation to breaks in employment, which will generally remain in the course of employment if taken in accordance with the employer's permission<sup>13</sup>. However, it must be borne in mind that the phrase 'reasonably incidental' is not part of the statutory test, and caution may need to be exercised when applying it outside the established category of breaks during employment<sup>14</sup>.

1 See PARA 127 ante.

2 See *Moore v Manchester Liners Ltd* [1910] AC 498 at 500, HL, per Lord Loreburn. A more succinct formulation is that the employee must be doing something he was employed to do: *St Helens Colliery Co Ltd v Hewitson* [1924] AC 59 at 71, 40 TLR 125 at 127, HL, per Lord Atkinson; *Smith v Stages* [1989] AC 928, [1989] 1 All ER 833, HL.

3 If acting directly under orders, the employee will almost certainly be in the course of employment, but the fact that he was not so acting will not always disqualify him: Decision R(I)1/70 (still in the course of employment although acting in an unauthorised manner). Acting merely in a permitted, as opposed to ordered, manner may still qualify: Decision R(I)1/88 (returning home by permitted company vehicle held in the course of employment).

4 *Nancollas v Insurance Officer* [1985] 1 All ER 833, CA; *Smith v Stages* [1989] AC 928, [1989] 1 All ER 833, HL; and see PARA 129 ante.

5 Decision R(I)1/93.

6 Decisions R(I)7/52; and R(I)5/67.

7 Decisions R(I)1/68; R(I)43/51; R(I)72/51; R(I)7/52; and R(I)41/57.

8 In Decision R(I)4/70 a civil servant working partly by making home visits was covered for a street accident when about to make his first visit of the day; but in Decision R(I)2/67 a home help on her way to her first call was held not in the course of employment, as this was merely preparatory to her work. See also Decisions R(I)12/75; R(I)14/81; and R(I)1/83. An employee working away from home is covered by an accident in accommodation where he is required to be: Decision R(I)30/57; but not if in accommodation chosen by himself (even if recommended by the employer): Decision R(I)22/54.

9 Being on call alone will not necessarily mean that the employee remains in the course of employment: Decision R(I)28/53 (fire officer on 24 hour call not covered for accident while at home); followed in Decision R(I)5/81. Where, however, there are restrictions on where the employee can be while on call, the employee may remain in the course of employment: *R v National Insurance Comr, ex p Reed* reported as an appendix to Decision R(I)7/80 (police sergeant permitted to take lunch at home while on call held covered while travelling back to the police station). Thus, where a driver was injured after he had delivered the passengers to a sporting event but before he was due to pick them up again he was not covered: Decisions R(I)10/52; and R(I)32/51. However, this was distinguished in Decision R(I)11/55 where the driver was required by the employer to remain with the coach or at the sports ground in case he was needed.

10 *R v National Insurance Comr, ex p East* [1976] ICR 206, DC. In that case the following passage from Willis' Workmen's Compensation (37th Edn, 1945) p 36 was approved. 'The course of employment may be taken to have commenced although the hour for actual work has not struck, if the workman's arrival on the premises is either not unreasonably early, or is necessitated by the circumstances of the employment, or if, at the time of the accident, he is doing something on the employer's premises which is necessary to be done to equip himself for his work': *R v National Insurance Comr, ex p East* supra at 210 per Lord Widgery CJ.

Thus, arriving reasonably early to avoid rush and congestion may be in the course of employment: Decisions R(I)22/56; and R(I)3/62. However, the travelling itself may not be covered (Decision R(I)22/53), or going to a canteen for food before a shift starts (Decision R(I)11/54); see also Decision R(I)1/59 (arriving early for a game of billiards). Likewise a reasonable period may be allowed at the end of a shift, for example in the case of a miner taking a bath: Decisions CI 24/49; CI 26/49; and CI 211/49. However, remaining on the premises for the employee's own purposes, for example to have a meal in the canteen, may not be covered (Decision R(I)14/61), nor attending the premises other than during work time for the employee's own purposes, for example to collect pay (Decision CI 114/1987); cf *Molloy v South Wales Anthracite Colliery Co* (1910) 4 BWCC 65, CA (collecting tools); *Riley v William Holland & Sons Ltd* [1911] 1 KB 1029, 4 BWCC 155, CA (collecting wages).

11 *Armstrong, Whitworth & Co Ltd v Redford* [1920] AC 757, HL; applied in *R v Industrial Injuries Comr, ex p Amalgamated Engineering Union (No 2)* [1966] 2 QB 31, [1966] 1 All ER 97, CA. See also *Charles R Davidson & Co Ltd v M'Robb* [1918] AC 304, 10 BWCC 673, HL.

12 *R v Industrial Injuries Comr, ex p Amalgamated Engineering Union (No 2)* [1966] 2 QB 31 at 49, [1966] 1 All ER 97 at 104, CA, per Lord Denning MR. Thus, the employee remained in the course of employment in Decision R(I)16/62 (employee injured by employer's chiropodist during normal working hours); Decision R(I)2/63 (injury caused by gas explosion following authorised lighting of cigarette); Decision R(I)17/63 (injury while handing over sweet); Decision R(I)2/58 (attendance at day release class); Decision R(I)4/73 (collecting pools coupons during working hours); and Decision R(I)1/77 (putting up Christmas decorations at work). Participation in trade union meetings may be covered if concerning matters relating to the employer: Decisions R(I) 63/51; R(I)9/57; R(I)46/59; and R(I)10/80.

13 Decisions CI 34/50; R(I)11/53; and R(I)4/67. An employee may, however, take himself out of the course of employment by overstaying a permitted break (*R v Industrial Injuries Comr, ex p Amalgamated Engineering Union (No 2)* [1966] 2 QB 31, [1966] 1 All ER 97, CA; Decision R(I)4/66); or by leaving the place where he should be during the break (Decision R(I)10/81 (merchant seaman going ashore for own purposes)).

14 *R v National Insurance Comr, ex p Michael* [1977] 2 All ER 420 at 423, [1977] ICR 121 at 126, CA, per Lord Denning MR. The case involved the particularly difficult question whether a sporting injury is in the course of employment: see further PARA 136 post.

## UPDATE

### 133 Accident arising in the course of employment

NOTE 2--The two questions to be asked are what are the employee's work duties, and was the employee discharging a duty at the time of the accident: *Chief Adjudication Officer v Rhodes* [1999] ICR 178, CA.



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### 134. Accident arising out of the employment.

It is not sufficient that the accident arose factually in the course of the employment; it is also necessary that it arose out of the employment<sup>1</sup>. This is primarily a question of causation, designed to ensure that benefit is only payable to those injured by employment risks. It is necessary to ask whether it was a part of the employee's employment that he should have acted as he was acting, or should have been in the position in which he was, whereby in the course of that employment he sustained injury<sup>2</sup>. If an employment risk was not the cause of the accident, it will not arise out of the accident, but if it was, the accident will arise out of the employment unless an act done by the employee for his own purposes has added or created a risk different from the employment risk and this different risk is the real cause of the accident<sup>3</sup>.

This emphasis upon the existence of an employment risk may mean that a claimant does not qualify for benefit if he is injured by a common risk which could have befallen anyone in his position, even though the accident happened during working time<sup>4</sup>. However, it is essential to consider further whether the circumstances of the employment were such as to involve increased exposure to what otherwise would be a common risk, in which case the accident may be held to have arisen out of the employment<sup>5</sup>. The distinction may be a fine one<sup>6</sup>, although the tendency may be to adopt a relatively liberal approach in marginal cases<sup>7</sup>.

The claimant's own conduct will only be relevant if it is serious enough to take him outside the employment altogether, which primarily means creating a different or added risk<sup>8</sup>. Short of that, there is no provision to take that conduct into account to reduce any benefit, by analogy with contributory negligence<sup>9</sup>.

1 There is a statutory presumption that an accident arising in the course of employment arises also out of that employment: see the Social Security Contributions and Benefits Act 1992 s 94(3); and PARA 127 ante. However, this only applies in the absence of evidence to the contrary, which means that it may be of limited use: see PARA 129 ante.

2 *Lancashire and Yorkshire Rly Co v Highley* [1917] AC 352 at 372, 10 BWCC 241 at 263, HL, per Lord Sumner. See also *Dennis v AJ White & Co* [1917] AC 479, 10 BWCC 280, HL; *Thorn v Sinclair* [1917] AC 127, HL; *Harris v Associated Portland Cement Manufacturers Ltd* [1939] AC 71, [1938] 4 All ER 831, HL; *Dover Navigation Co Ltd v Craig* [1940] AC 190, [1939] 4 All ER 558, HL; *Cadzow Coal Co Ltd v Price* [1944] 1 All ER 54, HL.

3 See Decision R(I)2/63, where an industrial accident resulted from an explosion caused when the claimant lit a cigarette where, unbeknown to him, gas was escaping from an unlit blow-pipe. The question whether the claimant created an added or different risk is one of fact, to be determined in the light of all the circumstances of the case: Decision R(I)2/63 supra at paras 26, 29. See also Decision R(I)77/54 (boy attempting to start machinery); Decision R(I)12/61 (repairer helping a shotfirer and causing explosion in an unauthorised manner). However, the principle of added peril remains only a factor when deciding whether or not a particular act was within the employee's employment: *Thomas v Ocean Coal Co Ltd* [1933] AC 100 at 109, 25 BWCC 436 at 445, HL, per Lord Buckmaster; *Noble v Southern Rly Co* [1940] AC 583 at 591-592, [1940] 2 All ER 383 at 387, HL, per Viscount Maugham.

4 See eg Decision R(I)89/52 (hospital porter stung by gad-fly while attending a patient); Decision R(I)52/54 (civil servant visiting houses injured when rescuing a child in the street); Decision R(I)22/59 (slate miner suffering nervous shock when told of son's death in mine accident while at work); Decision R(I)6/82 (ankle fracture while walking at work, but not caused by any contact with the employer's premises). All of these were held to be common risks.

5 *Dennis v AJ White & Co* [1917] AC 479, 10 BWCC 280, HL; *Lawrence v George Matthews (1924) Ltd* [1929] 1 KB 1, CA. See also Decision CI 401/50 (student nurse contracting typhoid fever); Decision R(I)5/56 (bus driver stung by wasp while driving); Decision R(I)27/60 (employee blown off bike by wind while in the course of

employment); Decision R(I)17/63 (potato picker run over by picking machine while handing fellow employee a sweet). All of these were held to arise out of the employment.

6 Contrast the following cases: Decision R(I)62/53 (driver struck by piece of flying grit while driving lorry held to be common risk); Decision R(I)67/53 (police motor cyclist struck by piece of flying grit while driving motor cycle held to be an industrial accident); Decision R(I)23/58 (agricultural worker struck by lightning while sheltering under a tree held to be industrial accident); Decision R(I)7/60 (agricultural worker struck by lightning while walking across a field held to be common risk).

7 See eg Decision CI/387/1988 (employee suffering nervous shock through seeing colleague in the terminal stage of an illness to which he himself was exposed); and Decision CSI/54/89 (employee injured trying to save a child, while in the street in the course of employment). Both of these accidents were held to arise out of the employment.

8 See Decision R(I)2/63; and note 3 supra. On similar facts in Decision R(I)24/51 there was such a different or added risk where fires were prohibited by the employer. Acting in contravention of orders or statutory obligations is now covered by the legislation: see PARA 138 post.

9 As to contributory negligence generally see NEGLIGENCE vol 78 (2010) PARA 75 et seq.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(1) IN GENERAL/135. Travelling to and from work.

### **135. Travelling to and from work.**

An accident happening while an employed earner is, with the express or implied<sup>1</sup> permission of his employer<sup>2</sup>, travelling as a passenger<sup>3</sup> by any vehicle<sup>4</sup> to or from his place of work is, notwithstanding that he is under no obligation to his employer to travel by that vehicle, to be taken to arise out of and in the course of his employment if (1) the accident would have been taken so to have arisen had he been under such an obligation; and (2) at the time of the accident the vehicle is being operated by or on behalf of his employer or some other person by whom it is provided in pursuance of arrangements<sup>5</sup> made with his employer, and is not being operated in the ordinary course of a public transport service<sup>6</sup>.

Outside this relatively narrow statutory category, the question of accidents while travelling to and from work has been one of the most difficult under the legislation, and has produced a large body of case law under both the existing system and the previous workmen's compensation system<sup>7</sup>. However, the modern approach is to accept that there is no conclusive test, and that a statutory authority when adjudicating on the matter must adopt a broad approach and weigh all the factors in the particular case, rather than seek to find an answer in the reported case law<sup>8</sup>. Following on from this, the House of Lords has now reviewed the whole question<sup>9</sup> and reaffirmed that the paramount rule is that an employee travelling on the highway would be acting in the course of employment if, but only if, he is at the material time going about his employer's business<sup>10</sup>.

Applying that principle, the following propositions were made. An employee travelling from his ordinary residence to his regular place of work, whatever the means of transport and even if it is provided by the employer, is not on duty and is not acting in the course of his employment, but if he is obliged by his contract of service to use the employer's transport, he would normally, in the absence of an express condition to the contrary, be regarded as acting in the course of his employment while doing so<sup>11</sup>. Travelling in the employer's time between workplaces (one of which may be the regular workplace) or in the course of a peripatetic occupation, whether accompanied by goods or tools or simply in order to reach a succession of workplaces (as an inspector of gas meters might do), will be in the course of the employment<sup>12</sup>. Receipt of wages (but not receipt of a travelling allowance<sup>13</sup>) will indicate that the employee is travelling in the employer's time and for his benefit and is acting in the course of his employment, and in such a case the fact that the employee may have discretion as to the mode and time of travelling will not take the journey out of the course of his employment. An employee travelling in the employer's time from his ordinary residence to a workplace other than his regular workplace or in the course of a peripatetic occupation or to a scene of an emergency (such as a fire, an accident or mechanical breakdown of plant) will be acting in the course of his employment. A deviation from or interruption of a journey undertaken in the course of employment (unless the deviation or interruption is merely incidental to the journey) will for the time being (which may include an overnight interruption) take the employee out of the course of his employment. Return journeys are to be treated on the same footing as outward journeys<sup>14</sup>.

It is therefore submitted that the correct approach now is to weigh carefully all the facts in the case under consideration, drawing such guidance from the propositions above as may be appropriate.

<sup>1</sup> Permission may be implied where the employer knows of the practice and does not prevent it: Decision R(I)8/62.

2 Where there has been a divergence from the route without the employer's permission this provision may cease to apply: Decision R(I)50/55 (member of furniture removal team killed on the journey from a public house to his home; held not an industrial accident).

3 'Passenger' does not include the driver of the vehicle and so does not apply to a cyclist: Decisions CI 49/59; R(I)9/51; and R(I)51/51. As this is an artificial extension of the course of employment, it must be strictly limited to the circumstances described, and will not apply, for example, to a person in the roadway prior to boarding the vehicle: Decision R(I)67/52. See also Decisions R(I)79/51; R(I)1/53; and R(I)48/54.

4 'Vehicle' includes a ship, vessel, hovercraft or aircraft: Social Security Contributions and Benefits Act 1992 s 99(2). It has been held to include a tractor being used to transport an employee home: Decision R(I)42/56.

5 Normally the arrangements would be made by contract between the employer and the provider of the vehicle. In the absence of a contract, there must be some definite, ascertainable arrangement between them which excludes the general public: Decision R(I)67/51 (special times fixed for running ordinary passenger trains insufficient). The arrangement must be with the employer: Decision R(I)101/49. In Decision R(I)5/80 there was a contract between the employer and a bus company to provide a passenger service for employees, but the employee was injured while travelling in the bus driver's private car for part of the return journey; this was outside the terms of the agreement and the accident was not an industrial accident.

6 Social Security Contributions and Benefits Act 1992 s 99(1).

7 The old case law is set out in Neligan *Social Security Case Law: Digest of Commissioners' Decisions* Ch 8.

8 *Nancollas v Insurance Officer* [1985] 1 All ER 833, CA. There remains a distinction to be drawn between cases where the act is done under an obligation to the employer (which will almost invariably be in the course of employment) and those where the act is merely done with the employer's permission (which may or may not be in the course of employment, depending on the facts): Decision R(I)1/88.

9 See *Smith v Stages* [1989] AC 928, [1989] 1 All ER 833, HL. The case in fact relates to the vicarious liability of an employer in the law of tort in relation to a road accident caused by his employee, but the tests are the same and the case has been adopted and applied in the social security context: see Decisions CI/110/1988; CI/163/1988; and R(I)1/91.

10 'One must not confuse the duty to turn up for one's work with the concept of already being 'on duty' while travelling to it': *Smith v Stages* [1989] AC 928 at 955, [1989] 1 All ER 833 at 851, HL, per Lord Lowry. There may, of course, be an overlap here with the more general question of the nature and place of the particular employment: see PARA 133 ante.

11 *Smith v Stages* [1989] AC 928 at 955-956, [1989] 1 All ER 833 at 851, HL, per Lord Lowry.

12 *Smith v Stages* [1989] AC 928 at 956, [1989] 1 All ER 833 at 851, HL, per Lord Lowry.

13 Decision R(I)1/91 (receipt of a flat-rate travelling allowance held not to constitute the receipt of wages while travelling).

14 *Smith v Stages* [1989] AC 928 at 956, [1989] 1 All ER 833 at 851, HL, per Lord Lowry.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(1) IN GENERAL/136. Accidents during recreation and training.

### **136. Accidents during recreation and training.**

Generally, an accident which results from an activity in which the claimant is obliged to engage by virtue of the terms (whether express or implied) of his contract of employment should be regarded as arising out of and in the course of employment<sup>1</sup>. Therefore, where participation in recreation is part of the claimant's duty, or such a normal and regular incident of his duty that it can be regarded as part of it, an accident in the course of that participation arises out of and in the course of employment<sup>2</sup>. Beyond that, there is a difficult distinction to be drawn, especially as it has been stated that the concept of activities 'reasonably incidental' to the employment is to be used with caution in this area<sup>3</sup>. Thus, a police constable selected to play football for his police force was not in the course of his employment during the match<sup>4</sup>. However, an officer might be considered to be in the course of employment if the recreational activity was organised as part of a programme designed to suit him for his duties<sup>5</sup>.

1 Claims were allowed in Decision CI 228/50 (apprentice injured during compulsory training); and Decision R(I)2/68 (apprentice injured during voluntary training). Claims were disallowed in Decision CI 229/50 (employee expected but not obliged to take part in a physical training class); and Decision R(I)10/80 (school cleaner granted paid leave for a trade union training course and injured on the premises where it was being held).

2 In the case of a nurse injured while playing games (especially in a mental home) the matter depends on the predominant purpose of those games. If it is to provide exercise for the nurse and only incidentally for the entertainment of the patients, it is not part of the employment, but if it is predominantly to exercise or occupy the patients it is part of the employment: Decisions R(I)13/51; R(I)33/56; and R(I)3/57. A school teacher injured at a Christmas party which she was required to attend succeeded in her claim: Decision R(I)62/52. However, claims were unsuccessful in the cases of a laboratory technician injured playing football on the hospital grounds during the lunch hour, which was encouraged by the employer (Decision R(I)2/69) and an airline stewardess injured playing tennis on a stop-over (Decision R(I)4/81).

3 *R v National Insurance Comr, ex p Michael* [1977] 2 All ER 420, [1977] ICR 121, CA; and see PARA 133 ante.

4 *R v National Insurance Comr, ex p Michael* [1977] 2 All ER 420, [1977] ICR 121, CA; followed in *Faulkner v Chief Adjudication Officer* [1994] PIQR P244, CA.

5 *R v National Insurance Comr, ex p Michael* [1977] 2 All ER 420 at 431, [1977] ICR 121 at 135, CA, per Lawton LJ. In Decision R(I)3/81 a police cadet required to compete in a swimming championship as part of a training exercise was in the course of employment when injured in a road accident on the way back to the training school. A similar distinction can be seen in the cases relating to firemen suffering sporting injuries. Cases have succeeded where participation was compulsory (Decision R(I)68/51) or where the playing of volleyball during recreational periods during long periods of waiting was encouraged as a way of maintaining fitness (Decision R(I)13/66, not following earlier decisions to the contrary in Decisions CI 17/50; and CI 145/50). Where, however, the injury was sustained by a fireman playing football in the evening after hours at a residential college it was held that the accident did not arise in the course of employment: Decision R(I)2/80.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(1) IN GENERAL/137. Accidents in the course of illegal employments.

### **137. Accidents in the course of illegal employments.**

The Secretary of State<sup>1</sup> may direct that the relevant employment<sup>2</sup> is, in relation to that accident, disease or injury, to be treated as having been employed earner's employment<sup>3</sup> notwithstanding that by reason of a contravention of, or non-compliance with, some provision contained in or having effect under an enactment passed for the protection of employed persons or any class of employed persons, either (1) the contract purporting to govern the employment was void; or (2) the employed person was not lawfully employed in the relevant employment at the time when, or in the place where, the accident happened or the disease or injury was contracted or received<sup>4</sup>.

The Secretary of State may make such a direction in any case where (a) a claim<sup>5</sup> is made for industrial injuries benefit<sup>6</sup> in respect of an accident, or of a prescribed disease or injury; or (b) an application is made<sup>7</sup> for a declaration that an accident was an industrial accident, or for a corresponding declaration as to a prescribed disease or injury<sup>8</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 'Relevant employment' means (1) in relation to an accident, the employment out of and in the course of which the accident arises; and (2) in relation to a prescribed disease or injury, the employment to the nature of which the disease or injury is due: Social Security Contributions and Benefits Act 1992 s 97(3). As to prescribed diseases see s 108; and PARA 152 post.

3 As to employed earner's employment see PARA 128 ante.

4 Social Security Contributions and Benefits Act 1992 s 97(2).

5 For the meaning of 'claim' see PARA 19 note 5 ante.

6 For the meaning of 'industrial injuries benefit' see PARA 127 note 1 ante.

7 Ie made under the Social Security Administration Act 1992 s 44 (see PARA 129 ante): see the Social Security Contributions and Benefits Act 1992 s 97(1).

8 Ibid s 97(1).

### **UPDATE**

### **137 Accidents in the course of illegal employments**

NOTE 7--The reference is now to the Social Security Act 1998 s 29: Social Security Contributions and Benefits Act 1992 s 97(1) (amended by the Social Security Act 1998 Sch 7 para 64).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(1) IN GENERAL/138. Accident when employee acting in breach of regulations or instructions.

### **138. Accident when employee acting in breach of regulations or instructions.**

An accident is to be taken to arise out of and in the course of an employed earner's employment<sup>1</sup>, notwithstanding that he is at the time of the accident acting in contravention of any statutory or other regulations<sup>2</sup> applicable to his employment, or of any orders given by or on behalf of his employer<sup>3</sup>, or that he is acting without instructions from his employer<sup>4</sup>, if (1) the accident would have been taken so to have arisen had the act not been done in contravention of any such regulations or orders, or without such instructions, as the case may be; and (2) the act is done for the purposes of and in connection with the employer's trade or business<sup>5</sup>.

Three questions have to be asked: (a) whether, looking at the facts as a whole, including any regulations or orders affecting the employee, the accident was one which arose out of and in the course of employment; (b) if the first question is answered in the negative, whether the negative answer is due to the fact that, when the accident occurred, the employee was acting in contravention of some regulation or order; (c) if the second question is answered in the affirmative, whether the act which the employee was engaged in performing was done by him for the purposes of and in connection with employer's trade or business<sup>6</sup>.

1 As to employed earner's employment see PARA 128 ante.

2 Eg riding in a tub contrary to statutory regulations as to coal mines (Decision CI 11/49; *James Nimmo & Co Ltd v Hargrey* (1941) 34 BWCC 121, HL). This does not extend to a mere notice in a bus or warning by the bus steward (Decision CI 182/49), nor a prohibition which has never been enforced (Decision CI 220/49). The claimant must have entered upon the course of his employment: Decision R(I)28/55.

3 Eg see Decision R(I)6/55, where a kitchen hand slipped when hanging a wet apron in a recess near an oven he had been forbidden to use.

4 Eg see Decision R(I)76/51, where a ship's fireman voluntarily helped a seaman to put hatches in place; and Decision R(I)4/59, where the claimant was injured on a public highway going to meet his employer's lorry.

5 Social Security Contributions and Benefits Act 1992 s 98. 'Trade or business' includes, in relation to a public or local authority, the exercise and performance of the powers and duties of that authority: s 122(1).

6 See *Noble v Southern Rly Co* [1940] AC 583 at 591, [1940] 2 All ER 383 at 386-387, HL, per Viscount Maugham; adopted in Decision CI 210/50. Earlier cases tended to draw a sharp distinction between cases to which the statutory provisions now contained in the Social Security Contributions and Benefits Act 1992 s 98 could apply and cases where the actions of the employee were such that he was not engaged on what he was employed to do at all: see eg Decision R(I)12/61 (colliery repairer injured while coupling up a shot for shot firer); and Decision R(I)17/61 (colliery worker finishing his work and walking up the haulage way while it was still working, in breach of orders). In neither case could the employee claim the protection of the statutory provisions.

In *R v D'Albuquerque, ex p Bresnahan* [1966] 1 Lloyd's Rep 69, DC (reported as an appendix to Decision R(I)1/66) the death of a dock labourer, employed as a 'hooker-on', whilst driving a fork lift truck was held not to arise in the course of employment because driving the truck was not within the scope of his employment; but this decision has been doubted: see *Kay v ITW Ltd* [1968] 1 QB 140 at 157, [1967] 3 All ER 22 at 29, CA, per Sachs LJ. *R v D'Albuquerque, ex p Bresnahan* supra was distinguished in Decision R(I)1/70, where a dock labourer loading a ship was injured while driving an electric truck to fetch the necessary slings; he was not authorised or permitted to drive the truck, but it was held that this was merely an unauthorised manner of carrying out his employment and so the statutory provisions now contained in the Social Security Contributions and Benefits Act 1992 s 98 applied. See further Decision CI 9/74 (unreported) in which *R v D'Albuquerque, ex p Bresnahan* supra was no longer regarded as good law.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(1) IN GENERAL/139. Accidents happening while meeting emergencies.

### **139. Accidents happening while meeting emergencies.**

An accident happening to an employed earner<sup>1</sup> in or about any premises<sup>2</sup> at which he is for the time being employed for the purposes of his employer's trade or business<sup>3</sup> is to be taken to arise out of and in the course of his employment if it happens while he is taking steps, on an actual or supposed emergency<sup>4</sup> at those premises, to rescue, succour or protect persons who are, or are thought to be or possibly to be, injured or imperilled, or to avert or minimise serious damage to property<sup>5</sup>.

In addition to the above statutory provision, an accident may be held to arise out of a person's employment on ordinary principles if, at the time of the occurrence, the employee was acting reasonably and sensibly in dealing with something that happened unexpectedly, and so was doing something incidental to his employment<sup>6</sup>. It is sufficient that the employee qualifies either under the general principle or the special statutory provision<sup>7</sup>.

1 For the meaning of 'employed earner' see PARA 128 ante.

2 'Premises' do not include the public highway (Decision CI 52/54), but may include a road adjacent to the premises in question (Decision R(I)46/60). A delivery person may be covered for an emergency at the premises to which he is delivering: Decision R(I)6/63.

3 For the meaning of 'trade or business' see PARA 138 note 5 ante. Premises at which an employed earner is for the time being employed for the purposes of training (organised by an industrial training board or the Secretary of State) are deemed to be premises at which he is for the time being employed for the purposes of his employer's trade or business: Industrial Training Act 1982 s 18(4). As to the Secretary of State see PARA 1 ante.

4 This does not necessarily imply imminent danger: Decision CI 280/49; following *Culpeck v Orient Steam Navigation Co Ltd* (1922) 15 BWCC 187, CA; and *Dermody v Higgs & Hill Ltd* [1937] 4 All ER 379, 30 BWCC 351, CA.

5 Social Security Contributions and Benefits Act 1992 s 100. The onus is on the claimant to prove that the statutory conditions are satisfied: Decisions R(I)5/54; and R(I)6/63.

6 See Decision CI 280/49 (claimant injured while helping a workman to hold up window frames); Decision R(I)11/51 (lorry driver knocked down while helping a fellow road user who was in difficulties); Decision R(I)62/51 (watchman injured while going, at a policeman's invitation, to investigate a light in nearby premises); Decision R(I)63/54 (off-duty van driver injured while rescuing the van from a burning garage). However, the claimant's actions were held not to be reasonable and sensible, and so the claim failed, in Decision R(I)32/54 (claimant injured while climbing into factory because the person responsible for opening it had not arrived).

7 Decisions CI 280/49; and R(I)6/63.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(1) IN GENERAL/140. Accident caused by misconduct etc.

#### **140. Accident caused by misconduct etc.**

An accident happening after 19 December 1961<sup>1</sup> is to be treated for the purposes of industrial injuries benefit<sup>2</sup>, where it would not apart from this provision be so treated, as arising out of an employed earner's employment<sup>3</sup> if:

- 379 (1) the accident arises in the course of the employment<sup>4</sup>; and
- 380 (2) the accident either is caused (a) by another person's misconduct, skylarking or negligence, or (b) by steps taken in consequence of any such misconduct, skylarking or negligence, or (c) by the behaviour or presence of an animal (including a bird, fish or insect), or is caused by or consists in the employed earner being struck by any object or by lightning; and
- 381 (3) the employed earner did not directly or indirectly induce or contribute to the happening of the accident by his conduct outside the employment or by any act not incidental to the employment<sup>5</sup>.

1 The day preceding the coming into force of the Family Allowances and National Insurance Act 1961 s 2 (repealed).

2 For the meaning of 'industrial injuries benefit' see PARA 127 note 1 ante.

3 For the meaning of 'employed earner's employment' see PARA 128 ante.

4 See PARA 133 ante.

5 Social Security Contributions and Benefits Act 1992 s 101. This provision was introduced partly to reverse the effects of *R v National Insurance (Industrial Injuries) Comr, ex p Richardson* [1958] 2 All ER 689, [1958] 1 WLR 851, DC, where a bus conductor assaulted on his bus was denied benefit on the basis that the attack was made on him simply as a person who happened to be there, rather than as the conductor, and so did not arise out of the employment.

In Decision R(I)3/69 a factory worker on a permitted smoke break was hit by a snowball by a young fellow employee. He followed the latter in order to remonstrate with him, but in doing so trapped his hand in a door. It was held that the claimant had not taken himself out of the course of employment, nor had his conduct contributed to the accident (aliter if he had been trying to retaliate), and so the Social Security Contributions and Benefits Act 1992 s 101 applied to him, deeming it to have been an industrial accident.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(2) DISABLEMENT PENSION/141. Disablement pension.

## (2) DISABLEMENT PENSION

### 141. Disablement pension.

An employed earner<sup>1</sup> is entitled to disablement pension if he suffers as the result of the relevant accident<sup>2</sup> from loss of physical or mental faculty<sup>3</sup> such that the assessed<sup>4</sup> extent of the resulting disablement amounts to not less than 14 per cent or, on a claim<sup>5</sup> made before 1 October 1986, 20 per cent<sup>6</sup>. However, a person is not entitled to a disablement pension until after the expiry of 90 days (disregarding Sundays) beginning with the day of the relevant accident<sup>7</sup>. The burden lies on the claimant to show on the balance of probabilities that he satisfies the conditions governing the claim<sup>8</sup>.

Where disablement pension is payable for a period<sup>9</sup>, it is paid at the appropriate weekly rate<sup>10</sup>.

1 For the meaning of 'employed earner' see PARA 128 ante.

2 For the meaning of 'relevant accident' see PARA 129 note 12 ante. The requirement that the disablement be suffered as a result of the relevant accident means that the necessary causal link must be established. This entails showing that the accident was a real and effective, if not the only, cause: Decision R(I)3/66. Whether there has been an industrial accident is determined by the usual adjudicating authorities (ie the adjudication officer, with appeal to a social security appeal tribunal, and then to a commissioner), but whether that accident resulted in a loss of faculty is a disablement question which is to be determined by the medical authorities (ie the adjudicating medical practitioner or medical appeal tribunal): Social Security Administration Act 1992 s 45(1)(a). However, it is specifically provided that a decision by the former authorities that there has been an industrial accident causing injury is not to be taken as importing a decision as to the origin of any injury or disablement suffered by the claimant (which therefore can be adjudicated upon afresh by the latter authorities): see s 60(3) (reversing *Jones v Secretary of State for Social Services* [1972] AC 944, [1972] 1 All ER 145, HL).

3 'Loss of physical faculty' includes disfigurement whether or not accompanied by any loss of physical faculty: Social Security Contributions and Benefits Act 1992 s 122(1). The loss of a kidney has been held to be a loss of faculty (even though the claimant could still exist on the other): Decision R(I)14/66. In considering a question of loss of faculty, the use of aids to mitigate the consequences of such a loss must be disregarded: Decision R(I)7/67.

4 As to the principles of assessment see PARA 142 post.

5 For the meaning of 'claim' see PARA 19 note 5 ante.

6 Social Security Contributions and Benefits Act 1992 s 103(1). Where an assessment of disablement on a claim made on or after 1 October 1986 is less than 20% but not less than 14%, it is to be treated as 20%: s 103(3).

7 Ibid s 103(6).

8 Decisions R(I)32/61; and R(I)12/62.

9 If this period is limited by reference to a definite date, the pension ceases on the death of the beneficiary before that date: Social Security Contributions and Benefits Act 1992 s 103(8). As to the period of assessment see PARA 145 post.

10 Ibid s 103(7). The rates are specified in s 103(7), Sch 4 Pt V (subject to frequent amendment). For the varying degrees of disablement, differing amounts are payable depending on whether or not the beneficiary is over the age of 18 or is entitled to an increase of benefit in respect of a child or adult dependant: see Sch 4 para 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(2) DISABLEMENT PENSION/142. General principles for assessing extent of disablement.

#### **142. General principles for assessing extent of disablement.**

In the determination of the extent of an employed earner's<sup>1</sup> disablement for the purposes of disablement pension there may be added to the percentage of the disablement resulting from the relevant accident<sup>2</sup> the assessed<sup>3</sup> percentage<sup>4</sup> of any present disablement of his (1) which resulted from any other accident after 4 July 1948 arising out of and in the course of his employment, being employed earner's employment<sup>5</sup>; and (2) in respect of which a disablement gratuity was not paid to him after a final assessment of his disablement, as well as any percentage which may be added in accordance with regulations<sup>6</sup>.

For the purposes of disablement benefit, the extent of disablement is assessed by reference to the disabilities incurred by the claimant as a result of the relevant loss of faculty<sup>7</sup>, in accordance with the following principles:

- 382 (a) Except as provided in heads (b) to (d) below, the disabilities to be taken into account are all disabilities so incurred (whether or not involving loss of earning power or additional expense) to which the claimant<sup>8</sup> may be expected, having regard to his physical and mental condition at the date of the assessment, to be subject during the period taken into account by the assessment as compared with a person of the same age and sex whose physical and mental condition is normal<sup>9</sup>;
- 383 (b) regulations may make provision as to the extent (if any) to which any disabilities are to be taken into account where they are disabilities which, though resulting from the relevant loss of faculty, also result, or without the relevant accident might have been expected to result, from a cause other than the relevant accident<sup>10</sup>;
- 384 (c) the assessment is made without reference to the particular circumstances of the claimant other than age, sex, and physical and mental condition<sup>11</sup>;
- 385 (d) the disabilities resulting from such loss of faculty as may be prescribed are taken as amounting to 100 per cent disablement and other disabilities are assessed accordingly<sup>12</sup>.

1 For the meaning of 'employed earner' see PARA 128 ante.

2 For the meaning of 'relevant accident' see PARA 129 note 12 ante.

3 In the Social Security Contributions and Benefits Act 1992 Pt V (ss 94-111), Schs 6-8, 'assessed', in relation to the extent of any disablement, means assessed in accordance with s 103(5), Sch 6 (as amended); and for the purposes of Sch 6 (as amended) there must be taken to be no relevant loss of faculty when the extent of the resulting disablement, if so assessed, would not amount to 1%: s 103(5). For the meaning of 'loss of physical faculty' see PARA 141 note 3 ante.

4 Where the assessment of disablement is between 20% and 100% which is not a multiple of 10, it is treated, if it is a multiple of 5, as being the next higher percentage which is a multiple of 10, and, if it is not a multiple of 5, as being the nearest percentage which is a multiple of 10; and where the assessment of disablement on a claim made on or after 1 October 1986 is less than 20%, but not less than 14%, it is treated as 20%: *ibid* s 103(3).

5 For the meaning of 'employed earner's employment' see PARA 128 ante.

6 Social Security Contributions and Benefits Act 1992 s 103(2). The regulations referred to are those under s 109(2) made by virtue of s 109(4)(b). Where s 103(2) applies, s 103(3) has effect in relation to the aggregate percentage and not in relation to any percentage forming part of the aggregate: s 103(4).

7 'Relevant loss of faculty' means, in relation to industrial injuries benefit, the loss of faculty resulting from the relevant injury: *ibid* s 122(1). For its meaning in relation to severe disablement allowance see *PARA 95* note 1 ante. 'Relevant injury' means the injury in respect of which industrial injuries benefit is claimed or payable: s 122(1).

8 For the meaning of 'claimant' see *PARA 19* note 5 ante.

9 Social Security Contributions and Benefits Act 1992 Sch 6 para 1(a).

10 *Ibid* Sch 6 para 1(b). Provision may be made by regulations for further defining the principles on which the extent of disablement is to be assessed and such regulations may in particular direct that a prescribed loss of faculty is to be treated as resulting in a prescribed degree of disablement; and, in connection with any such direction, nothing in head (c) in the text prevents the making of different provision, in the case of loss of faculty in or affecting hand or arm, for right-handed and for left-handed persons: Sch 6 para 2. Regulations under head (d) in the text or Sch 6 para 2 may include provision (1) for adjusting or reviewing an assessment made before the date of the coming into force of those regulations; (2) for any resulting alteration of that assessment to have effect as from that date, but no assessment is to be reduced by virtue of this provision: Sch 6 para 3. At the date at which this volume states the law, no such regulations had been made. However, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (General Benefit) Regulations 1982, SI 1982/1408 (as amended) (see *PARA 143* post) have effect under the Social Security Contributions and Benefits Act 1992 Sch 6 paras 2, 3.

11 *Ibid* Sch 6 para 1(c). See Decision R(I)6/75. Loss of earning power and any additional expenses are not relevant: see Decisions R(I)3/61; and R(I)3/84.

12 Social Security Contributions and Benefits Act 1992 Sch 6 para 1(d).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(2) DISABLEMENT PENSION/143. Special rules for assessing extent of disablement.

### **143. Special rules for assessing extent of disablement.**

There are special rules applying where the disabilities result from the relevant loss of faculty<sup>1</sup> and also from some other effective cause<sup>2</sup>. Where that other cause is a congenital defect or an injury or disease<sup>3</sup> which pre-dates the relevant accident, the total disablement is to be assessed, subject to an offset of the extent of the disablement if the accident had not happened<sup>4</sup>. Where that other cause is an injury or disease occurring after the relevant accident<sup>5</sup> (and not directly attributable to it), account is to be taken of the disablement that would have resulted throughout the period if the other cause had not occurred; where, however, that assessment is 11 per cent or more, the assessment is also to include disablement resulting from that other cause except to the extent to which the claimant would have been subject thereto if the relevant accident had not happened<sup>6</sup>.

Any assessment of the extent of the disablement resulting from the relevant loss of faculty may be reviewed by an adjudicating medical practitioner if he is satisfied that since the making of the assessment there has been an unforeseen aggravation of the results of the relevant injury<sup>7</sup>.

1 For the meaning of 'relevant loss of faculty' see PARA 142 note 7 ante.

2 See the Social Security (General Benefit) Regulations 1982, SI 1982/1408, reg 11(2); and Decision R(I)3/91.

3 An offset on this basis may only be made where there is some definite existing or developing impairment; it is not enough that the claimant had merely some existing susceptibility or latent problem: Decisions R(I)2/74; R(I)13/75; R(I)3/76; R(I)1/81; and CI/34/93.

4 See the Social Security (General Benefit) Regulations 1982, SI 1982/1408, reg 11(3) (amended by SI 1993/1985); *Murrell v Secretary of State for Social Services*, CA (reported as an Appendix to Decision R(I)3/84); and Decision CI/606/1993.

5 For the meaning of 'relevant accident' see PARA 129 note 12 ante.

6 See the Social Security (General Benefit) Regulations 1982, SI 1982/1408, reg 11(4) (amended by SI 1993/1985). The first rule allows the claimant to keep the assessment from the industrial accident even though, on common law principles of causation, the later occurrence might be said to have superseded it as the real cause of the total disability. The second rule (where the original assessment was more than 11%) allows the claimant to have the benefit of any extent to which the second occurrence aggravated the effect of the industrial accident (on the same principle as reg 11(3) (as amended)): see eg *R v Industrial Injuries Comr, ex p Cable* [1968] 1 QB 729, [1968] 1 All ER 9, CA (claimant lost the sight of one eye in an industrial accident; held entitled to the extra aggravation of that condition when he later lost the sight in the other eye due to disease); and Decision R(I)3/91.

7 Social Security Administration Act 1992 s 47(4). Where the assessment was made by a medical appeal tribunal, any such review must have the leave of that tribunal: see s 47(7). The normal principles of assessment apply on a review: Decisions R(I)18/61; and R(I)18/62. Normally a final assessment cannot be re-assessed downwards for improvement. If, however, such a final assessment is reviewed for unforeseen aggravation and is replaced by a provisional assessment, then any future improvement can be taken into account when that provisional assessment expires, which may result in a further assessment lower than that in the original final assessment: *Parker v Chief Adjudication Officer* (1991), CA (reported as an Appendix to Decision R(I)2/90). The reviewing authority may not call into question the original decision as to the loss of faculty and its link to the accident or disease: Decision CI/437/92. Special restrictions apply on reviewing for unforeseen aggravation an assessment in relation to occupational deafness: see the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, regs 30, 31 (amended by SI 1993/861).

### **UPDATE**

### **143 Special rules for assessing extent of disablement**

NOTE 7--SI 1985/967 regs 30, 31 revoked: SI 2003/2190.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(2) DISABLEMENT PENSION/144. Prescribed degrees of disablement.

#### **144. Prescribed degrees of disablement.**

An assessment for the purposes of disablement pension<sup>1</sup> must state the degree of disablement as a percentage<sup>2</sup>. A scale setting out the degree of disablement to be attributed to a number of specific injuries has been prescribed<sup>3</sup>. Increases or reductions may be made to the prescribed percentage for a specified injury where the degree of disablement prescribed does not provide a reasonable assessment of the extent of disablement resulting from the relevant loss of faculty<sup>4</sup>. Where a percentage is to be assessed in the case of an injury which is not specified, such regard as may be appropriate is to be paid to the prescribed percentages for the specified injuries<sup>5</sup>.

<sup>1</sup> See for the purposes of the Social Security Contributions and Benefits Act 1992 s 103: see PARAS 141-142 ante.

<sup>2</sup> Ibid s 103(5), Sch 6 para 7(a). As to the rounding up or down of percentages to multiples of 10 see PARA 142 ante.

<sup>3</sup> The scale is set out in the Social Security (General Benefit) Regulations 1982, SI 1982/1408, reg 11(6), Sch 2.

<sup>4</sup> See ibid reg 11(6). See also Decisions R(I)30/61; R(I)34/61; and R(I)19/62. For the meaning of 'relevant loss of faculty' see PARA 142 note 7 ante (definition applied by the Social Security (General Benefit) Regulations 1982, SI 1982/1408, reg 1(1)).

<sup>5</sup> See ibid reg 11(8). This may apply particularly in the case of a multiple injury where it is the overall effect which is to be assessed, not just the sum of the component parts (even where those component parts are scheduled): Decision R(I)39/61.

#### **UPDATE**

#### **144 Prescribed degrees of disablement**

NOTE 5--SI 1982/1408 reg 11(8) amended: SI 2008/2833.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(2) DISABLEMENT PENSION/145. The period of assessment.

#### **145. The period of assessment.**

An assessment for the purposes of disablement pension<sup>1</sup> must state the period taken into account by it and where the period is limited by reference to a definite date, it must specify whether the assessment is provisional or final<sup>2</sup>. The period to be taken into account by an assessment<sup>3</sup> of the extent of a claimant's<sup>4</sup> disablement is the period (beginning not earlier than the end of the period of 90 days from the day of the relevant accident<sup>5</sup> limited by reference either to the claimant's life or to a definite date) during which the claimant has suffered and may be expected to continue to suffer from the relevant loss of faculty<sup>6</sup>.

If on any assessment the condition of the claimant is not such, having regard to the possibility of changes in that condition (whether predictable or not), as to allow of a final assessment being made up to the end of the specified period<sup>7</sup> a provisional assessment must be made, taking into account such shorter period only as seems reasonable having regard to his condition and that possibility; and on the next assessment the period to be taken into account begins with the end of the period taken into account by the provisional assessment<sup>8</sup>.

1    Ie for the purposes of the Social Security Contributions and Benefits Act 1992 s 103: see PARAS 141-142 ante.

2    Ibid s 103(5), Sch 6 para 7(b), (c).

3    Ie for the purposes of ibid s 103, Sch 7 Pt II: see Sch 6 para 6(1).

4    For the meaning of 'claimant' see PARA 19 note 5 ante.

5    See the Social Security Contributions and Benefits Act 1992 s 103(6); and PARA 141 ante. For the meaning of 'relevant accident' see PARA 129 note 12 ante.

6    Ibid Sch 6 para 6(1). For the meaning of 'relevant loss of faculty' see PARA 142 note 7 ante. Different percentages may be fixed for different parts of the assessment period: Decision R(I)30/61. In the case of byssinosis, the minimum period is to be a year; in the case of occupational deafness, the initial assessment must be provisional for a period of five years, and any subsequent assessment must be for at least five years: see the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, regs 20(3), 29.

Where the assessed extent of a claimant's disablement amounts to less than 14% then that assessment is a final assessment and the period to be taken into account by it does not end before the earliest date on which it seems likely that the extent of the disablement will be less than 1%: Social Security Contributions and Benefits Act 1992 Sch 6 para 6(3). However, this does not apply in any case where it seems likely that (1) the assessed extent of the disablement will be aggregated with the assessed extent of any present disablement; and (2) that aggregate will amount to 14% or more: Sch 6 para 6(4). Where the extent of the claimant's disablement is assessed at different percentages for different parts of the period taken into account by the assessment, then (a) Sch 6 para 6(3) does not apply in relation to the assessment unless the percentage assessed for the latest part of that period is less than 14%; and (b) in any such case, Sch 6 para 6(3) applies only in relation to that part of that period (and subject to Sch 6 para 6(4)): Sch 6 para 6(5).

7    Ie as specified in ibid Sch 6 para 6(1).

8    Ibid Sch 6 para 6(2). A medical appeal tribunal is not bound by the findings of an earlier tribunal on a previous provisional assessment: *R v National Insurance Comr, ex p Viscusi* [1974] 2 All ER 724, [1974] 1 WLR 646, CA; *R v Industrial Injuries Comr, ex p Howarth* (1968) 4 KIR 621, CA. However, if a later tribunal is to differ from a previous decision it should give clear reasons: *Kitchen v Secretary of State for Social Services* [1993] NLJ Rep 1370, CA. The findings of a later tribunal cannot affect the actual decision of the earlier tribunal: Decision R(I)8/69.

#### **UPDATE**

#### **145 The period of assessment**

NOTE 6--SI 1985/967 reg 29 replaced: SI 2003/2190.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(2) DISABLEMENT PENSION/146. Adjustment for successive accidents.

#### **146. Adjustment for successive accidents.**

The assessed percentages of two separate industrial accidents may be aggregated in determining the extent of the claimant's disablement<sup>1</sup>.

Where a person suffers two or more successive accidents arising out of and in the course of his employed earner's employment<sup>2</sup>: (1) he is not for the same period entitled (apart from any increase of benefit<sup>3</sup>) to receive industrial injuries benefit<sup>4</sup> by way of two or more disablement pensions at an aggregate weekly rate exceeding the appropriate specified amount<sup>5</sup>; and (2) regulations<sup>6</sup> may provide for adjusting (a) disablement benefit, or the conditions for the receipt of that benefit, in any case where he has received or may be entitled to a disablement gratuity; (b) any increase of benefit, or the conditions for its receipt<sup>7</sup>.

Where there are two or more industrial accidents or diseases which together produce a degree of disability over and above that produced by the last one looked at in isolation, that extra degree of disability is to be attributed to the last accident or disease, leaving any assessment in respect of the earlier accident or disease undisturbed<sup>8</sup>. There are special provisions covering successive accidents where the claimant is in receipt of constant attendance allowance<sup>9</sup> or exceptionally severe disablement allowance<sup>10</sup>, or the now repealed disablement gratuity, unemployability supplement or dependant's increase<sup>11</sup>.

1 See the Social Security Contributions and Benefits Act 1992 s 103(2); and PARA 142 ante. For the meaning of 'assessed' see PARA 142 note 3 ante; and for the meaning of 'claimant' see PARA 19 note 5 ante. These provisions also apply in relation to industrial diseases: see s 109(4)-(6); and PARA 153 post.

2 For the meaning of 'employed earner's employment' see PARA 128 ante.

3 The increases of benefit referred to are those under the Social Security Contributions and Benefits Act 1992 s 104 (see PARA 147 post), s 105 (see PARA 149 post), s 106, Sch 7 Pt I paras 2, 4, 6 (as amended) (see PARA 162 post); s 107(2).

4 For the meaning of 'industrial injuries benefit' see PARA 127 note 1 ante.

5 The amount specified in the Social Security Contributions and Benefits Act 1992 Sch 4 Pt V para 4 (subject to frequent amendment).

6 At the date at which this volume states the law, no such regulations had been made. However, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (General Benefit) Regulations 1982, SI 1982/1408 (as amended) partly have effect under the Social Security Contributions and Benefits Act 1992 s 107.

7 Ibid s 107(1).

8 See the Social Security (General Benefit) Regulations 1982, SI 1982/1408, reg 11(5) (amended by SI 1993/1985); and Decision R(I)3/91.

9 As to constant attendance allowance see PARA 147 post.

10 As to exceptionally severe disablement allowance see PARA 149 post.

11 See the Social Security (General Benefit) Regulations 1982, SI 1982/1408, regs 38, 39; and Decision CI/420/94.

#### **UPDATE**

**146 Adjustment for successive accidents**

NOTE 5--Social Security Contributions and Benefits Act 1992 Sch 4 Pt V para 4 amended: Child Benefit Act 2005 Sch 1 para 15, Sch 2 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(2) DISABLEMENT PENSION/147. Constant attendance allowance.

#### **147. Constant attendance allowance.**

Where a disablement pension is payable in respect of an assessment<sup>1</sup> of 100 per cent, then if as the result of the relevant loss of faculty<sup>2</sup> the beneficiary<sup>3</sup> requires constant attendance, the weekly rate of the pension is increased by an amount not exceeding the specified amount<sup>4</sup>. Such an increase is payable for such period as may be determined at the time it is granted, but may be renewed from time to time<sup>5</sup>. The decision whether to award a constant attendance allowance lies with the Secretary of State<sup>6</sup>.

Constant attendance allowance may also be paid to persons entitled under the old workmen's compensations provisions, and to certain pensioners from the police force and fire brigades<sup>7</sup>.

For the purpose of determining whether a person is entitled to constant attendance allowance<sup>8</sup>, or to a corresponding increase of any other benefit<sup>9</sup>, regulations<sup>10</sup> may provide for the extent of the person's disablement resulting from the relevant injury or disease to be determined in such manner as may be provided for by the regulations by reference to all disabilities to which that person is subject which result either from the relevant injury or disease or from any other injury or disease in respect of which there fall to be made to the person payments of any of certain specified descriptions<sup>11</sup>.

1 As to the assessment of disability see PARA 142 ante.

2 For the meaning of 'relevant loss of faculty' see PARA 142 note 7 ante.

3 For the meaning of 'beneficiary' see PARA 21 note 2 ante.

4 Social Security Contributions and Benefits Act 1992 s 104(1). The amount must not exceed the specified amount as set out in Sch 4 Pt V para 2 (as amended) determined in accordance with regulations by reference to the extent and nature of the attendance required by the beneficiary: s 104(1). As to determination of the degree of disablement for a constant attendance allowance see the Social Security (General Benefit) Regulations 1982, SI 1982/1408, reg 20(1).

5 Social Security Contributions and Benefits Act 1992 s 104(2).

6 See the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 17(1)(a)(i). It is therefore not subject to appeal. The Secretary of State may by regulations direct that any provision of the Social Security Contributions and Benefits Act 1992 ss 64-67 (attendance allowance: see PARAS 112-116 ante) has effect, with or without modifications (including additions and omissions), in relation to increases of pension under s 104: s 104(3), (4). As to the Secretary of State see PARA 1 ante.

7 See the Social Security (General Benefit) Regulations 1982, SI 1982/1408, reg 20(2).

8 Ie an increase in disablement pension under the Social Security Contributions and Benefits Act 1992 s 104: see s 103(5), Sch 6 para 8(1).

9 Ie by virtue of *ibid* s 111, Sch 8 para 6(4)(b) or Sch 8 para 7(2)(b): see Sch 6 para 8(1).

10 At the date at which this volume states the law, no such regulations had been made. However, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (General Benefit) Regulations 1982, SI 1982/1408 (as amended) partly have effect under the Social Security Contributions and Benefits Act 1992 Sch 6 para 8.

11 *Ibid* Sch 6 para 8(1). Those payments are:

20 (1) payments by way of disablement pension (Sch 6 para 8(2)(a));

- 21 (2) payments by way of benefit under Sch 8 para 4 or Sch 8 para 7(1) (Sch 6 para 8(2)(b)); or
- 22 (3) payments in such circumstances as may be prescribed by way of such other benefit as may be prescribed (being benefit in connection with any hostilities or with service as a member of Her Majesty's forces or of such other organisation as may be specified in the regulations (Sch 6 para 8(2)(c))).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(2) DISABLEMENT PENSION/148. Period and rate of constant attendance allowance.

**148. Period and rate of constant attendance allowance.**

Constant attendance allowance is payable for such period as may be determined at the time it is granted and may be renewed from time to time<sup>1</sup>. Generally, however, it may not be paid for any period when the beneficiary is receiving, or has received, free in-patient treatment in a hospital or similar institution<sup>2</sup>. The increase must not exceed a specified weekly maximum according to whether or not it is a case of exceptionally severe disablement<sup>3</sup>. Thus, where the beneficiary is so severely disabled as to be entirely or almost entirely dependent on that attendance for the necessities of life, and is likely to remain so dependent for a prolonged period, the attendance required being whole-time, the specified maximum is higher<sup>4</sup> than where the beneficiary is so dependent to a substantial extent and likely to remain so for a prolonged period<sup>5</sup>. However, in the second case, if the attendance required is only part-time, it is such sum as may be reasonable in the circumstances, and where the extent of the attendance is greater by reason of the beneficiary's exceptionally severe disablement, the maximum is a sum not exceeding one and a half times the lesser amount<sup>6</sup>.

1 See the Social Security Contributions and Benefits Act 1992 s 104(2); and PARA 147 ante.

2 See the Social Security (General Benefit) Regulations 1982, SI 1982/1408, reg 21. For the meaning of 'beneficiary' see PARA 21 note 2 ante.

3 See the Social Security Contributions and Benefits Act 1992 s 104(1); and PARA 147 note 4 ante.

4 See the Social Security (General Benefit) Regulations 1982, SI 1982/1408, reg 19(b).

5 See *ibid* reg 19.

6 See *ibid* reg 19(a).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(2) DISABLEMENT PENSION/149. Exceptionally severe disablement allowance.

**149. Exceptionally severe disablement allowance.**

Where disablement pension is payable to a person who is or, but for having received medical<sup>1</sup> or other treatment as an in-patient in a hospital or similar institution, would be entitled to an increase in disablement pension for constant attendance<sup>2</sup> and the weekly rate of the increase exceeds the specified amount<sup>3</sup>, and the person's need for constant attendance is likely to be permanent, he is also entitled to an additional increase for exceptionally severe disablement<sup>4</sup>. This increase is payable at a specified weekly rate<sup>5</sup>, for such period as may be determined at the time it is granted, but may be reviewed from time to time<sup>6</sup>.

1 'Medical treatment' means medical, surgical or rehabilitative treatment (including any course or diet or other regimen), and references to a person receiving or submitting himself to medical treatment are to be construed accordingly: Social Security Contributions and Benefits Act 1992 s 122(1); and see the Social Security Administration Act 1992 s 191, which contains an identical definition.

2 As to constant attendance allowance see PARAS 147-148 ante

3 I.e. the amount specified in the Social Security Contributions and Benefits Act 1992 Sch 4 Pt V para 2(a) (subject to frequent amendment).

4 Ibid s 105(1).

5 The rate is specified in ibid Sch 4 Pt V para 3 (subject to frequent amendment).

6 Ibid s 105(2).

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### **(3) INDUSTRIAL DISEASES**

#### **(i) In general**

##### **150. The coverage of industrial diseases.**

The distinction traditionally drawn in the industrial injuries scheme between an accident and a process means that most diseases will not be covered by that scheme, even where their contraction was caused by the employed earner's work<sup>1</sup>. To fill that gap, separate provisions exist, extending entitlement to disablement benefit to employed earners suffering industrially-linked diseases<sup>2</sup>. This is done by a system of prescription of such diseases, so that a claimant will succeed if, but only if, he contracts a prescribed disease in the appropriate prescribed circumstances<sup>3</sup>. There is no residual category in this jurisdiction allowing a claimant to prove on the evidence that a non-prescribed disease was actually caused by a work activity. The only flexibility in the system lies in the power of the Secretary of State<sup>4</sup> to add to the prescribed list; and while this is done periodically, there can be time delays between concern arising medically over a possible work-related cause for a particular disease and that causal link being sufficiently demonstrated over time to justify adding a new disease to the list. Once it is so added, the effect is only prospective<sup>5</sup>. Moreover, the prescription system also has the effect of affixing specific limitations to entitlement which may mean that, as time and technology move on, the conditions become harder to satisfy, but this is not a reason for giving a more relaxed interpretation to the original wording<sup>6</sup>.

The ordinary accident-based system and the special industrial disease system are mutually exclusive in that a person is not entitled to benefit in respect of a disease as being an injury by accident arising out of and in the course of employment if at the time of the accident the disease is in relation to him a prescribed disease by virtue of the occupation in which he is engaged in that employment<sup>7</sup>.

1 As to the distinction between accident and process see PARA 132 ante.

2 These are contained in the Social Security Contributions and Benefits Act 1992 ss 108-110; and the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967 (as amended).

3 The prescribed diseases are set out in *ibid* reg 2(a), Sch 1 (as amended): see PARA 152 post.

4 As to the Secretary of State see PARA 1 ante.

5 Decision CI/414/1994.

6 Decisions R(I)3/90; and R(I)2/92.

7 Social Security Contributions and Benefits Act 1992 s 108(6). If the disease is not prescribed, a claimant may try to show that its contraction was indeed an accident, but given the distinction between accident and process (see PARA 132 ante) that may be difficult: see eg Decision R(I)6/91 (passive smoking; any ill health so caused will usually be a process, unless unusually the claimant can point to relatively specific instances of poisoning).

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### **151. Conditions for prescription of a disease.**

A disease or injury<sup>1</sup> may be prescribed in relation to any employed earners<sup>2</sup> if the Secretary of State<sup>3</sup> is satisfied that:

- 386 (1) it ought to be treated, having regard to its causes and incidence and any other relevant considerations, as a risk of their occupations and not as a risk common to all persons<sup>4</sup>; and
- 387 (2) it is such that, in the absence of special circumstances, the attribution of particular cases to the nature of the employment can be established or presumed with reasonable certainty<sup>5</sup>.

Advice on the prescription of new diseases is in practice provided by the Industrial Injuries Advisory Council<sup>6</sup>, which is also to be consulted in most cases on draft regulations relating to industrial injury benefit<sup>7</sup>.

1 The prescription system applies to personal injury (other than an injury caused by accident arising out of and in the course of employment) as well as diseases: see the Social Security Contributions and Benefits Act 1992 s 108(1)(b); and PARA 153 post. At the date at which this volume states the law, however, only diseases or conditions have been prescribed.

2 For the meaning of 'employed earner' see PARA 128 ante.

3 As to the Secretary of State see PARA 1 ante.

4 Social Security Contributions and Benefits Act 1992 s 108(2)(a).

5 Ibid s 108(2)(b).

6 See the Social Security Administration Act 1992 s 171(3); and PARA 408 post.

7 See ibid s 172; and PARA 408 post.

### **UPDATE**

#### **151 Conditions for prescription of a disease**

TEXT AND NOTES--Regulations must provide for applying the provisions of the Social Security Act 1998 Pt I Ch II (ss 8-39: see PARA 356A), subject to any prescribed additions or modifications, in relation to decisions made or falling to be made under the Social Security Contributions and Benefits Act 1992 s 108: Social Security Act 1998 s 32.

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## 152. Prescribed diseases.

There are four categories of prescribed diseases or conditions<sup>1</sup>:

- 388 (1) conditions due to physical agents<sup>2</sup>;
- 389 (2) conditions due to biological agents<sup>3</sup>;
- 390 (3) conditions due to chemical agents<sup>4</sup>; and
- 391 (4) miscellaneous conditions<sup>5</sup>.

Each disease or condition is linked to a prescribed occupation which may refer to either a particular type of work or a more general work-related activity<sup>6</sup>. There are specific provisions setting out the occupations for which pneumoconiosis is prescribed<sup>7</sup>.

1 See the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 2(a), Sch 1 Pt I (as amended). 'Prescribed disease' means a disease or injury prescribed under Pt II, and references to a prescribed disease being contracted is deemed to include references to a prescribed injury being received: reg 1(2). There is extensive case law in the form of commissioners' decisions on the detailed interpretation of these complex prescriptions, which lies outside the scope of this work: see Neligan *Social Security Case Law: Digest of Commissioners' Decisions* Ch 9.

2 See the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, Sch 1 Pt I col 1 category A (as amended).

3 See *ibid* Sch 1 Pt I col 1 category B (as amended).

4 See *ibid* Sch 1 Pt I col 1 category C (as amended).

5 See *ibid* Sch 1 Pt I col 1 category D (as amended).

6 See *ibid* Sch 1 Pt I col 2 (as amended). As to the presumption that the disease was caused by the occupation see PARA 155 post.

7 See *ibid* Sch 1 Pt II. There are also special provisions as to pneumoconiosis, byssinosis, occupational deafness and certain other diseases: see Pt V (regs 20-33) (as amended); and PARA 158 et seq post.

## UPDATE

### 152 Prescribed diseases

NOTES 1-6--SI 1985/967 Sch 1 Pt I category A col 1 further amended: SI 2000/1588, SI 2005/324, SI 2007/811, SI 2007/1753, SI 2009/1396. SI 1985/967 Sch 1 Pt I category B col 1 further amended: SI 2005/324. SI 1985/967 Sch 1 Pt I category C col 1 further amended: SI 2006/586 (amended by SI 2006/769). SI 1985/967 Sch 1 Pt I category D col 1 further amended: SI 2000/1588, SI 2005/324, SI 2006/586 (amended by SI 2006/769), SI 2008/14, SI 2008/1552. SI 1985/967 Sch 1 Pt I col 2 further amended: SI 2000/1588, SI 2003/2190, SI 2005/324, SI 2007/811, SI 2007/1753, SI 2008/14, SI 2008/1552, SI 2009/1396.

NOTE 1--SI 1985/967 reg 2(a) further amended: SI 2000/1588.

NOTE 6--See also *Janicki v Chief Adjudication Officer* [2000] All ER (D) 2143, CA.



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(3) INDUSTRIAL DISEASES/(ii) Entitlement/153. Conditions of benefit in respect of a prescribed disease.

## **(ii) Entitlement**

### **153. Conditions of benefit in respect of a prescribed disease.**

Industrial injuries benefit<sup>1</sup> is payable in respect of a person who has been in employed earner's employment<sup>2</sup> and in respect of a prescribed disease<sup>3</sup> or any prescribed personal injury (other than an injury caused by accident arising out of and in the course of employment<sup>4</sup>) which is due to the nature of that employment and which developed after 4 July 1948<sup>5</sup>.

The benefit and the conditions for its receipt are in general the same as in the case of personal injury by accident arising out of and in the course of employment<sup>6</sup>, but subject to a power to make amendments and modifications where necessary<sup>7</sup>.

1 For the meaning of 'industrial injuries benefit' see PARA 127 note 1 ante.

2 For the meaning of 'employed earner's employment' see PARA 128 ante.

3 For the meaning of 'prescribed disease' see PARA 152 note 1 ante.

4 The question whether the disease is due to the nature of the employment is to be decided by an adjudication officer (with appeal to a social security appeal tribunal), not by the medical authorities: Decision R(I)4/91. The person must have been employed in the occupation, which means actually engaged in it; it is not sufficient that he had a contractual obligation to do it if he did not in fact do so to a more than negligible extent: Decisions CI60/49; R(I)4/53; R(I)8/57; R(I)3/78; and R(I)2/79. It is not enough that a substance which features in the prescription was in use in the industrial premises in question (Decision R(I)2/77); or that it entered that workplace from other premises (Decision CI/379/94).

5 Social Security Contributions and Benefits Act 1992 s 108(1). Regulations prescribing any disease or injury for those purposes may provide that a person who developed the disease or injury on or at any time after a date specified in the regulations (being a date before the regulations came into force but not before 5 July 1948) is to be treated, subject to any prescribed modifications of s 108, s 109 or s 110, as if the regulations had been in force when he developed the disease or injury: s 108(3). Provision may be made by regulations for determining (1) the time at which a person is to be treated as having developed any prescribed disease or injury; and (2) the circumstances in which such a disease or injury is, where the person in question has previously suffered from it, to be treated as having recrudesced or as having been contracted or received afresh: s 108(4). The power conferred by head (1) supra includes power to provide that the time at which a person is to be treated as having developed a prescribed disease or injury is the date on which he first makes a claim which results in the payment of benefit by virtue of s 108 or s 110 in respect of that disease or injury: s 108(5).

At the date at which this volume states the law, no such regulations had been made. However, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967 (as amended) have effect partly under the Social Security Contributions and Benefits Act 1992 s 108(1), (3), (4).

6 Ibid s 109(1).

7 See ibid s 109(2)-(7). The relevant modifications are contained in the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, regs 11-19 (as amended), Sch 2.

## **UPDATE**

### **153 Conditions of benefit in respect of a prescribed disease**

TEXT AND NOTES--Regulations must provide for applying the provisions of the Social Security Act 1998 Pt I Ch II (ss 8-39: see PARA 356A), subject to any prescribed additions or modifications, in relation to decisions made or falling to be made under the Social Security Contributions and Benefits Act 1992 s 109: Social Security Act 1998 s 32.

NOTE 7--Social Security Contributions and Benefits Act 1992 s 109(2) amended: Social Security Act 1998 Sch 7 para 65.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(3) INDUSTRIAL DISEASES/(ii) Entitlement/154. Resulting conditions.

**154. Resulting conditions.**

Where a person is or was in employed earner's<sup>1</sup> employment and a disease is or was prescribed in relation to him in that employment, and he is suffering from a condition which, in his case, has resulted from that disease, he is to be treated as if he were suffering from that disease, whether or not the condition from which he is suffering is itself a prescribed disease<sup>2</sup>.

1 'Employed earner' means employed earner for the purposes of industrial injuries benefit, and 'employed earner's employment' is to be construed accordingly: Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 1(2).

2 Ibid reg 3. For the meaning of 'prescribed disease' see PARA 152 note 1 ante.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(3) INDUSTRIAL DISEASES/(ii) Entitlement/155. Presumption that a disease is due to the nature of employment.

### **155. Presumption that a disease is due to the nature of employment.**

In most cases, where a person has developed a disease which is prescribed<sup>1</sup> in relation to him, then, unless the contrary is proved<sup>2</sup>, that disease must be presumed to be due to the nature of the employed earner's employment<sup>3</sup> if that employment was in any occupation in relation to which that disease is prescribed, and he was so employed on the date on which he is treated as having developed the disease<sup>4</sup> or at any time within one month immediately preceding that date<sup>5</sup>.

This presumption is expressed not to apply to certain prescribed diseases<sup>6</sup>. In relation to five of them, it is replaced by specific presumptions more favourable to the claimant. Thus, in relation to tuberculosis<sup>7</sup> unless the contrary is proved, the disease is presumed to be due to the nature of the employment if the date on which the claimant is treated as having developed it is not less than six weeks after the date on which he was first employed in any occupation in relation to which tuberculosis is prescribed and not more than two years after the date on which he was last so employed<sup>8</sup>. In relation to pneumoconiosis<sup>9</sup>, unless the contrary is proved, the disease is presumed to be due to the nature of the employed earner's employment if he has been employed in one or other of the prescribed occupations<sup>10</sup> for a period or periods amounting in the aggregate to not less than two years which was either employed earner's employment or would have been had it taken place on or after 5 July 1948<sup>11</sup>. In relation to byssinosis<sup>12</sup>, occupational deafness<sup>13</sup>, and chronic bronchitis or emphysema<sup>14</sup>, there is a straightforward presumption, with no time limits, that the disease is due to the nature of the employment<sup>15</sup>.

In the case of the other excluded diseases<sup>16</sup>, however, there is no presumption at all and so a causal link must be proved in order for the claimant to succeed<sup>17</sup>.

1 For the meaning of 'prescribed disease' see PARA 152 note 1 ante.

2 The onus is on the adjudication officer to prove on a balance of probabilities that the disease was not in fact due to the nature of the employment: Decision R(I)38/52; and see the application of this principle in Decision R(I)37/52.

3 For the meaning of 'employed earner's employment' for this purpose see PARA 154 note 1 ante.

4 See PARA 156 post.

5 See the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 4(1) (as amended).

6 The prescribed diseases are those numbered A10, A12, B5, D1, D2, D5 and D12 in *ibid* reg 2(a), Sch 1 Pt I: see reg 4(1) (amended by SI 1993/862; SI 1993/1985; SI 1996/425).

7 *Ie* the disease numbered B5 in *ibid* Sch 1 Pt I col 1.

8 See *ibid* reg 4(2).

9 *Ie* the disease numbered D1 in *ibid* Sch 1 Pt I col 1.

10 *Ie* the occupations prescribed in *ibid* Sch 1 Pt II.

11 *Ibid* reg 4(3). As to the special provisions on the prescription of pneumoconiosis see PARA 158 post.

12 *Ie* the disease numbered D2 in *ibid* Sch 1 Pt I col 1.

13    Ie the disease numbered A10 in ibid Sch 1 Pt I col 1.

14    Ie the disease numbered D12 in ibid Sch 1 Pt I col 1.

15    See ibid reg 4(4)-(6) (reg 4(6) added by SI 1993/1985). As to the special provisions on the prescription of occupational deafness see PARA 159 post.

16    Ie the diseases numbered A12 (carpel tunnel syndrome) and D5 (non-infective dermatitis) in the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, Sch 1 Pt I col 1.

17    The factor that these diseases have in common is that they are also capable of resulting from non-industrial causes.

## **UPDATE**

### **155 Presumption that a disease is due to the nature of employment**

NOTES 6-15--In relation to primary neoplasm of the epithelial lining of the urinary tract (ie the disease numbered C23 in SI 1985/967 Sch 1 Pt I Col 1), the disease is presumed to be due to the nature of employment if the claimant was employed in one or other of the prescribed professions within one month immediately preceding the date on which he was treated as having the disease: reg 4(7) (added by SI 2003/270).

NOTES 6, 14--SI 1985/967 Sch 1 Pt I col 1 disease numbered D12 amended: SI 2000/1588, SI 2008/1552. The prescribed diseases are also those numbered C1, C2, C4, C5A, C5B, C6, C7, C12, C13, C16, C19, C20, C21, C22, C23, C25, C26, C27, C29, C30 in SI 1985/967 Sch 1 Pt 1 (amended by SI 2003/270).

NOTE 7--For 'ibid' read 'SI 1985/967'.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(3) INDUSTRIAL DISEASES/(ii) Entitlement/156. Date of development and recrudescence.

### **156. Date of development and recrudescence.**

If on a claim for benefit in respect of a prescribed disease<sup>1</sup> a person is found to be or to have been suffering from the disease, or to have died as the result of it, the disease is, for the purposes of such claim, to be treated as having developed on a date, known as 'the date of onset'<sup>2</sup>. This date is determined by reference to the first claim for benefit made in respect of the prescribed disease for which the award of benefit is made and, once determined, is treated as the date of onset for the purposes of any subsequent claim in respect of the same disease, except where in certain cases<sup>3</sup> the claimant, after recovery, suffers a further attack<sup>4</sup>.

Where the claim is for disablement benefit (except in respect of occupational deafness<sup>5</sup>), the date of onset is the day on which the claimant first suffered from the relevant loss of faculty on or after 5 July 1948<sup>6</sup>. Where the claim is for disablement benefit in respect of occupational deafness, the date of onset is the day on which the claimant first suffered from the relevant loss of faculty on or after 3 February 1975; or, if later, 3 September 1979 in the case of a claim made before that date which results in the payment of benefit commencing on that date<sup>7</sup> and, in any other case, the date on which such claim is made as results in the payment of benefit<sup>8</sup>.

Where in respect of a prescribed disease<sup>9</sup> a person's disablement has been assessed at more than 1 per cent and he suffers from another attack of the same disease, then:

- 392 (1) if the further attack commences<sup>10</sup> during a period taken into account by that assessment (the 'relevant period') the disease is treated as a recrudescence of the original attack, unless it is otherwise determined<sup>11</sup>;
- 393 (2) if the further attack commences otherwise than during the relevant period, or it is determined that the disease was in fact contracted afresh, it is to be treated as having been so contracted<sup>12</sup>, in which case the date of onset is to be the date on which the person was first incapable of work or first suffered from the relevant loss of faculty (whichever is the earlier) as a result of the further attack<sup>13</sup>.

1 For the meaning of 'prescribed disease' see PARA 152 note 1 ante.

2 Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 5. There are special rules for determining the date of onset if the claimant has been awarded or paid workmen's compensation in respect of the same disease: see reg 8.

3 See *ibid* reg 7 (as amended); and the text to notes 10-13 *infra*.

4 See *ibid* reg 6(1) (as amended). This does not preclude fresh consideration of the question whether the same person is suffering from the same disease on any subsequent claim for an award of benefit: reg 6(1)(a). If, on consideration of a claim, the degree of disablement is assessed at less than 1%, any date of onset determined is to be disregarded for the purposes of any subsequent claim: reg 6(1)(b) (amended by SI 1989/1207).

5 As to occupational deafness see PARA 159 *post*.

6 Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 6(2)(b).

7 *Ibid* reg 6(2)(c)(i).

8 *Ibid* reg 6(2)(c)(ii).

9 This does not apply to cases of pneumoconiosis, byssinosis, diffuse mesothelioma, occupational deafness, occupational asthma, primary carcinoma of the lung, bilateral diffuse pleural thickening or chronic bronchitis or emphysema: *ibid* reg 7(1) (amended by SI 1989/1207; SI 1993/862; and SI 1993/1985).

10 A further attack is deemed to commence on the date on which the person concerned was first incapable of work or first suffered from the relevant loss of faculty (whichever is the earlier) as a result of that further attack: Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 7(2).

11 *Ibid* reg 7(1)(a). Where a disease is treated as a recrudescence, any assessment of disablement in respect of recrudescence during a period taken into account by a previous assessment of disablement is by way of review of the assessment relating to the relevant period: see reg 7(4). The procedure for determining whether a further attack is a recrudescence or a fresh attack is contained in the Social Security (Adjudication) Regulations 1995, SI 1995/1801, Pt IV Section A (regs 43-54) (as amended). Regulation 51 provides for a review of the existing assessment if the decision is that there has been a recrudescence.

12 Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 7(1)(b).

13 See *ibid* reg 7(3).

## **UPDATE**

### **156 Date of development and recrudescence**

NOTE 2--SI 1985/967 reg 8 amended: SI 2003/270.

NOTE 11--For 'review' read 'a supersession': SI 1985/967 reg 7(4) (amended by SI 2000/1596).

NOTE 12--SI 1985/967 reg 7(1)(b) amended: SI 2003/270.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(3) INDUSTRIAL DISEASES/(ii) Entitlement/157. Diseases contracted outside Great Britain.

**157. Diseases contracted outside Great Britain.**

Benefit is not payable in respect of a prescribed disease<sup>1</sup> which is due to the nature of employment in an occupation in which the person has only been engaged outside Great Britain<sup>2</sup>. This is subject to exceptions relating to airmen<sup>3</sup>, mariners<sup>4</sup> and those working on the continental shelf<sup>5</sup>, and to any reciprocal agreements<sup>6</sup>.

1 For the meaning of 'prescribed disease' see PARA 152 note 1 ante.

2 See the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 14. For the meaning of 'Great Britain' see PARA 15 note 4 ante.

3 See the Social Security (Industrial Injuries) (Airmen's Benefits) Regulations 1975, SI 1975/469, reg 2(1).

4 See the Social Security (Industrial Injuries) (Mariners' Benefits) Regulations 1975, SI 1975/470, reg 2(1).

5 See the Social Security Benefit (Persons Abroad) Regulations 1975, SI 1975/563, reg 11(3).

6 As to the power to enter into reciprocal agreements with other countries see PARA 28 ante.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(3) INDUSTRIAL DISEASES/(iii) Special Provision for Certain Diseases/158. Prescription of pneumoconiosis.

### (iii) Special Provision for Certain Diseases

#### 158. Prescription of pneumoconiosis.

Pneumoconiosis<sup>1</sup> is prescribed in relation to all persons who have been employed<sup>2</sup> on or after 5 July 1948 in employed earner's employment<sup>3</sup> in certain specified employments<sup>4</sup>, and in their case there is a presumption, unless the contrary is proved, that the disease is due to the nature of their employment if they have been so employed for a period or periods amounting in aggregate to not less than two years<sup>5</sup>. It is also prescribed in relation to all other persons who have been employed in any occupation involving exposure to dust, but who have not worked in any of the specified employments at any time, whether in employed earner's employment or not<sup>6</sup>. In their case, however, the presumption does not apply, so they have to prove affirmatively that the disease is due to the nature of their employment.

Where a person is found to be suffering from pneumoconiosis accompanied by tuberculosis, the effects of the tuberculosis are to be treated for these purposes<sup>7</sup> as if they were effects of the pneumoconiosis<sup>8</sup>. This also applies to emphysema and chronic bronchitis, but only in relation to a person who (1) is disabled by pneumoconiosis (alone or accompanied by tuberculosis) to an extent which would, if his physical condition were otherwise normal, be assessed at not less than 50 per cent; and (2) is not entitled to disablement benefit already in respect of the emphysema or chronic bronchitis<sup>9</sup>.

A person found to be suffering from pneumoconiosis is to be treated as suffering from a loss of faculty such that the assessed extent of the resulting disablement amounts to not less than 1 per cent<sup>10</sup>.

As respects pneumoconiosis, regulations<sup>11</sup> may provide:

394 (a) for requiring persons to be medically examined<sup>12</sup> before, or within a prescribed<sup>13</sup> period after, becoming employed in any occupation in relation to which pneumoconiosis is prescribed, and to be medically examined periodically while so employed, and to furnish information required for the purposes of any such examination;

395 (b) for suspending from employment in any such occupation, and in such other occupations as may be prescribed, persons found on such an examination to be suffering from pneumoconiosis or tuberculosis, or to be unsuitable for such employment, having regard to the risk of pneumoconiosis and such other matters affecting their susceptibility to pneumoconiosis as may be prescribed;

396 (c) for the disqualification for the receipt of benefit<sup>14</sup> in respect of pneumoconiosis of any person who fails without good cause to submit himself to any such examination or to furnish information required by the regulations or who engages in any employment from which he has been suspended as mentioned in head (b) above;

397 (d) for requiring employers:

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44. (i) to provide facilities for such examinations;

45. (ii) not to employ in any occupation a person who has been suspended as mentioned in head (b) above from employment in that occupation or who has failed without good cause to submit himself to such an examination;

46. (iii) to give to such officer as may be prescribed the prescribed notice of the commencement of any prescribed industry or process;

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398 (e) for the recovery on summary conviction of monetary penalties in respect of any contravention of or failure to comply with any such requirement as is mentioned in head (d) above<sup>15</sup>;

399 (f) for such matters as appear to the Secretary of State to be incidental to or consequential on provisions included<sup>16</sup> in the regulations<sup>17</sup>.

1 'Pneumoconiosis' means fibrosis of the lungs due to silica dust, asbestos dust, or other dust, and includes the condition of the lungs known as dust-reticulation: Social Security Contributions and Benefits Act 1992 s 122(1).

2 See PARA 153 note 4 ante.

3 For the meaning of 'employed earner's employment' for these purposes see PARA 154 note 1 ante.

4 See the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 2(b) (i). The specified employments referred to are those set out in reg 2(a), Sch 1 Pt II. There are numerous commissioners' decisions on which occupations do and do not fall within the specified categories: see Neligan *Social Security Case Law: Digest of Commissioners' Decisions* Ch 9.

5 See the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 4(3).

6 See *ibid* reg 2(b)(ii).

7 *Ie* for the purposes of the Social Security Contributions and Benefits Act 1992 ss 108-110: see s 110(1); and the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 21.

8 See the Social Security Contributions and Benefits Act 1992 s 110(1); and the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 21. As to byssinosis see the Social Security Contributions and Benefits Act 1992 s 110(4).

9 See *ibid* s 110(2); and the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 22(1), (1A) (reg 22(1) amended, and reg 22(1A) added, by SI 1993/1985).

10 Social Security Contributions and Benefits Act 1992 s 110(3).

11 As to the power to make regulations generally see PARA 30 ante.

12 For the meaning of 'medically examined' see PARA 65 note 7 ante.

13 For the meaning of 'prescribed' see PARA 19 note 3 ante.

14 *Ie* within the meaning of the Social Security Contributions and Benefits Act 1992 s 122 (as amended): see PARA 13 note 8 ante.

15 Such penalties must not exceed £5 for every day on which the contravention or failure occurs or continues: see the Social Security Administration Act 1992 s 184.

16 *Ie* by virtue of heads (a)-(d) in the text or the Social Security Contributions and Benefits Act 1992 s 110(1).

17 Social Security Administration Act 1992 s 184. As to the regulations made by virtue of these provisions see notes 8-9 *supra*. As to the Secretary of State see PARA 1 ante.

## UPDATE

### 158 Prescription of pneumoconiosis

TEXT AND NOTES--Regulations must provide for applying the provisions of the Social Security Act 1998 Pt I Ch II (ss 8-39: see PARA 356A), subject to any prescribed additions or modifications, in relation to decisions made or falling to be made under

the Social Security Contributions and Benefits Act 1992 s 110: Social Security Act 1998 s 32.

NOTE 4--SI 1985/967 reg 2(a) amended: SI 2000/1588.

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### **159. Prescription of occupational deafness.**

Occupational deafness<sup>1</sup> is prescribed in relation to all persons who have been employed<sup>2</sup> in employed earner's employment<sup>3</sup> at any time on or after 5 July 1948, and for a period or periods (whether before or after that date) amounting in aggregate to not less than 10 years, in one or more of the specified occupations<sup>4</sup>. The assessment of the extent of disablement and the rate of disablement benefit in a case of occupational deafness are governed by special rules, depending on the measured hearing loss<sup>5</sup>.

1 'Occupational deafness' means the disease numbered A10 (as amended) in the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 2(a), Sch 1 Pt I (as amended): reg 1(2). The provisions relating to occupational deafness are contained in regs 25-35 (as amended), Sch 3 (as amended).

2 See PARA 153 note 4 ante.

3 For the meaning of 'employed earner's employment' for these purposes see PARA 154 note 1 ante.

4 Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 2(c). There is provision for concurrent employment in certain of these occupations to be treated as a single occupation: see reg 2(c). The occupations are set out in Sch 1 Pt I col 2 category A10 (as amended).

5 See *ibid* reg 34, Sch 3 (as amended). The period to be taken into account by an assessment of the extent of disability in respect of occupational deafness may not commence before 3 February 1975: reg 35.

### **UPDATE**

### **159 Prescription of occupational deafness**

TEXT AND NOTES 1-4--SI 1985/967 reg 2(c) amended: SI 2005/324.

NOTE 1--SI 1985/967 reg 25 further amended: SI 2000/1588, SI 2005/324. SI 1985/967 reg 27 further amended: SI 2000/1588. SI 1985/967 reg 29 replaced, regs 30-33 revoked: SI 2003/2190.

NOTE 4--Air-powered electrodes functioning as part of spot-welding equipment are 'pneumatic percussive tools' for the purposes of entitlement to disablement benefit for occupational deafness: *Appleby v Chief Adjudication Officer* (1999) Times, 5 August, CA.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(3) INDUSTRIAL DISEASES/(iii) Special Provision for Certain Diseases/159A. Prescription of cataract.

**159A. Prescription of cataract.**

Cataract is not prescribed unless the person was employed<sup>1</sup> in employed earner's employment<sup>2</sup> in a specified occupation<sup>3</sup> for a period or periods amounting in aggregate to not less than five years<sup>4</sup>.

1 See PARA 153 NOTE 4.

2 For the meaning of 'employed earner's employment' for these purposes see PARA 154 NOTE 1.

3 I.e. an occupation set out in the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, Sch 1 Pt I col 2 category A2.

4 Ibid reg 2(e) (added by SI 2000/1588).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(3) INDUSTRIAL DISEASES/(iii) Special Provision for Certain Diseases/160. Special provisions as to title to benefit.

### **160. Special provisions as to title to benefit.**

Where a claim is made for disablement pension in respect of pneumoconiosis<sup>1</sup>, byssinosis or diffuse mesothelioma<sup>2</sup>, the threshold of resulting disablement is 1 per cent, not the normal 14 per cent<sup>3</sup>. On such a claim, where the extent of disablement is assessed at 1 per cent or more but less than 20 per cent, the pension is payable at the 20 per cent rate if the resulting degree of disablement is greater than 10 per cent and, if it is not, at one-tenth of the 100 per cent rate, with any fraction of a penny being treated as a penny<sup>4</sup>. There are specific provisions applying to cases of occupational deafness<sup>5</sup> and occupational asthma<sup>6</sup>.

1 For the meaning of 'pneumoconiosis' see PARA 158 note 1 ante.

2 'Diffuse mesothelioma' means disease numbered D3 (as amended) in the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 2(a), Sch 1 Pt I (as amended): reg 1(2).

3 See the Social Security Contributions and Benefits Act 1992 s 103(1); and the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 20(1) (substituted by SI 1986/1561). Where a person is found to be suffering from pneumoconiosis the loss of faculty is to be assessed for the resulting disablement as not less than 1%: see the Social Security Contributions and Benefits Act 1992 s 110(3); and PARA 141 ante.

4 Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 20(1A) (added by SI 1986/1561). On a claim for byssinosis the period to be taken into account for the assessment (if not for life) is to be not less than one year: Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 20(3).

5 See *ibid* reg 25 (time for claiming); reg 26 (claims in respect of occupational deafness); reg 27 (as amended) (further claims); reg 28 (availability of disablement benefit); reg 29 (period to be covered by an assessment); regs 30, 31 (as amended) (unforeseen aggravation); reg 32 (no appeal against an initial provisional assessment); reg 33 (cases in which reassessment is final); and reg 35 (commencement of period of assessment). Several of these regulations refer to cases where claims were made under the provisions allowing a claim for sickness benefit by a person not satisfying the contribution conditions but suffering an industrial accident or disease (originally the Social Security Act 1975 s 50A (repealed); later the Social Security Contributions and Benefits Act 1992 s 102 (repealed)). However, this provision was repealed by the Social Security (Incapacity for Work) Act 1994 s 11, Sch 1 para 29, Sch 2 as from 13 April 1995 (on the replacement of sickness benefit), and so the relevant parts of the regulations now only apply to old cases.

6 See the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 36 (time for claiming benefit in respect of occupational asthma). The agents exposure to which constitute occupational asthma are set out in Sch 1 Pt I col 1 category D7.

## **UPDATE**

### **160 Special provisions as to title to benefit**

TEXT AND NOTES--See further SI 1985/967 regs 20A (diffuse mesothelioma--prescribed loss of faculty), 20B (asbestos-related primary carcinoma of the lung--special conditions and prescribed loss of faculty) (reg 20A added by SI 2002/1717, reg 20B added by SI 2006/586 (amended by SI 2006/769)).

TEXT AND NOTE 2--Reference to diffuse mesothelioma omitted: SI 1985/967 reg 20(1) (amended by SI 2002/1717).

NOTE 5--SI 1985/967 reg 25 further amended: SI 2000/1588, SI 2005/324. SI 1985/967 reg 27 further amended: SI 2000/1588. SI 1985/967 reg 29 replaced, regs 30-33 revoked: SI 2003/2190.

NOTE 6--SI 1985/967 reg 36 amended: SI 2000/1588.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(4) DISCONTINUED BENEFITS AND OLD CASES/161. In general.

#### **(4) DISCONTINUED BENEFITS AND OLD CASES**

##### **161. In general.**

The benefits which may be claimed by a person suffering an industrial injury or disease have undergone significant change. Industrial injury benefit used to be payable instead of, and at a higher rate than, ordinary sickness benefit<sup>1</sup>. Disablement benefit, which is more in the nature of a compensation payment than an income substitute, has also undergone major changes. The lump sum disablement gratuity (payable where the disability was assessed at less than 20 per cent) was abolished in 1986<sup>2</sup>, and various supplements have been discontinued, leaving only the basic disablement pension and the allowances for constant attendance and exceptionally severe disablement<sup>3</sup>. The discontinued supplements are considered in outline only as they now solely apply to a diminishing number of claimants who were already in receipt of them.

In addition, the legislation has had to cater for claims which arose in relation to employment, accidents and diseases pre-dating the inception of the modern social security system in 1948<sup>4</sup>. This now only concerns a small and rapidly diminishing number of claimants, and is therefore considered in outline only.

1 See PARA 126 ante.

2 This now only applies to a claim for disablement benefit made before 1 October 1986: see the Social Security Contributions and Benefits Act 1992 s 106, Sch 7 Pt II para 9.

3 As to disablement pension see PARA 141 et seq ante. As to constant attendance allowance see PARAS 147-148 ante; and as to severe disablement allowance see PARA 149 ante.

4 This used to be contained in the Industrial Injuries and Diseases (Old Cases) Act 1975 (repealed), and is now consolidated in the Social Security Contributions and Benefits Act 1992 s 111, Sch 8 (as amended); see PARA 167 post.

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## **162. Unemployability supplement.**

Unemployability supplement is payable to a beneficiary<sup>1</sup> who is incapable of work and likely to remain so permanently as a result of the relevant loss of faculty<sup>2</sup>.

This only applies in relation to a person who was a beneficiary in receipt of such supplement immediately before 6 April 1987<sup>3</sup>.

1 For the meaning of 'beneficiary' see PARA 21 note 2 ante.

2 See the Social Security Contributions and Benefits Act 1992 s 106, Sch 7 Pt I (as amended). As to the rate and duration of the supplement see Sch 7 para 2. There are increases in the supplement available in respect of beneficiary's age (see Sch 7 para 3 (as amended)), in respect of the beneficiary's dependent children (see Sch 7 para 4 (as amended), Sch 7 para 5, 7, 8) and in respect of the beneficiary's adult dependants (see Sch 7 paras 6-8). For the meaning of 'relevant loss of faculty' see PARA 142 note 7 ante.

3 See *ibid* Sch 7 para 1.

### **UPDATE**

## **162 Unemployability supplement**

NOTE 2--1992 Act Sch 7 Pt I further amended: Social Security Act 1998 Sch 7 para 114(1); Civil Partnership Act 2004 Sch 24 para 52; Tribunals, Courts and Enforcement Act 2007 Sch 8 para 19. 1992 Act Sch 7 para 4 amended: SI 2001/911, SI 2002/683, SI 2003/600, SI 2004/578, SI 2005/633, SI 2006/633, SI 2007/769, SI 2008/699, SI 2009/661.

1992 Act Sch 7 paras 4-6 amended: Child Benefit Act 2005 Sch 1 para 16.

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**163. Increases of disablement pension during hospital treatment.**

Where a person is awarded disablement benefit<sup>1</sup>, but the extent of his disablement is assessed for the period taken into account by the assessment at less than 100 per cent, it is treated as assessed at 100 per cent for any part of that period (whether before or after the making of the assessment or the award of benefit) during which he receives, as an in-patient in a hospital or similar institution, medical treatment<sup>2</sup> for the relevant injury or loss of faculty<sup>3</sup>.

This only applies to medical treatment which commenced before 6 April 1987<sup>4</sup>.

1 As to disablement pension see PARA 141 et seq ante.

2 For the meaning of 'medical treatment' see PARA 149 note 1 ante.

3 Social Security Contributions and Benefits Act 1992 s 106, Sch 7 Pt III para 10. For the meaning of 'relevant injury' and 'relevant loss of faculty' see PARA 142 note 7 ante.

4 See ibid Sch 7 para 10(1).

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#### **164. Reduced earnings allowance.**

Reduced earnings allowance<sup>1</sup> is payable, where a person is entitled to a disablement pension<sup>2</sup> (on a disablement assessed at more than 1 per cent) and, while capable of some work, is incapable permanently of following his usual occupation or one of an equivalent standard, in order to compensate for the lost earnings<sup>3</sup>.

This only applies where the loss of faculty resulted from an accident<sup>4</sup> happening before 1 October 1990<sup>5</sup>.

1 Reduced earnings allowance was previously known as a special hardship allowance but was renamed a reduced earnings allowance in 1986: see the Social Security (Industrial Injuries) (Reduced Earnings Allowance and Transitional) Regulations 1987, SI 1987/415 (as amended).

2 As to disablement pension see PARA 141 et seq ante.

3 See the Social Security and Benefits Act 1992 s 106, Sch 7 Pt IV paras 11, 12. Due largely to the difficult nature of the comparison that had to be made between pre-accident earnings and post-accident earning capacity, this allowance produced a large volume of commissioners' decisions: see Neligan *Social Security Case Law: Digest of Commissioners' Decisions* Ch 11.

4 This was extended to include the contraction of a prescribed disease by the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 11, Sch 2.

5 See the Social Security Contributions and Benefits Act 1992 Sch 7 para 11(1). If an existing beneficiary ceases to be entitled to it for one or more days the entitlement lapses altogether: see Sch 7 para 11(2). For the meaning of 'beneficiary' see PARA 21 note 2 ante.

### **UPDATE**

#### **164 Reduced earnings allowance**

TEXT AND NOTES--The reduced earnings and retirement allowance schemes are compatible with the European Convention on Human Rights: Applications 65731/01 and 65900/01 *Stec v United Kingdom* (2006) 43 EHRR 1017, ECtHR.

NOTE 1--A claimant who established a claim for special hardship allowance prior to its replacement, and who claimed within the prescribed period, was entitled to make a claim for the allowance even though the claim was made after the replacement of the allowance: *Chief Adjudication Officer v Maguire* [1999] 2 All ER 859, CA. Reduced earnings allowance is within the scope of the derogation to EC Council Directive 79/7, which allows member states to determine pensionable age for the purposes of granting old-age and retirement pensions and the possible consequences for other benefits: Case C-196/98 *Hepple v Adjudication Officer* [2000] All ER (EC) 513, ECJ.

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### **165. Retirement allowance.**

A person who (1) has attained pensionable age<sup>1</sup>; (2) gives up regular employment<sup>2</sup> on or after 10 April 1989; and (3) was entitled to reduced earnings allowance<sup>3</sup> on the day immediately before he gave up such employment, ceases to be entitled to reduced earnings allowance as from the day he gives up regular employment<sup>4</sup>. Such a person is then entitled to retirement allowance for life<sup>5</sup>.

This only applies where the loss of faculty resulted from an accident happening before 1 October 1990<sup>6</sup>.

1 For the meaning of 'pensionable age' see PARA 562 post.

2 For the meaning of 'employment' see PARA 32 note 1 ante. As to regular employment see the Social Security (Industrial Injuries) (Regular Employment) Regulations 1990, SI 1990/256 (as amended); and Decision R(I)2/93.

3 As to reduced earnings allowance see PARA 164 ante.

4 See the Social Security Contributions and Benefits Act 1992 s 106, Sch 7 Pt V para 13(1).

5 See ibid Sch 7 para 13(2), (3). As to the administration and rate of retirement allowance see Sch 7 para 13(4)-(11) (as amended).

6 This is because retirement allowance is conditional upon receipt of the reduced earnings allowance which is only applicable where the loss of faculty resulted from an accident happening before 1 October 1990: see PARA 164 text and note 5 ante.

### **UPDATE**

### **165 Retirement allowance**

TEXT AND NOTES--See Applications 65731/01 and 65900/01 *Stec v United Kingdom* (2006) 43 EHRR 1017, ECtHR; and PARA 164 TEXT AND NOTES.

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### **166. Industrial death benefit.**

The widow of the deceased (that is the person in respect of whose death industrial death benefit is claimed or payable<sup>1</sup>) is entitled to death benefit if at his death either (1) she was residing with him; or (2) she was receiving or entitled to receive, or would but for the relevant accident<sup>2</sup> have been receiving or entitled to receive, from him periodical payments for her maintenance of not less than the prescribed amount<sup>3</sup>.

This only applies in relation to deaths before 11 April 1988<sup>4</sup>.

1 See the Social Security Contributions and Benefits Act 1992 s 106, Sch 7 para 14(2).

2 For the meaning of 'relevant accident' see PARA 129 note 12 ante.

3 See the Social Security Contributions and Benefits Act 1992 Sch 7 para 15(1). As to the period of the entitlement see Sch 7 para 15(2)-(4). As to rate of the widow's benefit see Sch 7 para 16; and as to the rate of and entitlement to widower's benefit see Sch 7 para 17. There are specific provisions relating to children of the deceased's family (see Sch 7 para 18); limits of entitlement in respect of children (see Sch 7 para 19); death of a person with constant attendance allowance (see Sch 7 para 20); and death of deceased due to pulmonary disease (see Sch 7 para 21). As to constant attendance allowance see PARAS 147-148 ante.

4 Ibid Sch 7 para 14(1). A person widowed by an accident after that date is now entitled to the ordinary widow's benefits: see PARA 80 et seq ante.

### **UPDATE**

### **166 Industrial death benefit**

NOTE 3--Social Security Contributions and Benefits Act 1992 Sch 7 para 15(2), (3) amended: Civil Partnership Act 2004 Sch 24 para 52(5). Social Security Contributions and Benefits Act 1992 Sch 7 paras 16, 18, 19 amended: Child Benefit Act 2005 Sch 1 para 16.

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### 167. Old cases.

Although the workmen's compensation scheme was superseded by the modern social security system as from 5 July 1948, there are still what are in effect transitional provisions in force in relation to accidents or diseases occurring in relation to employment before that date. This is done in two ways. First, the repealed provisions of the Workmen's Compensation Acts continue to apply to cases where a right to compensation arose in respect of employment before 5 July 1948<sup>1</sup>. Secondly, the powers have been exercised by the Secretary of State<sup>2</sup> to provide state-financed schemes<sup>3</sup> to (1) allow supplementation of the pre-1948 rights to bring them more into line with the current rights<sup>4</sup>; and (2) establish new rights to benefit in relation to pneumoconiosis, byssinosis and certain other (primarily carcinogenic) illnesses attributable to employment before the relevant date and in respect of which the claimant would not otherwise have had a right to benefit<sup>5</sup>.

1 See the Social Security Contributions and Benefits Act 1992 s 111, Sch 8 para 1.

2 As to the Secretary of State see PARA 1 ante.

3 See the Social Security Contributions and Benefits Act 1992 Sch 8 paras 2-6 (as amended). As to the provision of benefit see Sch 8 para 7. Interpretation provisions are set out in Sch 8 para 8.

4 See the Workmen's Compensation (Supplementation) Scheme 1982, SI 1982/1489 (as amended).

5 See the Pneumoconiosis, Byssinosis and Miscellaneous Diseases Benefit Scheme 1983, SI 1983/136 (as amended).

The Social Security Administration Act 1992 s 185(1), Sch 9 (Old Cases payments administration) has effect in relation to such schemes; and regulations may provide for applying, in relation to payments under the Social Security Contributions and Benefits Act 1992 Sch 8 para 7, the provisions of the Social Security Administration Act 1992 relating to the making of claims and the determination of claims and questions in so far as those provisions apply in relation to (1) an unemployability supplement; (2) an increase of a disablement pension in respect of a child or adult dependant; or (3) an increase of a disablement pension in respect of the need for constant attendance or exceptionally severe disablement (as the case may be) subject to any additions or modifications: s 185(1), (2).

### UPDATE

### 167 Old cases

NOTE 3--Social Security Contributions and Benefits Act 1992 Sch 8 para 2 amended: Social Security Benefits Up-rating Order 2008, SI 2008/632. Social Security Contributions and Benefits Act 1992 Sch 8 para 6 amended: Civil Partnership Act 2004 Sch 24 para 53; Social Security Benefits Up-rating Order 2005, SI 2005/522. Social Security Contributions and Benefits Act 1992 Sch 8 para 8 amended: Civil Partnership Act 2004 Sch 24 para 53.

NOTE 5--Social Security Administration Act 1992 Sch 9 amended: Social Security Act 1998 Sch 7 para 115.

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## **(5) PAYMENTS UNDER THE PNEUMOCONIOSIS ETC (WORKERS' COMPENSATION) ACT 1979**

### **168. The provision for lump sum payments.**

In addition to any social security benefits payable, a person who is disabled by pneumoconiosis<sup>1</sup>, byssinosis, diffuse mesothelioma<sup>2</sup> or other specified disease<sup>3</sup> may make a claim to the Secretary of State<sup>4</sup> who, if satisfied that the appropriate conditions<sup>5</sup> are fulfilled, must make to him a payment of the prescribed amount<sup>6</sup>.

The conditions of entitlement are that (1) disablement benefit is payable to that person in respect of the disease or would be payable to him in respect of it but for his disablement amounting to less than the appropriate percentage<sup>7</sup>; (2) every relevant employer<sup>8</sup> of his has ceased to carry on business<sup>9</sup>; and (3) he has not brought an action<sup>10</sup>, or compromised any claim, for damages in respect of the disablement<sup>11</sup>.

1 For the meaning of 'pneumoconiosis' see PARA 158 note 1 ante (definition applied by the Pneumoconiosis etc (Workers' Compensation) Act 1979 s 10(1), (2) (amended by the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 57)). The Pneumoconiosis etc (Workers' Compensation) Act 1979 does not extend to Northern Ireland: s 10(4). For corresponding legislation in relation to Northern Ireland see the Pneumoconiosis etc (Workers' Compensation) (Northern Ireland) Regulations 1979, SI 1979/925 (as amended).

2 For the meaning of 'diffuse mesothelioma' see PARA 160 note 2 ante (definition as applied: see note 1 supra).

3 The other specified diseases are (1) primary carcinoma of the lung where there is accompanying evidence of one or both of the following: (a) asbestosis; (b) bilateral diffuse pleural thickening; (2) bilateral diffuse pleural thickening: see the Pneumoconiosis etc (Workers' Compensation) Act 1979 s 1(3) (amended by the Social Security Act 1985 s 24); and the Pneumoconiosis etc (Workers' Compensation) (Specified Diseases) Order 1985, SI 1985/2034, art 2.

4 As to the Secretary of State see PARA 1 ante.

5 The conditions of entitlement set out in the Pneumoconiosis etc (Workers' Compensation) Act 1979 s 2(2): see s 1(1).

6 Ibid s 1(1). Regulations may prescribe different amounts for different cases or classes or for different circumstances: s 1(4). No order may be made unless a draft has been laid before, and approved by resolution of, each House of Parliament: s 1(5) (added by the Social Security Act 1985 s 24). For the specified amount see the Pneumoconiosis etc (Workers' Compensation) (Payment of Claims) Regulations 1988, SI 1988/668 (subject to frequent amendment: see eg the Pneumoconiosis etc (Workers' Compensation) (Payment of Claims) Amendment Regulations 1997, SI 1997/1691). As to the power to make regulations see the Pneumoconiosis etc (Workers' Compensation) Act 1979 s 7.

Any expenditure incurred by the Secretary of State in making payments under the 1979 Act and any increase in the administrative expenses of the Secretary of State attributable to the 1979 Act are to be paid out of moneys provided by Parliament: s 9(1).

7 See ibid s 2(1)(a) (amended by the Social Security Administration Act 1992 s 39, Sch 3 para 17). No amount is payable in respect of disablement amounting to less than 1%: Pneumoconiosis etc (Workers' Compensation) Act 1979 s 2(3A) (added by the Social Security Act 1986 Sch 3 para 17).

8 'Relevant employer', in relation to a person disabled by a disease to which the Pneumoconiosis etc (Workers' Compensation) Act 1979 applies, means any person by whom he was employed at any time during the period during which he was developing the disease and against whom he might have or might have had a claim for damages in respect of the disablement: s 2(3).

9 Ibid s 2(1)(b).

10 Any action which has been dismissed otherwise than on the merits (as for example for want of prosecution or under any enactment relating to the limitation of actions) is to be disregarded: *ibid* s 2(4).

11 Ibid s 2(1)(d).

## UPDATE

### **168-172 Payments under the Pneumoconiosis etc (Workers' Compensation) Act 1979**

As to lump sum payments to sufferers of mesothelioma who are not eligible under the Pneumoconiosis etc (Workers' Compensation) Act 1979, see the Child Maintenance and Other Payments Act 2008 Pt 4 (ss 46-54); and PARA 172A.

### **168 The provision for lump sum payments**

TEXT AND NOTES--A payment under the 1979 Act is deductible from a subsequent award of damages made in a personal injury action: *Ballantine v Newalls Insulation Co Ltd* [2001] ICR 25, CA.

NOTE 6--SI 1988/668 further amended: SI 1998/1840, SI 2000/1118, SI 2001/3525, SI 2004/726, SI 2005/414, SI 2006/829, SI 2007/716, SI 2008/650, SI 2008/1963, SI 2009/747, SI 2010/1106. 1979 Act s 7 amended: Welfare Reform Act 2007 s 58(4).

NOTE 8--Definition of 'relevant employer' in 1979 Act s 2(3) substituted: Welfare Reform Act 2007 s 58(2); 'relevant employer' now has the meaning given in the 1979 Act Schedule (added by 2007 Act s 58(3), Sch 6). See also the Pneumoconiosis etc (Workers' Compensation) (Prescribed Occupations) Order 2007, SI 2007/2000.

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### **169. Lump sum payments to dependants of deceased disabled persons.**

If, on a claim by the dependant<sup>1</sup> of a person who, immediately before he died, was disabled by pneumoconiosis, byssinosis, diffuse mesothelioma or other specified disease<sup>2</sup>, the Secretary of State<sup>3</sup> is satisfied that the appropriate conditions are fulfilled<sup>4</sup>, he is to make to that dependant<sup>5</sup> a payment of a prescribed amount<sup>6</sup>. For these purposes, the following are dependants of such a person:

- 400 (1) if he left a spouse who was residing with him or was receiving or entitled to receive from him periodical payments for her maintenance, that spouse<sup>7</sup>;
- 401 (2) if head (1) above does not apply but he left a child<sup>8</sup> or children who satisfies or satisfy certain requirements<sup>9</sup>, that child or those children<sup>10</sup>;
- 402 (3) if neither head (1) or head (2) above applies but he left a reputed spouse who was residing with him, that reputed spouse<sup>11</sup>;
- 403 (4) if none of heads (1) to (3) above applies, any relative<sup>12</sup> or relatives of his who satisfies or satisfy certain requirements<sup>13</sup> and who was or were, in the opinion of the Secretary of State, wholly or mainly dependent on him at the date of his death<sup>14</sup>.

The conditions of entitlement are (a) that no payment under the Pneumoconiosis etc (Workers' Compensation) Act 1979 has been made to the deceased in respect of the disease<sup>15</sup>; (b) that death benefit<sup>16</sup> is payable to or in respect of the dependant by reason of the deceased's death as a result of the disease, or that disablement benefit was payable to the deceased in respect of the disease immediately before he died or would have been payable to him but for certain circumstances<sup>17</sup>; (c) that every relevant employer<sup>18</sup> of the deceased has ceased to carry on business<sup>19</sup>; and (d) that neither he nor his personal representatives nor any relative of his has brought any action<sup>20</sup>, or compromised any claim, for damages in respect of the disablement or death<sup>21</sup>.

1 For the meaning of 'dependant' see the text to notes 7-14 infra.

2 As to the specified diseases see PARA 168 note 3 ante.

3 As to the Secretary of State see PARA 1 ante.

4 As to the appropriate conditions see the text to notes 15-21 infra.

5 Where such a payment falls to be made to two or more persons, it is to be made to one of them or divided between some or all of them as the Secretary of State thinks fit: Pneumoconiosis etc (Workers' Compensation) Act 1979 s 3(3). Where a payment falls to be made to a person who is under the age of 18 or incapable of managing his own affairs, it is to be made for his benefit to such trustees as the Secretary of State may appoint to be held on such trusts as he may declare: s 6.

6 Ibid s 1(2). For the prescribed amount, and further provisions as to its assessment, see the Pneumoconiosis etc (Workers' Compensation) (Payment of Claims) Regulations 1988, SI 1988/668 (subject to frequent amendment).

7 Pneumoconiosis etc (Workers' Compensation) Act 1979 s 3(1)(a).

8 'Child' includes a posthumous child: ibid s 3(4).

9 The requirements are that at the relevant date (ie the date of the death of the deceased or 4 July 1979 (ie the date of the coming into force of the Pneumoconiosis etc (Workers' Compensation) Act 1979: see s 10(3)), whichever is the later), the person concerned was (1) under the age of 16; (2) under the age of 21 and not gainfully employed full-time; or (3) permanently incapable of self support: s 3(2).

10 Ibid s 3(1)(b).

11 Ibid s 3(1)(c).

12 'Relative' means brother, sister, lineal ancestor or lineal descendant; and for these purposes, a relationship is established as if any illegitimate child or step child of a person had been a child born to him in wedlock: ibid s 3(4).

13 As to these requirements see note 9 supra.

14 Pneumoconiosis etc (Workers' Compensation) Act 1979 s 3(1)(d).

15 Ibid s 2(2)(a).

16 As to industrial death benefit see PARAS 126, 166 ante.

17 Pneumoconiosis etc (Workers' Compensation) Act 1979 s 2(2)(b). The circumstances referred to in the text are (1) the deceased's disablement amounts to less than the appropriate percentage; or (2) the deceased not having claimed the benefit; or (3) the deceased having died before he had suffered from the disease for the appropriate period: see s 2(2)(b)(i)-(iii) (added by the Social Security Act 1986 s 39, Sch 3 para 17).

18 For the meaning of 'relevant employer' see PARA 168 note 8 ante.

19 Pneumoconiosis etc (Workers' Compensation) Act 1979 s 2(2)(c).

20 As to actions which are to be disregarded see PARA 168 note 10 ante.

21 Pneumoconiosis etc (Workers' Compensation) Act 1979 s 2(2)(d).

## UPDATE

### **168-172 Payments under the Pneumoconiosis etc (Workers' Compensation) Act 1979**

As to lump sum payments to sufferers of mesothelioma who are not eligible under the Pneumoconiosis etc (Workers' Compensation) Act 1979, see the Child Maintenance and Other Payments Act 2008 Pt 4 (ss 46-54); and PARA 172A.

### **169 Lump sum payments to dependants of deceased disabled persons**

NOTE 6--SI 1988/668 further amended: see PARA 168 NOTE 6.

TEXT AND NOTE 7--In 1979 Act s 3(1)(a) after 'spouse', in each place, add 'or civil partner': Welfare Reform Act 2007 s 59(1)(a).

TEXT AND NOTE 11--Head (3). Now if neither head (1) or head (2) in the text applies but he left a person who was residing with him and with whom he was in a qualifying relationship, that person: 1979 Act s 3(1)(c) (substituted by 2007 Act s 59(1)(b)).

For the purposes of the 1979 Act s 3(1)(c) (1) two persons of the opposite sex are in a qualifying relationship if they are living together as husband and wife; (2) two persons of the same sex are in a qualifying relationship if they are living together as if they were civil partners: s 3(2A) (added by 2007 Act s 59(2)). For the purposes of head (2), two persons of the same sex are to be regarded as living together as if they were civil partners if, but only if, they would be regarded as living together as husband and wife were they instead two people of the opposite sex: 1979 Act s 3(2B) (as so added).



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## 170. Claims for payment.

Any claim by a disabled person or the dependant of a deceased disabled person for a lump sum payment is to be made in the manner prescribed by regulations<sup>1</sup> within the period of 12 months beginning with the relevant date<sup>2</sup> or within such further period as the Secretary of State may allow<sup>3</sup>. Before determining the claim the Secretary of State may, if he thinks fit, appoint a person to hold an inquiry into any question arising on the claim, or any matter arising in connection with it, and to report on the question or those matters to him<sup>4</sup>. Appeal on a question of law lies from any determination of the Secretary of State of such a claim<sup>5</sup>.

1 The claim must be made in writing, signed by or on behalf of the person making the claim, in such form as the Secretary of State may determine: see the Pneumoconiosis etc (Workers' Compensation) (Determination of Claims) Regulations 1985, SI 1985/1645, regs 1, 3. The Secretary of State may require the applicant to give such information in relation to the claim and supply such evidence in connection with it as will enable him adequately to determine the claim: reg 5. As to the Secretary of State see PARA 1 ante.

2 The 'relevant date' means:

- 23 (1) in the case of a person disabled by pneumoconiosis, byssinosis or diffuse mesothelioma, the date on which disablement benefit first became payable to him in respect of the disease, or 4 July 1979 (ie the date of the coming into force of the Pneumoconiosis etc (Workers' Compensation) Act 1979), whichever is the later (see ss 1(3), 4(4)(a) (s 4(4)(a), (b) both amended by the Social Security Act 1985 s 24));
- 24 (2) in the case of a dependant of a person who, immediately before he died, was disabled by pneumoconiosis, byssinosis or diffuse mesothelioma, the date of the death of the deceased, or 4 July 1979, whichever is the later (see the Pneumoconiosis etc (Workers' Compensation) Act 1979 ss 1(3), 4(4)(b) (as so amended));
- 25 (3) in the case of a person disabled by a disease specified by order (see s 1(3) (as amended); and PARA 168 note 3 ante), the date on which disablement benefit first became payable to him in respect of that disease, or the date of the coming into force of that order, whichever is the later (s 4(4)(c), (d) (both added by the Social Security Act 1985 s 24));
- 26 (4) in the case of a dependant's claim in relation to a disease specified by order (see the Pneumoconiosis etc (Workers' Compensation) Act 1979 s 1(3); and PARA 168 note 3 ante), the date of the deceased's death or the date of the coming into force of that order, whichever is the later (s 4(4)(d) (as so added)).

3 See *ibid* s 4(1); and the Pneumoconiosis etc (Workers' Compensation) (Determination of Claims) Regulations 1985, SI 1985/1645, reg 4.

4 Pneumoconiosis etc (Workers' Compensation) Act 1979 s 4(2). This provision also applies in relation to any reconsideration of a determination under s 5: see s 5(3); and PARA 171 post.

5 See *ibid* s 4(3) (amended by the Social Security (Consequential Provisions) Act 1992 s 4, Sch 2 para 56); and the Social Security Administration Act 1992 s 18 (see PARA 358 post). The Pneumoconiosis etc (Workers' Compensation) Act 1979 s 4(3) also applies in relation to any reconsideration of a determination under s 5: s 5(3); and PARA 171 post.

## UPDATE

### 168-172 Payments under the Pneumoconiosis etc (Workers' Compensation) Act 1979

As to lump sum payments to sufferers of mesothelioma who are not eligible under the Pneumoconiosis etc (Workers' Compensation) Act 1979, see the Child Maintenance and Other Payments Act 2008 Pt 4 (ss 46-54); and PARA 172A.

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### **171. Reconsideration of determinations.**

On application or of his own motion<sup>1</sup> the Secretary of State<sup>2</sup> may reconsider a determination that a payment should not be made, on the ground (1) that there has been a material change of circumstances since the determination was made<sup>3</sup>; or (2) that it was made in ignorance of, or based on a mistake as to, some material fact<sup>4</sup>. Any person who has made a claim for payment, the Secretary of State having determined that payment should not be made, may apply to him for reconsideration of the determination on either of these grounds<sup>5</sup>. Any such application must be made in writing to the Secretary of State and signed by or on behalf of the person making the claim, who must specify the grounds on which it is requested and give such other relevant information as the Secretary of State may require in order that he may adequately deal with the reconsideration<sup>6</sup>. The application for reconsideration must be made within the prescribed time<sup>7</sup>. Notwithstanding the time limits<sup>8</sup>, the Secretary of State may extend the period for reconsideration for such further period as he considers appropriate, having regard to the circumstances of any particular case<sup>9</sup>.

1 See the Pneumoconiosis etc (Workers' Compensation) Act 1979 s 5(2); and the Pneumoconiosis etc (Workers' Compensation) (Determination of Claims) Regulations 1985, SI 1985/1645, regs 6, 9.

2 As to the Secretary of State see PARA 1 ante.

3 Pneumoconiosis etc (Workers' Compensation) Act 1979 s 5(1)(a).

4 Ibid s 5(1)(b). On this ground he may also reconsider a determination that a payment should be made: see s 5(1)(b).

5 Pneumoconiosis etc (Workers' Compensation) (Determination of Claims) Regulations 1985, SI 1985/1645, reg 6.

6 Ibid reg 7.

7 In the case of a person disabled by a disease to which the Pneumoconiosis etc (Workers' Compensation) Act 1979 applies other than a specified disease, application for reconsideration on the ground that there has been a material change of circumstances since the determination was made must be made in each case to the Secretary of State within the period of 12 months from the date on which disablement benefit became payable to that person or, if such benefit first became payable before the Act came into force, before 4 July 1980: Pneumoconiosis etc (Workers' Compensation) (Determination of Claims) Regulations 1985, SI 1985/1645, reg 8(1).

In the case of the dependant of a person who immediately before he died was disabled by a disease to which the Pneumoconiosis etc (Workers' Compensation) Act 1979 applies other than a specified disease, application for reconsideration on the ground that there has been a material change of circumstances since the determination was made must be made to the Secretary of State within the period of 12 months from the date of the deceased's death or, if such death occurred before the Act came into force, before 4 July 1980: Pneumoconiosis etc (Workers' Compensation) (Determination of Claims) Regulations 1985, SI 1985/1645, reg 8(2).

In the case of a person disabled by a specified disease, application for reconsideration on the ground that there has been a material change of circumstances since the determination was made must be made in each case to the Secretary of State within the period of 12 months from the date on which disablement benefit first became payable to that person in respect of the disease or from the date of the coming into force of the order specifying the disease, whichever is the later: reg 8(3).

In the case of a dependant of a person who immediately before he died was disabled by a specified disease, application for reconsideration on the ground that there has been a material change of circumstances since the determination was made must be made to the Secretary of State within the period of 12 months from the date

of the deceased's death or from the date of the coming into force of the order specifying the disease, whichever is the later: reg 8(4).

In the case of a person disabled by a disease to which the Pneumoconiosis etc (Workers' Compensation) Act 1979 applies or in the case of the dependant of a person who immediately before he died was disabled by a disease to which the Act applies, application for reconsideration on the ground that the determination was made in pursuance of, or was based on a mistake as to, some material fact must be made in each case to the Secretary of State within a period of three months from the date on which the applicant became aware that the determination appeared to be so made or so based: Pneumoconiosis etc (Workers' Compensation) (Determination of Claims) Regulations 1985, SI 1985/1645, reg 8(6).

8     le the time limits prescribed in ibid reg 8(1)-(4) (see note 7 supra): reg 8(5).

9     Ibid reg 8(5).

## **UPDATE**

### **168-172 Payments under the Pneumoconiosis etc (Workers' Compensation) Act 1979**

As to lump sum payments to sufferers of mesothelioma who are not eligible under the Pneumoconiosis etc (Workers' Compensation) Act 1979, see the Child Maintenance and Other Payments Act 2008 Pt 4 (ss 46-54); and PARA 172A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(5) PAYMENTS UNDER THE PNEUMOCONIOSIS ETC (WORKERS' COMPENSATION) ACT 1979/172. Misrepresentation.

## **172. Misrepresentation.**

If, whether fraudulently or otherwise, any person misrepresents or fails to disclose any material fact, and in consequence of the misrepresentation or failure a payment is made, the person to whom the payment was made is liable to repay the amount of the payment to the Secretary of State<sup>1</sup> unless he can show that the misrepresentation or failure occurred without his connivance or consent<sup>2</sup>.

Any person who, for the purpose of obtaining a payment, whether for himself or for some other person, knowingly makes a false statement or representation, or produces or furnishes or causes or knowingly allows to be produced or furnished any document or information which he knows to be false in a material particular, is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>3</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 Pneumoconiosis etc (Workers' Compensation) Act 1979 s 5(4). Except as provided under s 5(4), no payment is recoverable by virtue of reconsideration of a determination under s 5: s 5(5). Any sums repaid to the Secretary of State by virtue of s 5(4) are to be paid into the Consolidated Fund: s 9(2). As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711 et seq; PARLIAMENT vol 78 (2010) PARA 1028 et seq.

3 Ibid s 8 (amended by the Criminal Justice Act 1982 s 46). The 'standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37(2) (as substituted): Interpretation Act 1978 s 5, Sch 1 (amended by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58(a)). See SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 1991 s 18 (substituted by the Criminal Justice Act 1993 s 65); and SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 144.

## **UPDATE**

### **168-172 Payments under the Pneumoconiosis etc (Workers' Compensation) Act 1979**

As to lump sum payments to sufferers of mesothelioma who are not eligible under the Pneumoconiosis etc (Workers' Compensation) Act 1979, see the Child Maintenance and Other Payments Act 2008 Pt 4 (ss 46-54); and PARA 172A.

## **172 Misrepresentation**

NOTE 3--1991 Act s 18, consolidated in the Powers of Criminal Courts (Sentencing) Act 2000 s 128, repealed: Criminal Justice Act 2003 Sch 37 Pt 7. See now s 162.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/6. INDUSTRIAL INJURIES BENEFIT/(5) PAYMENTS UNDER THE PNEUMOCONIOSIS ETC (WORKERS' COMPENSATION) ACT 1979/172A. Payments under the Child Maintenance and Other Payments Act 2008.

## **172A. Payments under the Child Maintenance and Other Payments Act 2008.**

### **1. Lump sum payments**

A claim for a payment under the Child Maintenance and Other Payments Act 2008 Pt 4 (ss 46-54) may be made by a person with diffuse mesothelioma, or a dependant of a person who, immediately before death, had diffuse mesothelioma: s 46(1). For these purposes 'dependant' has the meaning given by the Pneumoconiosis etc (Workers' Compensation) Act 1979 s 3 (see PARA 169); and 'diffuse mesothelioma' has the same meaning as in that Act (see PARA 168): Child Maintenance and Other Payments Act 2008 s 46(4). The Secretary of State must make the payment to the claimant if satisfied that the conditions of entitlement in s 47 are fulfilled: s 46(2). Regulations may prescribe the amount of any payment and may prescribe different amounts for different cases or classes of cases or for different circumstances: s 46(3). As to such regulations, see the Mesothelioma Lump Sum Payments (Conditions and Amounts) Regulations 2008, SI 2008/1963, reg 5, Schedule (Schedule amended by SI 2010/1105), which set out the amounts payable based on the age of the person with mesothelioma. Where, because of the Pneumoconiosis etc (Workers' Compensation) Act 1979 s 3(1)(b) or (d) (children, siblings etc) (see PARA 169), a payment may be claimed by two or more persons, the payment is to be made to one of them or divided between some or all of them as the Secretary of State thinks fit: Child Maintenance and Other Payments Act 2008 s 46(5).

In the case of a person who has diffuse mesothelioma, the conditions of entitlement are (1) that no payment within s 47(3) has been made in consequence of the disease; (2) that the person is not eligible for any payment in consequence of the disease that is of a description prescribed by regulations (see SI 2008/1963 reg 2(2)); (3) that such requirement, if any, as may be prescribed by regulations as to the person's connection with the United Kingdom is satisfied (see SI 2008/1963 reg 4): Child Maintenance and Other Payments Act 2008 s 47(1). In the case of a dependant of a person who, immediately before death, had diffuse mesothelioma, the conditions of entitlement are (a) that no payment within s 47(3) has been made in consequence of the disease to that or another dependant or to the deceased or the deceased's personal representatives; (b) that the dependant is not, and the deceased was not, eligible for any payment in consequence of the disease that is of a description prescribed by regulations (see SI 2008/1963 reg 2(2)); (c) that such requirement, if any, as may be prescribed by regulations as to the deceased's connection with the United Kingdom is satisfied (see SI 2008/1963 reg 4): Child Maintenance and Other Payments Act 2008 s 47(2). The payments referred to in heads (1) and (a) are (i) a payment under Pt 4 or under corresponding provision made for Northern Ireland; (ii) a payment under the Pneumoconiosis etc (Workers' Compensation) Act 1979 or under corresponding provision made for Northern Ireland; (iii) an extra-statutory payment; (iv) damages or a payment in settlement of a claim for damages; (v) a payment of a description prescribed by regulations (see SI 2008/1963 reg 2(1) (amended by SI 2008/2365)): Child Maintenance and Other Payments Act 2008 s 47(3). A payment is to be disregarded for the purposes of heads (1) and (a) if it has been, or is liable to be repaid under s 49, the Pneumoconiosis etc (Workers' Compensation) Act 1979 s 5 or corresponding provision made for Northern Ireland, under the terms of an extra-statutory payment, or in circumstances prescribed for these purposes by regulations: s 47(4). 'Extra-statutory payment' has the meaning given by the Social Security (Recovery of Benefits) Act 1997 s 1A(5)(d): Child Maintenance and Other Payments Act 2008 s 47(5). A payment made in error and which in

consequence is liable to be repaid in accordance with statutory provision or rule of law, is to be disregarded for the purposes of heads (1) and (a): SI 2008/1963 reg 3.

## **2. Determination of claims**

A claim under the Child Maintenance and Other Payments Act 2008 s 46 (see PARA 172A.1) must be made in the manner and within the period prescribed by regulations and such regulations may prescribe different periods for different cases or classes of cases or for different circumstances: s 48(1), (2). Regulations may in particular provide that no claim may be made in cases where the prescribed period expired before the commencement of s 46 (ie before 1 October 2008: see SI 2008/1476) (or would have done but for any discretion to extend it): Child Maintenance and Other Payments Act 2008 s 48(3). As to such regulations see the Mesothelioma Lump Sum Payments (Claims and Reconsiderations) Regulations 2008, SI 2008/1595, regs 2, 3 which set out the form and the time limits for claims. The Secretary of State may, before determining any claim under the Child Maintenance and Other Payments Act 2008 s 46, appoint a person to inquire into any question arising on the claim, or any matters arising in connection with it, and to report on the question, or on those matters, to the Secretary of State: s 48(4).

## **3. Reconsideration**

Subject as follows, the Secretary of State (1) may reconsider a determination that a payment not be made under the Child Maintenance and Other Payments Act 2008 Pt 4 (ss 46-54), on the ground that there has been a material change of circumstances since the determination was made; and (2) may reconsider a determination either that a payment ought to be made or that a payment ought not to be made under Pt 4, on the ground that the determination was made in ignorance of, or was based on a mistake as to, a material fact: s 49(1). Regulations must prescribe the manner in which and the period within which an application may be made to the Secretary of State for reconsideration of a determination, or the Secretary of State may institute such a reconsideration without an application: s 49(2). As to such regulations, see the Mesothelioma Lump Sum Payments (Claims and Reconsiderations) Regulations 2008, SI 2008/1595, reg 4. The Child Maintenance and Other Payments Act 2008 s 48(4) (see PARA 172A.2) applies in relation to any reconsideration of a determination as it applies in relation to the determination of a claim: s 49(3). If, whether fraudulently or otherwise, any person misrepresents or fails to disclose any material fact, and in consequence of the misrepresentation or failure, a payment is made under Pt 4, the person to whom the payment was made is liable to repay the amount of that payment to the Secretary of State unless that person can show that the misrepresentation or failure occurred without that person's connivance or consent: s 49(4), (5). Otherwise, no payment under Pt 4 is recoverable by virtue of a reconsideration of a determination: s 49(6). Any sums repaid to the Secretary of State by virtue of s 49(5) are to be paid into the Consolidated Fund: s 49(7).

## **4. Appeals**

A person who has made a claim under the Child Maintenance and Other Payments Act 2008 s 46 (see PARA 172A.1) may appeal against a determination made by the Secretary of State on the claim, or on reconsideration under s 49 (see PARA 172A.2) of a determination made on the claim: s 50(1). Subject to regulations under s 50(4)(c) (see head (3)), the Secretary of State must refer any appeal to the First-tier Tribunal constituted under the Social Security Act 1998 Pt 1 Ch 1 (ss 1-7): Child Maintenance and Other Payments Act 2008 s 50(2) (amended by SI 2008/2833). On an appeal the tribunal may substitute for the determination concerned any determination which could have been made in accordance with the Child Maintenance and Other Payments Act 2008 Pt 4 (ss 46-54): s 50(3). Regulations may make provision (1) as to the

manner in which, and the time within which, an appeal may be made; and (2) for the purpose of enabling an appeal against a determination to be treated as an application for reconsideration under s 49 of the determination made on the claim: s 50(4) (amended by SI 2008/2833). As to such regulations, see the Mesothelioma Lump Sum Payments (Claims and Reconsiderations) Regulations 2008, SI 2008/1595, regs 5, 6 (reg 5 amended, reg 6 added by SI 2008/2706).

## **5. Minors and people who lack capacity**

Where a payment under the Child Maintenance and Other Payments Act 2008 Pt 4 (ss 46-54) falls to be made to a person aged under 18, or a person who lacks capacity within the meaning of the Mental Capacity Act 2005 in relation to financial matters, subject to the Child Maintenance and Other Payments Act 2008 s 46(5) (see PARA 172A.1), the payment is to be made for that person's benefit by paying it to such trustees as the Secretary of State may appoint: s 52(1), (2). The trustees are to hold the payment on such trusts or, in Scotland, for such purposes and on such conditions as the Secretary of State may declare: s 52(3).

### **UPDATE**

#### **168-172 Payments under the Pneumoconiosis etc (Workers' Compensation) Act 1979**

As to lump sum payments to sufferers of mesothelioma who are not eligible under the Pneumoconiosis etc (Workers' Compensation) Act 1979, see the Child Maintenance and Other Payments Act 2008 Pt 4 (ss 46-54); and PARA 172A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(1) IN GENERAL/173. The benefits.

## 7. INCOME-RELATED BENEFITS

### (1) IN GENERAL

#### 173. The benefits.

Schemes are prescribed<sup>1</sup> for what are referred to in the legislation<sup>2</sup> as 'income-related benefits', namely:

- 404 (1) income support<sup>3</sup>;
- 405 (2) family credit<sup>4</sup>;
- 406 (3) disability working allowance<sup>5</sup>;
- 407 (4) housing benefit<sup>6</sup>; and
- 408 (5) council tax benefit<sup>7</sup>.

The Secretary of State must make copies of schemes relating to income support, family credit and disability working allowance available for public inspection at local offices of the Department of Social Security at all reasonable hours without payment<sup>8</sup>.

Income-based jobseeker's allowance is the appropriate benefit, once contribution-based jobseeker's allowance has expired, for those who are unemployed but are required to remain available for work as a condition of entitlement<sup>9</sup>. Means-tested income support remains the benefit for those of no means, or restricted means, who are not required to be available for work<sup>10</sup>. Family credit may be claimed by those with family responsibilities who are in work but on incomes lower than the prescribed thresholds<sup>11</sup>. Disability working allowance enables a disabled person to take up work and yet remain eligible for an element of benefit if his income is lower than the prescribed thresholds<sup>12</sup>.

In addition, there is the extra-statutory Earnings Top-Up Scheme 1996, which has been introduced on an experimental and temporary basis and applies only in certain areas<sup>13</sup>. The purpose of the scheme is to provide a supplement to single persons or couples on low wages; and its main innovation is that it applies to people without responsibilities for children or young persons<sup>14</sup>.

1 'Prescribed' means specified in or determined in accordance with regulations: Social Security Contributions and Benefits Act 1992 s 137(1). Under s 137(2) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 35), regulations may make provision:

- 27 (1) as to circumstances in which a person is to be treated as being or not being in Great Britain;
- 28 (2) continuing a person's entitlement to benefit during periods of temporary absence from Great Britain;
- 29 (3) as to what is or is not to be treated as remunerative work or as employment;
- 30 (4) as to circumstances in which a person is or is not to be treated as (a) engaged or normally engaged in remunerative work; (b) available for employment; or (c) actively seeking employment;
- 31 (5) as to what is or is not to be treated as relevant education;

- 32 (6) as to circumstances in which a person is or is not to be treated as receiving relevant education;
- 33 (7) specifying the descriptions of pension increases under war pension schemes or industrial injuries schemes that are analogous to the benefits mentioned in the Social Security Contributions and Benefits Act 1992 s 129(2)(b)(i)-(iii) (as amended) (see PARA 221 post);
- 34 (8) as to circumstances in which a person is or is not to be treated as occupying a dwelling as his home;
- 35 (9) for treating any person who is liable to make payments in respect of a dwelling as if he were not so liable;
- 36 (10) for treating any person who is not liable to make payments in respect of a dwelling as if he were so liable;
- 37 (11) for treating as included in a dwelling any land used for the purposes of the dwelling;
- 38 (12) as to circumstances in which persons are to be treated as being or not being members of the same household;
- 39 (13) as to circumstances in which one person is to be treated as responsible or not responsible for another.

For the meaning of 'Great Britain' see PARA 15 note 4 ante. 'Dwelling' means any residential accommodation, whether or not consisting of the whole or part of a building and whether or not comprising separate and self-contained premises: s 137(1).

2 le the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended).

3 Ibid s 123(1)(a). As to income support see the Income Support (General) Regulations 1987, SI 1987/1967 (as amended); and PARA 176 et seq post.

4 Social Security Contributions and Benefits Act 1992 s 123(1)(b). As to family credit see the Family Credit (General) Regulations 1987, SI 1987/1973 (as amended); and PARA 202 et seq post.

5 Social Security Contributions and Benefits Act 1992 s 123(1)(c). As to disability working allowance see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887 (as amended); and PARA 218 et seq post.

6 Social Security Contributions and Benefits Act 1992 s 123(1)(d). As to housing benefit see the Housing Benefit (General) Regulations 1987, SI 1987/1971 (as amended); and HOUSING vol 22 (2006 Reissue) PARA 140 et seq.

7 Social Security Contributions and Benefits Act 1992 s 123(1)(e) (substituted by the Local Government Finance Act 1992 s 103, Sch 9 para 1). As to council tax benefit see the Council Tax Benefit (General) Regulations 1992, SI 1992/1814 (as amended); and RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq.

8 Social Security Contributions and Benefits Act 1992 s 123(2). As to the Secretary of State see PARA 1 ante.

9 The income-based allowance, modelled on income support, is linked to the contribution-based allowance which replaced unemployment benefit. As to income-based and contribution-based jobseeker's allowance see PARA 266 et seq post.

10 As to the conditions of entitlement to income support see PARA 176 et seq post.

11 As to the conditions of entitlement to family credit see PARA 202 et seq post.

12 As to the conditions of entitlement to disability working allowance see PARA 218 et seq post.

13 See the Earnings Top-Up Scheme 1996 (as amended). The scheme is subject to alteration at any time by the Secretary of State: see the Earnings Top-Up Scheme r 6(1). The duration of the scheme is 8 October 1996 until 4 October 1999: see r 4. The areas in which the scheme applies are set out in rr 1(2), 7, Sch 1 (as amended). The calculation method, which is similar to that of family credit (see PARA 202 et seq post), is set out in the Earnings Top-Up Scheme 1996 (as amended). See also the Earnings Top-Up (Applications and Payments) Rules 1996 (as amended); and the Earnings Top-Up (Assessment) Rules 1996 (as amended). Copies of the rules of the Earnings Top-Up Scheme (as amended) may be obtained from the Customer Services Manager, Earnings Top-Up, Norcross, Blackpool FY35 3TA; and are available for inspection at offices of the Benefits Agency and Employment Service Job Centres which serve the areas affected.

As to the treatment of this extra-statutory allowance for the purposes of the income-related benefits see the Income-related Benefits Schemes and Social Fund (Miscellaneous Amendments) Regulations 1996, SI 1996/1944, reg 13, Sch 1; and the Social Security and Child Support (Jobseeker's Allowance) (Miscellaneous Amendments) Regulations 1996, SI 1996/2538, reg 2 (amended by SI 1997/454).

14 See the Earnings Top-Up Scheme 1996 r 3.

## **UPDATE**

### **173 The benefits**

TEXT AND NOTES--The State Pension Credit Act 2002 introduces a new income-related benefit: see PARA 201A.

As to the statutory functions of local authorities in relation to income-related benefits which may be contracted out, see the Contracting Out (Functions of Local Authorities: Income-Related Benefits) Order 2002, SI 2002/1888.

TEXT AND NOTES 4, 5--Subject to savings (see SI 2003/962) Social Security Contributions and Benefits Act 1992 s 123(1)(b), (c) repealed: Tax Credits Act 2002 Sch 6.

NOTE 6--SI 1987/1971 replaced: Housing Benefit Regulations 2006, SI 2006/213; Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006, SI 2006/214.

NOTE 7--SI 1992/1814 replaced: Council Tax Benefit Regulations 2006, SI 2006/215 (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq); Council Tax Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006, SI 2006/216 (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq).

NOTE 8--The Social Security Contributions and Benefits Act 1992 s 123(2) is to be construed, in relation to tax credit, as if the reference to local offices of the Department of Social Security were a reference to offices of the Commissioners of Inland Revenue: Tax Credits Act 1999 s 18, Sch 2 para 24 (s 18 amended by the Employment Act 2002 Sch 7 para 52) (subject to savings (SI 2003/962) Tax Credits Act 1999 repealed: Tax Credits Act 2002 Sch 6). Reference to Department of Social Security is now to Department for Work and Pensions: Social Security Contributions and Benefits Act 1992 s 123(2) (amended by the Secretaries of State for Education and Skills and for Work and Pensions Order 2002, SI 2002/1397).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(1) IN GENERAL/174. Income, capital and the applicable amount.

### **174. Income, capital and the applicable amount.**

A person is not entitled to an income-related benefit<sup>1</sup> if his capital or a prescribed part of it exceeds the prescribed amount<sup>2</sup>. Further, the income of the claimant has to be set off against the applicable amount for the benefit in question for that claimant, in order to ascertain the benefit payable<sup>3</sup>.

Income and capital must be calculated or estimated in such manner as may be prescribed<sup>4</sup>.

Where the amount of any income-related benefit would be less than a prescribed amount, it is not payable except in prescribed circumstances<sup>5</sup>.

1 For the meaning of 'income-related benefit' see PARA 173 ante.

2 Social Security Contributions and Benefits Act 1992 s 134(1).

3 The applicable amount, in relation to any income-related benefit, is such amount or the aggregate of such amounts as may be prescribed in relation to that benefit: Social Security Contributions and Benefits Act 1992 s 135(1). The power to prescribe applicable amounts includes power to prescribe nil as an applicable amount: s 135(2).

In prescribing, for the purposes of income support, amounts under s 135(1) in respect of accommodation in any area for qualifying persons in cases where prescribed conditions are fulfilled, the Secretary of State must take into account information provided by local authorities or other prescribed bodies or persons with respect to the amounts which they have agreed to pay for the provision of accommodation in relevant premises in that area: s 135(3). 'Accommodation' includes any board or care: s 135(4). 'Qualifying person' means any person who falls within the National Assistance Act 1948 s 26A(1) (as added) or who would fall within that provision apart from any regulations made under s 26A(3) (as added) (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1034): Social Security Contributions and Benefits Act 1992 s 135(4). As to the Secretary of State see PARA 1 ante. 'Local authority', in relation to areas in England and Wales, has the same meaning as it has in the National Assistance Act 1948 Pt III (ss 21-36) (as amended) (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1005): Social Security Contributions and Benefits Act 1992 s 135(4). 'Relevant premises', in relation to areas in England and Wales, has the meaning given by the National Assistance Act 1948 s 26A(2) (as added) (see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1034): Social Security Contributions and Benefits Act 1992 s 135(4). As to the applicable amount in relation to income support see PARA 184 post.

In relation to income support, housing benefit and council tax benefit, the applicable amount for a severely disabled person is to include an amount in respect of his being a severely disabled person: s 135(5) (amended by the Local Government Finance Act 1992 s 103, Sch 9 para 8). Regulations may specify circumstances in which persons are to be treated as being or not being severely disabled: Social Security Contributions and Benefits Act 1992 s 135(6).

4 Ibid s 136(3). As to the calculation of income see PARA 187 et seq, 208 et seq, 224 et seq post. As to the calculation of capital see PARA 194 et seq, 213 et seq, 226 post.

Regulations may prescribe that capital not exceeding the amount prescribed under s 134(1) (see the text and note 2 supra) but exceeding a prescribed lower amount is to be treated, to a prescribed extent, as if it were income of a prescribed amount: s 136(2). See PARAS 194, 213 post.

A person's income in respect of a week must be calculated in accordance with prescribed rules; and the rules may provide for the calculation to be made by reference to an average over a period, which need not include the week concerned: s 136(4).

Circumstances may be prescribed in which (1) a person is treated as possessing capital or income which he does not possess ('notional' capital or income); (2) capital or income that a person does possess is to be disregarded; (3) income is to be treated as capital; and (4) capital is to be treated as income: s 136(5).

5 Ibid s 134(4).

### **UPDATE**

## **174 Income, capital and the applicable amount**

TEXT AND NOTES--See also the 1992 Act s 136A (added by State Pension Credit Act 2002 Sch 2 para 3) (effect of attaining qualifying age for state pension credit).

NOTE 3--Regulations made under the Social Security Contributions and Benefits Act 1992 s 135(1), so far as relating to income support and in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

Social Security Contributions and Benefits Act 1992 s 135(3), (4) repealed: Health and Social Care Act 2001 Sch 6 Pt 3.

Subject to savings (see SI 2003/962) words 'In relation to income support, housing benefit and council tax benefit' omitted: Social Security Contributions and Benefits Act 1992 s 135(5) (amended by the Tax Credits Act 2002 Sch 6).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(1) IN GENERAL/175. Families and income-related benefits.

### **175. Families and income-related benefits.**

Except in prescribed circumstances (1) the entitlement of one member of a family<sup>1</sup> to any one income-related benefit<sup>2</sup> excludes entitlement to that benefit for any other member for the same period<sup>3</sup>; and (2) where a person claiming an income-related benefit is a member of a family, the income and capital of any member of that family is to be treated as the income and capital of that person<sup>4</sup>.

1 'Family' means (1) a married or unmarried couple; (2) a married or unmarried couple and a member of the same household for whom one of them is or both are responsible and who is a child or a person of a prescribed description; (3) except in prescribed circumstances, a person who is not a member of a married or unmarried couple and a member of the same household for whom that person is responsible and who is a child or a person of a prescribed description: Social Security Contributions and Benefits Act 1992 s 137(1). 'Married couple' means a man and woman who are married to each other and are members of the same household: s 137(1). 'Unmarried couple' means a man and a woman who are not married to each other but are living together as husband and wife (as to which see PARA 83 ante) otherwise than in prescribed circumstances: s 137(1). 'Household' is not defined in the Act, but it must be given its normal everyday meaning: Decision R(SB)4/83. In the case of a child, there must be an actual tie (as opposed to a merely formal one) to that particular household, but that tie may subsist through temporary absence: *England v Secretary of State for Social Services* [1982] 3 FLR 222; Decisions R(FIS)4/83; R(SB)28/84; R(SB)14/87. There may be more than one household in one premises (Decision R(SB)13/82); and this may be so even if the persons concerned remain married (Decision CIS/72/1994). 'Child' means a person under the age of 16: Social Security Contributions and Benefits Act 1992 s 137(1). As to the meaning of 'person of a prescribed description' in relation to income support see PARA 182 note 1 post; and, in relation to family credit, see PARA 202 note 11 post.

As to families and income support see PARA 182 post; and as to families and family credit see PARA 207 post.

2 For the meaning of 'income-related benefit' see PARA 173 ante.

3 Social Security Contributions and Benefits Act 1992 s 134(2).

4 Ibid s 136(1).

### **UPDATE**

### **175 Families and income-related benefits**

NOTE 1--In heads (1)-(3) of the definition of 'family' in the Social Security Contributions and Benefits Act 1992 s 137(1), for 'married or unmarried couple' read 'couple': Civil Partnership Act 2004 Sch 24 para 46(2). 'Couple' means (a) a man and woman who are married to each other and are members of the same household; (b) a man and woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances; (c) two people of the same sex who are civil partners of each other and are members of the same household; or (d) two people of the same sex who are not civil partners of each other but are living together as if they were civil partners otherwise than in prescribed circumstances: Social Security Contributions and Benefits Act 1992 s 137(1) (amended by Civil Partnership Act 2004 Sch 24 para 46(3)). For the purposes of the Social Security Contributions and Benefits Act 1992 Pt 7, two people of the same sex are to be regarded as living together as if they were civil partners if, but only if, they would be regarded as living together as husband and wife were they instead two people of the opposite sex: s 137(1A) (added by Civil Partnership Act 2004 Sch 24 para 46(5)). Definitions of 'married couple' and

'unmarried couple' omitted: Civil Partnership Act 2004 Sch 24 para 46(4), Sch 30. See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

Subject to savings (see SI 2003/962) family credit (working families' tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(i) Entitlement/176. Conditions of entitlement.

## **(2) INCOME SUPPORT**

### **(i) Entitlement**

#### **176. Conditions of entitlement.**

A person in Great Britain<sup>1</sup> is entitled to income support if:

- 409 (1) he is of or over the age of 16<sup>2</sup>;
- 410 (2) he has no income or his income does not exceed the applicable amount<sup>3</sup>;
- 411 (3) he is not engaged in remunerative work<sup>4</sup> and, if he is a member of a married or unmarried couple<sup>5</sup>, the other member is not so engaged;
- 412 (4) Except in such circumstances as may be prescribed, he is not receiving relevant education<sup>6</sup>;
- 413 (5) he falls within a prescribed category of person<sup>7</sup>; and
- 414 (6) he is not entitled to a jobseeker's allowance<sup>8</sup> and, if he is a member of a married or unmarried couple, the other member of the couple is not entitled to an income-based jobseeker's allowance<sup>9</sup>.

1 For the meaning of 'Great Britain' see PARA 15 note 4 ante. A person who is temporarily absent from Great Britain may continue to receive income support for a limited period in certain circumstances: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 4 (amended by SI 1988/663; SI 1990/547; SI 1995/482; SI 1996/206; SI 1996/1944).

Certain persons from abroad are not entitled to income support, even if present in Great Britain: see PARA 177 post.

2 There are special provisions affecting the entitlement of those who are less than 18: see PARA 184 note 4 post. As to when a person attains a particular age see PARA 19 note 11 ante.

3 As to the applicable amount see PARA 184 post.

4 As to the meaning of 'remunerative work' see PARA 179 post.

5 For the meaning of 'married couple' and 'unmarried couple' see PARA 175 note 1 ante.

6 For these purposes, a child or young person is to be treated as receiving relevant education if, and only if, he is not receiving advanced education, but he is receiving full-time education for the purposes of the Child Benefit Act 1975 s 2 (repealed: see now the Social Security Contributions and Benefits Act 1992 s 142; and PARA 239 post) or, as the case may be, he is treated as a child for the purposes of that provision: Income Support (General) Regulations 1987, SI 1987/1967, reg 12(1) (reg 12 substituted by SI 1990/547). For the meaning of 'child' for these purposes see PARA 175 note 1 ante. 'Receiving advanced education' means participating in any course (whether full-time or part-time) (1) leading to a postgraduate degree or comparable qualification, a first degree or comparable qualification, a diploma of higher education, a higher national diploma, a higher national diploma or higher national certificate of either the Business and Technology Education Council or the Scottish Vocational Education Council or a teaching qualification; or (2) any other course which is a course of a standard above ordinary national diploma, a national diploma or national certificate of either the Business and Technology Education Council or the Scottish Vocational Education Council, a general certificate of education (advanced level), a Scottish certificate of education (higher level) or a Scottish certificate of sixth year studies: Income Support (General) Regulations 1987, SI 1987/1967, reg 12(2) (as so substituted; and amended by SI 1992/2155; SI 1992/2155; SI 1993/2119).

As to the circumstances in which income support is available for those in education see PARA 181 post.

7 As to the prescribed categories of person who may claim income support see PARA 177 post.

8 As to the jobseeker's allowance see PARA 258 et seq post.

9 Social Security Contributions and Benefits Act 1992 s 124(1) (amended by the Jobseekers Act 1995 s 41(4), (5), Sch 2 para 30, Sch 3).

## UPDATE

### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training

allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **176 Conditions of entitlement**

TEXT AND NOTES--No person is entitled to income support under the Social Security Contributions and Benefits Act 1992 while he is a person to whom the Children (Leaving Care) Act 2000 s 6 applies: s 6(1). Subject to s 6(3), s 6 applies to (a) an eligible child for the purposes of the Children Act 1989 Sch 2 para 19B (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 873); (b) a relevant child for the purposes of s 23A (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 928); and (c) any person of a description prescribed in regulations under s 6(4): s 6(2). As to regulations under s 6 see s 6(3)-(10); and the Children (Leaving Care) Social Security Benefits Regulations 2001, SI 2001/3074 (amended by SI 2004/565, SI 2008/1554).

The Children (Leaving Care) Act 2000 s 6 does not apply for the purposes of entitlement to income support, income-based jobseeker's allowance or income-related

employment and support allowance where a person falls within head (a) or (b); and falls within a category of person prescribed in (i) provided the person is a lone parent (see PARA 177 NOTE 3), the Income Support (General) Regulations 1987, SI 1987/1967, reg 13(2)(a) (see PARA 181 head (1)); (ii) reg 13(2)(b) (see PARA 181 head (2)); or (3) Sch 1B para 1, 2, 7, 8, 10, 11, 12, 13, 24 or 25 (see PARA 177): SI 2001/3074 reg 2(1). The Children (Leaving Care) Act 2000 s 6 does not apply to a person who falls within head (a) or (b) who has not been looked after by a local authority for the purposes of the Children Act 1989 Sch 2 para 19B on or after 1 October 2001: SI 2001/3074 reg 2(2), (4).

NOTE 1--SI 1987/1967 reg 4 further amended: SI 2004/1869, SI 2008/2767. The withdrawal of the payment of income support during periods of temporary absence from Great Britain is not incompatible with EC Council Regulation 1408/71 (see EUROPEAN COMMUNITIES): *Perry v Chief Adjudication Officer* [1999] 2 CMLR 439, CA.

NOTE 6--For these purposes, a person is to be treated as receiving relevant education if he is a qualifying young person within the meaning of the Social Security Contributions and Benefits Act 1992 s 142: SI 1987/1967 reg 12 (substituted by SI 2006/718).

TEXT AND NOTE 9--For 'the other member ... not' read 'the other member of the couple is not and the couple are not': Social Security Contributions and Benefits Act 1992 s 124(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 8 para 28).

Social Security Contributions and Benefits Act 1992 s 124(1) further amended: Civil Partnership Act 2004 Sch 24 para 42.

Also, head (7) he is not entitled to an employment and support allowance and, if he is a member of a couple, the other member of the couple is not entitled to an income-related employment and support allowance: 1992 Act s 124(1) (amended by Welfare Reform Act 2007 Sch 3 para 9(9), Sch 8). In the 1992 Act s 124, 'income-related employment and support allowance' means an income-related allowance under the Welfare Reform Act 2007 Pt 1 (employment and support allowance): 1992 Act s 124(7) (added by 2007 Act Sch 3 para 9(10)).

## UPDATE

### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July

1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of

participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(i) Entitlement/177. Categories of person who may claim income support.

### **177. Categories of person who may claim income support.**

Since the introduction of the income-based jobseeker's allowance<sup>1</sup> for those required to be available for work, income support has been limited to persons in prescribed categories<sup>2</sup>. The categories are:

- 415 (1) lone parents<sup>3</sup>;
- 416 (2) single persons looking after foster children<sup>4</sup>;
- 417 (3) persons temporarily looking after another person<sup>5</sup>;
- 418 (4) persons caring for another person<sup>6</sup>;
- 419 (5) persons incapable of work<sup>7</sup>;
- 420 (6) disabled workers<sup>8</sup>;
- 421 (7) persons in employment living in residential care homes, nursing homes or residential accommodation<sup>9</sup>;
- 422 (8) disabled students<sup>10</sup>;
- 423 (9) deaf students<sup>11</sup>;
- 424 (10) blind persons<sup>12</sup>;
- 425 (11) women incapable of work due to pregnancy, or during a period before and after confinement<sup>13</sup>;
- 426 (12) certain persons in education<sup>14</sup>;
- 427 (13) certain persons aged 50 who have not been in remunerative work for 10 years<sup>15</sup>;
- 428 (14) persons aged 60 or over<sup>16</sup>;
- 429 (15) refugees<sup>17</sup>;
- 430 (16) persons required to attend court<sup>18</sup>;
- 431 (17) persons affected by a trade dispute<sup>19</sup>;
- 432 (18) certain persons from abroad<sup>20</sup>;
- 433 (19) persons in custody<sup>21</sup>;
- 434 (20) a member of a couple looking after children while the other member is temporarily abroad<sup>22</sup>;
- 435 (21) persons appealing against a decision that they are not incapable of work<sup>23</sup>;
- 436 (22) persons engaged in training<sup>24</sup>.

1 As to the jobseeker's allowance see PARA 258 et seq post.

2 Social Security Contributions and Benefits Act 1992 s 124(1)(e) (added by the Jobseekers Act 1995 s 41(4), Sch 2 para 30). See also PARA 176 head (5) ante. The prescribed categories are set out in the Income Support (General) Regulations 1987, SI 1987/1967, reg 4ZA(1), Sch 1B (added by SI 1996/206). A student during the period of study is not included in the prescribed categories unless further conditions are met: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 4ZA(2), (3) (as so added); and PARA 198 post. A person who falls within such a prescribed category for these purposes for any day in a benefit week falls within that category for the whole of that week: reg 4ZA(4) (added by SI 1997/2197). For the meaning of 'benefit week' see PARA 182 note 3 post.

3 I.e. a person who is a lone parent and responsible for a child who is a member of his household: Income Support (General) Regulations 1987, SI 1987/1967, Sch 1B para 1 (as added: see note 2 supra). For the meaning of 'child' see PARA 175 note 1 ante. As to the meaning of 'household' see PARA 182 post.

4 I.e. a single claimant or a lone parent with whom a child is placed by a local authority or voluntary organisation within the meaning of the Children Act 1989 (see CHILDREN AND YOUNG PERSONS): Income Support (General) Regulations 1987, SI 1987/1967, Sch 1B para 2 (as added: see note 2 supra).

5     Ie a person who is (1) looking after a child because the parent of that child or the person who usually looks after him is ill or is temporarily absent from his home; or (2) looking after a member of his family who is temporarily ill: *ibid* Sch 1B para 3 (as added: see note 2 *supra*).

6     *Ibid* Sch 1B paras 4-6 (as added: see note 2 *supra*; para 4 amended by SI 1996/1517). The carer must be regularly and substantially engaged in caring for another person; and there are detailed requirements that either the person cared for must be in receipt of, or have claimed, disability living allowance or attendance allowance, or the carer himself must be in receipt of invalid care allowance: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 1B paras 4-6 (as so added).

7     Ie persons incapable of work, or treated as such, in accordance with the Social Security Contributions and Benefits Act 1992 Pt XIA (ss 171A-171G) (as amended) (see PARA 65 *et seq ante*) or in receipt of statutory sick pay: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 1B para 7 (as added: see note 2 *supra*). As to statutory sick pay see EMPLOYMENT vol 39 (2009) PARA 498 *et seq*.

8     Ie a person to whom *ibid* reg 6(a) (as substituted: see PARA 180 note 2 *post*) applies: Sch 1B para 8 (as added: see note 2 *supra*).

9     Ie a person to whom *ibid* reg 6(g) (as added and substituted: see PARA 180 note 8 *post*) applies: Sch 1B para 9 (as added: see note 2 *supra*). As to residential care homes see SOCIAL SERVICES AND COMMUNITY CARE; as to nursing homes see SOCIAL SERVICES AND COMMUNITY CARE; and as to residential accommodation see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1029 *et seq*.

10    See *ibid* Sch 1B paras 10-11 (as added: see note 2 *supra*).

11    See *ibid* Sch 1B para 12 (as added: see note 2 *supra*).

12    See *ibid* Sch 1B para 13 (as added: see note 2 *supra*).

13    Ie the period commencing 11 weeks before the expected week of confinement and ending seven weeks after the date on which the pregnancy ends: *ibid* Sch 1B para 14 (as added: see note 2 *supra*).

14    Ie persons to whom *ibid* reg 13(2)(a)-(e) (as amended: see PARA 181 *post*) applies: Sch 1B para 15 (as added: see note 2 *supra*).

15    See *ibid* Sch 1B para 16 (as added: see note 2 *supra*; and amended by SI 1997/827). As to the meaning of 'remunerative work' see PARA 179 *post*.

16    Income Support (General) Regulations 1987, SI 1987/1967, Sch 1B para 17 (as added: see note 2 *supra*).

17    Ie a person who (1) is a refugee within the definition in the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1954); Cmd 9171) art 1 (extended by the Protocol relating to the Status of Refugees (New York, 31 January 1967; TS 15 (1969); Cmd 3906) art 1(2)); (2) is attending for more than 15 hours a week a course in English so that he may obtain employment; and (3) on the date on which the course commenced, had been in Great Britain for not more than 12 months: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 1B para 18 (as added: see note 2 *supra*). This provision only applies for a period not exceeding nine months: Sch 1B para 18 (as so added).

18    Ie as a justice of the peace, a party to any proceedings, a witness or a juror: *ibid* Sch 1B para 19 (as added: see note 2 *supra*).

19    Ie a person to whom the Social Security Contributions and Benefits Act 1992 s 126 (as amended) applies or in respect of whom s 124(1) (as amended) has effect as modified by s 127(b) (see PARA 178 *post*): Income Support (General) Regulations 1987, SI 1987/1967, Sch 1B para 20 (as added: see note 2 *supra*).

20    Ie a person to whom *ibid* reg 70(3) (as amended) (see PARA 200 *post*) applies: Sch 1B para 21 (as added: see note 2 *supra*).

21    Ie a person remanded in, or committed in, custody for trial or for sentencing: *ibid* Sch 1B para 22 (as added: see note 2 *supra*).

22    Ie a person who is a member of a couple and who is treated as responsible for a child who is a member of his household where the other member of that couple is temporarily not present in the United Kingdom: *ibid* Sch 1B para 23 (as added: see note 2 *supra*). 'Couple' means a married or an unmarried couple: reg 2(1). For the meaning of 'United Kingdom' see PARA 15 note 4 *ante*.

23    See *ibid* Sch 1B paras 24-27 (as added: see note 2 *supra*).

24 The training for which persons aged under 18 are eligible and for which persons aged 18 to 24 may be eligible, provided in England and Wales by a Training and Enterprise Council: see *ibid* Sch 1B para 28 (as added: see note 2 *supra*).

## UPDATE

### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his

participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **177 Categories of person who may claim income support**

TEXT AND NOTES--Also, heads (23) certain persons taking parental leave (SI 1987/1967 Sch 1B para 14A (added by SI 1999/3329; and amended by SI 2003/1731)); (24) persons who have commenced remunerative work (SI 1987/1967 Sch 1B para 9A (added by SI 2001/488)); (25) persons taking paternity leave (SI 1987/1967 Sch 1B para 14B (added by SI 2002/2689)); (26) persons under 21 with no parents, or living away from their parents, undertaking full-time, non-advanced education; (SI 1987/1967 Sch 1B para 15A (added by SI 2009/583; and amended by SI 2009/2655)); (27) a single claimant or a lone parent with whom a child is placed for adoption by an adoption agency within the meaning of the Adoption and Children Act 2002 (SI 1987/1967 Sch 1B para 2A (added by SI 2009/2655)).

A person who is entitled to and taking unpaid statutory parental leave in respect of a child who is a member of his household where such person is entitled to working

families' tax credit, disabled person's tax credit, housing benefit or council tax benefit on the day before the leave begins, may claim income support under head (23): SI 1987/1967 Sch 1B para 14A (added by SI 1999/3329; and amended by SI 2003/1731).

NOTE 2--Regulations made under the Social Security Contributions and Benefits Act 1992 s 124(1)(e), in so far as they are consequential on or supplementary to any regulations made under s 171D (see PARA 69) may make pilot schemes providing for their application only in relation to one or more specified areas or localities, one or more specified classes of persons, persons selected by reference to prescribed criteria or on a sampling basis: Social Security Act 1998 s 77.

For 'student' read 'full-time student': SI 1987/1967 reg 4ZA(2), (3) (reg 4ZA(2) amended by SI 2000/1981; SI 1987/1967 reg 4ZA(3) amended by SI 2000/1981, SI 2006/2144, SI 2009/2655).

A person to whom the Children (Leaving Care) Act 2000 s 6 (see PARA 176s) applies is not included in the prescribed categories: SI 1987/1967 reg 4ZA(3A) (added by SI 2001/3070).

NOTE 3--The reference is now to a person who is a lone parent and responsible for a single child aged under 10 (or, as from 25 October 2010, under 7), or more than one child where the youngest is aged under 10 (or, as from 25 October 2010, under 7), who is a member of that person's household: SI 1987/1967 Sch 1B para 1 (substituted by SI 2008/3051). Lone parents who claim, or are entitled to, income support are required to take part in work-focused interviews at regular intervals: see Social Security (Work-focused Interviews for Lone Parents) and Miscellaneous Amendments Regulations 2000, SI 2000/1926 (amended by SI 2001/1189, SI 2001/3210, SI 2003/400, SI 2004/565, SI 2004/959, SI 2004/2244, SI 2005/2727, SI 2006/909, SI 2008/2683, SI 2008/3051).

NOTE 5--SI 1987/1967 Sch 1B para 3 amended: SI 2009/583.

NOTE 6--SI 1987/1967 Sch 1B para 2 amended: SI 2009/2655. For 'in receipt of invalid care allowance' read 'both entitled to and in receipt of invalid care allowance': SI 1987/1967 Sch 1B para 4 (amended by SI 2000/681).

NOTE 7--Persons living in specified areas who are incapable of work are required to take part in interviews at regular intervals as a condition of their entitlement to the full amount of income support: see the Social Security (Quarterly Work-focused Interviews for Certain Lone Parents) Regulations 2004, SI 2004/2244; and the Social Security (Incapacity Benefit Work-focused Interviews) Regulations 2008, SI 2008/2928 (amended by SI 2009/1541).

NOTE 8--SI 1987/1967 Sch 1B para 8 revoked: SI 2009/3228.

NOTE 9--SI 1987/1967 Sch 1B para 8 revoked: SI 2009/3228.

TEXT AND NOTES 10, 11--In heads (8) and (9) for 'students' read 'full-time students': SI 1987/1967 Sch 1B paras 10-12 (amended by SI 2000/1981).

NOTE 11--SI 1987/1967 Sch 1B para 12 amended: SI 2000/1922.

NOTE 13--SI 1987/1967 Sch 1B para 14 amended: SI 2002/2689.

NOTE 14--SI 1987/1967 Sch 1B para 14 amended: SI 2006/718.

NOTE 15--SI 1987/1967 Sch 1B para 16 omitted: SI 2006/2378.

NOTE 16--SI 1987/1967 Sch 1B para 17 revoked: SI 2002/3019.

NOTE 18--SI 1987/1967 Sch 1B para 19 substituted: SI 2006/1402.

NOTE 20--SI 1987/1967 Sch 1B para 21 substituted: SI 2009/3228.

NOTE 23--SI 1987/1967 Sch 1B para 25 amended: SI 1999/3109. SI 1987/1967 Sch 1B paras 26, 27 revoked: SI 2008/698.

NOTE 24--SI 1987/1967 Sch 1B para 28 amended: SI 2001/652, SI 2005/3238, SI 2006/718, SI 2008/3157, SI 2009/583.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(i) Entitlement/178. Trade disputes.

### 178. Trade disputes.

There are limitations on the entitlement to income support of a person<sup>1</sup> who is prevented from being entitled to a jobseeker's allowance<sup>2</sup> by virtue of a trade dispute at his place of work<sup>3</sup> (or would be so prevented if otherwise entitled to that benefit), except during any period shown by the person to be a period of incapacity for work or to be within the maternity period<sup>4</sup>. The limitations are that:

- 437 (1) the person is treated as still engaged in remunerative work (and so not entitled to income support) for the first seven days of the stoppage of work or, if no stoppage occurs, of his withdrawal of labour<sup>5</sup>;
- 438 (2) for the purpose of calculating income support, the applicable amount is reduced or disregarded<sup>6</sup>;
- 439 (3) in calculating the entitlement to income support of the person or a member of his family, certain sums are to be treated as his income and are not to be disregarded<sup>7</sup>;
- 440 (4) any payment by way of income support for the period of the trade dispute or any part of it which apart from this provision would be made to the person, or to a person whose applicable amount is aggregated with his, is not made if the weekly rate of payment is equal to or less than the relevant sum<sup>8</sup> and, if it is more than the relevant sum, is made at a weekly rate equal to the difference<sup>9</sup>.

If a person returns to work<sup>10</sup> with the same employer after a period during which these provisions applied to him, the provisions cease to apply to him at the commencement of the day on which he returns to work; and he is eligible for income support for a period of 15 days from that day, although any benefit actually paid is recoverable from future earnings<sup>11</sup>.

1 le a person other than a child or a person of a prescribed description: Social Security Contributions and Benefits Act 1992 s 126(1). For the meaning of 'child' see PARA 175 note 1 ante. As to the meaning of 'person of a prescribed description' see PARA 182 note 1 post.

2 As to the jobseeker's allowance see PARA 258 et seq post.

3 le under the Jobseekers Act 1995 s 14 (as amended): see PARA 301 post.

4 Social Security Contributions and Benefits Act 1992 s 126(1) (amended by the Social Security (Incapacity for Work) Act 1994 s 11, Sch 1 Pt I para 31, Sch 2; and the Jobseekers Act 1995 s 41(4), Sch 2 para 31). 'The maternity period' means the period commencing at the beginning of the sixth week before the expected week of confinement and ending at the end of the seventh week after the week in which confinement takes place: Social Security Contributions and Benefits Act 1992 s 126(2). As to incapacity for work see PARA 65 et seq ante.

5 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 5(4) (amended by SI 1988/663). As to the meaning of 'remunerative work' see PARA 179 post.

6 See the Social Security Contributions and Benefits Act 1992 s 126(3). As to the applicable amount see PARA 184 post.

In the case of a person who is not a member of a family, the applicable amount is disregarded: s 126(3)(a). In the case of a person who is a member of a family but is not a member of a married or unmarried couple, the portion of the applicable amount which is included in respect of him is disregarded: s 126(3)(b). In the case of a member of a married or unmarried couple (1) if the applicable amount consists only of an amount in respect of them, it is reduced to one-half; and (2) if it includes other amounts, the portion of it which is included in respect of them is reduced to one-half and any further portion of it which is included in respect of the member of the

couple to whom these provisions apply is disregarded: see s 126(3)(c), (4). Where both the members of a married or unmarried couple are involved in the trade dispute (a) if neither of them is responsible for a child or a person of a prescribed description who is a member of the same household, the applicable amount is disregarded; and (b) in any other case, the portion of the applicable amount which is included in respect of them and any further portion of it which is included in respect of either of them is disregarded: s 126(3)(d). For the meaning of 'family', 'married couple', 'unmarried couple' and 'child', and as to the meaning of 'household', see PARA 175 note 1 ante.

7 See *ibid* s 126(5)(a), (6). The sums treated as income and which are not to be disregarded are: (1) any payment which the person or a member of his family receives or is entitled to obtain by reason of the person involved in the trade dispute being without employment for that period; and (2) any income tax rebate which becomes or would on an application duly made become available to him in that period: see s 126(5)(a)(i), (ii).

8 As to the 'relevant sum', which was introduced to represent notional strike pay from the person's union, see *ibid* s 126(7) (amended by the Social Security Benefits Up-rating Order 1997, SI 1997/543, art 20). This sum is deductible whether or not a trade union actually pays some or all of it to the claimant; but if a union actually does make such a payment (up to the level of the relevant sum), that is to be disregarded when calculating the claimant's earnings: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 40(2), Sch 9 para 34.

As to the calculation of the relevant sum, which is subject to frequent variation, see the Social Security Contributions and Benefits Act 1992 s 126(8).

9 See *ibid* s 126(5)(b), (6).

10 Is whether or not his return is before the end of any stoppage of work in relation to which he is or would be prevented from being entitled to a jobseeker's allowance: see *ibid* s 127 (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 32).

11 See the Social Security Contributions and Benefits Act 1992 s 127 (as amended: see note 10 *supra*); and the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, Pt VIII (regs 18-29) (as amended).

## UPDATE

### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment

of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged under 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act

1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **178 Trade disputes**

TEXT AND NOTE 6--Social Security Contributions and Benefits Act 1992 s 126(3) amended: Civil Partnership Act 2004 Sch 24 para 43.

TEXT AND NOTE 8--1992 Act s 126(7) now as amended by Social Security Benefits Up-rating Order 2008, SI 2008/632.

TEXT AND NOTES 10, 11--Social Security Contributions and Benefits Act 1992 s 127 further amended: Civil Partnership Act 2004 Sch 24 para 44.

NOTE 11--SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(ii) Defining the Conditions of Entitlement/179. The meaning of remunerative work.

## (ii) Defining the Conditions of Entitlement

### 179. The meaning of remunerative work.

Remunerative work<sup>1</sup> is work in which a person is engaged or, where his hours of work fluctuate<sup>2</sup>, he is engaged on average for not less than 16 hours a week<sup>3</sup>, being work for which payment is made or which is done in expectation of payment<sup>4</sup>. In the case of a partner of the claimant, the figure is raised to 24 hours a week<sup>5</sup>.

A person is to be treated as engaged in remunerative work during any period in which he is absent from work either without good cause or by reason of a recognised, customary or other holiday<sup>6</sup>; but not so treated if on maternity leave or absent from work because that person is ill<sup>7</sup>.

Where a person leaves remunerative work with a payment in lieu of remuneration or notice or in respect of holiday pay or compensation<sup>8</sup>, that person is to be treated as engaged in remunerative work for the period for which those earnings are to be taken into account as income or capital<sup>9</sup>.

1 It is a condition of entitlement that neither the claimant nor a partner be in remunerative work: see PARA 176 ante. For the meaning of 'partner' see PARA 182 note 5 post.

2 The number of hours for which a person is engaged in work is to be determined (1) where there is no recognisable cycle, by reference to the number of hours (or, where they are likely to fluctuate, the average of the hours) which he is expected to work in a week; (2) where the number of hours fluctuates, by reference to the average of hours worked over either a recognisable cycle or, in any other case, over the five weeks immediately before the date of claim or review, or such other length of time as may, in the particular case, enable the person's average hours of work to be determined more accurately: Income Support (General) Regulations 1987, SI 1987/1967, reg 5(2). Where a person's recognisable cycle of work at a school, other educational establishment or other place of employment is one year and includes periods of school holidays or similar vacations during which he does not work, those periods and any other periods not forming part of such holidays or vacations during which he is not required to work are to be disregarded in establishing the average hours for which he is engaged in work: reg 5(3B) (added by SI 1995/516). The Income Support (General) Regulations 1987, SI 1987/1967, reg 5(2) only applies in the particular circumstances which it is expressed to cover: Decision R(IS)8/95.

3 In determining the number of hours in which a person is engaged or treated as engaged in remunerative work (1) no account is to be taken of any hours spent in an employment or scheme to which the Income Support (General) Regulations 1987, SI 1987/1967, reg 6 (as amended: see PARA 180 post) applies: reg 5(6) (added by SI 1988/1445; and amended by SI 1993/2119); (2) the number of hours is to include any time allowed by the employer for a meal or for refreshment, but only where the person is, or expects to be, paid earnings in respect of that time: Income Support (General) Regulations 1987, SI 1987/1967, reg 5(7) (added by SI 1990/547).

Most of the case law generally on the hours to be counted has arisen in the context of the equivalent provision on family credit (where the claimant must be in remunerative work for not less than 16 hours per week): see PARA 206 post. As to the position where a claimant works for his own small company, of which he is also a director, see Decision R(IS)5/95; and as to a share fisherman who is engaged in work for the whole time the boat is at sea see Decision R(IS)12/95. Hours simply on call may not count, depending on the facts: Decision CIS815/1992.

4 Income Support (General) Regulations 1987, SI 1987/1967, reg 5(1) (amended by SI 1991/1559). 'Expectation' means more than hope, desire or intention: Decision R(IS)1/93 (unsuccessful writer held not to be working in expectation of payment). In the case of a business, preparatory work in setting it up, or carrying on with it for some other purpose (eg to sell it as a going concern) may not come within the definition: *Smith v Chief Adjudication Officer* (11 October 1994, unreported), CA; *Chief Adjudication Officer v Ellis* (15 February

1995, unreported), CA. However, once a business is operating, the fact that it is unprofitable does not necessarily mean that the work is not in expectation of payment: *Perrot v Supplementary Benefits Commission* [1980] 3 All ER 110, [1980] 1 WLR 1153, CA (decided under previous legislation).

5 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 5(1A) (added by SI 1996/1944).

6 Income Support (General) Regulations 1987, SI 1987/1967, reg 5(3). The inclusion of the phrase 'or other' means that the origin of the holiday is unimportant: see Decision R(SB)7/84. This provision treats a person as in remunerative work during holidays, but is irrelevant to the separate question of the calculation of that person's average weekly hours: see Decision R(IS)15/94. There cannot be a holiday within this provision if the employment has in fact been terminated: Decision R(U)2/87 (decided under previous equivalent provisions on unemployment benefit). As to the position where a person leaves with holiday pay see the text and notes 8-9 *infra*.

7 Income Support (General) Regulations 1987, SI 1987/1967, reg 5(3A) (added by SI 1993/2119).

8 ie a payment of earnings to which the Income Support (General) Regulations 1987, SI 1987/1967, reg 35(1)(b)-(d) (as amended) or reg 35(1)(i) (as added) applies (see PARA 188 *post*).

9 See *ibid* reg 5(5) (amended by SI 1988/2022; SI 1989/1323).

## UPDATE

### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a

grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **179 The meaning of remunerative work**

NOTE 2--SI 1987/1967 reg 5(3B) does not mean that the cycle should be reduced from one complete cycle to the relevant cycle less the holiday period: *Banks v Chief Adjudication Officer* [2001] UKHL 33, [2001] 1 WLR 1411.

NOTE 3--Head (1) now refers to reg 6(1): SI 1987/1967 reg 5(6) (amended by SI 2000/681). Subject to savings (see SI 2003/962) family credit (working families' tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

NOTE 4--See *Kazantzis v Chief Adjudication Officer* (1999) Times, 30 June, CA (time spent by minicab driver waiting for customers was an integral part of his work and counted as time spent engaged in remunerative work).

TEXT AND NOTE 7--For 'maternity leave' read 'maternity leave, paternity leave or adoption leave': SI 1987/1967 reg 5(3A) (amended by SI 2002/2689).

NOTE 8--Reference to SI 1987/1967 reg 35(1)(b)-(d) now to reg 35(1)(b), (d): reg 5(5) (amended by SI 2008/698).

NOTE 9--SI 1987/1967 reg 5(5) does not apply to earnings disregarded under Sch 8 para 1 (see PARA 188): reg 5(5A) (added by SI 2007/2618).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(ii) Defining the Conditions of Entitlement/180. Persons not treated as engaged in remunerative work.

### **180. Persons not treated as engaged in remunerative work.**

A person is not to be treated as engaged in remunerative work<sup>1</sup> in so far as:

- 441 (1) he is mentally or physically disabled, and by reason of that disability his earnings or hours are 75 per cent or less of what would otherwise reasonably be expected in that employment or in comparable employment in that area<sup>2</sup>;
- 442 (2) he is engaged in child minding in his home<sup>3</sup>;
- 443 (3) he is engaged by a charity or voluntary organisation or is a volunteer whose payment is disregarded in the calculation of income<sup>4</sup>;
- 444 (4) he is engaged on a scheme for which a training allowance is being paid<sup>5</sup>;
- 445 (5) he is affected by the provisions on trade disputes<sup>6</sup>;
- 446 (6) he is a person caring for another person<sup>7</sup>;
- 447 (7) he is in employment and living in a residential care home, nursing home or residential accommodation, and is entitled to the appropriate residential premium or allowance<sup>8</sup>;
- 448 (8) he is engaged in certain named employments<sup>9</sup>;
- 449 (9) he is performing his duties as a councillor<sup>10</sup>;
- 450 (10) he is caring for a person who is accommodated with him or a person who is not normally a member of his household, and he is in receipt of certain allowances<sup>11</sup>.

1 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 6 (amended by SI 1988/1445). As to the meaning of 'remunerative work' see PARA 179 ante.

2 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 6(a) (substituted by SI 1991/1559).

3 Income Support (General) Regulations 1987, SI 1987/1967, reg 6(b).

4 Ibid reg 6(c) (amended by SI 1994/2139; SI 1995/516). 'Voluntary organisation' means a body, other than a public or local authority, the activities of which are carried on otherwise than for profit: Income Support (General) Regulations 1987, SI 1987/1967, reg 2(1) (definition added by SI 1995/516). A 'volunteer' is a person who, whilst not necessarily associated with a charitable or voluntary body, of his own free will (ie without any legal obligation) performs a service for another person, and does so without expectation of payment: Decision R(IS)12/92. However, a volunteer (or charitable or voluntary worker) may be deemed to have a notional income for the work done unless he can satisfy an adjudication officer that it is reasonable for him to provide his services free of charge: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 42(6) (as amended); and PARA 192 post.

5 Ibid reg 6(d) (amended by SI 1992/468). For the meaning of 'training allowance' see the Income Support (General) Regulations 1987, SI 1987/1967, reg 2(1) (amended by SI 1989/1323; SI 1991/236).

6 Income Support (General) Regulations 1987, SI 1987/1967, reg 6(e) (amended by SI 1988/663; SI 1988/1445; SI 1992/468). As to trade disputes see PARA 178 ante.

7 Ie he is a person to whom the Income Support (General) Regulations 1987, SI 1987/1967, reg 4ZA(1), Sch 1B para 4 (as added) (see PARA 177 ante) applies: reg 6(f) (substituted by SI 1996/206).

8 Income Support (General) Regulations 1987, SI 1987/1967, reg 6(g) (added by SI 1991/1559; and substituted by SI 1993/518). As to such homes or accommodation see the Income Support (General) Regulations 1987, SI 1987/1967, reg 19 (as amended), reg 21 (as amended); para 184 post; SOCIAL SERVICES AND COMMUNITY CARE.

9 le those (eg fireman, coastal rescue service, etc) set out in ibid regs 36(2), 38(2), Sch 8 para 7(1)(a)-(d) (as amended): reg 6(h) (added by SI 1992/468; and amended by SI 1992/2155).

10 Income Support (General) Regulations 1987, SI 1987/1967, reg 6(j) (added by SI 1992/468; and amended by SI 1992/2155).

11 Income Support (General) Regulations 1987, SI 1987/1967, reg 6(k) (added by SI 1992/2155; and amended by SI 1994/2139). The allowances are set out in the Income Support (General) Regulations 1987, SI 1987/1967, reg 40(2), Sch 9 para 26 (as amended) PARA 27. As to the meaning of 'household' see PARA 182 post.

## UPDATE

### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **180 Persons not treated as engaged in remunerative work**

TEXT AND NOTES--SI 1987/1967 reg 6(a)-(k) renumbered reg 6(1)(a)-(k) (amended by SI 1999/2556). Heads (1), (5)-(7), SI 1987/1967 reg 6(1)(a), (e)-(g) revoked: SI 2000/681. Head (9), reg 6(1)(j) further amended: SI 2000/681.

Also, heads (11) he is participating in the programme known as the intensive activity period of the New Deal pilots for 25 plus as defined for the purposes of the Social Security (New Deal Pilot) Regulations 2000, SI 2000/3134 (SI 1987/1967 reg 6(1)(l) (added by SI 2000/3134)); (12) he is engaged in an activity in respect of which a sports

award has been made, or is to be made, to him, and no other payment is made or is expected to be made to him (SI 1987/1967 reg 6(1)(m) (added by SI 1999/2165)); (13) he is receiving assistance under the self-employment route (SI 1987/1967 reg 6(1)(dd) (added by SI 2004/963)).

Also, the following persons are not to be treated as engaged in remunerative work (a) subject to SI 1987/1967 reg 5(4), (5), a person to whom the Social Security Contributions and Benefits Act 1992 s 126 applies or in respect of whom s 124(1) has effect (as modified by s 127(b)); and (b) a person to whom SI 1987/1967 Sch 1B para 4 applies: reg 6(4) (added by SI 2000/681; and amended by SI 2001/3767, SI 2005/2687, SI 2009/3228). 'Care home' has the meaning assigned to it by the Care Standards Act 2000 s 3 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 985); 'Abbeyfield Home' means an establishment run by the Abbeyfield Society including all bodies corporate or incorporate which are affiliated to that Society; and 'independent hospital' has the meaning assigned to it by the Care Standards Act 2000 s 2 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 983); SI 1987/1967 reg 2(1) (definitions added by SI 2005/2687). For the purposes of SI 1987/1967, where a person's principal place of residence is a care home, an Abbeyfield Home or an independent hospital and he is temporarily absent from that home or hospital, he is to be regarded as continuing to reside in that home or hospital, where he is absent because he is a patient, for the first 52 weeks of any such period of absence, and for the first three weeks of any other period of absence; and 'patient' has the meaning it has in Sch 7 by virtue of reg 21(3), and periods of absence separated by not more than 28 days are to be treated as a single period of absence equal in duration to all those periods: reg 2(1A) (added by SI 2001/3767; and amended by SI 2003/1195, SI 2005/2687).

Further, a person is not treated as engaged in remunerative work for the period specified in SI 1987/1967 reg 6(6) in so far as (A) he or his partner is engaged in work which is remunerative work, and he, or his partner, is expected to be engaged in for a period of no less than five weeks; (B) he or his partner had, for a continuous period of 26 weeks ending on the day before the day on which he commenced the work referred to in head (A), been entitled to and in receipt of income support, an income-based jobseeker's allowance or an income-based employment and support allowance (including joint-claim jobseeker's allowance); (C) he or his partner had, as at the day before the day on which he commenced the work referred to in head (A), an applicable amount which included an amount determined in accordance with Sch 3 as applicable to him in respect of housing costs which qualify under Sch 3 paras 15-17, or an amount determined in accordance with the Jobseeker's Allowance Regulations 1996, SI 1996/207, Sch 2 as applicable to him in respect of housing costs which qualify under Sch 2 paras 14-16, or an amount determined in accordance with the Employment and Support Allowance Regulations 2008, SI 2008/794, Sch 6 as applicable to him in respect of housing costs which qualify under Sch 6 paras 16-18; and (D) he or his partner remain liable to make payments in respect of such housing costs: SI 1987/1967 reg 6(5), (8) (regs 5-8 added by SI 2001/488; SI 1987/1967 reg 6 amended by SI 2003/1589, SI 2007/3183, SI 2008/1554). Such a person is not treated as engaged in remunerative work for the period of four weeks commencing with the day on which he was first engaged in the work referred to in head (A): SI 1987/1967 reg 6(6). In calculating the period of benefit entitlement referred to in head (B), no account is to be taken of entitlement arising by virtue of reg 6(6): reg 6(7).

NOTE 5--Definition of 'training allowance' in SI 1987/1967 reg 2(1) further amended: SI 2001/652.

NOTE 11--SI 1987/1967 Sch 9 para 26 amended: SI 2006/2378. SI 1987/1967 Sch 9 para 27 amended: SI 1998/563, SI 2001/859.



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### **181. Income support for persons in education.**

The prescribed circumstances<sup>1</sup> in which a person in relevant education<sup>2</sup> may be entitled to income support are that he is a person over 16 but under 19 (an 'eligible person')<sup>3</sup> and:

- 451 (1) he is the parent of a child for whom he is treated as responsible<sup>4</sup> and who is treated as a member of his household<sup>5</sup>; or
- 452 (2) he is severely mentally or physically handicapped and because of that he would be unlikely, even if he were available for employment, to obtain employment within the next 12 months<sup>6</sup>; or
- 453 (3) he has no parent nor any person acting in the place of his parents<sup>7</sup>; or
- 454 (4) of necessity he has to live away from his parents or any such person because he is estranged from them, or is in physical or moral danger or there is a serious risk to his physical or mental health<sup>8</sup>; or
- 455 (5) he is living away from his parents and any such person, where the parents are or other person is (a) unable financially to support him; and (b) chronically sick or mentally or physically disabled<sup>9</sup>, or detained in custody or prohibited from entering or re-entering Great Britain<sup>10</sup>; or
- 456 (6) he is a refugee<sup>11</sup>.

1 See the Social Security Contributions and Benefits Act 1992 s 124(1)(d) (as substituted) (see PARA 176 ante); and the Income Support (General) Regulations 1987, SI 1987/1967, reg 13(1).

2 For the meaning of 'relevant education' see PARA 176 note 6 ante. As to students see PARAS 198-199 post.

3 Income Support (General) Regulations 1987, SI 1987/1967, reg 13(2) (amended by SI 1991/1559). As to the entitlement to income support of those who are less than 18 see PARA 184 note 4 post.

4 He is under the Income Support (General) Regulations 1987, SI 1987/1967, reg 15 (as amended); see PARA 182 post.

5 He is under ibid reg 16 (as amended) (see PARA 182 post): reg 13(2)(a).

6 Ibid reg 13(2)(b).

7 Ibid reg 13(2)(c). For these purposes, any reference to a person acting in the place of an eligible person's parents includes a reference to a local authority or voluntary organisation where the eligible person is being looked after by it or, where the eligible person is placed by the local authority or voluntary organisation with another person, to that other person: see reg 13(3)(a) (substituted by SI 1992/468).

8 Income Support (General) Regulations 1987, SI 1987/1967, reg 13(2)(d) (substituted by SI 1989/1034; and amended by SI 1991/236).

9 For the meaning of 'chronically sick or mentally or physically disabled' see the Income Support (General) Regulations 1987, SI 1987/1967, reg 13(3)(b).

10 Ibid reg 13(2)(e).

11 He is a person to whom para 177 head (15) ante applies: ibid reg 13(2)(h) (substituted by SI 1996/206).

### **UPDATE**

### **176-201 Income Support**

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while

participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **181 Income support for persons in education**

TEXT AND NOTES--For these purposes, the eligible person is to be treated as satisfying the condition prescribed in the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257), reg 8 (child benefit not payable in respect of qualifying young person: other financial support): SI 1987/1967 reg 13(2A)(a) (reg 13(2A) added by SI 2008/698).

TEXT AND NOTE 6--Head (2). Now, heads (2) (a) he has in his applicable amount the disability premium or severe disability premium; or (b) he has satisfied the provisions of SI 1987/1967 Sch 1B para 7 (see PARA 177) for a continuous period of not less than 196 days, and for this purpose any two or more separate periods separated by a break of not more than 56 days are to be treated as one continuous period; or (c) he is a person to whom the Social Security (Immigration and Asylum) Consequential Amendments Regulations 2000, SI 2000/636, Schedule Pt 1 para 1 applies: SI 1987/1967 reg 13(2)(b), (bb), (bc) (substituted by SI 2006/718).

TEXT AND NOTES 7-10--Where heads (3)-(5) apply, the eligible person is to be treated as satisfying the condition prescribed in SI 2006/223 reg 5(2)(e), (f) (extension period: 16 and 17 year olds): SI 1987/1967 reg 13(2A)(b).

NOTE 9--SI 1987/1967 reg 13(3)(b) amended: SI 2009/2655.



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## **182. The treatment of families.**

The general rules relating to families and income-related benefits apply for the purposes of income support<sup>1</sup>.

A person is to be treated as responsible for a child or young person for whom he is receiving child benefit<sup>2</sup>. In general, only one person may be considered responsible in any benefit week<sup>3</sup>. If no child benefit is being received by anyone, the person to be treated as responsible is the person (if any) who has made the only claim for child benefit, or otherwise the person with whom the child or young person usually lives<sup>4</sup>.

The persons to be treated as members of the same household are the claimant, any partner<sup>5</sup>, any child or young person for whom the claimant or the partner are treated as responsible, and any child of that child or young person; this is so notwithstanding that any of them is temporarily living away from the other members of the family<sup>6</sup>.

1 As to the general rules relating to families and income-related benefits see PARA 175 ante. For the meaning of 'family' see PARA 175 note 1 ante. For the purposes of that definition in relation to income support, a person of a prescribed description is a person (a 'young person') aged 16 or over but under 19 who is treated as a child for the purposes of the Child Benefit Act 1975 s 2 (repealed: see now the Social Security Contributions and Benefits Act 1992 s 142; and PARA 239 post), and is not receiving advanced education nor is or would (apart from the provision against dual entitlement of members of a family) be entitled to income support in his own right: Income Support (General) Regulations 1987, SI 1987/1967, reg 14 (amended by SI 1988/1445; SI 1990/547). For the meaning of 'receiving advanced education' see PARA 176 note 6 ante. As to a young person's entitlement to income support see PARA 184 note 4 post.

2 Income Support (General) Regulations 1987, SI 1987/1967, reg 15(1) (substituted by SI 1993/2119). As to child benefit see PARA 237 et seq post. Where a child is himself in receipt of child benefit in respect of another child, the person responsible for the first child is also to be treated as responsible for the second child: Income Support (General) Regulations 1987, SI 1987/1967, reg 15(1A) (added by SI 1993/2119).

3 Income Support (General) Regulations 1987, SI 1987/1967, reg 15(4). There is provision, however, for a child or young person to be treated as the responsibility of a claimant for any part of a benefit week when he is treated as being a member of the claimant's household: see reg 15(3). 'Benefit week' has the meaning prescribed in the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, Sch 7 para 4 (as amended) (ie if the beneficiary is entitled to incapacity benefit (see PARA 59 et seq ante), severe disablement allowance (see PARA 92 et seq ante), retirement pension (see PARA 561 et seq post) or widow's benefit (see PARA 80 et seq ante) or would be so entitled but for failure to satisfy the contribution conditions or had not exhausted his entitlement, the week corresponding to the week in respect of which that benefit is paid, and in any other case a period of seven days beginning or ending with such day as the Secretary of State may direct; and post) and for the purposes of calculating any payment of income and of the Income Support (General) Regulations 1987, SI 1987/1967, reg 74(2)(a), benefit week' also means the period of seven days ending on the day before the first day of the first benefit week following the date of claim or the last day on which income support is paid if it is in payment for less than a week: reg 2(1) (definition amended by SI 1988/1445).

4 Income Support (General) Regulations 1987, SI 1987/1967, reg 15(2) (substituted by SI 1993/2119).

5 'Partner' means (1) where the claimant is a member of a married or unmarried couple, the other member of that couple; (2) where the claimant is married polygamously to two or more members of his household, any such member: Income Support (General) Regulations 1987, SI 1987/1967, reg 2(1). For the meaning of 'married couple' and 'unmarried couple' see PARA 175 note 1 ante.

6 Ibid reg 16(1) (amended by SI 1988/663; SI 1993/2119). However, this provision does not apply to a person living away from the other members of his family where (1) that person does not intend to resume living with them; or (2) his absence is likely to exceed 52 weeks, unless there are exceptional circumstances (especially where he has no control over the length of the absence, eg hospitalisation) and the absence is unlikely to be

substantially more than 52 weeks: Income Support (General) Regulations 1987, SI 1987/1967, reg 16(2) (substituted by SI 1993/2119). Nor does it apply to any member of a couple or a polygamous marriage where (a) one, both or all are patients detained in a special hospital; (b) one, both or all are in custody or on temporary release; (c) the claimant is abroad and does not satisfy the conditions of temporary absence from Britain (see the Income Support (General) Regulations 1987, SI 1987/1967, reg 4 (as amended); and PARA 176 note 1 ante); or (d) one of them is permanently in residential accommodation or a residential care home or residential nursing home: reg 16(3) (amended by SI 1992/3147; SI 1996/1944). For these purposes, a person in a bail hostel is not in custody: Decision R(IS)17/93. As to residential accommodation see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1029 et seq; as to residential care homes see SOCIAL SERVICES AND COMMUNITY CARE; and as to nursing homes see SOCIAL SERVICES AND COMMUNITY CARE.

There are also special provisions setting out a series of exceptional cases where a child or young person is not to be treated as part of the claimant's household: (i) where the child or young person is placed with the claimant or his partner (see the Income Support (General) Regulations 1987, SI 1987/1967, reg 16(4) (amended by SI 1992/468)); (ii) in certain circumstances, where the child or young person is not living with the claimant (see the Income Support (General) Regulations 1987, SI 1987/1967, reg 16(5) (amended by SI 1988/663; SI 1989/534; SI 1990/547; SI 1992/468; SI 1996/206), Income Support (General) Regulations 1987, SI 1987/1967, reg 16(5A) (added by SI 1996/206), Income Support (General) Regulations 1987, SI 1987/1967, reg 16(6)); (iii) where, for the purposes of attending the educational establishment at which he is receiving relevant education, the child or young person is living with the claimant or his partner and neither of them is treated as responsible for him (see reg 16(7)). As to the meaning of 'relevant education' see PARA 176 note 6 ante.

## **UPDATE**

### **176-201 Income Support**

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a

person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **182 The treatment of families**

NOTE 1--SI 1987/1967 reg 14 substituted by SI 2001/3070; and amended by SI 2002/2402, SI 2006/718, SI 2008/1554.

NOTE 2--SI 1987/1967 reg 15(1) amended: SI 2002/2402.

NOTE 5--Definition of 'partner' in SI 1987/1967 reg 2(1) amended: SI 2005/2877.

NOTE 6--In head (a), reference to 'special hospital' is now to 'high security psychiatric services': SI 1987/1967 reg 16(3) (amended by SI 2006/2387). Now, head (d) one of them is permanently residing in a care home, an Abbeyfield Home or an independent hospital: SI 1987/1967 reg 16(3) (further amended by SI 2005/2687). For the meanings of 'care home', 'Abbeyfield Home' and 'independent hospital' see PARA 180. SI 1987/1967 reg 16(5) further amended: SI 2005/2687.

SI 1987/1967 reg 16 intrinsically discriminates on the ground of nationality against the children of European migrant workers as compared to British children whose families are normally resident in the United Kingdom: *Secretary of State for Work and Pensions v Bobezes* [2005] EWCA Civ 111, [2005] 3 All ER 497.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(iii) Calculation of the Amount of the Award/183. Amount of the award.

### **(iii) Calculation of the Amount of the Award**

#### **183. Amount of the award.**

Where a person is entitled to income support<sup>1</sup>, if he has no income the amount of his income support benefit is to be the applicable amount<sup>2</sup>; if he has income<sup>3</sup>, the amount is to be the difference between his income and the applicable amount<sup>4</sup>.

Where (1) an award of income support is in force in favour of any person ('the recipient'); and (2) there is an alteration<sup>5</sup> in any of the relevant amounts<sup>6</sup>; and (3) the alteration affects the computation of the amount of income support to which the recipient is entitled, the following provisions have effect<sup>7</sup>. Where, in consequence of the alteration in question, the recipient becomes entitled to an increased or reduced amount of income support ('the new amount'), then, as from the commencing date<sup>8</sup>, the amount of income support payable to or for the recipient under the award must be the new amount, without any further decision of an adjudication officer, and the award must have effect accordingly<sup>9</sup>. Where, notwithstanding the alteration in question, the recipient continues on and after the commencing date to be entitled to the same amount of income support as before, the award continues in force accordingly<sup>10</sup>.

In any case where (a) there is an alteration in any of the relevant amounts; and (b) before the commencing date (but after that date is fixed) an award of income support is made in favour of a person, the award either may provide for income support to be paid as from the commencing date, in which case the amount must be determined by reference to the relevant amounts in force on that date, or may provide for an amount determined by reference to the amounts in force at the date of the award<sup>11</sup>.

Where an award of income support is in force in favour of the recipient and there is a component<sup>12</sup> which becomes applicable, or applicable at a particular rate, in his case if he or some other person attains a particular age, then the following provisions apply<sup>13</sup>. If the recipient or other person attains that particular age and, in consequence (i) the component in question becomes applicable, or applicable at a particular rate, in the recipient's case (whether or not some other component ceases, for the same reason, to be applicable, or applicable at a particular rate, in his case); and (ii) after taking account of any such cessation, the recipient becomes so entitled, the amount of income support payable to or for him under the award must be that increased amount, without any further decision of an adjudication officer, and the award must have effect accordingly<sup>14</sup>. However, this does not apply in any case where, in consequence of the recipient or other person attaining the age in question, some question arises in relation to the recipient's entitlement to any benefit<sup>15</sup>, other than (A) the question whether the component concerned, or any other component, becomes or ceases to be applicable, or applicable at a particular rate, in his case; and (B) the question whether, in consequence, the amount of his income support falls to be varied<sup>16</sup>.

1 As to entitlement to income support see PARA 176 et seq ante.

2 As to the applicable amount see PARA 184 post.

3 As to the calculation of income see PARA 187 et seq post.

4 Social Security Contributions and Benefits Act 1992 s 124(4). Provision is made for calculating the amount payable in respect of a part week: see s 124(5), (6); and the Income Support (General) Regulations 1987, SI 1987/1967, regs 73-77 (as added and amended).

5 'Alteration', in relation to the component rates of income support or any other sums specified in regulations under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended), means their alteration by or under any enactment whether or not contained in that Part; and, in relation to a person's benefit income, means the alteration of any of the sums referred to in the Social Security Administration Act 1992 s 150 (as amended) (see PARA 17 ante) by any enactment or by an order under s 150 (as amended) or s 152, to the extent that any such alteration affects the amount of his benefit income: s 159(5). 'Component rate', in relation to income support, means the amount of (1) the sum referred to in the Social Security Contributions and Benefits Act 1992 s 126(5)(b)(i), (ii) (see PARA 178 head (4) ante); or (2) any of the sums specified in regulations under s 135(1) (see PARAS 174 ante, 184 post): Social Security Administration Act 1992 s 159(5). 'Benefit income', in relation to any person, means so much of his income as consists of benefit under the Social Security Contributions and Benefits Act 1992, other than income support, or a war disablement pension or war widow's pension: Social Security Administration Act 1992 s 159(5).

6 'Relevant amounts' means (1) any of the component rates of income support; (2) any of the other sums specified in regulations under the Social Security Contributions and Benefits Act 1992 Pt VII (as amended); or (3) the recipient's benefit income: Social Security Administration Act 1992 s 159(1), (5).

7 Ibid s 159(1).

8 'Commencing date', in relation to an alteration, means the date on which the alteration comes into force in the case of the person in question: ibid s 159(5).

9 Ibid s 159(2).

10 Ibid s 159(3).

11 Ibid s 159(4).

12 'Component', in relation to a person and his income support, means any of the sums specified in regulations under the Social Security Contributions and Benefits Act 1992 s 135(1) (see PARAS 174 ante, 184 post): Social Security Administration Act 1992 s 160(4).

13 Ibid s 160(1). As to when a person attains a particular age see PARA 19 note 11 ante.

14 Ibid s 160(2).

15 Ie under the Social Security Contributions and Benefits Act 1992.

16 Social Security Administration Act 1992 s 160(3).

## UPDATE

### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the

same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13

September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **183 Amount of the award**

NOTE 4--SI 1987/1967 reg 73 further amended: SI 2001/3767, SI 2008/1554. SI 1987/1967 reg 75 amended: SI 2008/1554.

TEXT AND NOTES 5-7--No appeal lies against a decision as to the amount of benefit to which a person is entitled, where it appears to the Secretary of State that the amount is determined by an alteration of a kind referred to in the Social Security Administration Act 1992 s 159(1)(b) (see TEXT head (2)): Social Security Act 1998 s 12(1), Sch 2 para 6(b)(i).

NOTE 5--Definition of 'alteration' in 1992 Act s 159(5) amended: Pensions Act 2007 Sch 1 para 25 (partly in force: see 2007 Act ss 5(3)-(7), 30(1)(a)).

NOTE 14--No appeal lies against a decision as to the amount of benefit to which a person is entitled, where it appears to the Secretary of State that the amount is determined by the recipient's entitlement to an increased amount of income support in the circumstances referred to in the Social Security Administration Act 1992 s 160(2): Social Security Act 1998 s 12(2), Sch 2 para 7.

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#### (iv) The Applicable Amount

##### 184. Calculation of the applicable amount.

The amount of income support to which a claimant is entitled is calculated by deducting his income, if any, from the applicable amount which applies in his case<sup>1</sup>. The weekly applicable amount is the aggregate of such of the following amounts as may apply in the specific case<sup>2</sup>:

- 457 (1) an amount in respect of himself or, if he is a member of a couple<sup>3</sup>, an amount in respect of both of them<sup>4</sup>;
- 458 (2) an amount in respect of any child<sup>5</sup> or young person<sup>6</sup> who is a member of his family<sup>7</sup>, except for any child or young person whose capital exceeds a specified sum<sup>8</sup>;
- 459 (3) an amount by way of residential allowance for himself or any member of the family over 16 if he or they are in residential accommodation<sup>9</sup>;
- 460 (4) an amount by way of a family premium if he is a member of a family of which at least one member is a child or young person<sup>10</sup>;
- 461 (5) the amount of any premiums that may be applicable<sup>11</sup>;
- 462 (6) any amounts which are applicable to him in respect of mortgage interest payments or other prescribed housing costs<sup>12</sup>.

There are special provisions governing the applicable amount of a claimant who is a member of a polygamous marriage<sup>13</sup> or who is in a residential care home or a nursing home<sup>14</sup>. There is also provision for certain special cases, which include patients, claimants without accommodation, prisoners, temporarily separated couples, persons in local authority accommodation, certain persons abroad, persons in residential accommodation and persons from abroad<sup>15</sup>.

There may be a reduction in the applicable amount of a claimant who is appealing against a decision that he is not incapable of work<sup>16</sup>.

1 See the Social Security Contributions and Benefits Act 1992 s 124(4); and PARA 183 ante.

2 Income Support (General) Regulations 1987, SI 1987/1967, reg 17(1) (amended by SI 1996/206). As to the power to prescribe the applicable amount see PARA 174 ante.

3 For the meaning of 'couple' see PARA 177 note 22 ante.

4 Income Support (General) Regulations 1987, SI 1987/1967, reg 17(1)(a). The amounts are set out in reg 17 (as amended), Sch 2 para 1 (amended by SI 1997/543). There are different amounts specified for different age groups; and the entitlement of those who are less than 18 depends on the satisfaction of certain conditions: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 1 (as so amended), Sch 2 para 1A (added by SI 1996/206). As to changes in the amount of income support on the attainment of a particular age see PARA 183 ante.

5 For the meaning of 'child' see PARA 175 note 1 ante.

6 For the meaning of 'young person' see PARA 182 note 1 ante.

7 For the meaning of 'family' see PARA 175 note 1 ante.

8 Income Support (General) Regulations 1987, SI 1987/1967, reg 17(1)(b) (amended by SI 1993/2119). The amounts are set out in the Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 2 (amended by SI 1996/599; SI 1996/2545; SI 1997/543). The specified sum which the capital must not exceed is £3,000: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 17(1)(b) (as so amended).

9 Ibid reg 17(1)(bb) (added by SI 1992/3147). The amounts are set out in the Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 2A (added by SI 1992/3147; and amended by SI 1993/518; SI 1993/1219; SI 1993/2119; SI 1997/543). As to residential accommodation see note 15 infra; and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1029 et seq.

10 Income Support (General) Regulations 1987, SI 1987/1967, reg 17(1)(c). The amount is set out in Sch 2 para 3 (amended by SI 1988/1445; SI 1996/1803; SI 1997/543). With effect from 6 April 1998, new provisions prescribe the circumstances in which the applicable amount of income support will include the lone parent rate of family premium: see the Social Security (Lone Parents) (Amendment) Regulations 1997, SI 1997/1790, reg 11, further amending the Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 3.

11 Ibid reg 17(1)(d). Any such premium is to be determined in accordance with Sch 2 Pts III, IV (both as amended): see reg 17(1)(d).

The premiums which are available include:

- 40 (1) pensioner premium for persons under 75: Sch 2 para 9 (substituted by SI 1989/534);
- 41 (2) pensioner premium for persons 75 and over: Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 9A (added by SI 1989/534);
- 42 (3) higher pensioner premium: Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 10 (amended by SI 1988/663; SI 1992/468);
- 43 (4) disability premium: Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 11 (amended by SI 1988/663);
- 44 (5) severe disability premium: Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 13 (amended by SI 1988/663; SI 1989/1678; SI 1991/2742; SI 1993/1150; SI 1993/2119; SI 1994/2139; SI 1994/3061);
- 45 (6) disabled child premium: Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 14 (amended by SI 1991/2742; SI 1993/2119);
- 46 (7) carer premium: Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 14ZA (added by SI 1990/1776; and amended by SI 1991/1559; SI 1991/2742).

There are additional conditions to be met in order to qualify for the premiums in heads (3)-(4) supra: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 12 (amended by SI 1988/663; SI 1988/2022; SI 1989/1678; SI 1991/2742; SI 1994/2139; SI 1995/482; SI 1995/516; SI 1995/2303).

The general rule is that the claimant may only qualify for one premium, which is to be that with the higher or highest amount of those which potentially apply to him: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 5. Exceptionally, however, the severe disability premium, the disabled child premium and the carer premium may be applicable in addition to any other premium: see Sch 2 para 6 (amended by SI 1989/1678; SI 1990/1776).

The amounts of the various premiums are set out in the Income Support (General) Regulations 1987, SI 1987/1967, Sch 2 para 15 (amended by SI 1997/543).

12 Income Support (General) Regulations 1987, SI 1987/1967, reg 17(1)(e). Such amounts are to be determined in accordance with reg 17 (as amended), Sch 3 (as substituted and amended): see PARAS 185-186 post.

13 See ibid reg 18 (amended by SI 1988/1228; SI 1988/1445; SI 1989/534; SI 1989/1034; SI 1992/3147; SI 1993/2119; SI 1996/206).

14 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 19, Sch 4 (both as amended). As to residential care homes see SOCIAL SERVICES AND COMMUNITY CARE; and as to nursing homes see SOCIAL SERVICES AND COMMUNITY CARE.

15 See ibid reg 21, Sch 7 (both as amended). For the meaning of 'patient' see reg 21(3). For the meaning of 'prisoner' see reg 21(3) (definition substituted by SI 1995/516). For the meaning of 'residential accommodation' see the Income Support (General) Regulations 1987, SI 1987/1967, reg 21(3) (definition substituted by SI 1992/3147; and amended by SI 1994/2139; SI 1995/516); *Chief Adjudication Officer v Quinn* [1996] 4 All ER 72,

[1996] 1 WLR 1184, HL; and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1029 et seq. For the meaning of 'person from abroad' see the Income Support (General) Regulations 1987, SI 1987/1967, reg 21(3) (definition amended by SI 1990/547; SI 1991/236; SI 1993/315; SI 1994/1807; SI 1996/30; SI 1996/1944).

As to refugees see the Income Support (General) Regulations 1987, SI 1987/1967, reg 21ZA (added by SI 1996/2431).

16 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 22A (added by SI 1996/206).

## **UPDATE**

### **176-201 Income Support**

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001,

during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

#### **184 Calculation of the applicable amount**

NOTES 2-12--SI 1987/1967 reg 17 further amended: SI 2003/455, SI 2003/1121, SI 2005/2687, SI 2006/588, SI 2009/3228.

NOTE 4--SI 1987/1967 Sch 2 para 1 now as amended by SI 2008/632.

NOTE 8--SI 1987/1967 Sch 2 para 2 further amended: SI 2008/632.

NOTE 9--SI 1987/1967 Sch 2 para 2A revoked: SI 2003/1121.

NOTE 10--SI 1987/1967 Sch 2 para 3 further amended: SI 2000/724, SI 2008/632. SI 1997/1790 revoked: SI 1998/766.

NOTE 11--SI 1987/1967 Sch 2 para 9 amended: SI 2002/3019. SI 1987/1967 Sch 2 para 10 further amended: SI 1998/2231, SI 2000/724, SI 2002/3019, SI 2003/2379, SI 2006/2378, SI 2007/719. SI 1987/1967 Sch 2 para 11 further amended: SI 2002/3019, SI 2003/2379, SI 2007/719. SI 1987/1967 Sch 2 para 12 further amended: SI 1998/2231, SI 1999/2556, SI 2002/3019, SI 2003/1589, SI 2003/2379, SI 2004/1141, SI 2005/3360, SI 2006/2378, SI 2007/719. SI 1987/1967 Sch 2 para 13 further amended: SI 2000/681, SI 2000/2629, SI 2007/719. SI 1987/1967 Sch 2 para 14 substituted: SI 2007/719. SI 1987/1967 Sch 2 para 14ZA further amended: SI 2000/681, SI 2002/2020, SI 2003/2279. SI 1987/1967 Sch 2 para 15 now as amended by SI 2007/719, SI 2007/2618, SI 2008/632.

Also head (8) enhanced disability premium: SI 1987/1967 Sch 2 para 13A (added by SI 2000/2629; and amended by SI 2002/3019, SI 2003/455, SI 2007/719).

NOTE 13--SI 1987/1967 reg 18 further amended: SI 2001/3767, SI 2003/455, SI 2003/1121, SI 2006/588, SI 2009/3228.

NOTE 14--SI 1987/1967 reg 19, Sch 4 revoked: SI 2001/3767.

NOTE 15--SI 1987/1967 reg 21 further amended: SI 1998/563, SI 2000/636, SI 2000/979, SI 2001/3767, SI 2003/2325, SI 2004/1232, SI 2005/522, SI 2005/2687, SI 2005/2877, SI 2005/3360, SI 2006/1026, SI 2008/632, SI 2009/583, SI 2010/442. SI 1987/1967 Sch 7 further amended: SI 2000/636, SI 2000/681, SI 2001/488, SI 2001/3767, SI 2003/1121, SI 2003/1195, SI 2005/522, SI 2005/2687, SI 2005/3360, SI 2008/632, SI 2008/1554. Definition of 'residential accommodation' omitted: SI 2005/2687. As to persons from abroad, see *Secretary of State for Social Security v Remilien; Chief Adjudication Officer v Wolke* [1998] 1 All ER 129, HL (deportation order required to terminate Community national's income support entitlement); *Nessa v Chief Adjudication Officer* [1999] 4 All ER 677, HL (in the definition of 'person from abroad' in reg 21(3), as amended, which refers to persons not being habitually resident in the United Kingdom, habitual residence means residence for a period which shows that the residence is in fact habitual); *Gingi v Secretary of State for Work and Pensions* [2001] EWCA Civ 1685, [2002] 1 CMLR 587 (application of habitual residence requirement in relation to non-Community national). See also *R (on the application of RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63, [2009] 2 All ER 556 (non-eligibility of persons without accommodation for disability premium not contrary to human rights).

Definition of 'person from abroad' further amended: SI 1998/563, SI 2000/636, SI 2000/979, SI 2004/1232. SI 1987/1967 reg 21ZA lapsed on the repeal of the Immigration and Asylum Act 1999 s 123 by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 12(1), Sch 4. For further provision in relation to persons from abroad see SI 1987/1967 reg 21AA (added by SI 2006/1026; and amended by SI 2006/1981, SI 2006/2528, SI 2006/3341, SI 2009/362).

Provision now also included as to partners of persons subject to immigration control, and persons serving a sentence of imprisonment detained in hospital: see SI 1987/1967 Sch 7.

NOTE 16--SI 1987/1967 reg 22A amended: SI 1999/2422, SI 1999/3109, SI 2000/590, SI 2001/3767, SI 2007/2618. As to the period for which the applicable amount is to be calculated where a person is not excluded from income support under the Immigration and Asylum Act 1999 s 115 see SI 1987/1967 reg 22B (added by SI 2009/3228).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(iv) The Applicable Amount/185. Allowable housing costs.

### 185. Allowable housing costs.

Allowable housing costs<sup>1</sup> are those which the claimant or, where he is a member of a family<sup>2</sup>, he or any member of the family is liable to meet<sup>3</sup> in respect of the dwelling<sup>4</sup> which he or any other member of his family is treated as occupying, and which come within the following categories<sup>5</sup>:

- 463 (1) a loan taken out for the purpose of acquiring an interest in the dwelling occupied as the home (or paying off another loan to the extent that the other loan would have qualified)<sup>6</sup>;
- 464 (2) a loan taken out, with or without security, for the purpose of carrying out repairs and improvements, or paying any service charge imposed to meet the cost of repairs and improvements (or paying off another loan to the extent that the other loan would have qualified)<sup>7</sup>;
- 465 (3) other allowable housing costs, namely payments by way of rent or ground rent relating to a long tenancy, service charges<sup>8</sup>, payments by way of rent charge, payments under a co-ownership scheme, payments under or relating to a tenancy or licence of a Crown tenant and, where the dwelling occupied as the home is a tent, payments in respect of the tent and the site on which it stands<sup>9</sup>.

A deduction is made in respect of any non-dependant<sup>10</sup> aged 18 or over, the amount of which depends on whether the non-dependant is engaged in any remunerative work or not and, if so, on the level of his income<sup>11</sup>.

1 No amount may be met in respect of expenditure of a kind for which housing benefit may be granted, or where the claimant is in a residential care home or nursing home (unless he is in such a home only temporarily): see the Income Support (General) Regulations 1987, SI 1987/1967, reg 17 (as amended), Sch 3 para 4(1) (Sch 3 substituted by SI 1995/1613). As to residential care homes see SOCIAL SERVICES AND COMMUNITY CARE; and as to nursing homes see SOCIAL SERVICES AND COMMUNITY CARE.

2 For the meaning of 'family' see PARA 175 note 1 ante.

3 A person is liable to meet housing costs where (1) the liability falls upon him or his partner (but not where the liability is to a member of the same household); (2) because the person liable to meet the costs is not meeting them, the claimant has to meet them in order to continue to live there and it is reasonable in all the circumstances to treat the claimant as liable to meet those costs; (3) he in practice shares the housing costs with other members of the household (none of whom are close relatives of the claimant or his partner), one or more of those members is liable to meet those costs, and it is reasonable in the circumstances to treat him as sharing responsibility: Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 2(1) (as substituted: see note 1 supra). For the meaning of 'partner' see PARA 182 note 5 ante.

4 Ie the dwelling occupied as the home: see *ibid* Sch 3 para 1(1) (as substituted: see note 1 supra). 'Dwelling occupied as the home' means the dwelling together with any garage, garden and outbuildings normally occupied by the claimant as his home including any premises not so occupied which it is impracticable or unreasonable to sell separately: reg 2(1). This includes a dwelling to be occupied as the home: Decision R(IS)11/94 (house being built on acquired land).

5 Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 1(1) (as substituted: see note 1 supra). A person is to be treated as occupying as his home the dwelling normally occupied as his home by himself or, if he is a member of a family, by himself and his family; and he is not to be treated as occupying any other dwelling as his home: Sch 3 para 3(1) (as so substituted). As to when a person is to be treated as occupying a dwelling as his home (the normal rule being that up to 13 weeks absence is permissible) see Sch 3 para 3(2)-(13) (as so substituted; Sch 3 para 3(11) amended by SI 1995/2927). As to the apportionment of

housing costs in the case of a composite hereditament see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 5 (as so substituted).

6 Ibid Sch 3 para 15(1) (as substituted: see note 1 supra). This also applies to money borrowed under a hire purchase agreement for these purposes: Sch 3 para 15(2) (as so substituted). A loan applied only partly for these purposes is to be apportioned: Sch 3 para 15(3) (as so substituted). As to whether a transfer between the claimant and his partner constitutes an acquisition of an interest see Decision R(IS)1/95; as to replacement of an interest-free loan from friends with a commercial loan see Decision R(IS)11/95.

The weekly amount of housing costs in respect of a qualifying loan is determined by applying the standard interest rate: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 paras 10, 12 (both as so substituted; Sch 3 para 12 amended by SI 1995/2927; SI 1996/2903; SI 1997/944 (revoked with savings); and, with effect from 2 September 1997, by SI 1997/2055). The actual rate of interest is only now used where, as at the day the housing costs first fall to be met, it was less than 5% per annum, and it ceases to apply when it reaches 5% or more: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 12(2), (3) (as so substituted). As to the applicable amount in respect of housing costs for income support when the claimant or his partner was previously in receipt of, or treated as being in receipt of, income-based jobseeker's allowance (as to which see PARA 271 et seq post), see Sch 3 para 1A (added by SI 1997/2305).

7 Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 16(1) (as substituted: see note 1 supra). The loan must have been used for that purpose, or be used for that purpose within six months of the date of receipt or such further period as is reasonable in the particular circumstances: Sch 3 para 16(1) (as so substituted). 'Repairs and improvements' means any of the following measures undertaken with a view to maintaining the fitness of the dwelling for human habitation: (1) provision of a fixed bath, shower, wash basin, sink or lavatory, and necessary associated plumbing, including the provision of hot water not connected to a central heating system; (2) repairs to existing heating systems; (3) damp proof measures; (4) provision of ventilation and natural lighting; (5) provision of drainage facilities; (6) provision of facilities for preparing and cooking food; (7) provision of insulation of the dwelling occupied as the home; (8) provision of electric lighting and sockets; (9) provision of storage facilities for fuel or refuse; (10) repairs of unsafe structural defects; (11) adapting a dwelling for the special needs of a disabled person; or (12) provision of separate sleeping accommodation for children of different sexes aged ten or over who are part of the same family as the claimant: Sch 3 para 16(2) (as so substituted). A loan used partly for a qualifying purpose or purposes is to be apportioned: Sch 3 para 16(3) (as so substituted).

As to the determination of the amount of housing costs in respect of a qualifying loan see note 6 supra.

8 This may apply not only to a leaseholder, but also to a freeholder: Decision R(IS)4/91. See the interpretation set out in the appendix added jointly to Decisions R(IS)4/91; R(IS)3/91. Building insurance levied by a landlord may be included: Decisions R(IS)4/92; R(IS)19/93. However, this does not apply to ordinary building insurance premiums paid by an owner-occupier as a condition of a mortgage: *Dunne v Department of Health and Social Security* (10 September 1993, unreported, CA).

9 Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 17(1) (as substituted: see note 1 supra). Certain deductions may be made under Sch 3 para 17(2) (as so substituted).

10 'Non-dependant' means any person who normally resides with a claimant, or with whom a claimant normally resides, except (1) a member of the claimant's family; (2) a child or young person living with the claimant but not treated as being a member of his household; (3) a person living with the claimant to care for him or for his partner, and who is provided, for a charge, by a charity or voluntary association; or (4) the partner of a person within head (3) supra: *ibid* reg 3(1) (amended by SI 1991/2334; SI 1994/3061), Income Support (General) Regulations 1987, SI 1987/1967, reg 3(2) (substituted by SI 1991/2334; and amended by SI 1995/516). This exception also extends to persons (other than close relatives) in a commercial relationship with the claimant (see the Income Support (General) Regulations 1987, SI 1987/1967, reg 3(2A) (added by SI 1991/2334)); and to co-owners and those jointly liable for rent (see the Income Support (General) Regulations 1987, SI 1987/1967, reg 3(2B) (added by SI 1991/2334)). For the meaning of 'child' see PARA 175 note 1 ante. For the meaning of 'young person' see PARA 182 note 1 ante. As to the meaning of 'household' see PARA 182 ante.

11 See the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 18 (as substituted: see note 1 supra; and amended by SI 1995/2927; SI 1996/2518; SI 1997/543; SI 1997/827).

## UPDATE

### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the

Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **185 Allowable housing costs**

NOTE 1--For 'in a residential care home ... only temporarily' read 'living in a care home, an Abbeyfield Home or an independent hospital except where he is living in such a home or hospital temporarily': SI 1987/1967 Sch 3 para 4(1) (amended by SI 2005/2687). For the meanings of 'care home', 'Abbeyfield Home' and 'independent hospital' see PARA 180.

NOTE 5--SI 1987/1967 Sch 3 para 3(3) amended: SI 2000/1981. SI 1987/1967 Sch 3 para 3(6) amended: SI 2000/1981, SI 2006/3274. SI 1987/1967 Sch 3 para 7 amended: SI 2006/2378. SI 1987/1967 Sch 3 para 3(11) further amended: SI 2000/1981, SI 2004/2327. SI 1987/1967 Sch 3 para 3(13) amended: SI 2001/3767, SI 2005/2687, SI 2009/583, SI 2009/2655.

NOTE 6--SI 1987/1967 Sch 3 para 1A amended: SI 2007/3183, SI 2008/1554. SI 1987/1967 Sch 3 para 10 amended: SI 2001/3651, SI 2004/2825. SI 1987/1967 Sch 3 para 12 substituted by SI 2004/2825; and amended by SI 2007/3183. SI 1987/1967 Sch 3 para 12 modified: SI 2008/3195 (amended by SI 2009/3257).

NOTE 9--SI 1987/1967 Sch 3 para 17 amended: SI 2006/217, SI 2006/2378.

NOTE 11--SI 1987/1967 Sch 3 para 18 further amended: SI 1999/527, SI 1999/3178, SI 2000/440, SI 2002/3019, SI 2003/1195, SI 2004/2327, SI 2005/3360, SI 2006/217, SI 2008/632, SI 2008/1554.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(iv) The Applicable Amount/186. Restrictions on housing costs.

## **186. Restrictions on housing costs.**

On a new claim for income support<sup>1</sup>, in the case of existing housing costs<sup>2</sup>, nothing is payable in relation to those costs for the first eight weeks, then only one-half for the next 18 weeks<sup>3</sup>; in the case of new housing costs, nothing is payable for the first 39 weeks<sup>4</sup>.

There is a statutory ceiling on the size of the loan or aggregate of loans in respect of which housing costs may be paid<sup>5</sup>.

Housing costs are not to be met on any loan incurred during any period when the person was entitled to income support, or was living as a member of a family one of whom was entitled to income support, after a certain date<sup>6</sup>. This restriction does not apply where a loan is taken out or an existing loan increased to acquire alternative accommodation more suited to the needs of a disabled person<sup>7</sup>, or where the loan commitment increased on a move of house made solely by reason of the need to provide separate sleeping accommodation for children of different sexes aged ten or over who belong to the same family as the claimant<sup>8</sup>. Where the claimant or a member of his family acquires an interest in a dwelling which he then occupies or continues to occupy as his home, and in the week preceding that acquisition housing benefit was payable to him or a member of his family, limited housing costs may be paid<sup>9</sup>.

Where (1) the dwelling occupied as the home, excluding any part of it which is let, is larger than is required by the claimant and his family (and any foster children) and any other non-dependants having regard, in particular, to suitable alternative accommodation occupied by a household of the same size<sup>10</sup>; or (2) the immediate area<sup>11</sup> in which the dwelling is located is more expensive than other areas in which suitable alternative accommodation exists; or (3) the outgoings of the dwelling which are normally met by housing costs are higher than the outgoings of suitable alternative accommodation in the area, the amount of the loan which falls to be met may be restricted and the excess over the amounts which he would need to obtain suitable alternative accommodation is not allowed<sup>12</sup>. This restriction does not apply where, having regard to certain factors<sup>13</sup>, it is not reasonable to expect the claimant and his family to seek alternative cheaper accommodation<sup>14</sup>. Moreover, where the claimant was able to meet the financial commitments<sup>15</sup> for the dwelling when they were entered into, no restriction is to be made during the first 26 weeks of any period of entitlement to income support or during the 26 weeks from the date of a review, nor during the next 26 weeks, if and so long as the claimant uses his best endeavours to obtain cheaper accommodation<sup>16</sup>.

1 In order to prevent the initial restriction applying repeatedly where a person's entitlement to income support is intermittent (eg where he has taken on short-term employment) there are 'linking rules': see the Income Support (General) Regulations 1987, SI 1987/1967, reg 17 (as amended), Sch 3 para 14 (Sch 3 substituted by SI 1995/1613; Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 14 amended by SI 1995/2927; SI 1996/206; SI 1996/1944). The general rule is that two periods of entitlement separated by a period of 12 weeks or less may be considered to be one period of entitlement, so that the initial restriction only applies once.

2 'Existing housing costs' means housing costs arising under an agreement entered into before 2 October 1995 or under a new agreement entered into after 1 October 1995 which replaces an existing agreement (which was entered into before 2 October 1995) between the same parties in respect of the same property and which is for a loan of the same amount or less: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 1(2) (as substituted: see note 1 supra; and amended by SI 1995/2927).

3 See the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 6(1) (as substituted: see note 1 supra; and amended by SI 1995/2927). For these purposes, the eligible capital for the time being owing

is to be determined on the date the existing housing costs are first met and thereafter on each anniversary of that date; but where a claimant or his partner ceases to be in receipt of or treated as being in receipt of income-based jobseeker's allowance (as to which see PARA 271 et seq post) and one of them becomes entitled to income support in a case to which these provisions apply, the eligible capital for the time being owing must be recalculated on each anniversary of the date on which the housing costs were first met for whichever of the benefits concerned the claimant or his partner was first entitled: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 6(1A), (1B) (added respectively by SI 1995/2927; and SI 1997/2305).

The rule may apply to what would otherwise be new housing costs where the claimant is caring for another person, is detained in custody or has been refused payments under a mortgage protection insurance policy because of a pre-existing medical condition or HIV infection, or where the claim is due to the death of the claimant's partner or the claimant being abandoned by his partner and the claimant's family includes a child: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 8(2)-(5) (as so substituted; and amended by SI 1996/206). 'New housing costs' means housing costs arising under an agreement entered into after 1 October 1995 other than an agreement which is referred to in note 2 supra: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 1(2) (as so substituted). For the meaning of 'partner' see PARA 182 note 5 ante. For the meaning of 'family', and for the meaning of 'child', see PARA 175 note 1 ante.

See also note 4 infra.

4 See ibid Sch 3 para 8(1) (as substituted: see note 1 supra; and amended by SI 1995/2927). For these purposes, the eligible capital for the time being owing is to be determined on the date the new housing costs are first met and thereafter on each anniversary of that date; but where a claimant or his partner ceases to be in receipt of or treated as being in receipt of income-based jobseeker's allowance and one of them becomes entitled to income support in a case to which these provisions apply, the eligible capital for the time being owing must be recalculated on each anniversary of the date on which the housing costs were first met for whichever of the benefits concerned the claimant or his partner was first entitled: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 8(1A), (1B) (added respectively by SI 1995/2927; and SI 1997/2305).

The restrictions in the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 paras 6, 8 (both as substituted and amended) do not apply where (1) the claimant or his partner is aged 60 or over; or (2) where the housing costs are payments under a co-ownership agreement, payments under or relating to a tenancy or licence of a Crown tenant or, where the dwelling occupied as the home is a tent, payments in respect of the tent and its site: Sch 3 para 9 (as so substituted).

5 See ibid Sch 3 para 11(4)-(11) (as substituted: see note 1 supra; and amended by SI 1995/2927). A loan taken out and used for the purpose of adapting a dwelling for the special needs of a disabled person is disregarded in determining whether the statutory limit has been exceeded: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 11(9) (as so substituted).

6 Ibid Sch 3 para 4(2)-(5) (as substituted: see note 1 supra; and amended by SI 1995/2927). Where the loan has been applied to pay off an earlier qualifying loan or to finance the purchase of a property where an earlier qualifying loan in respect of another property is paid off in whole or in part with moneys received from the sale of that property, the rule only applies to the amount (if any) by which the new loan exceeds the earlier one: Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 4(6) (as so substituted; and amended by SI 1996/1944).

7 Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 4(9) (as substituted: see note 1 supra).

8 Ibid Sch 3 para 4(10) (as substituted: see note 1 supra).

9 See ibid Sch 3 para 4(8) (as substituted: see note 1 supra; and amended by SI 1995/2927). In practice, this is particularly applicable where a claimant exercises his right to buy his council house.

The amount is initially limited to the amount of the housing benefit plus any other housing costs to which he was already entitled (see PARA 184 head (6) ante); and the amount may be increased subsequently only to the extent that it is necessary to take account of any increase, arising after the date of the acquisition, in the standard rate of interest or in any other housing costs (ie under para 185 head (3) ante): see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 4(8) (as so substituted and amended). There is no provision for any decrease consequent on a decrease in the standard rate: Decision R(IS)8/94.

There is a similar restriction where the claimant acquires an interest in a dwelling where previously he had been entitled only to an amount representing other housing costs (ie under para 185 head (3) ante); in such a case, the amount is limited to the level of those existing housing costs: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 4(11) (as so substituted; and amended by SI 1995/2927).

10 For the meaning of 'non-dependant' see PARA 185 note 10 ante. As to the meaning of 'household' see PARA 182 ante.

11 'Area' denotes something more confined, restricted and more compact than a locality or district, and so the comparison must not be too widely drawn: Decision R(IS)12/91.

12 Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 13(1), (3) (both as substituted: see note 1 supra). For these purposes, no regard is to be had to the capital value of the dwelling occupied as the home: Sch 3 para 13(2) (as so substituted).

The excess is to be calculated subjectively to the claimant: Decision R(IS)9/91, applying Decision R(SB)6/89 (where the sale of the original home meant that a suitable, smaller home could be bought without a mortgage, no housing costs were to be awarded).

13 The relevant factors are (1) the availability of suitable accommodation and the level of housing costs in the area; and (2) the circumstances of the family including in particular the age and state of health of its members, the employment prospects of the claimant and, where a change of accommodation is likely to result in a change of school, the effect on the education of any child or young person who is a member of his family, or any foster children: see the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 13(5) (as substituted: see note 1 supra). For the meaning of 'young person' see PARA 182 note 1 ante. While factor (1) is objective, it is balanced by factor (2) which must be considered subjectively to the claimant and may include matters not listed, such as financial hardship and difficulties in disposing of the property: Decision R(SB)6/89; Decision R(SB)7/89; Decision R(IS)10/93.

14 Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 13(4) (as substituted: see note 1 supra).

15 The test is ability to meet the financial commitments, not whether it was wise to enter them in the first place: see *Secretary of State for Social Security v Julien* (1992) Times, 21 April, CA.

16 See the Income Support (General) Regulations 1987, SI 1987/1967, Sch 3 para 13(6) (as substituted: see note 1 supra). As to the calculation of these 26 week periods see Sch 3 para 13(7), (8) (both as so substituted).

The 'best endeavours' rule in Sch 3 para 13(6) (as substituted) is not to be applied to a claimant unless he has been notified in advance that the restriction of housing costs is likely to take place: Decision R(SB)7/89.

## UPDATE

### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in

connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the

arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **186 Restrictions on housing costs**

NOTES 1, 6--Periods of participation in the New Deal may be treated as periods of entitlement to income support for the purpose of applying the rules on payment of housing costs: SI 1987/1967 Sch 3 paras 4(4A), 14; SI 1997/2863, SI 2001/1029, SI 2008/698. See also SI 1987/1967 Sch 3 para 4(4B) (added by SI 2007/3183).

NOTE 1--In the case of a person who is a welfare to work beneficiary, for '12 weeks' read '104 weeks': SI 1987/1967 Sch 3 para 14 (amended by SI 1998/2231, SI 1999/714, SI 1999/1921, SI 2000/724, SI 2000/1981, SI 2001/158, SI 2001/488, SI 2002/841, SI 2002/3019, SI 2006/2378, SI 2008/698, SI 2008/1554, SI 2009/2655). A 'welfare to work beneficiary' is a person (1) to whom the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A(1) (see PARA 71) applies; and (2) who again becomes incapable of work for the purposes of the Social Security Contributions and Benefits Act 1992 Pt XIA: SI 1987/1967 reg 2; SI 1998/2231.

NOTE 3--SI 1987/1967 Sch 3 para 6 amended: SI 2002/3019, SI 2006/2378, SI 2008/1554. For the purposes of SI 1987/1967 Sch 3 para 8(2)-(5), 'abandonment' requires both physical separation and an intent on the part of the deserting party to desert the other: *W v Secretary of State for Work and Pensions* (2005) Times, 10 June, CA.

NOTE 4--SI 1987/1967 Sch 3 paras 8, 9 amended: SI 2002/3019. SI 1987/1967 Sch 3 para 8(1B) amended: SI 2008/1554.

NOTE 6--SI 1987/1967 Sch 3 para 4(4) further amended: SI 2008/1554.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(v) Income/187. Calculation of income.

## **(v) Income**

### **187. Calculation of income.**

The income of a claimant is to be calculated on a weekly basis<sup>1</sup>. For this purpose, income includes capital treated as income and notional income<sup>2</sup>, and any tariff income from capital<sup>3</sup>.

Earnings derived from employment as an employed earner<sup>4</sup> and other income not consisting of earnings<sup>5</sup> are to be taken into account for the period in respect of which they were paid<sup>6</sup>. A payment of such income is generally treated as paid on the first day of the benefit week in which it is due to be paid, or the first succeeding benefit week in which it is practicable to take it into account<sup>7</sup>.

Where a claimant's income consists of earnings from employment as a self-employed earner<sup>8</sup>, the weekly amount of his earnings is to be determined by reference to his average weekly earnings from that employment over a period of one year or, where the claimant has recently become engaged in that employment or there has been a change likely to affect the normal pattern of business, over such other period as may enable the weekly amount of his earnings to be determined more accurately<sup>9</sup>.

1 Income Support (General) Regulations 1987, SI 1987/1967, reg 28(1). Any income of the claimant's family must be taken into account: see PARA 175 ante. As to the calculation of such income see reg 23 (amended by SI 1988/1228; SI 1996/206). For the meaning of 'family' see PARA 175 note 1 ante.

There are special rules relating to the income of children and young persons: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 44 (amended by SI 1988/663; SI 1993/2119), Income Support (General) Regulations 1987, SI 1987/1967, Sch 8 paras 14, 15 (amended by SI 1989/534; SI 1992/468). For the meaning of 'child' see PARA 175 note 1 ante; and for the meaning of 'young person' see PARA 182 note 1 ante.

2 Income Support (General) Regulations 1987, SI 1987/1967, reg 28(2) (substituted by SI 1991/1559). As to capital treated as income see PARA 191 post; and as to notional income see PARA 192 post.

3 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 28(1). As to tariff income see PARA 194 post.

4 See PARA 188 post.

5 As to income other than earnings see PARA 190 post.

6 Income Support (General) Regulations 1987, SI 1987/1967, reg 29(1) (amended by SI 1988/2022), Income Support (General) Regulations 1987, SI 1987/1967, reg 29(2)(a). See also Decision R(IS)3/93. As to payments not made in respect of a period see the Income Support (General) Regulations 1987, SI 1987/1967, reg 29(2)(b) (amended by SI 1990/547).

Where the periods in respect of which different kinds of earnings from the same source fall to be taken into account overlap, the earnings are to be taken into account for the aggregate length of those periods: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 29(3). As to the order of priority in which such earnings are to be taken into account see reg 29(4) (substituted by SI 1989/1323); and see eg Decision R(SB)11/85.

As to the period over which earnings paid in respect of or on the termination of employment are to be taken into account see the Income Support (General) Regulations 1987, SI 1987/1967, reg 29(4B), (4C) (both added by SI 1989/1323).

7 Income Support (General) Regulations 1987, SI 1987/1967, reg 31(1)(b). A payment due to be paid before the first benefit week is treated as paid on the date on which it is due to be paid: reg 31(1)(a). For the meaning of 'benefit week' see PARA 182 note 3 ante.

Income support, jobseeker's allowance, maternity allowance, incapacity benefit or severe disablement allowance is to be treated as paid on the day of the benefit week in respect of which it is payable: reg 31(2) (amended by SI 1988/663; SI 1988/1445; SI 1995/482; SI 1996/206).

Where a contract of employment is terminated unlawfully by the employer, any outstanding amounts or in lieu payments are due at the date of the employer's repudiation of the contract: Decisions R(SB)23/84; R(SB)11/85.

As to translating payments made otherwise than on a weekly basis into the appropriate weekly amounts see the Income Support (General) Regulations 1987, SI 1987/1967, reg 32 (amended by SI 1988/663; SI 1988/1445; SI 1989/1323; SI 1995/482; SI 1996/206).

8 See PARA 189 post.

9 Income Support (General) Regulations 1987, SI 1987/1967, reg 30(1) (amended by SI 1993/2119). Special rules apply to royalties and copyright payments: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 30(2).

## UPDATE

### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made

under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **187 Calculation of income**

NOTE 1--SI 1987/1967 reg 23A added: SI 1998/1174. SI 1987/1967 reg 44 further amended: SI 2000/2629). SI 1987/1967 Sch 8 para 15 further amended: SI 2001/3767. SI 1987/1967 Sch 8 para 15C added: SI 2001/488.

NOTE 6--SI 1987/1967, reg 29(2)(a) substituted: SI 2008/698. SI 1987/1967 reg 29(4B) revoked: SI 2008/698. SI 1987/1967 reg 29(2A), (2B) added by SI 1997/65; SI 1987/1967 reg 29(2B) amended by SI 1998/563, SI 2000/1981. As to the treatment of sick pay when assessing entitlement to income support, see *Owen v Chief Adjudication Officer* (1999) Independent, 11 May, CA.

NOTE 7--Working tax credit under the Tax Credits Act 2002 s 10 or child tax credit under s 8 are to be treated as paid (1) where the award of that tax credit begins on the first day of a benefit week, on that day; or (2) on the first day of the benefit week that follows the date the award begins; or (3) on the first day of the first benefit week that follows the date an award of income support begins, if later, until the last day of the last benefit week that coincides with or immediately follows the last day for which the award of that tax credit is made: SI 1987/1967 reg 31(3) (added by SI 2000/681, replaced by SI 2002/2402).

NOTE 9--SI 1987/1967 reg 30(2) amended: SI 2008/698. As to application of SI 1987/1967 reg 30(2) see reg 30(2A) (added by SI 2008/698, substituted by SI 2009/583).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(v) Income/188. Earnings of employed earners.

### 188. Earnings of employed earners.

In the case of employment as an employed earner, 'earnings' means any remuneration or profit derived from that employment<sup>1</sup>, and includes:

- 466 (1) any bonus or commission;
- 467 (2) any payment in lieu of remuneration<sup>2</sup>, except any periodic sum paid to a claimant on account of the termination of his employment by reason of redundancy;
- 468 (3) any payment in lieu of notice;
- 469 (4) any holiday pay, except any payable more than four weeks after the termination or interruption of employment<sup>3</sup>;
- 470 (5) any payment by way of a retainer<sup>4</sup>;
- 471 (6) any payment made by the claimant's employer in respect of expenses not wholly, exclusively and necessarily incurred in the performance of the duties of the employment, including any payment by the employer in respect of travelling expenses incurred by the claimant between his home and place of work, and expenses incurred by the claimant under arrangements made for the care of a member of his family owing to the claimant's absence from home<sup>5</sup>;
- 472 (7) an award of compensation for unfair dismissal<sup>6</sup>;
- 473 (8) any sum specified to be earnings for social security purposes<sup>7</sup>;
- 474 (9) where:
- 39 47. (a) a payment of compensation is made in respect of employment which is not part-time employment<sup>8</sup> and that payment is not less than the maximum weekly amount<sup>9</sup>, the amount of the compensation less the deductible remainder<sup>10</sup>, where that is applicable;
- 48. (b) a payment of compensation is made in respect of employment which is part-time employment, the amount of the compensation<sup>11</sup>.
- 40

Earnings do not include:

- 475 (i) any payment in kind<sup>12</sup>;
- 476 (ii) any remuneration paid by or on behalf of an employer to a claimant in respect of a period throughout which the claimant is on maternity leave or is absent from work because he is ill;
- 477 (iii) any payment in respect of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment;
- 478 (iv) any occupational pension;
- 479 (v) any lump sum payment made under the Iron and Steel Re-adaptation Benefits Scheme<sup>13</sup>.

The earnings of a claimant derived from employment as an employed earner which are to be taken into account in calculating income are his net earnings<sup>14</sup>. These are to be calculated by taking into account the gross earnings less (A) income tax; (B) primary Class 1 contributions; and (C) one-half of the claimant's contributions towards an occupational or personal pension

scheme<sup>15</sup>. In order to ascertain the gross income in the first place, necessary expenses may be deducted<sup>16</sup>. Certain specified sums ('disregards') are to be disregarded from the claimant's net earnings<sup>17</sup>.

1 'Derived from' applies a broad causative test and means 'having their origin in': Decision R(SB)21/86. A cash payment to a miner in lieu of concessionary coal has been held to be remuneration or profit derived from his employment: Decision R(SB)2/86.

2 This may apply to any award of compensation which includes an element of loss of earnings: Decision R(SB)21/86 (compensation for unfair dismissal); Decision CIS/590/1993 (compensation for sex discrimination).

3 This exception does not apply to a claimant subject to the trade dispute provisions (see PARA 178 ante). The payable date is the date when the amount is first due to be paid (not necessarily when it is actually paid); on termination, holiday pay normally becomes immediately payable: Decision R(SB)11/85. Any holiday pay not in fact payable until more than four weeks afterwards is treated as capital: see PARA 195 post.

4 This includes a guarantee payment under the Employment Rights Act 1996 s 28 (see EMPLOYMENT vol 39 (2009) PARA 237 et seq): see Decision CIS/743/1992.

5 As to the treatment of the expenses, including travelling expenses, of a local councillor see Decision R(IS)6/92. As to the apportionment of expenses generally see the text and note 16 infra. For the meaning of 'family' see PARA 175 note 1 ante.

6 For the meaning of 'compensation' see the Income Support (General) Regulations 1987, SI 1987/1967, reg 35(3)(a) (added by SI 1989/1323; and amended by SI 1990/774; SI 1997/454).

7 ie any sum referred to in the Social Security (Miscellaneous Provisions) Act 1977 s 18(2) (repealed) (maternity pay etc).

8 'Part-time employment' means employment in which a person is not to be treated as engaged in remunerative work (see PARAS 179-180 ante): see the Income Support (General) Regulations 1987, SI 1987/1967, reg 35(3)(c) (added by SI 1989/1323).

9 'Maximum weekly amount' means the maximum weekly amount that may be used in employment law for the purpose of calculating a statutory redundancy payment: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 35(3)(b) (added by SI 1989/1323); and EMPLOYMENT vol 39 (2009) PARA 121.

10 The 'deductible remainder' applies in cases where dividing the amount of the compensation by the maximum weekly amount produces a whole number plus a fraction, and it is equal to the difference between (1) the amount of the compensation; and (2) the product of the maximum weekly amount multiplied by the whole number: Income Support (General) Regulations 1987, SI 1987/1967, reg 35(1A) (added by SI 1989/1323).

11 Income Support (General) Regulations 1987, SI 1987/1967, reg 35(1) (amended by SI 1988/663; SI 1989/1323).

12 Eg concessionary coal provided to miners and their dependants: see *R v Doncaster Metropolitan Borough Council, ex p Boulton* (1992) 25 HLR 195. However, a cash payment in lieu of a payment in kind does not qualify for the exemption: see Decision R(SB)2/86; and note 1 supra.

13 Income Support (General) Regulations 1987, SI 1987/1967, reg 35(2) (amended by SI 1993/2119; SI 1997/454). Any payments falling within the Income Support (General) Regulations 1987, SI 1987/1967, reg 35(2) (as amended) are deemed to be income other than earnings: see reg 40(4); and PARA 190 post.

Head (iii) in the text (necessary expenses) only relates to the reimbursement of expenses by an employer; expenses paid out by the employee himself must be deducted (if at all) under reg 36 (as amended) (see the text and notes 14-17 infra): Decision R(IS)16/93.

14 Income Support (General) Regulations 1987, SI 1987/1967, reg 36(1).

15 Ibid reg 36(3) (amended by SI 1994/2139). As to income tax see generally INCOME TAXATION; as to primary Class 1 contributions see PARAS 34-36 ante; and as to occupational or personal pension schemes see PARA 710 et seq post.

16 The same principle that was applied to the former family income supplement provisions in *Parsons v Hogg* [1985] 2 All ER 897, sub nom *Chief Adjudication Officer v Hogg* [1985] 1 WLR 1100, CA, (ie that the gross amount is the amount of earnings before deduction of tax, etc, but after the deduction of allowable expenses, on a similar principle to that used for income tax purposes) should be applied to the income support calculation:

Decision R(IS)16/93. Where expenses are incurred partly for employment purposes and partly for private purposes, those incurred wholly, exclusively and necessarily for the production of the earnings should be allowed, and the expenses should be apportioned accordingly: Decision R(IS)13/91 (self-employed earner; but the same principle should apply to employed earners), applying Decision R(FC)1/91. Child minding costs are not allowable: Decision R(FIS)2/88; and see Joined Cases C-63/91, 64/91 *Jackson v Chief Adjudication Officer* [1993] QB 367, [1993] 3 All ER 265, ECJ (not contrary to EC law). As to EC social security law see PARA 451 et seq post.

17 Income Support (General) Regulations 1987, SI 1987/1967, reg 36(2). As to the disregards see reg 36(2), Sch 8 paras 1-13 (as amended). The disregards are the same as those applicable to self-employed earners: see PARA 189 post.

## UPDATE

### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **188 Earnings of employed earners**

TEXT AND NOTES 1-11--Also, head (10) any payment or remuneration made under the Employment Rights Act 1996 s 28 (see EMPLOYMENT vol 39 (2009) PARA 237), 34 (see EMPLOYMENT vol 39 (2009) PARA 241), 64 (see EMPLOYMENT vol 39 (2009) PARA 316), 68 (see EMPLOYMENT vol 39 (2009) PARA 318) or 70 (see EMPLOYMENT vol 39 (2009) PARA 321): SI 1987/1967 reg 35(1) (amended by SI 2007/2618).

NOTE 6--SI 1987/1967 reg 35(3)(a) amended: SI 2007/2618.

NOTE 7--Now refers to the Social Security Contributions and Benefits Act 1992 s 112(3) (see PARA 33): SI 1987/1967 reg 35(1) (amended by SI 2007/2618).

NOTE 8--Definition of 'part-time employment' amended: SI 1987/1967 reg 35(3)(c) (amended by SI 2000/681).

NOTES 9, 10--SI 1987/1967 reg 35(1A), (3)(b) revoked: SI 2008/698.

NOTE 11--SI 1987/1967 reg 35(1) further amended: SI 2006/2378, SI 2007/2618, SI 2008/698, SI 2009/2655.

TEXT AND NOTES 12, 13--In head (ii) reference to maternity leave is now to maternity leave, paternity leave or adoption leave; and new head (vi) any payment in respect of expenses arising out of the claimant's participation in a service user group: SI 1987/1967 reg 35(2) (amended by SI 2002/2689, SI 2009/2655). For the meaning of 'service user group' see SI 1987/1967 reg 2(1) (definition added by SI 2009/2655).

NOTE 17--SI 1987/1967 Sch 8 paras 1, 2 substituted by SI 2007/2618; and amended by SI 2009/2655. SI 1987/1967 Sch 8 para 1A added: SI 2002/3019. SI 1987/1967 Sch 8 para 4 amended: SI 2000/681, SI 2000/2545, SI 2001/3767, SI 2002/3019, SI 2005/2687, SI 2008/1554. SI 1987/1967 Sch 8 para 5 substituted by SI 1998/766 and amended by SI 2000/2545. SI 1987/1967 Sch 8 para 6A amended: SI 2000/2545, SI 2002/2497. SI 1987/1967 Sch 8 para 6B amended: SI 2000/2545. SI 1987/1967 Sch 8 para 7 amended: SI 2000/2545, SI 2004/3168 (England), SI 2005/2929 (Wales), SI 2006/2378. SI 1987/1967 Sch 8 para 8 amended: SI 2000/2545.

As to the disregards see also SI 1987/1967 Sch 8 para 15A (added by SI 1996/1944; and amended by SI 2006/2378): SI 1987/1967 reg 36(2) (amended by SI 2003/1589).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(v) Income/189. Earnings of self-employed earners.

### **189. Earnings of self-employed earners.**

In the case of employment as a self-employed earner, 'earnings' means the gross receipts of the employment<sup>1</sup>. The earnings of a claimant who is engaged in employment on his own account which are to be taken into account in calculating income are the net profit<sup>2</sup>. The net profit is to be calculated by taking into account the earnings of the employment over the appropriate period<sup>3</sup>, less:

- 480 (1) any expenses wholly and exclusively defrayed in that period for the purposes of that employment<sup>4</sup>;
- 481 (2) an amount in respect of income tax and social security contributions<sup>5</sup>; and
- 482 (3) one-half of any premium paid in that period in respect of a retirement annuity contract or a personal pension scheme<sup>6</sup>.

Certain specified sums ('disregards') are to be disregarded from the net profit<sup>7</sup>.

Where a claimant is engaged in employment as a self-employed earner and is also engaged in one or more other employments (on the same basis or as a employed earner), any loss incurred in any one of his employments may not be offset against his earnings in any other of his employments<sup>8</sup>.

1 Income Support (General) Regulations 1987, SI 1987/1967, reg 37(1). Allowances paid to the claimant for the purpose of assisting him in carrying on his business under the Employment and Training Act 1973 s 2 (as substituted and amended) (see EMPLOYMENT vol 40 (2009) PARA 563) are included: Income Support (General) Regulations 1987, SI 1987/1967, reg 37(1). However, where a claimant is involved in providing board and lodging accommodation for which a charge is payable, any payment by way of such a charge is excluded from the claimant's earnings; and certain payments for fostering and temporary care are also excluded: see reg 37(2) (substituted by SI 1992/2155; and amended by SI 1994/2139). Any payments falling within the Income Support (General) Regulations 1987, SI 1987/1967, reg 37(2) (as substituted and amended) are deemed to be income other than earnings: see reg 40(4); and PARA 190 post.

'Gross receipts' do not include business loans made to the claimant, or the proceeds of sale of capital assets: see Decision CFC/3/1992 (decided under the equivalent provisions of the family credit legislation: see PARA 210 post).

2 Income Support (General) Regulations 1987, SI 1987/1967, reg 38(1)(a). As to the equivalent provisions applying to self-employed earners who are members of a partnership or who are share fishermen, where the net profit is shared, see reg 38(1)(b), (4) (reg 38(1)(b) amended by SI 1993/2119; SI 1994/2139).

3 The period determined under the Income Support (General) Regulations 1987, SI 1987/1967, reg 30 (as amended): see PARA 187 ante. However, an adjudication officer may assess any item of income or expenditure over another period if that would, in the particular case, enable the weekly amount to be determined more accurately: see reg 38(10).

4 No deduction may be made in respect of (1) any capital expenditure; (2) the depreciation of any capital asset; (3) any sum employed or intended to be employed in the setting up or expansion of the employment; (4) any loss incurred before the beginning of the appropriate period (see note 3 supra); (5) the repayment of capital on any loan taken out for the purposes of the employment; (6) any expenses incurred in providing business entertainment: *ibid* reg 38(5). However, a deduction is to be made in respect of the repayment of capital on any loan used for (a) the replacement in the course of business of equipment or machinery; and (b) the repair of an existing business asset, except to the extent that any sum is payable under an insurance policy for its repair: reg 38(6). Where a permissible item of expenditure has both business and personal purposes (eg telephone or car expenses) it may be apportioned and the business-related part allowed as a deduction, in much the same way as for income tax purposes: see Decision R(IS)13/91, applying Decision R(FC)1/91 (decided

under the equivalent provisions of the family credit legislation: see PARA 210 post). An adjudication officer must refuse to make a deduction in respect of any expenses if he is not satisfied that it has been defrayed or, having regard to its nature and amount, that it has been reasonably incurred: Income Support (General) Regulations 1987, SI 1987/1967, reg 38(7). A deduction is not to be made in respect of any sum unless it has been expended for the purposes of the business; and a deduction is to be made for (i) any excess of VAT paid over VAT received in the appropriate period; (ii) any income expended in the repair of an existing asset, except to the extent that any sum is payable under an insurance policy for its repair; (iii) any payment of interest on a loan taken out for the purposes of the employment: reg 38(8).

5 As to the calculation of the amounts to be deducted in respect of income tax and social security contributions see *ibid* reg 39 (amended by SI 1992/2155; SI 1993/2119; SI 1994/2139).

6 Income Support (General) Regulations 1987, SI 1987/1967, reg 38(3) (amended by SI 1993/2119; SI 1994/2139). Special provisions exist for assessing the net profit of a claimant engaged in employment as a child minder: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 38(9) (amended by SI 1993/2119).

7 Income Support (General) Regulations 1987, SI 1987/1967, reg 38(2). As to the disregards see reg 38(2), Sch 8 paras 1-13 (as amended). The disregards are the same as those applicable to an employed earner: see PARA 188 ante.

8 *Ibid* reg 38(11).

## **UPDATE**

### **176-201 Income Support**

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be

treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **189 Earnings of self-employed earners**

NOTES 1, 2, 5--As to the treatment of gross receipts, calculations of income, and deductions in respect of tax for participants in the self-employment route, see SI 1987/1967 reg 39A-39D (added by SI 1998/1174; and amended by SI 2000/2910; SI 1987/1967 reg 39D amended by SI 2007/1749, SI 2007/2618, SI 2009/583). 'Self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1987/1967 reg 2(1) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). For the meaning of 'employment zone programme' see PARA 192 TEXT AND NOTE 8.

NOTES 1, 4--Subject to savings (see SI 2003/962) family credit (working families' tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

NOTE 5--SI 1987/1967 reg 39 further amended: SI 2007/1749, SI 2007/2618, SI 2009/583.

NOTE 7--SI 1987/1967 Sch 8 paras 1-13 further amended: see PARA 188 NOTE 17.

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### **190. Calculation of income other than earnings.**

The income of a claimant which does not consist of earnings but which is still to be taken into account is his gross income<sup>1</sup> and any capital treated as income<sup>2</sup>, less certain specified sums ('disregards') which are to be disregarded<sup>3</sup>.

1 For these purposes, any expenses incurred in producing the income may not be deducted from the gross income (except to the extent that they are specifically disregarded: see note 3 *infra*): Decision CIS/563/1991 (distinguishing *Parsons v Hogg* [1985] 2 All ER 897, sub nom *Chief Adjudication Officer v Hogg* [1985] 1 WLR 1100, CA; and not following Decision CIS/25/1989).

2 Income Support (General) Regulations 1987, SI 1987/1967, reg 40(1) (amended by SI 1988/2022; SI 1990/1549). As to capital treated as income see PARA 191 post.

Amounts which are not earnings under the Income Support (General) Regulations 1987, SI 1987/1967, reg 35(2) (as amended) (see PARA 188 ante) or reg 37(2) (as substituted and amended) (see PARA 189 ante) are to be included as income under these provisions: reg 40(4). However, some of these amounts may fall to be disregarded: see note 3 *infra*.

Where the payment of any benefit is subject to any deduction by way of recovery (eg for an overpayment), it is the gross amount that is to be taken into account in calculating income: reg 40(3).

Special provisions apply in relation to former students and student loans: see reg 40(3A) (added by SI 1990/1549; and amended by SI 1991/236; SI 1997/2197); the Income Support (General) Regulations 1987, SI 1987/1967, reg 40(3B) (added by SI 1997/65).

3 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 40(2). As to the disregards see reg 40(2), Sch 9 (subject to frequent amendment).

## **UPDATE**

### **176-201 Income Support**

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the

Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those

periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **190 Calculation of income other than earnings**

NOTE 2--SI 1987/1967 reg 40(1) further amended: SI 1998/563, SI 2005/2294, SI 2009/2655. SI 1987/1967 reg 40(3A) now reg 40(3A)-(3AB) (substituted by SI 2001/2319; and amended by SI 2008/1599) which provides a formula for calculating the income of a former student who has received a student loan or an amount intended for the maintenance of dependants and who abandons, or is dismissed from, his course before the end of the penultimate term of the academic year.

In the case of a claimant who is receiving support provided by the Immigration and Asylum Act 1999 s 95 or 98 including support provided by virtue of regulations made under Sch 9, the amount of support provided in respect of essential living needs of the claimant and his dependants, if any, as is specified in regulations made under Sch 8 para 3 is also to be included as income to be taken into account: SI 1987/1967 reg 40(4) (amended by SI 2000/636). In the case of a claimant who is the partner of a person subject to immigration control and whose partner is receiving support provided under the 1999 Act s 95 or 98 including support provided by virtue of regulations made under Sch 9, there is not to be included as income to be taken into account the amount of support provided in respect of essential living needs of the partner of the claimant and his dependants, if any, as is specified in regulations made under Sch 8 para 3: SI 1987/1967 reg 40(5) (added by SI 2000/636).

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## **191. Capital treated as income.**

The following amounts, which might normally be considered to be capital, are treated as income<sup>1</sup>:

- 483 (1) any capital payable by instalments outstanding on the first day in respect of which income support is payable or the date of the determination of the claim, whichever is the earlier, if the aggregate of the instalments outstanding and the amount of the claimant's other capital exceeds a specified sum<sup>2</sup>;
- 484 (2) any payment received under an annuity<sup>3</sup>;
- 485 (3) where the trade dispute provisions apply<sup>4</sup>, certain payments under the Children Act 1989<sup>5</sup> and any repayment of income tax<sup>6</sup>;
- 486 (4) any earnings to the extent that they are not a payment of income<sup>7</sup>;
- 487 (5) any career development loan<sup>8</sup>.

1 As to tariff income from capital see PARA 194 post.

2 Income Support (General) Regulations 1987, SI 1987/1967, reg 41(1) (amended by SI 1990/671; SI 1997/65). In the case of a review, the relevant date for outstanding instalments is the date of any subsequent review: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 41(1) (as so amended).

3 Ibid reg 41(2).

4 As to the trade dispute provisions see PARA 178 ante.

5 I.e. payments under the Children Act 1989 s 17 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 851 et seq) or s 24 (as amended) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 922 et seq): Income Support (General) Regulations 1987, SI 1987/1967, reg 41(3) (amended by SI 1988/663; SI 1989/1034; SI 1992/468).

6 Income Support (General) Regulations 1987, SI 1987/1967, reg 41(4) (added by SI 1988/1445).

7 Income Support (General) Regulations 1987, SI 1987/1967, reg 41(5) (added by SI 1989/1323).

8 I.e. paid pursuant to the Employment and Training Act 1973 s 2 (as substituted and amended) (see EMPLOYMENT vol 40 (2009) PARA 563): Income Support (General) Regulations 1987, SI 1987/1967, reg 41(6) (added by SI 1997/65).

## **UPDATE**

### **176-201 Income Support**

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and

Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and

'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **191 Capital treated as income**

TEXT AND NOTES 2-8--Also, head (6) where an agreement or court order provides that payments must be made to the claimant in consequence of any personal injury to the claimant and that such payments are to be made, wholly or partly, by way of periodical payments, any such periodical payments received by the claimant (but not a payment which is treated as capital by virtue of SI 1987/1967 Pt V (regs 23-69)): reg 41(7) (added by SI 2002/2442).

NOTE 2--SI 1987/1967 reg 41(1) amended: SI 2000/2545, SI 2005/2465.

NOTE 3--See *Beattie v Secretary of State for Social Security* [2001] EWCA Civ 498, [2001] 1 WLR 1404 (payments made under structured damages settlement were received under annuity).

NOTE 5--Reference to the Children Act 1989 s 24 is now to s 23B (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 929), 23C (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 930) or 24A (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 923): SI 1987/1967 reg 41(3) (amended by SI 2001/3070).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(v) Income/192. Notional income.

## **192. Notional income.**

For income support purposes, a claimant may be treated as possessing certain income ('notional income') even though he does not do so<sup>1</sup>. Such notional income includes:

- 488 (1) income of which the claimant has deprived himself for the purpose of securing entitlement to income support or increasing the amount of that benefit<sup>2</sup>;
- 489 (2) income which would become available to the claimant on application being made, but which has not been acquired by him<sup>3</sup>;
- 490 (3) income foregone by a claimant of 60 or over who fails to take advantage of certain benefits of his personal pension scheme or retirement annuity contract<sup>4</sup>;
- 491 (4) any income which is due to be paid to the claimant but has not been paid to him<sup>5</sup>;
- 492 (5) certain payments made to a third party in respect of the claimant or a member of his family, or to the claimant or a member of his family in respect of a third party<sup>6</sup>;
- 493 (6) payments made by a third party in respect of the cost of maintaining the claimant or a member of his family in a residential care home or nursing home<sup>7</sup>.

Where a claimant's earnings are not ascertainable at the time of determination of the claim (or any subsequent review) the adjudication officer is to treat the claimant as possessing such earnings as are reasonable in the circumstances of the case, having regard to the number of hours worked and the earnings paid for comparable employment in the area<sup>8</sup>.

Where a claimant performs a service for another person and that person makes no payment of earnings, or pays less than that paid for a comparable employment in the area, the adjudication officer is to treat the claimant as possessing such earnings (if any) as are reasonable for that employment unless the claimant satisfies him that the means of that person are insufficient for him to pay, or pay more, for the service; but this does not apply to a claimant who is engaged by a charitable or voluntary organisation or is a volunteer<sup>9</sup>, if the adjudication officer is satisfied that it is reasonable for him to provide his services free of charge<sup>10</sup>.

1 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 42 (as amended). Where this is the case, the amount of the notional income is to be calculated as if a payment had actually been made and as if it were actual income which he does possess, ie subject to the normal rules on the calculation of income (see PARA 187 et seq ante): reg 42(7).

2 Ibid reg 42(1). As to similar provisions relating to notional capital, which is where the case law has arisen, see PARA 196 post.

3 See ibid reg 42(2) (amended by SI 1988/663; SI 1992/468; SI 1995/2303; SI 1996/206; SI 1996/1803; SI 1996/1944; and SI 1997/2197). This only applies from the date on which the income could be expected to be acquired were an application made; and does not apply in the case of a discretionary trust, a trust derived from a payment made in consequence of a personal injury, jobseeker's allowance, an increase of child benefit, child benefit payable for the only, elder or eldest child of a lone parent, family credit, disability working allowance, a personal pension scheme or retirement annuity contract where the claimant is under 60, or earnings top-up: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 42(2) (as so amended).

4 See ibid reg 42(2A)-(2C) (added by SI 1995/2303).

5 Income Support (General) Regulations 1987, SI 1987/1967, reg 42(3) (amended by SI 1992/1198). This does not apply to a discretionary trust or a trust derived from a payment made in consequence of a personal injury, or a payment prescribed in the Social Security (Payments on account, Overpayment and Recovery) Regulations 1988, SI 1988/664, reg 8 (as amended) or reg 9: Income Support (General) Regulations 1987, SI 1987/1967, reg 42(3) (as so amended). Further, it does not apply to amounts due under an occupational pension scheme which are either not paid out or which fall short of what is due, where the reason for the non-payment or the shortfall is that the trustees or managers have insufficient funds to meet the scheme's liabilities: see reg 42(3A), (3B) (both added by SI 1992/1198; and amended by SI 1993/315).

Where the Income Support (General) Regulations 1987, SI 1987/1967, reg 42(3) (as amended) applies, there may be an application for an urgent cases payment: see PARA 200 post.

6 See *ibid* reg 42(4) (substituted by SI 1988/1445; and amended by SI 1990/127; SI 1991/1175; SI 1991/1559; SI 1992/1101; SI 1993/315; SI 1993/963; SI 1993/1249; SI 1994/527; SI 1995/2792; SI 1995/3282). Payments from certain named trusts are exempted: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 42(4) (as so substituted and amended).

7 *Ibid* reg 42(4A) (added by SI 1994/527). As to residential care homes see SOCIAL SERVICES AND COMMUNITY CARE; and as to nursing homes see SOCIAL SERVICES AND COMMUNITY CARE.

8 Income Support (General) Regulations 1987, SI 1987/1967, reg 42(5). As to the amount of tax and national insurance and pension scheme contributions to be taken into account in calculating net earnings attributed under reg 42(5) or reg 42(6) (as amended: see note 10 *infra*) see reg 42(8) (amended by SI 1992/2155; SI 1994/527; SI 1994/2139).

9 For the meaning of 'voluntary organisation', and as to the meaning of 'volunteer', see PARA 180 note 4 *ante*.

10 Income Support (General) Regulations 1987, SI 1987/1967, reg 42(6) (amended by SI 1995/516). See note 8 *supra*.

The provisions relating to notional earnings may apply to family relationships (see eg Decision R(IS)12/92 (family shop)); but a person caring for a disabled relative may be excepted as a volunteer (see *Sharrock v Chief Adjudication Officer* (reported as an appendix to Decision R(SB)3/92), CA; Decision CIS/93/1991).

## UPDATE

### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in

connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the

arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **192 Notional income**

TEXT AND NOTES--SI 1987/1967 reg 42(1)-(6) does not apply in respect of any amount of income other than earnings, or earnings derived from employment as an employed earner, arising out of the claimant's participation in a service user group (see PARA 188): reg 42(8ZA) (added by SI 2009/2655).

TEXT AND NOTES 1-7--Also, head (7) payments made (a) under the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No 2) Trust, the Eileen Trust or the Independent Living Funds; (b) under the Coal Industry Act 1994 s 19(1)(a); (c) under the Employment and Training Act 1973 s 2 in respect of a person's participation in an employment programme, a training scheme, a qualifying course (all as defined), or the Intensive Activity Period; or (d) under an occupational pension scheme or in respect of a pension or other periodical payment made under a personal pension scheme or a payment made by the Board of the Pension Protection Fund where a bankruptcy order has been made in respect of the person in respect of whom the payment has been made, the payment is made to the trustee in bankruptcy or any other person acting on behalf of the creditors; and the claimant and any member of his family does not possess, or is not treated as possessing, any other income apart from that payment: SI 1987/1967 reg 42(4ZA) (added by SI 1998/2117; and amended by SI 1999/2046, SI 2001/1029, SI 2006/588, SI 2008/698).

NOTE 1--SI 1987/1967 reg 42(7) further amended: SI 1998/563.

NOTE 3--No longer refers to child benefit, now refers to working families instead of family credit, to disabled person's tax credit instead of disability working allowance and to a payment made by the Board of the Pension Protection Fund instead of retirement annuity contract; and refers also to child tax credit, rehabilitation allowance made under the Employment and Training Act 1973 s 2 and to any sum to which reg 42(8ZA) (see TEXT AND NOTES) applies: SI 1987/1967 reg 42(2) (amended by SI 1998/563, SI 1999/2566, SI 2003/455, SI 2005/2465, SI 2006/588, SI 2007/719, SI 2007/2618, SI 2009/2655).

NOTE 4--SI 1987/1967 reg 42(2A) substituted, reg 42(2AA) added: SI 2007/1749. SI 1987/1967 reg 42(2B) amended: SI 2007/1749. SI 1987/1967 reg 42(2C) amended: SI 2002/3019, SI 2005/2465, SI 2007/1749.

NOTE 5--SI 1987/1967 reg 42(3) further amended: SI 1999/3324. Head (4) does not apply to any earnings which are due to an employed earner on the termination of his employment by reason of redundancy but which have not been paid to him: SI 1987/1967 reg 42(3C) (added by SI 1999/3324).

NOTE 6--Payments under the New Deal are excluded from the calculation of notional income: SI 1987/1967 reg 42(4) (amended by SI 1997/2197, SI 1997/2863, SI 1998/2117, SI 1999/2640, SI 2002/841, SI 2003/455, SI 2005/574, SI 2005/2465, SI 2005/2878, SI 2006/588, SI 2008/3157).

TEXT AND NOTE 7--For 'residential care home or nursing home' read 'care home, Abbeyfield Home, or independent hospital': SI 1987/1967 reg 42(4A) (amended by SI

2005/2687). For the meanings of 'care home', 'Abbeyfield Home' and 'independent hospital' see PARA 180.

TEXT AND NOTE 8--Where the amount of a subsistence allowance paid to a claimant in a benefit week is less than the amount of income-based jobseeker's allowance that person would have received in that benefit week had it been payable to him, less 50p, he is to be treated as possessing the amount which is equal to the amount of income-based jobseeker's allowance which he would have received in that week, less 50p: SI 1987/1967 reg 42(5A) (added by SI 2000/724). 'Subsistence allowance' means an allowance which an employment zone contractor has agreed to pay to a person who is participating in an employment zone programme; 'employment zone contractor' means a person who is undertaking the provision of facilities in respect of an employment zone programme on behalf of the Secretary of State; 'employment zone' means an area within Great Britain designated for the purposes of the Welfare Reform and Pensions Act 1999 s 60 (see PARA 310A); and an 'employment zone programme' means a programme established for such an area or areas designed to assist claimants for a jobseeker's allowance to obtain sustainable employment: SI 1987/1967 reg 2(1) (amended by SI 2000/724).

NOTE 8--SI 1987/1967 reg 42(8) further amended: SI 2007/2618, SI 2009/583.

TEXT AND NOTE 10--SI 1987/1967 reg 42(6) does not apply (1) to a claimant who is engaged by a charitable or voluntary organisation or who is a volunteer if the Secretary of State is satisfied that it is reasonable for him to provide the service free of charge; (2) in a case where the service is performed in connection with (a) the claimant's participation in an employment or training programme in accordance with the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 19(1)(q), other than where the service is performed in connection with the claimant's participation in the Intensive Activity Period; or (b) the claimant's or the claimant's partner's participation in an employment or training programme as defined in reg 19(3) for which a training allowance is not payable or, where such an allowance is payable, it is payable for the sole purpose of reimbursement of travelling or meal expenses to the person participating in that programme; or (3) to a claimant who is engaged in work experience while participating in the New Deal for Lone Parents, or a scheme which has been approved by the Secretary of State as supporting the objectives of the New Deal for Lone Parents; or (4) to a claimant who is participating in a work placement approved by the Secretary of State (or a person providing services to the Secretary of State) before the placement starts: reg 42(6A) (added by SI 1999/2554; and amended by SI 2000/678, SI 2004/2308, SI 2007/2618, SI 2008/698). 'Work placement' means practical work experience which is not undertaken in expectation of payment: SI 1987/1967 reg 42(6AA) (added by SI 2007/2618).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(v) Income/193. Maintenance and child support payments.

### **193. Maintenance and child support payments.**

There are special provisions relating to certain maintenance payments<sup>1</sup>.

Liable relative payments<sup>2</sup> are in general to be treated as income<sup>3</sup>. Liable relative payments are calculated as a weekly amount<sup>4</sup>, and are treated as paid on a prescribed date<sup>5</sup>.

Child support maintenance<sup>6</sup> is also to be treated as income<sup>7</sup>. It is to be taken into account on a weekly basis<sup>8</sup>, and treated as paid on a prescribed date<sup>9</sup>.

1 Where these provisions apply, the general provisions relating to calculation of income and capital (see PARA 187 et seq ante, 194 et seq post) do not apply: see the Income Support (General) Regulations 1987, SI 1987/1967, regs 25, 25A (added by SI 1993/846).

2 'Liable relative' means (1) a spouse or former spouse of a claimant or of a member of the claimant's family; (2) a parent of a child or young person who is a member of the claimant's family or of a young claimant; (3) a person who has not been adjudged to be the father of a child or young person who is a member of the claimant's family or of a young claimant where that person is contributing towards the maintenance of that child, young person or young claimant and by reason of that contribution he may reasonably be treated as the father of that child, young person or young claimant; (4) a person liable to maintain another person where the latter is the claimant or a member of the claimant's family: Income Support (General) Regulations 1987, SI 1987/1967, reg 54. In this definition, a reference to a child's, young person's or young claimant's parent includes any person in relation to whom the child, young person or young claimant was treated as a child or a member of the family: reg 54. For the meaning of 'family', and for the meaning of 'child', see PARA 175 note 1 ante. For the meaning of 'young person' see PARA 182 note 1 ante. 'Young claimant' means a person aged 16 or over but under 19 who makes a claim for income support: reg 54.

'Payment' means a periodical payment or any other payment made by or derived from a liable relative including, except in the case of a discretionary trust, any payment which would be so made or derived upon application being made by the claimant but which has not been acquired by him (but only from the date on which it could be expected to be acquired were an application made): reg 54 (amended by SI 1988/663). It does not include any payment:

- 47 (a) arising from a disposition of property made in contemplation of, or as a consequence of, an agreement to separate or any proceedings for judicial separation, divorce or nullity of marriage (Income Support (General) Regulations 1987, SI 1987/1967, reg 54);
- 48 (b) made after the death of the liable relative (reg 54);
- 49 (c) made by the way of a gift but not in aggregate or otherwise exceeding a specified sum in the period of 52 weeks beginning with the date on which the payment, or if there is more than one such payment, the first payment, is made; and, in the case of a claimant who continues to be in receipt of income support at the end of the period of 52 weeks, this provision continues to apply with the modification that any subsequent period of 52 weeks begins with the first day of the benefit week in which the first payment is made after the end of the previous period of 52 weeks (reg 54);
- 50 (d) by a third party to an educational establishment in respect of the maintenance of a children or young person (ie a payment to which reg 44(2) applies) (see PARA 187 ante) (reg 54);
- 51 (e) made to a third party in respect of the claimant or a member of the claimant's family, or to the claimant or to a member of the claimant's family in respect of a third party, where (having regard to the purpose of the payment, the terms under which it is made and its amount) it is unreasonable to take it into account (reg 54);
- 52 (f) in kind (reg 54);

- 53 (g) to, or in respect of, a child or young person who is to be treated as not being a member of the claimant's household (ie under reg 16 (as amended)) (see PARA 182) (reg 54);
- 54 (h) which is not a periodical payment, to the extent that any amount of that payment (i) has already been taken into account by virtue of a previous claim or determination; or (ii) has been recovered under the provisions relating to prevention of duplication of payments (see PARA 394 post) or is currently being recovered; or (iii) at the time the determination is made, has been used by the claimant except where he has deprived himself of that amount for the purpose of securing entitlement to income support or increasing the amount of that benefit (reg 54).

'Periodical payment' means:

- 55 (A) a payment which is made or is due to be made at regular intervals in pursuance of a court order or agreement for maintenance;
- 56 (B) in a case where the liable relative has established a pattern of making payments at regular intervals, any such payment;
- 57 (C) any payment not exceeding the amount of income support payable had that payment not been made;
- 58 (D) any payment representing a commutation of payments to which head (A) or (B) supra applies whether made in arrears or in advance,

but does not include a payment due to be made before the first benefit week pursuant to the claim which is not so made: reg 54(1). As to the interpretation of the exclusion in the proviso see *McCorquodale v Chief Adjudication Officer* [1989] FCR 82, CA (decided under the previous supplementary benefit provision). For the meaning of 'benefit week' see PARA 182 note 3 ante.

3 Income Support (General) Regulations 1987, SI 1987/1967, reg 55 (amended by SI 1996/940). However, where the Secretary of State collects maintenance payments and treats any payment as not being relevant income, that payment is to be disregarded in calculating a claimant's income: Income Support (General) Regulations 1987, SI 1987/1967, reg 55A (added by SI 1996/940). As to the Secretary of State see PARA 1 ante.

Where a liable relative makes a periodical payment concurrently with any other payment, and the weekly amount of the periodical payment is equal to or greater than a specified amount, the other payment is to be treated as capital: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 60.

4 See *ibid* reg 58. As to the period over which periodical payments are to be taken into account see reg 56. As to the period over which payments other than periodical payments are to be taken into account see reg 57 (amended by SI 1990/1776; SI 1996/1803).

5 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 59. In the case of periodical payments, this is generally the first day of the benefit week in which the payment is due to be paid; and, in the case of other payments, the first day of the benefit week in which it is paid: see reg 59.

6 'Child support maintenance' means such periodical payments as are referred to in the Child Support Act 1991 s 3(6) (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 553 et seq): Income Support (General) Regulations 1987, SI 1987/1967, reg 60A (added by SI 1993/846).

7 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 60B (added by SI 1993/846; and amended by SI 1996/940). Where the Secretary of State collects maintenance payments and treats any payment of child support maintenance as not being relevant income, that payment is to be disregarded in calculating a claimant's income: Income Support (General) Regulations 1987, SI 1987/1967, reg 60E (added by SI 1996/940).

8 Income Support (General) Regulations 1987, SI 1987/1967, reg 60B (as added and amended: see note 7 supra). As to the calculation of the weekly amounts of payments of child support see reg 60C (added by SI 1993/846).

9 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 60D (added by SI 1993/846; and amended by SI 1996/1944). This is generally the first day of the benefit week in which it is due to be paid: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 60D (as so added and amended).

## UPDATE

### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus:

art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **193 Maintenance and child support payments**

TEXT AND NOTE 1--Reference to maintenance omitted: SI 1987/1967 reg 25 (amended by SI 2008/2111, SI 2009/2655).

NOTE 1--SI 1987/1967 reg 25A revoked: SI 2008/2111.

TEXT AND NOTES 2, 3--SI 1987/1967 reg 55 further amended: SI 2008/2111, SI 2009/2655.

NOTE 2--Definition of 'liable relative' amended: SI 2005/2877, SI 2008/2111. Definition of 'payment' amended: SI 2005/2877, SI 2008/2111, SI 2009/2655. Definition of 'periodical payment' amended: SI 2008/2111, SI 2009/2655. In definition of 'young claimant' for '19' read '20': SI 2006/718.

NOTE 3--SI 1987/1967 reg 60 revoked: SI 2008/2111.

TEXT AND NOTE 4--SI 1987/1967 reg 58 amended: SI 2008/2111, SI 2009/2655.

NOTE 4--SI 1987/1967 reg 57 substituted: SI 2008/2111, SI 2009/2655.

NOTE 5--SI 1987/1967 reg 59 amended: SI 2008/2111, SI 2009/2655.

TEXT AND NOTES 6-9--SI 1987/1967 regs 60A-60E revoked: SI 2008/2111.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(vi) Capital/194. The capital limit and tariff income from capital.

## **(vi) Capital**

### **194. The capital limit and tariff income from capital.**

No person is entitled to income support if his capital exceeds £8,000<sup>1</sup>. Where a claimant's capital is less than that amount but exceeds £3,000, it is to be treated as equivalent to a weekly income of £1 for each complete £250 in excess of £3,000 but not exceeding £8,000 ('tariff income')<sup>2</sup>.

1 See the Social Security Contributions and Benefits Act 1992 s 134(1) (see PARA 174 ante); and the Income Support (General) Regulations 1987, SI 1987/1967, reg 45(a) (reg 45 substituted by SI 1996/462). The capital limit is £16,000 for those in a residential care or nursing home or residential accommodation: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 45(b) (as so substituted). As to residential care homes see SOCIAL SERVICES AND COMMUNITY CARE; as to nursing homes see SOCIAL SERVICES AND COMMUNITY CARE; and as to residential accommodation generally see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1029 et seq.

2 Ibid reg 53(1) (amended by SI 1990/671; SI 1996/462). Where those in a residential care or nursing home or residential accommodation have capital exceeding £10,000, it is treated as equivalent to a weekly income of £1 for each complete £250 in excess of £10,000 but not exceeding £16,000: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 53(1A), (1B), (1C) (all added by SI 1996/462; Income Support (General) Regulations 1987, SI 1987/1967, reg 53(1B), (1C) amended by SI 1997/65). As to the meaning of 'residential accommodation' for these purposes see the Income Support (General) Regulations 1987, SI 1987/1967, reg 53(4) (added by SI 1996/462).

Where any part of the excess is not a complete £250, that part is to be treated as equivalent to a weekly income of £1: Income Support (General) Regulations 1987, SI 1987/1967, reg 53(2) (amended by SI 1996/462). Capital for this purpose includes any income treated as capital under the Income Support (General) Regulations 1987, SI 1987/1967, reg 48 (as amended) (see PARA 195 post) or reg 60 (see PARA 193 ante): reg 53(3) (amended by SI 1988/2022; SI 1996/462).

## **UPDATE**

### **176-201 Income Support**

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training:

New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the

self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

#### **194 The capital limit and tariff income from capital**

NOTE 1--The capital limit is £12,000 for those aged 60 or over or with a partner aged 60 or over and to whom the £16,000 limit does not apply: reg 45(aa) (added by SI 2000/2545).

SI 1987/1967 reg 45(a) amended: SI 2000/2545.

TEXT AND NOTE 2--Where the claimant (1) has a partner who is aged 60 or over; (2) is not a person to whom the circumstances prescribed in SI 1987/1967 reg 53(1B) apply; and (3) has capital which exceeds £6,000, that capital is to be treated as equivalent to a weekly income of £1 for each complete £250 in excess of £6,000 but not exceeding £12,000: reg 53(1ZA) (added by SI 2000/2545; amended by SI 2002/3019).

NOTE 2--SI 1987/1967 reg 53(1)-(3) amended: SI 2000/2545. SI 1987/1967 reg 53(1C) further amended: SI 2001/3767, SI 2005/2687. References to residential care, a nursing home or residential accommodation are now to a care home, an independent hospital or an Abbeyfield Home: SI 1987/1967 reg 53(1B) (further amended by SI 2005/2687). SI 1987/1967 reg 53(4) revoked: SI 2005/2687.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(vi) Capital/195. Calculation of capital.

### **195. Calculation of capital.**

For the purposes of income support, the capital of a claimant<sup>1</sup> to be taken into account is the whole of his capital and any income treated as capital<sup>2</sup>. Certain specified capital, however, is to be disregarded in calculating a claimant's capital<sup>3</sup>.

Capital which the claimant possesses in the United Kingdom is to be calculated at its current market or surrender value, less (1) where there would be expenses attributable to sale, 10 per cent; and (2) the amount of any incumbrance secured on it<sup>4</sup>. The same rule applies to capital in a country outside the United Kingdom, except that if there is a prohibition in that country against the transfer to the United Kingdom of an amount equal to its current market or surrender value in that country, the value is to be the price which it would realise if sold in the United Kingdom to a willing buyer<sup>5</sup>.

1 The capital of a child or young person who is a member of the claimant's family is not to be treated as capital of the claimant: Income Support (General) Regulations 1987, SI 1987/1967, reg 47. Any capital of the claimant's partner must, however, be taken into account: see PARA 175 ante. As to the calculation of such capital see reg 23 (amended by SI 1988/1228; SI 1996/206). For the meaning of 'child', and for the meaning of 'family', see PARA 175 note 1 ante. For the meaning of 'young person' see PARA 182 note 1 ante; and for the meaning of 'partner' see PARA 182 note 5 ante.

2 Income Support (General) Regulations 1987, SI 1987/1967, reg 46(1) (amended by SI 1988/2022). The income which is to be treated as capital includes, inter alia, annual bounties from employment, tax rebates, holiday pay not treated as earnings, certain forms of income derived from capital, advances of earnings, certain local authority payments and certain charitable or voluntary payments: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 48 (amended by SI 1988/663; SI 1988/1445; SI 1988/2022; SI 1989/1323; SI 1990/127; SI 1991/1175; SI 1992/468; SI 1992/1101; SI 1993/963; SI 1993/1249). Capital given away by the claimant subject to a condition which is not satisfied remains the capital of the claimant: *Ellis v Chief Adjudication Officer* [1997] TLR 264, CA.

3 Income Support (General) Regulations 1987, SI 1987/1967, reg 46(2). As to the capital to be disregarded see reg 46(2), Sch 10 (subject to frequent amendment). Where on a claimant's divorce he was ordered to transfer his entire interest in the former matrimonial home to his ex-wife in return for a charge on the property, to be enforced only when she died, remarried or cohabited for a period of six months or more, he had no interest in the property but a secured debt payable at a future date; this was not a reversionary interest and thus his rights did not fall to be disregarded altogether under Sch 10 (as amended); but in valuing his rights a discount should be applied for the fact that the debt was not payable immediately and possibly not for many years: see Decision R(IS)4/96.

4 Income Support (General) Regulations 1987, SI 1987/1967, reg 49(a). There are special rules applying to National Savings Certificates: see reg 49(b). For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

The basic test of current market or surrender value is the price that a willing buyer would pay to a willing seller: Decision R(SB)57/83. However, any restrictions on saleability have to be taken into account and may depress the value, especially as what is envisaged for income support purposes is a relatively rapid sale (so that a longer term valuation such as one used for Inland Revenue purposes may not be appropriate): see Decisions R(IS)2/90; R(IS)8/92 (both cases concerning the valuation of share holdings subject to restrictions on sale). Any incumbrance is to be ignored in fixing the valuation, but then deducted specifically under head (2) in the text: Decision R(SB)2/83. As to the meaning of 'incumbrance' see Decision R(IS)21/93.

For the position where capital is shared see PARA 197 post.

5 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 50.

### **UPDATE**

### **176-201 Income Support**

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while

participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **195 Calculation of capital**

NOTE 2--SI 1987/1967 reg 48 further amended: SI 1998/563, SI 2000/724, SI 2006/2378, SI 2008/698.

NOTE 3--See *Peters v East Midlands Strategic Health Authority; East Midlands Strategic Health Authority v Nottingham City Council* [2009] EWCA Civ 145, [2009] 3 WLR 737, [2009] All ER (D) 24 (Mar) (exclusion of damages for personal injury).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(vi) Capital/196. Notional capital.

### **196. Notional capital.**

For income support purposes, a claimant may be treated as possessing certain capital ('notional capital') even though he does not do so<sup>1</sup>. Notional capital includes:

- 494 (1) capital of which the claimant has deprived himself for the purpose of securing entitlement to income support or increasing the amount of that benefit<sup>2</sup>;
- 495 (2) capital which would become available to the claimant on application being made, but which has not been acquired by him<sup>3</sup>;
- 496 (3) certain payments of capital made to a third party in respect of the claimant or his family, or to the claimant or his family in respect of a third party<sup>4</sup>.

Where a claimant stands in relation to a company in a position analogous to that of a sole owner or partner in the business of that company<sup>5</sup>, he is to be treated as if he were such a sole owner or partner and in such a case (a) the value of his holding in that company is to be disregarded; and (b) he is to be treated as possessing an amount of capital equal to the value of the capital of that company (or his share of it), which is to be calculated as if it were actual capital that he possessed<sup>6</sup>. However, for so long as he undertakes activities in the course of the business of the company, the amount which he is treated as possessing under this provision is to be disregarded<sup>7</sup>.

Where a claimant is treated as possessing notional capital under head (1) above, the amount which he is treated as possessing may be reduced if he would otherwise have been entitled to income support<sup>8</sup>.

1 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 51 (as amended). Where this is the case, the amount of the notional capital is to be calculated as if it were actual capital which the claimant does possess (see PARA 195 ante): reg 51(6).

2 Ibid reg 51(1) (amended by SI 1990/1776). This does not, however, apply to capital derived from a payment in consequence of any personal injury and placed in trust for the benefit of the claimant or where the notional capital is treated as reduced under the diminishing notional capital rule (see the text and note 8 infra): Income Support (General) Regulations 1987, SI 1987/1967, reg 51(1) (as so amended).

A claimant is to be treated as possessing capital under reg 51(1) (as amended) only if the capital of which he has deprived himself is actual capital: reg 51(7) (added by SI 1988/663).

In applying the Income Support (General) Regulations 1987, SI 1987/1967, reg 51(1) (as amended) it is still appropriate to look at the case law on the previous equivalent provision in supplementary benefit law: Decision R(IS)1/91. Particularly relevant are Decisions R(SB)38/85 and R(SB)40/85, which together establish the following points: (1) 'deprive' is an ordinary English word which is not to be given a technical meaning; (2) there may be a deprivation even if the capital is spent on some other asset (see also Decision R(IS)13/94); (3) on the question of purpose, there may be little direct evidence and so it is necessary to consider all the circumstances and draw any appropriate inferences; (4) the obtaining or increasing of benefit need not be the only purpose and so it will be sufficient if that was a subsidiary purpose, provided it was a significant operative purpose, and one significant factor may be the extent of the claimant's knowledge of the capital limit (see also Decision R(SB)12/91). The repayment of debts out of capital suddenly received may not constitute 'deprivation', but this will normally mean legally binding debts which need to be substantiated by evidence; vague assertions about repaying money owed to members of the family may not be sufficient: Decision R(IS)12/91. As to the position where an elderly claimant has to enter residential care, and sells his house giving the proceeds to his children see Decision R(SB)9/91.

3 Income Support (General) Regulations 1987, SI 1987/1967, reg 51(2). The notional capital under this head is treated as possessed by the claimant only from the date on which it could be expected to be acquired were an application made: see reg 51(2) (amended by SI 1988/663).

The Income Support (General) Regulations 1987, SI 1987/1967, reg 51(2) (as amended) does not apply in the case of a discretionary trust, a trust derived from a payment made in respect of a personal injury, any loan which would be obtainable only if secured against disregarded capital, or a personal pension scheme or retirement annuity contract: reg 51(2)(a), (b), (c), (d) (added by SI 1995/2303). As to personal pension schemes see PARA 710 et seq ante; and as to retirement annuity contracts see PARA 677 et seq ante.

4 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 51(3) (substituted by SI 1988/1445; and amended by SI 1988/1445; SI 1989/534; SI 1990/127; SI 1990/547; SI 1990/1776; SI 1991/1175; SI 1991/1559; SI 1992/1101; SI 1993/315; SI 1993/963; SI 1993/1249; SI 1997/65). For the meaning of 'family' see PARA 175 note 1 ante.

5 As to the meaning of this phrase see Decision R(IS)8/92.

6 Income Support (General) Regulations 1987, SI 1987/1967, reg 51(4). What has to be valued is the net worth of the total assets, not the value of any individual items: Decision R(IS)13/93.

7 Income Support (General) Regulations 1987, SI 1987/1967, reg 51(5). As to what activities are sufficient for this purpose see Decision R(IS)13/93.

8 le under the diminishing notional capital rule: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 51A (added by SI 1990/1776; and amended by SI 1993/315). The general principle is that the notional capital is to be treated as diminished each week by the weekly amount of benefit that the claimant would have received but for the application to him of the Income Support (General) Regulations 1987, SI 1987/1967, reg 51(1) (as amended: see note 2 supra).

## **UPDATE**

### **176-201 Income Support**

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see

PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment

route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **196 Notional capital**

TEXT AND NOTES 1-4--Also, head (4) payments made (a) under the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No 2) Trust, the Eileen Trust, the Independent Living Funds, the Skipton Fund or the London Bombings Relief Charitable Fund; or (b) under the Employment and Training Act 1973 s 2 in respect of a person's participation in an employment programme, a training scheme, a qualifying course, or the Intensive Activity Period (all as defined): SI 1987/1967 reg 51(3A) (added by SI 1998/2117; and amended by SI 1999/2640, SI 1999/3156, SI 2001/1029, SI 2003/455, SI 2004/2308, SI 2005/3391, SI 2006/588, SI 2008/698).

NOTE 2--1987/1967 reg 51(1) further amended: SI 2007/719.

TEXT AND NOTE 3--Payments under the New Deal are excluded from the calculation of notional capital: SI 1987/1967 reg 51(3); SI 1997/2863, SI 1998/2117.

NOTE 3--Reference to retirement annuity contract omitted: SI 1987/1967 reg 51(2) (amended by SI 2006/588, SI 2007/719, SI 2007/1749).

NOTE 4--SI 1987/1967 reg 51(3) further amended: SI 2001/3767, SI 2002/841, SI 2005/2878, SI 2006/588.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(vi) Capital/197. Capital jointly held.

### **197. Capital jointly held.**

Where a claimant and one or more persons are beneficially entitled in possession to any capital asset<sup>1</sup>, they are to be treated as if each of them were entitled in possession to an equal share of the whole beneficial interest<sup>2</sup>. The value of that equal share is to be calculated by taking the value of the whole beneficial interest<sup>3</sup> as though that interest were solely owned by the claimant and, in the case of a dwelling, none of the other joint owners occupied the dwelling concerned, and dividing the same by the number of persons who have a beneficial interest in the capital in question<sup>4</sup>.

1   Ie except where a claimant possesses disregarded notional capital under the Income Support (General) Regulations 1987, SI 1987/1967, reg 51(4): see PARA 196 ante.

2   Ibid reg 52 (amended by SI 1995/2303). The 1995 amendment was in order to reverse the effects of *Chief Adjudication Officer v Palfrey* [1995] TLR 92, CA, where the Court of Appeal (upholding the commissioners' decisions in Decisions CIS/391/1992 and CIS/417/1992) had negated the harsher aspects of this automatic division rule by holding that, although the shares had to be equal, what was to be valued was the artificial equal share, ie the interest; where there were others beneficially interested (eg co-owners of a house who had the right to live there) the market value might be very low, or even nil. The statutory amendment makes it clear that the whole beneficial interest is to be valued (ie in effect the property itself) and then divided equally among the people beneficially interested, without the fact of shared ownership affecting the value. This makes it clear that the rule is entirely artificial and meant to operate independently of any normal principles of property law.

3   Ie calculated on the ordinary principles: see PARA 195 ante.

4   Income Support (General) Regulations 1987, SI 1987/1967, reg 52 (as amended: see note 2 supra).

## **UPDATE**

### **176-201 Income Support**

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a

training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the

purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **197 Capital jointly held**

TEXT AND NOTES 2-4--For 'to an equal share of the whole beneficial interest ... capital in question', read 'to the whole beneficial interest therein in an equal share and SI 1987/1967 regs 45-51A (see PARAS 194-196) apply for the purposes of calculating the amount of capital which the claimant is treated as possessing as if it were actual capital which the claimant does possess': reg 52; SI 1998/2250.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(vii) Students/198. Eligibility.

## (vii) Students

### 198. Eligibility.

A student<sup>1</sup> during the period of study<sup>2</sup> falls within a prescribed category<sup>3</sup> for the purposes of entitlement to income support only if:

- 497 (1) certain provisions relating to urgent cases apply to him<sup>4</sup>; or
- 498 (2) one of certain specified categories of entitlement applies to him<sup>5</sup>; or
- 499 (3) any other category of entitlement applies to him and he has a partner who is also a student, and either he or his partner is treated as responsible for a child or young person, but this provision only applies for the period of the summer vacation appropriate to his course<sup>6</sup>.

1 'Student' means a person, other than a person in receipt of a training allowance, aged less than 19 who is attending a full-time course of advanced education or, as the case may be, a person aged 19 or over but under pensionable age who is attending a full-time course of study at an educational establishment; and for these purposes (1) a person who has started on such a course is to be treated as attending it until the last day of the course or such earlier date as he abandons it or is dismissed from it; (2) a person on a sandwich course is to be treated as attending a full-time course of advanced education or, as the case may be, of study: Income Support (General) Regulations 1987, SI 1987/1967, reg 61 (amended by SI 1991/1559; SI 1992/468; SI 1995/1742). The 1995 amendment was in order to reverse the effects of *Chief Adjudication Officer v Clarke and Faul* [1995] ELR 259, [1995] TLR 103, CA (decided under the previous wording, where it was held that a student intercalating for a year due to personal circumstances was no longer a 'student' as defined and so not subject to the restrictions on claiming benefit during that time): see also *Chief Adjudication Officer v Webber* [1997] 4 All ER 274, CA. As to the meaning of 'training allowance' see PARA 180 note 5 ante. 'Course of advanced education' means (a) a course leading to a postgraduate degree or comparable qualification, a first degree or comparable qualification, a diploma of higher education or a higher national diploma; or (b) any other course which is of a standard above advanced GNVQ or equivalent, including a course which is of a standard above a general certificate of education (advanced level), a Scottish certificate of education (higher level) or a Scottish certificate of sixth year studies: Income Support (General) Regulations 1987, SI 1987/1967, reg 61 (definition added by SI 1996/1944). For the meaning of 'full-time course of advanced education' see the Income Support (General) Regulations 1987, SI 1987/1967, reg 61 (definition added by SI 1996/1944). For the meaning of 'pensionable age' see PARA 562 post. 'Last day of the course' means the date on which the last day of the final academic term falls in respect of the course in which the student is enrolled: Income Support (General) Regulations 1987, SI 1987/1967, reg 61 (definition added by SI 1991/1559).

2 'Period of study' means (1) in the case of a course of study for one year or less, the period beginning with the start of the course and ending with the last day of the course; (2) in the case of a course of study for more than one year, in the first or, as the case may be, any subsequent year of the course, other than the final year of the course, the period beginning with the start of the course or, as the case may be, that year's start and ending with either (a) the day before the start of the next year of the course in a case where the student's grant is assessed at a rate appropriate to his studying throughout the year, or, if he does not have a grant, where it would have been assessed at such a rate had he had one; or (b) in any other case, the day before the start of the normal summer vacation appropriate to his course; (3) in the final year of a course of study of more than one year, the period beginning with that year's start and ending with the last day of the course: Income Support (General) Regulations 1987, SI 1987/1967, reg 61 (amended by SI 1991/1559). 'Year', in relation to a course of study, means the period of 12 months beginning on 1 January, 1 April or 1 September according to whether the academic year of the course in question begins in the spring, the summer or the autumn respectively: Income Support (General) Regulations 1987, SI 1987/1967, reg 61 (amended by SI 1996/1944).

3 Ie for the purposes of the Social Security Contributions and Benefits Act 1992 s 124(1)(e) (as added) (see PARA 176 head (5) ante).

4 Ie the provisions of the Income Support (General) Regulations 1987, SI 1987/1967, reg 70(3)(a) (see PARA 200 post): reg 4ZA(3)(a) (reg 4ZA added by SI 1996/206).

5 le the categories listed in PARA 177 heads (1), (2), (8), (9), (15) ante: Income Support (General) Regulations 1987, SI 1987/1967, reg 4ZA(3)(b) (as added: see note 4 supra).

6 Ibid reg 4ZA(3)(c) (as added: see note 4 supra). For the meaning of 'partner' see PARA 182 note 5 ante. For the meaning of 'child' see PARA 175 note 1 ante. For the meaning of 'young person' see PARA 182 note 1 ante.

## UPDATE

### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training

allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **198 Eligibility**

TEXT AND NOTES--In SI 1987/1967 reg 4ZA(3) for 'student' read 'full-time student': reg 4ZA(3) (amended by SI 2000/1981, SI 2006/2144). 'Full-time student' means a person who is not a qualifying young person or child within the meaning of the Social Security Contributions and Benefits Act 1992 s 142 (child and qualifying young person) and who is (1) aged less than 19 and is attending or undertaking a full-time course of advanced education; (2) aged 19 or over but under pensionable age and is attending or undertaking a full-time course of study at an educational establishment; or (3) on a sandwich course: SI 1987/1967 reg 61(1) (renumbered by SI 2000/1981; and amended by SI 2006/718). For the purposes of the definition of 'full-time student', a person is to be regarded as attending or, as the case may be, undertaking a full-time course of study, a full-time course of advanced education or as being on a sandwich course (a) in

the case of a person attending or undertaking a part of a modular course which would be a full-time course of study, for the period beginning on the day on which that part of the course starts and ending on the last day on which he is registered with the educational establishment as attending or undertaking that part as a full-time course of study, or on such earlier date (if any) as he finally abandons the course or is dismissed from it; (b) in any other case, throughout the period beginning on the date on which he starts attending or undertaking the course and ending on the last day of the course or on such earlier date (if any) as he finally abandons it or is dismissed from it: SI 1987/1967 reg 61(2) (reg 61(2)-(4) added by SI 2000/1981). The period referred to in head (a) includes (i) where a person has failed examinations or has failed to complete successfully a module relating to a period when he was attending or undertaking a part of the course as a full-time course of study, any period in respect of which he attends or undertakes the course for the purpose of retaking those examinations or that module; (ii) any period of vacation within the period specified in head (a) or immediately following that period except where the person has registered with the educational establishment to attend or undertake the final module in the course and the vacation immediately follows the last day on which he is required to attend or undertake the course: SI 1987/1967 reg 62(3). 'Modular course' means a course of study which consists of two or more modules, the successful completion of a specified number of which is required before a person is considered by the educational establishment to have completed the course: SI 1987/1967 reg 61(4). For the meaning of 'full-time course of study' and 'full-time course of advanced education' see reg 61(1) (amended by SI 2001/652, SI 2005/3238).

NOTE 1--'Student' now means a person other than a person in receipt of a training allowance, who is attending or undertaking a course of study at an educational establishment, or a qualifying course: SI 1987/1967 reg 61(1) (as renumbered: see TEXT AND NOTES). Head (b) for 'Scottish certificate of education ... sixth year studies' read 'Scottish national qualification (higher or advanced higher)': reg 61(1) (amended by SI 2004/1708)

See *O'Connor v Chief Adjudication Officer* [1999] 1 FLR 1200, CA (a university student who takes a year's leave of absence in order to re-sit his examinations, is not eligible for income support); *Denton v Chief Adjudication Officer* [1999] ELR 86, CA (university student undertaking foundation year of degree course but in receipt of maintenance grant is not eligible for income support).

NOTE 2--SI 1987/1967 reg 61 now reg 61(1).

Now, head (2)(a) the day before the start of the next year of the course in a case where the student's grant or loan is assessed at a rate appropriate to his studying throughout the year or, if he does not have a grant or loan, where a loan would have been assessed at such a rate had he had one: SI 1987/1967 reg 61(1) (amended by SI 2000/1922).

Definition of 'year' replaced by definition of 'academic year' which means the period of 12 months beginning on 1 January, 1 April, 1 July or 1 September according to whether the course in question begins in the winter, the spring, the summer or the autumn respectively but if students are required to begin attending the course during August or September and to continue attending through the autumn, the academic year of the course is considered to begin in the autumn rather than the summer: SI 1987/1967 reg 61(1) (as amended by SI 2001/2319).

TEXT AND NOTE 4--For 'urgent cases' read 'immigration control': SI 1987/1967 reg 4ZA(3) (a) (amended by SI 2000/636). The provisions referred to are those set out in SI 2000/636 Schedule Pt I para 1: SI 1987/1967 reg 4ZA(3)(a).

NOTE 5--SI 1987/1967 reg 4ZA(3)(b) amended: SI 2009/583.

TEXT AND NOTE 6--SI 1987/1967 reg 4ZA(3)(c) substituted: SI 2008/1826.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(2) INCOME SUPPORT/(vii) Students/199. Calculation of grant income.

### **199. Calculation of grant income.**

The provisions relating to the calculation of income and capital have effect in relation to students and their partners<sup>1</sup> subject to the following modifications<sup>2</sup>. The grant income<sup>3</sup> of a student to be taken into account is to be the whole of his grant income<sup>4</sup>, but disregarding any payment:

- 500 (1) intended to meet tuition fees or examination fees<sup>5</sup>;
- 501 (2) intended to meet additional expenditure incurred by a disabled student in respect of his attendance on a course<sup>6</sup>;
- 502 (3) intended to meet additional expenditure connected with term time residential study away from the student's educational establishment<sup>7</sup>;
- 503 (4) on account of the student maintaining a home at a place other than that at which he resides while attending his course but only to the extent that his rent or rates is or are not met by housing benefit<sup>8</sup>;
- 504 (5) on account of any other person but only if that person is residing outside the United Kingdom and there is no applicable amount in respect of him<sup>9</sup>;
- 505 (6) intended to meet the cost of books and equipment or if the payment is not so intended a specified amount towards such costs<sup>10</sup>;
- 506 (7) intended to meet travel expenses incurred as a result of his attendance on the course<sup>11</sup>.

Where a student is in receipt of a grant in respect of maintenance, a sum in respect of travel costs may also be excluded from his grant income<sup>12</sup>.

The grant income is to be apportioned equally between the weeks in the period of study<sup>13</sup> or other period to which it is attributable<sup>14</sup>; however, any amount intended for the maintenance of dependants or for an older student is to be apportioned equally over a period of 52 weeks<sup>15</sup>.

A student loan is treated as income<sup>16</sup>; and a student is treated as possessing the maximum amount of any loan which he could, by taking reasonable steps, acquire<sup>17</sup>. In calculating the weekly amount of the student loan to be taken into account as income, the loan is to be apportioned equally between the weeks in the academic year in respect of which it is payable (or, in the case of the final year or a one year course, over the period from the beginning of the academic year to the last day of the course<sup>18</sup>); and the weekly amount so apportioned is subject to a specified disregard<sup>19</sup>.

1 For the meaning of 'student' see PARA 198 note 1 ante. For the meaning of 'partner' see PARA 182 note 5 ante.

2 Income Support (General) Regulations 1987, SI 1987/1967, reg 26.

3 'Grant income' means (1) any income by way of a grant; (2) in the case of a student other than one to whom head (3) infra refers, any contribution which has been assessed whether or not it has been paid; (3) in the case of persons falling within certain specified categories (see *ibid* Sch 1B paras 1, 2, 10, 11, 12 (as added)) any contribution which has been assessed and which has been paid: reg 61 (amended by SI 1997/2197). Any such contribution which is paid by the way of a covenant must be treated as part of the student's grant income: Income Support (General) Regulations 1987, SI 1987/1967, reg 61. As to the calculation of covenant income see regs 63, 64 (both amended by SI 1992/468). 'Contribution' means any contribution in respect of the income of any other person which the Secretary of State or an education authority takes into account in ascertaining the

amount of the student's grant: Income Support (General) Regulations 1987, SI 1987/1967, reg 61. As to the Secretary of State see PARA 1 ante. Where the claimant or his partner is a student and the other partner's income has been taken into account for the purpose of assessing a contribution to the student's grant, an amount equal to the contribution is to be disregarded for the purposes of assessing that other partner's income: reg 67 (amended by SI 1996/462). Any amount by way of a refund of tax deducted from a student's income is to be treated as capital: Income Support (General) Regulations 1987, SI 1987/1967, reg 68.

4 Ibid reg 62(1) (amended by SI 1992/2155).

5 Income Support (General) Regulations 1987, SI 1987/1967, reg 62(2)(a).

6 Ibid reg 62(2)(c).

7 Ibid reg 62(2)(d).

8 Ibid reg 62(2)(e).

9 Ibid reg 62(2)(f). For the meaning of 'United Kingdom' see PARA 15 note 4 ante. As to the applicable amount see PARA 184 ante.

10 Ibid reg 62(2)(g) (amended by SI 1996/1944; SI 1996/1759; SI 1997/1671).

11 Income Support (General) Regulations 1987, SI 1987/1967, reg 62(2)(h).

12 See ibid reg 62(2A) (added by SI 1992/468). See also Decision R(IS)7/95. As to certain other detailed provisions relating to disregards see the Income Support (General) Regulations 1987, SI 1987/1967, regs 65, 66 and 69 (all as amended).

13 For the meaning of 'period of study' see PARA 198 note 2 ante.

14 Income Support (General) Regulations 1987, SI 1987/1967, reg 62(3) (amended by SI 1988/663; SI 1992/468).

15 Income Support (General) Regulations 1987, SI 1987/1967, reg 62(3A) (added by SI 1988/663). If there are 53 benefit weeks including part weeks in the year, the amount must be apportioned equally over 53 weeks: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 62(3A) (as so added). As to apportionment in the case of sandwich courses see reg 62(4). For the meaning of 'benefit week' see PARA 182 note 3 ante.

16 Ibid reg 66A(1) (added by SI 1990/1549; and amended by SI 1991/236).

17 Income Support (General) Regulations 1987, SI 1987/1967, reg 66A(3) (added by SI 1990/1549; and substituted by SI 1996/462).

18 For the meaning of 'last day of the course' see PARA 198 note 1 ante.

19 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 66A(2) (added by SI 1990/1549; and amended by SI 1991/1559).

## **UPDATE**

### **176-201 Income Support**

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option,

that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a

participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **199 Calculation of grant income**

TEXT AND NOTES--A payment from access funds, other than payments to which SI 1987/1967 reg 68(2), (3) applies, is disregarded as income: reg 66B(1), (2) (reg 66B added by SI 2000/1922). 'Access funds' means grants made under the Further and Higher Education Act 1992 s 7 (repealed) and described as 'learner support funds'; grants made under s 68 (see EDUCATION vol 15(2) (2006 Reissue) PARA 757) for the purpose of providing funds on a discretionary basis to be paid to students; discretionary payments, known as 'learner support funds', which are made available to students in further education by institutions out of funds provided by the Learning and Skills Council for England under the Learning and Skills Act 2000 ss 5 (see EDUCATION vol 15(2) (2006 Reissue) PARA 1092), 6 (see EDUCATION vol 15(2) (2006 Reissue) PARA 1093) and 9 (see EDUCATION vol 15(2) (2006 Reissue) PARA 1095); or Financial Contingency Funds made available by the National Assembly for Wales: SI 1987/1967 reg 61(1) (definition added by SI 2000/1922; and amended by SI 2001/2319, SI 2002/1589). Any payments from access funds which are intended and used for food, ordinary clothing or footwear, household fuel, rent for which housing benefit is payable, or any housing costs to the extent that they are met under SI 1987/1967 reg 17(1)(e) or 18(1)(f) (housing costs), of a single claimant or, as the case may be, of any other member of his family, and any payments from access funds which are used for any council tax or water charges for which that claimant or member is liable are disregarded as income to the extent of £20 per week: reg 66B(3) (reg 66B as added; reg 66B(3) amended by SI 2001/3767, SI 2007/719). For these purposes 'ordinary clothing or footwear' means clothing or footwear for normal daily use, but it does not include school uniforms, or clothing or footwear used solely for sporting activities: SI 1987/1967 reg 66B(3A) (added by SI 2007/719). Where a payment from access funds is made (1) on or after 1 September or the first day of the course, whichever first occurs, but before receipt of any student loan in respect of that year and that payment is intended for the purpose of bridging the period until receipt of the student loan; or (2) before the first day of the course to a person in anticipation of that person becoming a student, that payment is disregarded as income: SI 1987/1967 reg 66B(4) (reg 66B as added). A loan for fees, known as a fee loan or a fee contribution loan,

made pursuant to regulations under the Teaching and Higher Education Act 1998 s 22 is to be disregarded as income: SI 1987/1967 reg 66C (added by SI 2006/1752).

TEXT AND NOTES 3-11--Also, head (8) intended for the maintenance of a child dependant: SI 1987/1967 reg 62(2)(i) (added by SI 2003/455; and amended by SI 2004/1708). Head (9) intended for the child care costs of a child dependant: SI 1987/1967 reg 62(2)(j) (added by SI 2004/1708). Head (10) of higher education bursary for care leavers made under the Children Act 1989 Pt III (ss 17-30A) (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 851): SI 1987/1967 reg 62(2)(k) (added by SI 2009/583).

NOTE 3--In the definition of 'grant income' head (3) now refers to SI 1987/1967 Sch 1B para 15A as well: reg 61(1) (amended by SI 2009/583).

'Contribution' means (1) any contribution in respect of the income of a student or any person which the Secretary of State, the Scottish Ministers or an education authority takes into account in ascertaining the amount of a student's grant or student loan; or (2) any sums, which in determining the amount of a student's allowance or bursary in Scotland under the Education (Scotland) Act 1980, the Scottish Ministers or education authority takes into account being sums which the Scottish Ministers or education authority consider that it is reasonable for the following persons to contribute towards the holder's expenses (a) the holder of the allowance or bursary; (b) the holder's parents; (c) the holder's parent's spouse, civil partner or a person ordinarily living with the holder's parent as if he or she were the spouse or civil partner of that parent; or (d) the holder's spouse or civil partner: SI 1987/1967 reg 61(1) (amended by SI 1998/563, SI 2000/1981, SI 2001/2319, SI 2005/2877, SI 2009/583).

'Grant', except in the definition of 'access funds, means any kind of educational grant or award and includes any scholarship, studentship, exhibition, allowance or bursary but does not include a payment from access funds or any payment to which SI 1987/1967 Sch 9 para 11 or Sch 10 para 63 (both as substituted by SI 2004/1708) apply: SI 1987/1967 reg 61(1) (definition substituted by SI 2000/1922; and amended by SI 2004/1708).

SI 1987/1967 reg 68 now reg 68(1) (amended by SI 2000/1922). An amount paid from access funds (see TEXT AND NOTES) as a single lump sum is treated as capital: SI 1987/1967 reg 68(2) (reg 68(2), (3) added by SI 2000/1922). An amount paid from access funds as a single lump sum which is intended and used for an item other than food, ordinary clothing or footwear, household fuel, rent for which housing benefit is payable, or any housing costs to the extent that they are met under SI 1987/1967 reg 17(1)(e) or 18(1)(f) (housing costs), of a single claimant or, as the case may be, of any other member of his family, or which is used for an item other than any council tax or water charges for which that claimant or member is liable is disregarded as capital but only for a period of 52 weeks from the date of the payment: reg 68(3) (as so added; amended by SI 2001/3767, SI 2007/719). For these purposes 'ordinary clothing or footwear' means clothing or footwear for normal daily use, but it does not include school uniforms, or clothing or footwear used solely for sporting activities: SI 1987/1967 reg 68(4) (added by SI 2007/719).

NOTES 10, 11--See *Alexander v Chief Adjudication Officer* [1998] ELR 455, CA (the sum to be disregarded for the purposes of calculating a grant income is that specified by SI 1987/1967 reg 62(2), notwithstanding that it represents a sum less than that actually spent by the student on books and travel).

NOTE 10--SI 1987/1967 reg 62(2)(g) further amended: SI 1998/1379.

NOTE 12--SI 1987/1967 reg 62(2A) substituted by SI 1999/1935 and amended by SI 2001/2319, SI 2002/1589, SI 2003/1701, SI 2003/1914, SI 2004/1708, SI 2005/1807, SI 2006/1752, SI 2007/1632, SI 2008/1599, SI 2009/1575. Where any part of a student's

income has already been taken into account for the purposes of assessing his entitlement to a grant or student loan, the amount taken into account is disregarded in assessing his income. SI 1987/1967 reg 67A (added by SI 1998/563; and amended by SI 1999/1935).

TEXT AND NOTES 13-15--In a case where a student is in receipt of a student loan or where he could have acquired a student loan by taking reasonable steps but had not done so, any amount intended for the maintenance of dependants under provisions other than what is now the Education (Mandatory Awards) Regulations 2000, SI 2000/2123, Sch 2 Pts III, IV (amended by SI 2000/2825) (see EDUCATION vol 15(2) (2006 Reissue) PARA 1045), must be apportioned over the same period as the student's loan is apportioned, or, as the case may be, would have been apportioned: SI 1987/1967 reg 62(3B) (added by SI 2000/1922; and amended by SI 2002/1589).

NOTE 14--SI 1987/1967 reg 62(3) amended: SI 2000/1922, SI 2002/1589.

TEXT AND NOTE 15--Any grant in respect of dependants paid under the Health Services and Public Health Act 1968 s 63(6) (see HEALTH SERVICES vol 54 (2008) PARA 20) is also to be apportioned equally over a period of 52 weeks: SI 1987/1967 reg 62(3A) (amended by SI 2001/2319).

TEXT AND NOTE 16--Now a student loan is treated as income unless it is a hardship loan in which case it is disregarded: SI 1987/1967 reg 66A(1) (substituted by SI 2000/1922). 'Hardship loan' means a loan made under the Education (Student Support) Regulations 2000, SI 2000/1121, reg 21 (replaced by Education (Student Support) Regulations 2001, SI 2001/951, reg 22 (revoked)): SI 1987/1967 reg 66A(1A) (added by SI 2000/1922).

NOTE 17--SI 1987/1967 reg 66A(3) now reg 66A(3)-(5) (substituted by SI 1999/1935; SI 1987/1967 reg 66A(4) amended by SI 2009/583; SI 1987/1967 reg 66A(5) amended by SI 2001/2319, SI 2002/1589, SI 2003/1701, SI 2003/1914, SI 2004/1708, SI 2005/1807, SI 2006/1752, SI 2007/1632, SI 2008/1599, SI 2009/1575).

NOTE 19--As to the apportionment of student loans where the academic year starts other than on 1 September see SI 1987/1967 reg 66A(2) (amended by SI 2001/2319, SI 2002/1589).

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## **(viii) Urgent Cases**

### **200. Definition of urgent cases.**

Urgent cases are restricted to only two categories of claimant who would normally be precluded from benefit, namely (1) certain persons from abroad<sup>1</sup>; (2) claimants who are treated as possessing notional income<sup>2</sup>.

1 Income Support (General) Regulations 1987, SI 1987/1967, reg 70(2)(a). This provision applies to a person from abroad within the meaning of reg 21(3) (as amended) (see PARA 184 ante), who (1) having supported himself without recourse to public funds during any one period of limited leave, is temporarily without funds during that period of leave because remittances to him from abroad have been disrupted (provided that there is a reasonable expectation that his supply of funds will be resumed) (reg 70(3)(a)); (2) is an asylum seeker (reg 70(3)(b) (substituted by SI 1993/1679)); (3) is a sponsored immigrant, where the person or persons who gave the undertaking to provide for his maintenance and accommodation has or have died (Income Support (General) Regulations 1987, SI 1987/1967, reg 70(3)(c) (substituted by SI 1996/30)). As to the meaning of 'asylum seeker' for these purposes see the Income Support (General) Regulations 1987, SI 1987/1967, reg 70(3A) (added by SI 1993/1679; and substituted by SI 1996/30), Income Support (General) Regulations 1987, SI 1987/1967, reg 70(3B) (added by SI 1993/1679; and amended by SI 1996/30). As to accommodation etc for asylum seekers see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1029.

2 Ie under the Income Support (General) Regulations 1987, SI 1987/1967, reg 42(3) (as amended) (see PARA 192 ante): reg 70(2)(b). However, in such a case the urgent cases provisions only apply where the income the claimant is treated as possessing is not readily available to him, he would otherwise have a lower income support entitlement and the adjudication officer is satisfied that, unless these provisions apply, the claimant or his family will suffer hardship: reg 70(4) (amended by SI 1989/1323). For the meaning of 'family' see PARA 175 note 1 ante.

## **UPDATE**

### **176-201 Income Support**

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July

1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of

participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **200-201 Definition of urgent cases ... Calculation of entitlement in urgent cases**

SI 1987/1967 Pt VI (regs 70-72) revoked: SI 2009/3228.

### **200 Definition of urgent cases**

NOTE 1--See also *Yildiz v Secretary of State for Social Security* [2001] All ER (D) 01 (Mar), CA; and *Kola v Secretary of State for Work and Pensions* [2007] UKHL 54, [2007] All ER (D) 425 (Nov).

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## **201. Calculation of entitlement in urgent cases.**

The applicable amount<sup>1</sup> in an urgent case is calculated under separate rules, the general approach of which is to permit 90 per cent of the normal applicable amount for the claimant and any partner and the full applicable amount for any child or young person who is a member of his family (provided that the child or young person does not have capital exceeding a specified amount), and any applicable premium and housing costs<sup>2</sup>. When determining entitlement under these rules, a wider approach is taken to the assessment of income and capital, with fewer disregards than under the normal rules<sup>3</sup>.

1 As to the applicable amount generally see PARA 184 ante.

2 See the Income Support (General) Regulations 1987, SI 1987/1967, reg 71 (amended by SI 1988/663; SI 1988/1445; SI 1989/534; SI 1989/1034; SI 1992/3147; SI 1993/2119; SI 1994/527; SI 1996/30; SI 1996/206). For the meaning of 'partner' see PARA 182 note 5 ante. For the meaning of 'child' see PARA 175 note 1 ante; and for the meaning of 'young person' see PARA 182 note 1 ante. For the meaning of 'family' see PARA 175 note 1 ante.

3 See, in relation to income, the Income Support (General) Regulations 1987, SI 1987/1967, reg 72(1) (amended by SI 1988/999; SI 1988/2022; SI 1989/1323; SI 1990/127; SI 1991/1175; SI 1992/1101; SI 1993/963; SI 1993/1249; SI 1996/2431); and, in relation to capital, the Income Support (General) Regulations 1987, SI 1987/1967, reg 72(2) (amended by SI 1988/2022; SI 1996/2431).

## **UPDATE**

### **176-201 Income Support**

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in

connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the

arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

**200-201 Definition of urgent cases ... Calculation of entitlement in urgent cases**

SI 1987/1967 Pt VI (regs 70-72) revoked: SI 2009/3228.

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## **201A. State pension credit.**

### **1. Entitlement**

A claimant is entitled<sup>1</sup> to state pension credit if (1) he is in Great Britain<sup>2</sup>; (2) he has attained the qualifying age<sup>3</sup>; and (3) he satisfies the relevant conditions<sup>4</sup>. A claimant who is entitled to state pension credit is entitled to a guarantee credit<sup>5</sup>, or to a savings credit<sup>6</sup>, or to both, if he satisfies the relevant conditions<sup>7</sup>.

A claimant is not entitled to state pension credit if he is a member of a couple the other member of which is entitled to state pension credit<sup>8</sup>. Where the amount payable by way of state pension credit would, apart from this provision, be less than a prescribed amount, it is not payable except in prescribed circumstances<sup>9</sup>.

1 'Entitled', in relation to state pension credit, is to be construed in accordance with the State Pension Credit Act 2002, the Social Security Administration Act 1992 s 1 (see PARA 337), and the Social Security Act 1998 s 27 (see PARA 356A.16), and, in relation to any other benefit within the meaning of the Social Security Administration Act 1992 s 1 or the Social Security Act 1998 s 27, in accordance with that section or, as the case may be, both of those sections in addition to any other conditions relating to that benefit: State Pension Credit Act 2002 s 17(1).

2 Regulations may make provision as to circumstances in which a person is to be treated as being or not being in Great Britain, or continuing a person's entitlement to state pension credit during periods of temporary absence from Great Britain: s 1(5). See the State Pension Credit Regulations 2002, SI 2002/1792 (amended by SI 2002/3019, SI 2002/3197, SI 2003/1195, SI 2003/2274, SI 2004/647, SI 2004/1141, SI 2004/1232, SI 2004/2327, SI 2004/2825, SI 2004/3168 (England), SI 2005/522, SI 2005/2183, SI 2005/2687, SI 2005/2677, SI 2005/2877, SI 2005/2929 (Wales), SI 2005/2465, SI 2005/3205, SI 2005/3360, SI 2005/3391, SI 2006/588, SI 2006/718, SI 2006/1062, SI 2006/1981, SI 2006/2378, SI 2006/2528, SI 2006/3274, SI 2006/3341, SI 2007/688, SI 2007/719, SI 2007/2538, SI 2007/2618, SI 2007/3183, SI 2008/632, SI 2008/698, SI 2008/1554, SI 2008/2424, SI 2008/3157, SI 2009/362, SI 2009/471, SI 2009/583, SI 2009/1676, SI 2009/2655, SI 2010/442; and modified by SI 2008/3195 (amended by SI 2009/3257)). The Social Security Contributions and Benefits Act 1992 s 172 (see PARA 15) applies for the purposes of the State Pension Credit Act 2002: s 17(3)(a). A dependant of a person with worker status in the United Kingdom is resident in Great Britain for this purpose: *Pedro v Secretary of State for Work and Pensions* [2009] EWCA Civ 1358, [2009] All ER (D) 130 (Dec).

3 'The qualifying age' means (1) in the case of a woman, pensionable age; or (2) in the case of a man, the age which is pensionable age in the case of a woman born on the same day as the man: *ibid*, ss 1(4), (6), 17(1). The Social Security Contributions and Benefits Act 1992 s 173 (see PARA 19), applies for the purposes of the State Pension Credit Act 2002: s 17(3)(b). 'Pensionable age' has the meaning given by the rules in the Pensions Act 1995 Sch 4 para 1 (see PARA 562): State Pension Credit Act 2002 s 17(1).

4 *Ibid* s 1(1), (2)(a)-(c), (4). 'Claimant' means a claimant for state pension credit: s 17(1). As to the relevant conditions, see NOTE 7.

5 'Guarantee credit' is to be construed in accordance with *ibid* ss 1, 2: s 17(1): see PARA 201A.2.

6 'Savings credit' is to be construed in accordance with *ibid* ss 1, 3: s 17(1): see PARA 201A.3.

7 *Ibid* s 1(3), (4). As to the relevant conditions, see s 2(1) in relation to guarantee credit (see PARA 201A.2) and s 3(1) and (2) in relation to savings credit (see PARA 201A.3).

8 *Ibid* s 4(1) (amended by Civil Partnership Act 2004 Sch 24 para 140). 'Couple' means (1) a man and woman who are married to each other and are members of the same household; (2) a man and woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances; (3) two people of the same sex who are civil partners of each other and are members of the same household; or (4) two people of the same sex who are not civil partners of each other but are living together as if they were

civil partners otherwise than in prescribed circumstances: State Pension Credit Act 2002 s 17(1) (amended by Civil Partnership Act 2004 Sch 24 para 142(2)). For the purposes of the State Pension Credit Act 2002, two people of the same sex are to be regarded as living together as if they were civil partners if, but only if, they would be regarded as living together as husband and wife were they instead two people of the opposite sex: s 17(1A) (added by Civil Partnership Act 2004 Sch 24 para 143). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW. Regulations may make provision as to circumstances in which persons are to be treated as being or not being members of the same household: 2002 Act s 17(2)(a). See SI 2002/1792; and NOTE 2.

9 2002 Act s 4(3) See SI 2002/1792; and NOTE 2.

## 2. Guarantee credit

A claimant is entitled to a guarantee credit if he has no income<sup>1</sup>, or has income which does not exceed the appropriate minimum guarantee<sup>2</sup>. The appropriate minimum guarantee is the total of (1) the standard minimum guarantee<sup>3</sup>; and (2) such prescribed additional amounts as may be applicable<sup>4</sup>. The standard minimum guarantee is a prescribed amount<sup>5</sup> which is (a) a uniform single amount in the case of every claimant who is a member of a couple<sup>6</sup>; and (b) a lower uniform single amount in the case of every claimant who is not a member of a couple<sup>7</sup>.

Where the claimant is entitled to a guarantee credit, then (i) if he has no income<sup>8</sup>, the guarantee credit is the appropriate minimum guarantee<sup>9</sup>; and (ii) if he has income, the guarantee credit is the difference between the appropriate minimum guarantee and his income<sup>10</sup>.

1 As to what is taken into account as income, see PARA 201A.4.

2 State Pension Credit Act 2002 s 2(1).

3 Ibid ss 2(3)(a), 17(1). Regulations may provide that, in prescribed cases, s 2(3)(a) has effect with the substitution for the reference to 'the standard minimum guarantee' of a reference to 'a prescribed amount': s 2(6). See the State Pension Credit Regulations 2002, SI 2002/1792; and PARA 201A.1 NOTE 2. 'Standard minimum guarantee' is to be construed in accordance with the State Pension Credit Act 2002 s 2(3)-(5), (9): s 17(1).

4 Ibid ss 2(3)(b), 17(1). See SI 2002/1792; and NOTE 3. The powers conferred by the State Pension Credit Act 2002 s 2 to prescribe amounts include power to prescribe nil as an amount: s 2(9). Where the claimant is severely disabled, an amount in respect of that circumstance must be included among the additional amounts prescribed under s 2(3)(b): s 2(7). Regulations may make provision as to circumstances in which persons are to be treated as being or not being severely disabled: s 17(2)(b). See SI 2002/1792; and NOTE 3.

Where the claimant is entitled to an allowance under the Social Security Contributions and Benefits Act 1992 s 70 (see PARAS 100, 101), or if the claimant is a member of a couple, the other member of the couple is entitled to such an allowance, an amount in respect of that circumstance must be included among the additional amounts prescribed under the State Pension Credit Act 2002 s 2(3)(b): s 2(8) (amended by Civil Partnership Act 2004 Sch 24 para 140). As to the meaning of 'couple', see PARA 201A.1.

5 State Pension Credit Act 2002 s 2(4). See SI 2002/1792; and NOTE 3. The powers conferred by the State Pension Credit Act 2002 s 2 to prescribe an amount for the standard minimum guarantee do not include power to prescribe nil as an amount: s 2(9).

6 Ibid s 2(5)(a) (amended by Civil Partnership Act 2004 Sch 24 para 140). As to the meaning of 'couple', see PARA 201A.1.

7 State Pension Credit Act 2002 s 2(5)(b) (amended by Civil Partnership Act 2004 Sch 24 para 141).

8 See NOTE 1.

9 State Pension Credit Act 2002 s 2(2)(a).

10 Ibid s 2(2)(b).

## 3. Savings credit

A claimant is entitled to a savings credit if he (1) has attained the age of 65<sup>1</sup>; or (2) is a member of a couple<sup>2</sup>, the other member of which has attained that age<sup>3</sup>; and (3) his qualifying income<sup>4</sup> exceeds the savings credit threshold<sup>5</sup>; and (4) his income is such that, for the purposes of determining the amount of savings credit, amount A exceeds amount B<sup>6</sup>.

'Amount A' is the smaller of (a) the maximum savings credit<sup>7</sup>; and (b) a prescribed percentage of the amount by which the claimant's qualifying income exceeds the savings credit threshold, and 'amount B' is (i) a prescribed percentage of the amount (if any) by which the claimant's income exceeds the appropriate minimum guarantee<sup>8</sup>; or (ii) if there is no such excess, nil<sup>9</sup>.

Where the claimant is entitled to a savings credit, the amount of the savings credit is the amount by which amount A exceeds amount B<sup>10</sup>.

1 State Pension Credit Act 2002 s 3(1)(a). The Social Security Contributions and Benefits Act 1992 s 173 (see PARA 19), applies for the purposes of the State Pension Credit Act 2002: s 17(3)(b). In 2002 Act s 3(1)(a) for 'the age of 65' read 'pensionable age': Pensions Act 2007 Sch 1 para 44 (this amendment has effect as from 6 April 2024: see s 13(3)).

2 As to the meaning of 'couple', see PARA 201A.1.

3 State Pension Credit Act 2002 s 3(1)(b) (amended by Civil Partnership Act 2004 Sch 24 para 140). See NOTE 1.

4 Regulations may make provision as to income which is, and income which is not, to be treated as qualifying income for the purposes of the State Pension Credit Act 2002 s 3: s 3(6). See the State Pension Credit Regulations 2002, SI 2002/1792; and PARA 201A.1 NOTE 2.

5 State Pension Credit Act 2002 s 3(2)(a). 'The savings credit threshold' is such amount as may be prescribed: *ibid* s 3(7). See SI 2002/1792; and NOTE 4.

6 State Pension Credit Act 2002 s 3(2)(b). As to what is taken into account as income, see PARA 201A.4.

7 'The maximum savings credit' is a prescribed percentage of the difference between (1) the standard minimum guarantee; and (2) the savings credit threshold: *ibid* s 3(7). Regulations may prescribe descriptions of persons in whose case the maximum savings credit is to be taken to be nil: s 3(8). See SI 2002/1792; and NOTE 4.

8 As to 'the appropriate minimum guarantee', see PARA 201A.2.

9 State Pension Credit Act 2002 s 3(4). See SI 2002/1792; and NOTE 4. Where, by virtue of regulations under the State Pension Credit Act 2002 s 2(6) (see PARA 201A.2), the claimant's appropriate minimum guarantee does not include the standard minimum guarantee, regulations may provide that the definition of 'amount B' in s 3(4) has effect with the substitution for the reference to 'the appropriate minimum guarantee' of a reference to 'a prescribed higher amount': s 3(5). See SI 2002/1792; and NOTE 4.

10 State Pension Credit Act 2002 s 3(3).

#### **4. Income and capital**

For the purposes of state pension credit, 'income' means income of any of the following descriptions: (1) earnings<sup>1</sup>; (2) working tax credit<sup>2</sup>; (3) retirement pension income<sup>3</sup>; (4) income from annuity contracts, other than retirement pension income; (5) prescribed social security benefits<sup>4</sup>, other than retirement pension income and state pension credit; (6) foreign social security benefits of any prescribed description<sup>5</sup>; (7) a war disablement pension<sup>6</sup> or war widow's or widower's pension<sup>7</sup>; (8) a foreign war disablement pension<sup>8</sup> or foreign war widow's or widower's pension<sup>9</sup>; (9) income from capital<sup>10</sup>; (10) income of any prescribed description<sup>11</sup>.

Income and capital are to be calculated or estimated in such manner as may be prescribed<sup>12</sup>. A person's income in respect of any period is calculated in accordance with prescribed rules<sup>13</sup>. Circumstances may be prescribed in which (a) a person is treated as possessing capital or income which he does not possess; (b) capital or income which a person does possess is to be disregarded; (c) income is to be treated as capital; or (d) capital is to be treated as income<sup>14</sup>.

Where the claimant is a member of a couple, the income and capital of the other member of the couple is, except in prescribed circumstances, treated as income and capital of the claimant<sup>15</sup>.

1 'Earnings' has the same meaning as in the Social Security Contributions and Benefits Act 1992 Pts I-V (ss 1-111) (see ss 3(1), 112, and the definition of 'employment' in s 122: see PARA 33): State Pension Credit Act 2002 s 17(1).

2 'Working tax credit' means a working tax credit under the Tax Credits Act 2002 to which a person is entitled whether alone or jointly with another: State Pension Credit Act 2002 s 17(1).

3 'Retirement pension income' means any of the following: (1) a Category A or Category B retirement pension payable under the Social Security Contributions and Benefits Act 1992 ss 43-55 (see PARAS 568-578); (2) a shared additional pension payable under s 55A (see PARA 582A); (3) graduated retirement benefit payable under s 62 (see PARA 583); (4) a Category C or Category D retirement pension payable under s 78 (see PARAS 579-582); (5) age addition payable under s 79 (see PARA 588); (6) income from an occupational pension scheme or a personal pension scheme; (7) income from an overseas arrangement; (8) income from a retirement annuity contract; (9) income from annuities or insurance policies purchased or transferred for the purpose of giving effect to rights under a personal pension scheme or an overseas arrangement; (10) income from annuities purchased or entered into for the purpose of discharging liability under the Welfare Reform and Pensions Act 1999 s 29(1)(b) (see PARA 961A); or (11) any sum payable by way of pension out of money provided under the Civil List Act 1837, the Civil List Act 1937, the Civil List Act 1952, the Civil List Act 1972 or the Civil List 1975: State Pension Credit Act 2002 ss 16(1)(a)-(k), (2), 17(1); State Pension Credit Regulations 2002, SI 2002/1792, reg 16.

'Occupational pension scheme' in head (6) has the meaning given by the Pension Schemes Act 1993 s 1 (see PARA 741): State Pension Credit Act 2002 s 17(1). 'Personal pension scheme' in head (6) means a personal pension scheme as defined in the Pension Schemes Act 1993 s 1: State Pension Credit Act 2002 s 17(1). 'Overseas arrangement' in head (7) has the meaning given by the Pension Schemes Act 1993 s 181(1) (see PARA 891): State Pension Credit Act 2002 s 16(3). 'Retirement annuity contract' in head (8) means a contract or scheme approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch 3 (ss 618-629): State Pension Credit Act 2002 s 16(3).

4 'Social security benefits' means benefits payable under the enactments relating to social security in any part of the United Kingdom: *ibid* s 17(1).

5 'Foreign social security benefit' means any benefit, allowance or other payment which is paid under the law of a country outside the United Kingdom and is in the nature of social security: *ibid* s 17(1).

6 'War disablement pension' means (1) any retired pay, pension or allowance granted in respect of disablement under powers conferred by or under (a) the Air Force (Constitution) Act 1917 (see ARMED FORCES vol 2(2) (Reissue) PARA 9), (b) the Personal Injuries (Emergency Provisions) Act 1939 (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 596 et seq), (c) the Pensions (Navy, Army, Air Force and Mercantile Marine) Act 1939 (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 599 et seq), (d) the Polish Resettlement Act 1947 (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 617), or (e) the Reserve Forces Act 1980 Pt 7 (ss 139-144) (see ARMED FORCES vol 2(2) (Reissue) PARA 227 et seq) or s 151; or (2) without prejudice to head (1), any retired pay or pension to which the Income and Corporation Taxes Act 1988 s 315(1) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1226) applies: State Pension Credit Act 2002 s 17(1).

7 'War widow's or widower's pension' means (1) any widow's, widower's or surviving civil partner's pension or allowance granted in respect of a death due to service or war injury and payable by virtue of any enactment mentioned in head (1) of the definition of 'war disablement pension' (see NOTE 6); or (2) a pension or allowance for a widow, widower or surviving civil partner granted under any scheme mentioned in the Income and Corporation Taxes Act 1988 s 315(2)(e): State Pension Credit Act 2002 s 17(1) (amended by Civil Partnership Act 2004 Sch 24 para 142(5)).

8 'Foreign war disablement pension' means any retired pay, pension, allowance or similar payment granted by the government of a country outside the United Kingdom (1) in respect of disablement arising from forces' service or war injury; or (2) corresponding in nature to any retired pay or pension to which the Income and Corporation Taxes Act 1988 s 315(1) applies: State Pension Credit Act 2002 s 17(1).

9 'Foreign war widow's or widower's pension' means any pension, allowance or similar payment granted to a widow, widower or surviving civil partner by the government of a country outside the United Kingdom (1) in respect of a death due to forces' service or war injury; or (2) corresponding in nature to a pension or allowance for a widow, widower or surviving civil partner under any scheme mentioned in the Income and Corporation Taxes Act 1988 s 315(2)(e): State Pension Credit Act 2002 s 17(1) (amended by Civil Partnership Act 2004 Sch 24 para 142(3)).

10 'Capital' is to be construed in accordance with the State Pension Credit Act 2002 s 15: s 17(1). Regulations may provide that a person's capital is deemed to yield him income at a prescribed rate: s 15(2). See the State Pension Credit Regulations 2002, SI 2002/1792; and PARA 201A.1 NOTE 2.

11 State Pension Credit Act 2002 ss 15(1)(a)-(j), 17(1). See SI 2002/1792; and NOTE 10.

12 State Pension Credit Act 2002 s 15(3). See SI 2002/1792; and NOTE 10.

13 State Pension Credit Act 2002 s 15(4). See SI 2002/1792; and NOTE 10. The rules may provide for the calculation to be made by reference to an average over a period, which need not consist of or include the whole or any part of the period concerned: State Pension Credit Act 2002 s 15(5).

14 Ibid s 15(6). See SI 2002/1792; and NOTE 10.

15 State Pension Credit Act 2002 s 5 (amended by Civil Partnership Act 2004 Sch 24 para 140). See SI 2002/1792; and NOTE 10. As to couples, see PARA 201A.1.

## 5. Secretary of State's duty to specify assessed income period

The following provisions<sup>1</sup> apply in either of the following two cases. The first is where (1) the Secretary of State determines the amount of a claimant's income for the purposes of a decision relating to state pension credit<sup>2</sup>; (2) the decision is a 'decision' for the purposes of certain social security provisions<sup>3</sup>; (3) the decision takes effect on or after the day on which the claimant attains the age of 65, or if earlier, in a case where the claimant is a member of a couple, the day on which the other member of the couple attains that age<sup>4</sup>; and (4) the decision is not to the effect that the claimant is not entitled to state pension credit<sup>5</sup>. The second is where (a) the amount of the claimant's income is determined on, or for the purposes of, an appeal against a decision that the claimant is not entitled to state pension credit<sup>6</sup>; (b) on the appeal, it is decided that the claimant is entitled to state pension credit<sup>7</sup>; and (c) the decision takes effect as mentioned in head (3) above<sup>8</sup>.

In either of the two cases, the Secretary of State must, on the making of the relevant decision<sup>9</sup>, specify a period as the assessed income period, unless prevented from doing so<sup>10</sup>, either (i) where the relevant decision takes effect at a time when an assessed income period is in force in the case of the claimant by virtue of a previous application of these provisions<sup>11</sup>; or (ii) in such other circumstances as may be prescribed<sup>12</sup>.

Where the Secretary of State specifies a period as the assessed income period the following provisions have effect for the purpose of determining, as at any time in the assessed income period: (i) the claimant's entitlement to state pension credit; or (ii) the amount of state pension credit to which the claimant is entitled<sup>13</sup>. Where the claimant's income, as determined for the purposes of the relevant decision, includes an amount (the 'assessed amount'<sup>14</sup>) in respect of an element of the claimant's retirement provision<sup>15</sup>, the amount of that element as at any time in the assessed income period is to be taken to be the assessed amount as for the time being varied in accordance with regulations<sup>16</sup>. Where it is determined for the purposes of the relevant decision that the claimant's income does not include any, or any further, elements of retirement provision, the claimant's income throughout the assessed income period is to be taken not to include those elements<sup>17</sup>. For the purposes of these provisions<sup>18</sup>, regulations may make provision (A) for treating income of any particular description as income of another description; or (B) for treating income from different sources as income from the same source<sup>19</sup>.

1 The State Pension Credit Act 2002 ss 6-10 (see *infra*; and PARA 201A.6). By virtue of s 6(7), ss 6-10 are to be construed as one. Section 6 is subject to s 9 (see *infra*; and PARA 201A.6): s 6(6).

2 Ibid s 6(3)(a).

3 Ibid s 6(3)(b). The provisions are the Social Security Act 1998 s 8(1) (see PARA 356A.1), 9 (see PARA 356A.2) or 10 (see PARA 356A.3).

4 State Pension Credit Act 2002 s 6(3)(c) (amended by Civil Partnership Act 2004 Sch 24 para 140). The Social Security Contributions and Benefits Act 1992 s 173 (see PARA 19), applies for the purposes of the State Pension Credit Act 2002: s 17(3)(b). As to couples, see PARA 201A.1.

5 Ibid s 6(3)(d).

6 Ibid s 6(4)(a).

7 Ibid s 6(4)(b).

8 Ibid s 6(4)(c).

9 'The relevant decision' means the decision mentioned in head (1), ie under s 6(3)(a) (see TEXT AND NOTE 2) or the decision on appeal mentioned in head (b), ie under s 6(4)(b) (see TEXT AND NOTE 7): s 6(5)(a), (b).

10 Ibid s 6(1). 'Assessed income period' is to be construed in accordance with ss 6 and 9 (see PARA 201A.6): s 17(1).

11 Ibid s 6(2)(a).

12 Ibid s 6(2)(b). See the State Pension Credit Regulations 2002, SI 2002/1792; and PARA 201A.1 NOTE 2.

13 State Pension Credit Act 2002 s 7(1), (2). Section 7 is subject to s 8: s 7(9).

14 The assessed amount is deemed, except in prescribed circumstances, to increase, or, in the case of income from capital, to increase or decrease, on such date or dates and by such amounts as may be prescribed: ibid s 7(4). See SI 2002/1792; and NOTE 12.

Where an assessed income period is in force, and there is a variation in the amount of an element of the claimant's retirement provision in accordance with regulations under the State Pension Credit Act 2002 s 7(4) (an 'alteration'), which affects the computation of the amount of state pension credit to which the claimant is entitled to the extent that the amount of state pension credit to which the claimant is entitled is increased or reduced, then, as from the commencing date, the amount of state pension credit payable in the case of the claimant shall be the increased or reduced amount, without any further decision of the Secretary of State, and the award of state pension credit has effect accordingly: s 10(1), (2), (4). Where, notwithstanding the alteration, the claimant continues on and after the commencing date to be entitled to the same amount of state pension credit as before, the award continues in force accordingly: s 10(3). 'Commencing date', in relation to an alteration, means the date on which the alteration comes into force: s 10(4).

15 'Retirement provision' means (1) retirement pension income, other than benefit under the Social Security Contributions and Benefits Act 1992; (2) income from annuity contracts (other than retirement pension income); (3) income from capital; (4) PPF periodic payments; and an 'element' of a person's retirement provision is income of any of those descriptions from a particular source: State Pension Credit Act 2002 ss 7(6), 17(1) (s 7(6) amended by SI 2006/343). 'PPF periodic payment' means (1) any periodic compensation payments made in relation to a person, payable under the pension compensation provisions specified in the Pensions Act 2004 s 162(2), or (2) any periodic payments made in relation to a person payable under s 166: State Pension Credit Act 2002 s 17(1) (definition added by SI 2006/343). As to 'retirement pension income' and 'capital', see PARA 201A.4.

16 Ibid s 7(3). As to variation of the assessed amount by regulations, see s 7(4); and NOTE 14.

17 Ibid s 7(5). Nothing in s 7(3)-(5) prevents the revision of the relevant decision under the Social Security Act 1998 s 9 (see PARA 356A.2) or of any earlier or later decision under s 10 (see PARA 356A.3): State Pension Credit Act 2002 s 7(8).

The provisions of s 7(3)-(5) do not prevent the making of fresh determinations as to the elements, or any of the elements, or the amount of any of the elements, of the claimant's retirement provision as at any time during the assessed income period, if (1) the fresh determinations are for the purpose of making a decision under the Social Security Act 1998 s 10 ('the new decision'); (2) the new decision increases the amount of state pension credit to which the claimant is entitled; and (3) the increase is in whole or in part the result of the fresh determinations (taken as a whole): State Pension Credit Act 2002 s 8(1). The conditions in heads (2) and (3) are taken to be satisfied if the new decision reduces the amount of state pension credit to which the claimant is entitled, but the reduction is less than it would have been apart from the fresh determinations (taken as a whole): s 8(2). Where a fresh determination is made by virtue of s 8(1), then, as respects the part of the assessed income period that begins with the day on which the new decision takes effect, s 7(3)-(5) have effect in accordance with the fresh determination, instead of the determination which it replaces, but as if (i) the fresh determination were (and the determination which it replaces were not) a determination for the purposes of the relevant decision; (ii) any assessed amount resulting from the fresh determination were not subject to variation

under s 7(4) at any time before the day on which the new decision takes effect; and (iii) the claimant's income, as determined for the purposes of the relevant decision, were constituted accordingly: s 8(3)(a)-(c).

18    Ibid s 7.

19    Ibid s 7(7); SI 2002/1792 (see NOTE 12).

## 6. Duration of assessed income period

An assessed income period must (subject to certain exceptions<sup>1</sup>) be (1) in the case of a claimant who is under the age of 75 on the day on which the relevant decision takes effect, the period of five years beginning with that day; (2) in the case of a claimant who is aged 75 or over on that day, an indefinite period beginning with that day<sup>2</sup>. If the Secretary of State considers that the particulars of the claimant's retirement provision<sup>3</sup> as determined for the purposes of the relevant decision are not likely, after taking account of any assumed variations<sup>4</sup>, to be typical of the claimant's retirement provision throughout the period of 12 months beginning with the day on which that decision takes effect, then he need not specify an assessed income period<sup>5</sup>, or if he does so, he must specify a period that is shorter than five years but still beginning with the day on which the relevant decision takes effect<sup>6</sup>. An assessed income period is brought to an end, except in prescribed circumstances, by any of the following events taking place: (a) the claimant becoming a member of a couple; (b) the claimant ceasing to be a member of a couple; (c) the claimant attaining the age of 65; or (d) in a case where the claimant is a member of a couple, the other member of the couple attaining the age of 65<sup>7</sup>. Regulations may prescribe further times at which, or circumstances in which, an assessed income period will end<sup>8</sup>.

Where (i) an assessed income period is brought to an end by the expiry of a period of five years or more, and (ii) the claimant is aged 80 or over at that time, the assessed income period must be treated as not ending at that time but<sup>9</sup> as continuing indefinitely<sup>10</sup>.

1    Ibid subject to the State Pension Credit Act 2002 s 9(2)-(6).

2    State Pension Credit Act 2002 s 9(1) (substituted by Pensions Act 2008 s 105(2)). As to 'the relevant decision', see PARA 201A.5.

The amendment made by s 105(2) applies only where the relevant decision (within the meaning given by the State Pension Credit Act 2002 s 6(5)) takes effect on or after 6 April 2009: Pensions Act 2008 s 105(5).

3    As to 'retirement provision', see PARA 201A.5.

4    Ibid variations assumed to be made under the State Pension Credit Act 2002 s 9(3). It is assumed for the purposes of s 9(2) that the same variations fall to be made in relation to the amount of an element of the claimant's retirement provision as determined for the purposes of the relevant decision as would fall to be made under s 7(4) (see PARA 201A.5) if an assessed income period were to be specified in accordance with s 9(1): s 9(3).

5    Ibid s 9(2)(a).

6    Ibid s 9(2)(b) (amended by Pensions Act 2008 s 105(3)). The amendment made by s 105(3) applies only where the relevant decision (within the meaning given by the State Pension Credit Act 2002 s 6(5)) takes effect on or after 6 April 2009: Pensions Act 2008 s 105(5).

7    State Pension Credit Act 2002 s 9(4)(a)-(d); Civil Partnership Act 2004 Sch 24 para 140; State Pension Credit Regulations 2002, SI 2002/1792 (see PARA 201A.1 NOTE 2). As to couples, see PARA 201A.1. The Social Security Contributions and Benefits Act 1992 s 173 (see PARA 19), applies for the purposes of the State Pension Credit Act 2002: s 17(3)(b).

8    Ibid s 9(5); SI 2002/1792 (see NOTE 7).

9    Subject to the State Pension Credit Act 2002 s 9(4) and provision made under s 9(5).

10 State Pension Credit Act 2002 s 9(6) (added by Pensions Act 2008 s 105(4)). The State Pension Credit Act 2002 s 9(6) ceases to have effect on 6 April 2014: Pensions Act 2008 s 105(6).

## 7. Disclosure of information relating to state pension credit recipients

The Secretary of State may by regulations make provision authorising the Secretary of State, or a person providing services to the Secretary of State, to supply relevant persons<sup>1</sup> with social security information<sup>2</sup> about persons in receipt of state pension credit<sup>3</sup>.

1 In the Pensions Act 2008 s 142 'relevant person' means (1) a person who holds a licence under the Electricity Act 1989 s 6(1)(d) or the Gas Act 1986 s 7A(1) (supply of electricity or gas to premises), or (2) a person providing services to the Secretary of State or to a person within head (1): Pensions Act 2008 s 142(2).

2 In the Pensions Act 2008 s 142 'social security information' means information held by or on behalf of the Secretary of State and obtained as a result of, or for the purpose of, the exercise of the Secretary of State's functions in relation to social security: s 142(6).

3 Pensions Act 2008 s 142(1). 'State pension credit' has the meaning given by the State Pension Credit Act 2002 s 1(1): Pensions Act 2008 s 142(6).

Regulations under s 142 must specify the purposes for which information may be supplied by virtue of s 142(1), which must be purposes in connection with enabling the provision of assistance to persons in receipt of state pension credit: s 142(3). Regulations under s 142 may authorise the supply of information by a relevant person to the Secretary of State or another relevant person (1) for the purpose of determining what information is to be supplied by virtue of s 142(1), or (2) to enable information supplied to a relevant person by virtue of s 142(1) to be used by that or another relevant person for purposes within s 142(3): s 142(4). Regulations under s 142 may (a) make provision as to the use or disclosure of information supplied under the regulations (including provision creating criminal offences); (b) provide for the recovery by the Secretary of State of costs incurred in connection with the supply or use of information under the regulations: s 142(5). As to the regulations so made see the State Pension Credit (Disclosure of Information) (Electricity Suppliers) Regulations 2010, SI 2010/227.

## 8. Pilot schemes

Provision is made to pilot, for a period of up to twelve months, ways in which state pension credit entitlement may be calculated and paid in order to increase the numbers of eligible persons receiving benefit<sup>1</sup>.

1 See State Pension Credit Act 2002 s 18A (added by Welfare Reform Act 2009 s 27(2)).

### UPDATE

#### 176-201 Income Support

As from 6 April 2005, the child-related elements of income support are abolished and replaced: see Tax Credits Act 2002 s 1, SI 2003/962; and PARA 227A.1.

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to income support to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

For the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a

person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (amended by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule (amended by SI 1998/1425). See further PARA 31-46.

Also for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route (see PARA 189) and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Income Support (General) Regulations 1987, SI 1987/1967, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated (1) for the purposes of reg 6(1)(d) as a training allowance; and (2) for all other purposes as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

**200-201 Definition of urgent cases ... Calculation of entitlement in urgent cases**

SI 1987/1967 Pt VI (regs 70-72) revoked: SI 2009/3228.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(i) Entitlement/202. Conditions of entitlement.

### **(3) FAMILY CREDIT**

#### **(i) Entitlement**

##### **202. Conditions of entitlement.**

A person in Great Britain<sup>1</sup> is entitled to family credit<sup>2</sup> if, when the claim for it is made or is treated as made:

- 507 (1) his income does not exceed the amount which is the applicable amount<sup>3</sup> at such date as may be prescribed; or exceeds it, but only by such an amount that there is an amount remaining if the prescribed deduction is made<sup>4</sup>;
- 508 (2) he or, if he is a member of a married or unmarried couple<sup>5</sup>, he or the other member of the couple, is engaged and normally engaged in remunerative work<sup>6</sup>;
- 509 (3) Except in such circumstances as may be prescribed, neither he nor any member of his family<sup>7</sup> is entitled to a disability working allowance<sup>8</sup>; and
- 510 (4) he or, if he is a member of a married or unmarried couple, he or the other member, is responsible for a member of the same household<sup>9</sup> who is a child<sup>10</sup> or a person of a prescribed description<sup>11</sup>.

1 For the meaning of 'Great Britain' see PARA 15 note 4 ante. As to presence in Great Britain see PARA 205 post.

2 The subject to regulations under the Social Security Administration Act 1992 s 5(1)(a): see PARA 330 post. Family credit is paid under a scheme made under the Social Security Contributions and Benefits Act 1992 s 123(1) (as amended): see PARA 173 ante. As to exclusions from benefit generally see s 134 (as amended); and PARA 174 ante; and as to treatment of income and capital see s 136; and PARAS 174 ante; 208 et seq post.

3 As to the applicable amount see *ibid* s 135 (as amended); and PARA 174 ante.

4 The deduction for which *ibid* s 128(2)(b) provides is made: see PARA 204 text to note 5 post. As to the calculation of the award see PARA 204 post.

5 For the meaning of 'married or unmarried couple' see PARA 175 note 1 ante.

6 For the meaning of 'remunerative work' see PARA 206 post.

7 For the meaning of 'family' see PARA 175 note 1 ante. As to the membership of a family see PARA 207 post.

8 As to disability working allowance see PARAS 218-227 post. For the purposes of the Social Security Contributions and Benefits Act 1992 s 128(1)(c), where a claimant or a member of his family is entitled to disability working allowance, he is entitled to family credit, if: (1) at the date of the claim for family credit the award of disability working allowance for him or a member of his family will expire within 42 days; and (2) the claimant is or would be otherwise entitled to family credit by virtue of the Family Credit (General) Regulations 1987, SI 1987/1973 (as amended); and (3) the claim for family credit is made in respect of a period which commences immediately after the expiry of the award of disability working allowance: see reg 52 (added by SI 1991/2887); Interpretation Act 1978 s 17(2)(b).

9 For the meaning of 'household' see PARAS 175 note 1 ante, 207 post.

10 For the meaning of 'child' for these purposes see the Social Security Contributions and Benefits Act 1992 s 137(1); and PARA 175 note 1 ante.

11 See *ibid* s 128(1). A person of a prescribed description as it applies to family credit is a person aged 16 or over but under 19 who is receiving full-time education within the meaning of s 142(1)(c) (see PARA 239 post);

and in the Family Credit (General) Regulations 1987, SI 1987/1973 (as amended) such a person is referred to as 'a young person': see reg 6(1). This does not apply to a person (1) who is entitled to income support or would, but for the Social Security Contributions and Benefits Act 1992 s 134(2) (provision against dual entitlement of members of family: see PARA 174 ante), be so entitled; (2) who is entitled to income-based jobseeker's allowance or would, but for the Jobseekers Act 1995 s 3(1)(d) (provision against dual entitlement of members of family: see PARA 271 post), be so entitled; (3) who is receiving advanced education within the meaning of Child Benefit (General) Regulations 1976, SI 1976/965, reg 1(2) (as added and amended); or (4) who has ceased to receive full-time education but is to continue to be treated as a child by virtue of the Child Benefit (General) Regulations 1976, SI 1976/965, reg 7 (as substituted and amended): see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 6(2) (substituted by SI 1990/574; amended by SI 1996/1345).

The provisions of the Social Security Contributions and Benefits Act 1992 relating to family credit apply in relation to persons employed by or under the Crown as they apply in relation to persons employed otherwise than by or under the Crown: s 128(6).

## UPDATE

### 202-217 [Working Families' Tax Credit]

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are

designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **202 Conditions of entitlement**

TEXT AND NOTES--Subject to savings (SI 2003/962), Social Security Contributions and Benefits Act 1992 s 128 repealed: Tax Credits Act 2002 Sch 6. See further PARA 227A.

NOTE 11--SI 1987/1973 reg 6(1) amended: SI 1999/2487, SI 2001/1082. SI 1976/965 now replaced by the Child Benefit (General) Regulations 2006, SI 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2009/3268).



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(i) Entitlement/203. Duration of an award of family credit.

### **203. Duration of an award of family credit.**

Family credit is payable for a period of 26 weeks or such other period as may be prescribed<sup>1</sup> and, subject to regulations, an award of family credit and the rate at which it is payable are not affected by any change of circumstances during that period or by any up-rating order<sup>2</sup> under statutory provision<sup>3</sup>. There are specific exceptions to this rule in the case of the death of the claimant<sup>4</sup>, duplication of awards<sup>5</sup>, a reduced benefit direction under the child support legislation<sup>6</sup>, or the cessation of full-time education by the only young person in the household<sup>7</sup>. Regulations may provide that an award of family credit must terminate:

- 511 (1) if a person who was a member of the family at the date of the claim becomes a member of another family and some member of that family is entitled to family credit; or
- 512 (2) if income support, an income-based jobseeker's allowance or a disability working allowance becomes payable in respect of a person who was a member of the family at the date of the claim for family credit<sup>8</sup>.

<sup>1</sup> For the meaning of 'prescribed' for these purposes see the Social Security Contributions and Benefits Act 1992 s 137(1); and PARA 173 note 1 ante.

<sup>2</sup> In any order under the Social Security Administration Act 1992 s 150 (as amended): see PARA 17 ante.

<sup>3</sup> Social Security Contributions and Benefits Act 1992 s 128(3). This stringent rule is supported procedurally by the Social Security Administration Act 1992 s 25(4) which states that there cannot be a review of a family credit award on the grounds of change in circumstances: see PARA 373 post.

<sup>4</sup> An award of family credit ceases to have effect upon the death of the claimant: see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 49(1). However, where a claimant dies and is survived by a partner who was the claimant's partner at the date of claim, an award of family credit made in the claimant's favour has effect for its unexpired period as if originally made in favour of the partner: see reg 49(2).

<sup>5</sup> As to the prevention of duplication of awards of family credit and income support see *ibid* reg 50 (as amended). As to overlapping awards see reg 51 (as substituted and amended).

<sup>6</sup> A reduced benefit direction given by a child support officer (or its cessation, cancellation, suspension or the removal of its suspension) are changes of circumstances which affect an award of family credit and the rate at which it is payable: see *ibid* reg 51A (as added). As to child support see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 553 et seq.

<sup>7</sup> As to young persons leaving full-time education see *ibid* reg 49A (as added).

<sup>8</sup> Social Security Contributions and Benefits Act 1992 s 128(4) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 33). As to jobseeker's allowance see PARA 258 et seq post.

## **UPDATE**

### **202-217 [Working Families' Tax Credit]**

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed

to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **203 Duration of an award of [working families' tax credit]**

TEXT AND NOTES--Subject to savings (SI 2003/962), Social Security Contributions and Benefits Act 1992 s 128 and Jobseekers Act 1995 Sch 2 para 33 repealed: Tax Credits Act 2002 Sch 6. See further PARA 227A.

TEXT AND NOTE 1--Where an award of working families' tax credit becomes payable on or after 4 June 2002, the prescribed period begins on the date on which it becomes payable and ends on 7 April 2003: Tax Credits (Prescribed Periods of Awards) Regulations 2002, SI 2002/1334, reg 2.

NOTE 6--Regulation 51A revoked: SI 1999/2487.

TEXT AND NOTE 8--An existing award of working families' tax credit is terminated if the claimant or partner elects to surrender it following the birth of a child, the adoption of a child or young person or the granting of a parental order for a surrogate child: SI 1987/1973 reg 49ZA (added by SI 2001/892). 'Surrogate child' means a child in respect of whom an order has been made under the Human Fertilisation and Embryology Act 1990 s 30 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 106) or the Human Fertilisation and Embryology Act 2008 s 54 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 112A.5): SI 1987/1973 reg 2(1) (definition added by SI 2001/892 and amended by SI 2010/986).

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## **204. Calculation of an award.**

Where a person is entitled to family credit<sup>1</sup>, then:

- 513 (1) if his income does not exceed the amount which is the applicable amount at the date prescribed<sup>2</sup>, the amount of the family credit is the amount which is the appropriate maximum family credit in his case<sup>3</sup>; and
- 514 (2) if his income exceeds the amount which is the applicable amount at that date, the amount of the family credit is what remains after the deduction from the appropriate maximum family credit of a prescribed percentage<sup>4</sup> of the excess of his income over the applicable amount<sup>5</sup>.

The applicable amount is one figure stated by regulation<sup>6</sup>. The appropriate maximum family credit is the aggregate of the following credits<sup>7</sup>:

- 515 (a) in respect of a claimant or, if he is a member of a married or unmarried couple, in respect of the couple, the credit specified by statutory provision<sup>8</sup>;
- 516 (b) in respect of a lone parent<sup>9</sup> who works, or a claimant who is a member of a married or unmarried couple either or both of whom work, for not less than 30 hours per week, the credit specified by statutory provision<sup>10</sup>;
- 517 (c) in respect of any child or young person for whom the claimant or his partner is treated as responsible<sup>11</sup>, the credit specified by statutory provision<sup>12</sup> as appropriate to the child or young person concerned<sup>13</sup>.

1 As to the conditions of entitlement see PARA 202 ante.

2 I.e. the date prescribed under the Social Security Contributions and Benefits Act 1992 s 128(1)(a)(i): see PARA 202 ante. The prescribed date is the date on which the period of the award begins: see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 47(2) (added by SI 1988/660).

3 Social Security Contributions and Benefits Act 1992 s 128(2)(a). Regulations must prescribe the manner in which the appropriate maximum family credit is to be determined in any case: s 128(5); and see the text to notes 7-13 infra.

4 The prescribed percentage is 70%: see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 48.

5 Social Security Contributions and Benefits Act 1992 s 128(2)(b).

6 See the Family Credit (General) Regulations 1987, SI 1987/1973, reg 47(1) (amended by SI 1992/2155).

7 I.e. subject to the Family Credit (General) Regulations 1987, SI 1987/1973, reg 46(2)-(7) (as amended).

8 See *ibid* reg 46(1)(a) (amended by SI 1988/660). The credit is specified in the Family Credit (General) Regulations 1987, SI 1987/1973, Sch 4 para 1, col (2): see reg 46(1)(a) (as so amended). As to provisions relating to polygamous marriages see reg 46(2) (as amended), reg 46(3).

9 'Lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person: *ibid* reg 2(1) (definition added by SI 1994/1924); see also the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 2(1) which contains an identical definition.

10 I.e. the credit specified in the Family Credit (General) Regulations 1987, SI 1987/1973, Sch 4 para 1A, col (2): see reg 46(1)(aa) (added by SI 1995/1339).

11 le by virtue of the Family Credit (General) Regulations 1987, SI 1987/1973, reg 7: see PARA 207 post.

12 le the credit specified in *ibid* Sch 4 paras 2, 3: see reg 46(1)(b) (amended by SI 1996/2545).

13 See the Family Credit (General) Regulations 1987, SI 1987/1973, reg 46(1)(b) (as amended: see note 12 *supra*). For the purposes of reg 46 (as amended) the amount of any credit and the age of any child or young person is determined by reference to the credit specified in Sch 4 and the age of the child or young person at the date the date on which the period under the Social Security Contributions and Benefits Act 1992 s 128(3) (period of award: see PARA 203 ante) begins: see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 46(7) (as added). The credit in respect of a child or young person is nil if: (1) his capital exceeds £3,000; (2) his income, other than income consisting of payments of maintenance whether under a court order or not, exceeds the amount specified for him; or (3) he is a patient or in residential accommodation on account of physical or mental handicap or physical or mental illness and has been so accommodated for the 52 weeks immediately before the date of the claim: see reg 46(4)-(6) (reg 46(4) amended by SI 1993/2119). Apart from head (2) *supra*, any earnings of a child or young person are sums to be disregarded in the calculation of earnings: see the Family Credit (General) Regulations 1987, SI 1987/1973, Sch 1 para 2.

## UPDATE

### 202-217 [Working Families' Tax Credit]

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons

who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **204 Calculation of an award**

TEXT AND NOTES--Subject to savings (SI 2003/962), Social Security Contributions and Benefits Act 1992 s 128 repealed: Tax Credits Act 2002 Sch 6. See further PARA 227A.

NOTE 3--See the Tax Credit (New Category of Child Care Provider) Regulations 1999, SI 1999/3110 (made under the Tax Credits Act 1999 s 15 (repealed subject to savings: SI

2003/962)), which make a scheme for establishing a new category of persons, to be approved by an organisation accredited by the Secretary of State, whose charges for providing child care are to be taken into account for the purposes of determining the appropriate amount of working families' tax credit.

NOTE 4--Prescribed percentage now 55 per cent: SI 1987/1973 reg 48 (amended by SI 1999/2487).

NOTE 6--SI 1987/1973 reg 47(1) further amended: SI 1999/2487, SI 2000/440, SI 2000/931, SI 2002/829.

TEXT AND NOTES 7-13--SI 1987/1973 reg 46(1), Sch 4 substituted: SI 2001/367. SI 1987/1973 s 46(1) (as substituted) amended: SI 2001/1351. SI 1987/1973 Sch 4 (as substituted) amended: SI 2001/1141, SI 2001/1351, SI 2002/829, SI 2002/1333.

Subject to SI 1987/1973 reg 46(2)-(7), the appropriate maximum working families' tax credit is the aggregate of (a) in respect of a claimant or, if he is a member of a married or unmarried couple, in respect of the couple, the credit specified in Sch 4 para 1 col (2); (b) in respect of a lone parent who works, or in respect of a claimant who is a member of a married or unmarried couple either or both of whom work, for not less than 30 hours per week, the credit specified in Sch 4 para 2 col (2); (c) in a case to which reg 46A applies, a credit ('childcare tax credit') equal to 70 per cent of the amount of any relevant childcare charges as mentioned and calculated on a weekly basis in reg 46A, subject to a maximum in respect of the claimant's family of whichever the amounts specified in reg 46(1A) applies in the claimant's case; (d) in respect of a lone parent to whom reg 46(1D) applies, or, where the claimant is a member of a married or unmarried couple to either or both of whom reg 46(1D) applies, in respect of the couple, the credit specified in Sch 4 para 3 col (2); (e) in respect of any child or young person for whom the claimant or his partner is treated as responsible by virtue of reg 7, the credit specified in Sch 4 para 4 col (2) or Sch 4 para 5 col (2) as appropriate in respect of the period specified therein; (f) in respect of any child or young person for whom the claimant or his partner is treated as responsible by virtue of reg 7 and who is a member of the claimant's household, (i) where reg 46(1B) applies, and reg 46(1D) does not apply, to the child or young person, the credit specified in Sch 4 para 6(a) col (2); (ii) where reg 46(1D) applies to the child or young person, the credit specified in Sch 4 para 6(b) col (2): reg 46(1) (as substituted).

NOTE 7--SI 1987/1973 reg 46(4)-(6) further amended: SI 2000/931, SI 2001/1141, SI 2002/829. SI 1987/1973 reg 46(5) further amended: SI 2001/367.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(ii) Defining the Conditions of Entitlement/205. Presence in Great Britain.

## **(ii) Defining the Conditions of Entitlement**

### **205. Presence in Great Britain.**

A person is treated as being in Great Britain<sup>1</sup> if, on the date of claim:

- 518 (1) he is present and ordinarily resident in Great Britain; and
- 519 (2) his right to reside or remain in Great Britain is not subject to any limitation or condition<sup>2</sup>; and
- 520 (3) his partner, if any, is ordinarily resident in the United Kingdom; and
- 521 (4) his earnings or the earnings of his partner, if any, derive at least in part from remunerative work in the United Kingdom; and
- 522 (5) his earnings do not wholly derive from remunerative work outside the United Kingdom nor do the earnings of his partner, if any<sup>3</sup>.

<sup>1</sup> The conditions set out in the text constitute an exhaustive definition of presence in Great Britain, and so must be satisfied by a claimant; they are not merely 'deeming' provisions applicable only to certain cases: Decision R(FC)2/93. For the meaning of 'Great Britain' see PARA 15 note 4 ante.

<sup>2</sup> He is subject to the Family Credit (General) Regulations 1987, SI 1987/1973, reg 3(1A) (as added): see reg 3(1)(aa) (added by SI 1996/30). For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, reg 3(1)(aa), a person's right to reside or remain in Great Britain is not to be treated as if it were subject to a limitation or condition if: (1) he is a person recorded by the Secretary of State as a refugee; (2) he is a person who has been granted exceptional leave outside the provisions of the immigration rules within the meaning of the Immigration Act 1971 to remain in the United Kingdom by the Secretary of State; (3) he is a national, or a member of the family of a national, of a state contracting party to the European Economic Area Agreement (Oporto, 21 May 1992; OJ L1, 3.1.94, p 3; Cm 2073); or (4) he is a person who is: (a) lawfully working in Great Britain and is a national of a state with which the Community has concluded an agreement under the EC Treaty (Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) art 238 providing, in the field of social security, for the equal treatment of workers who are nationals of the signatory state and their families; or (b) a member of the family of, and living with, such a person: see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 3(1A) (added by SI 1996/30).

<sup>3</sup> See the Family Credit (General) Regulations 1987, SI 1987/1973, reg 3(1) (amended by SI 1996/30). A person is treated as not being in Great Britain during any period for which he, or his partner, is entitled to be paid family credit or disability working allowance under the law of Northern Ireland: see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 3(2) (amended by SI 1991/2742). For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

## **UPDATE**

### **202-217 [Working Families' Tax Credit]**

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed

but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and

'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **205 Presence in Great Britain**

NOTES--SI 1987/1973 reg 3 further amended: SI 2000/795.

NOTE 2--Heads (1), (2) omitted: SI 1987/1973 reg 3(1A) (amended by SI 1998/563).

Also, heads (5) he is a person who (a) has been given leave to enter, or remain in, the United Kingdom by the Secretary of State on the undertaking of another person, or persons, pursuant to the immigration rules within the meaning of the Immigration Act 1971, to be responsible for his maintenance and accommodation, and (b) has been resident in the United Kingdom for a period of at least five years beginning with his date of entry into the United Kingdom, or the date on which the undertaking was given in respect of him, whichever is the later; or (6) he is a person who (a) has been given leave to enter, or remain in, the United Kingdom by the Secretary of State on the undertaking of another person, or persons, pursuant to the immigration rules mentioned in head (5), to be responsible for his maintenance and accommodation, and (b) has been resident in the United Kingdom for less than five years beginning with his date of entry into the United Kingdom, or the date on which the undertaking was given in respect of him, whichever is the later, but the person giving the undertaking has died or, where the undertaking was given by more than one person, they have all died: SI 1987/1973 reg 3(1A) (amended by SI 2000/2978).

NOTE 3--For 'family credit' read 'working families' tax credit' and for 'disability working allowance' read 'disabled person's tax credit': SI 1987/1973 reg 3(2) (amended by SI 1999/2487).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(ii) Defining the Conditions of Entitlement/206. Remunerative work.

## 206. Remunerative work.

For the purposes of family credit<sup>1</sup>, a person is treated as engaged in remunerative work where:

- 523 (1) the work<sup>2</sup> he undertakes is for not less than 16 hours per week;
- 524 (2) the work is done for payment or in expectation of payment<sup>3</sup>; and
- 525 (3) he is employed at the date of claim and satisfies specific requirements<sup>4</sup>.

In determining for the purposes of head (1) above whether the work a person undertakes is for not less than 16 hours per week:

- 526 (a) there is to be included in the calculation any time allowed for meals or refreshment but only where the person is, or expects to be, paid earnings in respect of that time; and
- 527 (b) if he is a person to whom normal weekly earnings of employed earners<sup>5</sup> applies, the hours worked are to be calculated by reference to the average number of hours which his employer expects him to work in a week; or
- 528 (c) where head (b) above does not apply and:  
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- 49. (i) a recognised cycle of working has been established at the date of claim, the hours worked are to be calculated by reference to the average number of hours worked in a week over the period of one complete cycle (including, where the cycle involves periods in which the person does not normally work, those periods, but disregarding any other absences<sup>6</sup>); or
- 50. (ii) no recognised cycle of working has been established at the date of claim, the hours worked are to be calculated by reference to: (A) the average number of hours worked over the five weeks immediately preceding the week of claim, or such other longer time preceding that week as may, in the particular case, enable the person's weekly average hours of work to be determined more accurately; or (B) where he is a self-employed earner and he has worked for less than five weeks at the date of claim, or he has, in the five weeks immediately preceding the week of claim, increased the number of hours that he works from below 16 hours to 16 hours or more per week, the average number of hours he expects to work in a week<sup>7</sup>.

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Except in these particular provisions, what constitutes remunerative work is a broad question of fact to be determined by examining all the evidence, not just any hours of work formally specified in a contract of employment; it may involve considering what time is necessarily spent carrying out activities in the course of the work in question, especially in occupations where the necessity to work over and above the contractual hours is an integral part of the job<sup>8</sup>. In the case of a self-employed claimant, it may require consideration of activities on top of those which are actually costed<sup>9</sup>.

1. For the purposes of the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended) (income-related benefits) as it applies to family credit, and subject to the Family Credit (General) Regulations 1987, SI 1987/1973, reg 4(3) (as substituted): see the Interpretation Act 1978 s 17(2)(b).

2 The emphasis in this definition is on the work itself, not any particular form of employment relationship: Decision R(FC)2/90.

3 For the meaning of this phrase see PARA 179 note 4 ante.

4 Family Credit (General) Regulations 1987, SI 1987/1973, reg 4(1) (reg 4 substituted by SI 1992/573). A person who does not satisfy all the requirements of the Family Credit (General) Regulations 1987, SI 1987/1973, reg 4(1)(a)-(c) (as substituted) is not to be treated as engaged in remunerative work: see reg 4(2) (as so substituted). Where a person is treated as engaged in remunerative work in accordance with reg 4 (as substituted), he is also to be treated as normally engaged in remunerative work: see reg 4(7) (as so substituted).

Subject to reg 4(6) (as substituted), the requirements of reg 4(5) (as substituted) are that the person:

59 (1) worked not less than 16 hours in either: (a) the week of claim; or (b) either of the two weeks immediately preceding the week of claim; or

60 (2) is expected by his employer to work or, where he is a self-employed earner he expects to work, not less than 16 hours in the week next following the week of claim; or

61 (3) cannot satisfy the requirements of either head (1) above or head (2) supra and at the date of claim he is absent from work by reason of a recognised, customary or other holiday but he is expected by his employer to work or, where he is a self-employed earner he expects to work, not less than 16 hours in the week following his return to work from that holiday (see Decision R(FC) 2/91),

and for the purposes of calculating the number of hours worked, the Family Credit (General) Regulations 1987, SI 1987/1973, reg 4(4)(a) (as substituted and amended) applies to reg 4(5) (as substituted) as it applies to reg 4(1)(a) (as substituted): see reg 4(5) (as so substituted). For the purposes of reg 4(5) (as substituted): (i) work which a person does only qualifies if it is the work he normally does (on which see Decision R(FIS)6/83 and Decision R(FIS)1/84 on students taking up short-term employment; likely future possibilities may need to be considered: Decision R(FIS)2/83), and it is likely to last for a period of five weeks or more beginning with the week of claim; and (ii) a person is treated as not on a recognised, customary or other holiday on any day on which the person is on maternity leave or is absent from work because he is ill: see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 4(6) (substituted by SI 1993/2119).

A person who otherwise satisfies all the requirements of the Family Credit (General) Regulations 1987, SI 1987/1973, reg 4(1) (as substituted) is not to be treated as engaged in remunerative work in so far as: (A) he is engaged by a charitable or voluntary organisation or is a volunteer, where the only payment received by him or due to be paid to him is a payment which is to be disregarded under reg 24(2) and Sch 2 para 2 (as amended); (B) he is engaged in caring for a person in respect of whom he receives payments to which Sch 2 para 24 refers; or (C) he is engaged on a scheme for which a training allowance is being paid: see reg 4(3) (as so substituted; and substituted by SI 1994/2139).

5 le to whom the Family Credit (General) Regulations 1987, SI 1987/1973, reg 14(5) (as substituted) applies: see PARA 208 note 8 post.

6 This qualification had caused problems in relation to persons employed for academic years (see eg Decision R(IS)15/94 on the equivalent income support provision). However, where for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, reg 4(4)(c)(i) (as substituted and amended), a person's recognised cycle of work at a school, other educational establishment, or other place of employment is one year and includes periods of school holidays or similar vacations during which he does not work, those periods and any other periods not forming part of such holidays or vacations during which he is not required to work are to be disregarded in establishing the average hours for which he is engaged in work: reg 4(4A) (added by SI 1995/516).

7 See the Family Credit (General) Regulations 1987, SI 1987/1973, reg 4(4) (as substituted (see note 4 supra); amended by SI 1995/516; and SI 1997/806).

8 Decision R(FC)1/92 (ambulance transport clerk contracted to work 22.5 hours, but shown in practice to work more than the 24 hours per week then required for family credit).

9 Decision R(FIS)6/85 (part time self-employed silversmith allowed to count time spent visiting clients, wholesalers, retailers and the Assay office and in working out ideas for a design competition).

## UPDATE

### 202-217 [Working Families' Tax Credit]

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus:

art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **206 Remunerative work**

TEXT AND NOTE 1--For 'family credit' read 'working families' tax credit': SI 1987/1973 reg 4(1) (amended by SI 1999/2487).

NOTE 4--Or heads (4) cannot satisfy the requirements of head (1) or head (2) and at the date of claim he is absent from work by reason of jury service but he is expected by his employer to work or, where he is a self-employed earner, he expects to work, not less than 16 hours in the week following his return to work from that jury service; (5) cannot satisfy the requirements of head (1) or head (2) at the date of claim because she is on maternity leave at that date but prior to the commencement of her maternity leave, she worked, on average, not less than 16 hours a week, and she is entitled to maternity allowance or statutory maternity pay at the date of the claim; or (6) cannot satisfy the requirements of head (1) or head (2) because he is on paternity leave at that date but, prior to the commencement of his paternity leave, he worked, on average, not less than 16 hours a week: SI 1987/1973 reg 4(5) (amended by SI 2000/2978, SI 2001/892, SI 2003/44). Any period where a person is absent from work by reason of jury service is disregarded in establishing the average hours for which he is engaged in work: SI 1987/1973 reg 4(4B) (added by SI 2000/2978). 'Maternity allowance' is to be construed in accordance with the Social Security Contributions and Benefits Act 1992 s 35 (see PARA 76): SI 1987/1973 reg 2(1) (definition added by SI 2001/892). 'Statutory maternity pay' is to be construed in accordance with the Social Security Contributions and Benefits Act 1992 Pt XII (ss 164-171) (see EMPLOYMENT vol 39 (2009) PARA 365 et seq): SI 1987/1973 reg 2(1) (definition added by SI 2001/892).

Also, heads (D) he is participating in the programme known as the intensive activity period of the New Deal pilots for 25 plus as defined for the purposes of the Social Security (New Deal Pilot) Regulations 1999, SI 1999/3156; (E) he is participating in the Intensive Activity Period specified in the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 75(1)(a)(iv) (see PARA 304) or in the Intensive Activity Period for 50 plus; (F) he is engaged in an activity in respect of which a sports award has been made, or is to be made, to him, and no other payment is made or is expected to be made to him; or (G) he is in receipt of an employment zone subsistence allowance: SI 1987/1973 reg 4(3) (head (D) added by SI 1999/3156; head (E) added by SI 1999/2165; head (F) added by SI 2001/1334; head (G) added by SI 2000/2978).

TEXT AND NOTES 5-7--Also, head (d) in the case of a woman on maternity leave at the date of the claim, the hours worked must be calculated on the basis of a declaration made by her of the average hours worked per week prior to the commencement of her maternity leave; head (e) in the case of a man on paternity leave at the date of the claim, the hours worked must be calculated on the basis of a declaration made by him of the average hours worked per week prior to the commencement of his paternity leave: SI 1991/2887 reg 4(4) (amended by SI 2001/892, SI 2003/44).

NOTE 7--SI 1987/1973 reg 4(4) further amended: SI 2000/1807, SI 2000/2978, SI 2001/892.

NOTE 8--Subject to savings (see SI 2003/962) family credit (working families' tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(ii) Defining the Conditions of Entitlement/207. The treatment of families.

## 207. The treatment of families.

The general rules relating to the entitlement to family credit of members of a family have already been discussed<sup>1</sup>.

A person is to be treated as responsible for a child or young person who is normally living with him<sup>2</sup>. Where a child or young person spends equal amounts of time in different households, or where there is a question as to which household he is living in, the child or young person is to be treated<sup>3</sup> as normally living with:

- 529 (1) the person who is receiving child benefit<sup>4</sup> in respect of him; or
- 530 (2) if there is no such person:
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- 51. (a) where only one claim for child benefit has been made in respect of him, the person who made that claim; or
- 52. (b) in any other case the person who has the primary responsibility for him<sup>5</sup>.
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Where a claimant or any partner is treated as responsible for a child or young person<sup>6</sup>, that child or young person and any child of that child or young person is to be treated as a member of the claimant's household<sup>7</sup>. Where the claimant and any partner of his are living apart from each other they are treated as members of the same household unless they do not intend to resume living together<sup>8</sup>.

1 See PARA 175 ante.

2 Ie subject the provisions of the Family Credit (General) Regulations 1987, SI 1987/1973, reg 7: reg 7(1). For the purposes of reg 7 a child or young person is to be treated as the responsibility of only one person during the period of an award and any person other than the one treated as responsible for the child or young person under reg 7(1)-(2) is to be treated as not so responsible: see reg 7(3). For the meaning of 'child' see PARA 175 note 1 ante; and for the meaning of 'young person' see PARA 202 note 11 ante.

3 Ie for the purposes of ibid reg 7(1); see the text to note 2 supra.

4 As to child benefit see PARA 237 et seq post.

5 See the Family Credit (General) Regulations 1987, SI 1987/1973, reg 7(2); and Decision CFC/1537/1995. 'Primary responsibility' is not defined for these purposes.

6 Ie by virtue of the Family Credit (General) Regulations 1987, SI 1987/1973, reg 7: see the text to notes 2-5 supra.

7 Ie except in a case to which ibid reg 8(2) applies: see reg 8(1). For the meaning of 'household' see PARA 175 note 1 ante. However, a child or young person is not to be treated as a member of the claimant's household in any case where the child or young person: (1) is a patient or in residential accommodation on account of physical or mental handicap or physical or mental illness and has been so accommodated for the 12 weeks immediately before the date of claim and is no longer in regular contact with the claimant or any member of the claimant's household; or (2) has been placed with the claimant or his partner prior to adoption; or (3) has been placed with the claimant or his partner by a local authority under the Children Act 1989 s 23(2)(a) or by a voluntary organisation under s 59(1)(a); or (4) has been placed for adoption with the claimant or his partner pursuant to a decision under the Adoption Agencies Regulations 1983, SI 1983/1964, or the corresponding provisions in Scotland; or (5) is detained in custody under a sentence imposed by a court: see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 8(2) (amended by SI 1992/573).

8 See the Family Credit (General) Regulations 1987, SI 1987/1973, reg 9(1) (substituted by SI 1993/2119). However, where one of the members of a married or unmarried couple is a hospital patient or detained in custody he is not to be treated, on this account, as ceasing to be a member of the same household as his partner: (1) unless he has been a patient in a hospital for 52 weeks or more; or (2) unless he is a patient detained in a special hospital (see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 9(2)(b)); or (3) unless he is detained in custody whilst serving a sentence of 52 weeks or more imposed by a court, but is to be treated as not being a member of the same household as his partner wherever the conditions in heads (1), (2) or (3) supra are fulfilled: see reg 9(2) (amended by SI 1988/660).

## **UPDATE**

### **202-217 [Working Families' Tax Credit]**

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001,

during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **207 The treatment of families**

TEXT AND NOTE 1--For 'family credit' read 'working families' tax credit': SI 1987/1973 reg 4(1) (amended by SI 1999/2487).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(iii) Income/208. Calculation of income.

### (iii) Income

#### 208. Calculation of income.

The income of a claimant<sup>1</sup> is calculated on a weekly basis:

- 531 (1) by ascertaining<sup>2</sup> the amount of his normal weekly income;
- 532 (2) by adding to that amount any weekly income<sup>3</sup>; and
- 533 (3) by then deducting any relevant child care charges<sup>4</sup> from any earnings which form part of the normal weekly income, up to a maximum deduction in respect of the claimant's family of a prescribed amount per week<sup>5</sup>.

Where a claimant's income consists of earnings from employment as an employed earner<sup>6</sup>, except where those earnings arise from employment as a director, his normal weekly earnings from that employment are, subject to statutory provision<sup>7</sup>, to be determined by taking account of his earnings from that employment which are received in the assessment period relevant to his case, whether the amount so received was earned in respect of that period or not, and in accordance with statutory provision<sup>8</sup>.

Where an adjudication officer considers, on the basis of available evidence, that the claimant has elected to work fewer hours than he would otherwise have worked in the whole or part of the assessment period<sup>9</sup> with the result that, but for this provision<sup>10</sup>, he would secure entitlement or increased entitlement to family credit, the adjudication officer may determine the claimant's normal weekly earnings by taking account of his earnings received during the period equal to, and ending immediately before, the period determined<sup>11</sup>, unless the claimant satisfies him that the reason for reducing his hours of work was otherwise than to secure such an entitlement or increased entitlement<sup>12</sup>.

Where<sup>13</sup> a claimant's income consists of earnings from employment as a self-employed earner<sup>14</sup>, his normal weekly earnings are to be determined<sup>15</sup>, by reference to his weekly earnings from that employment:

- 534 (a) Except where head (b) or head (c) below applies, over a period of six consecutive complete months up to and including the second last complete month<sup>16</sup> immediately preceding the date of claim; or
- 535 (b) Except where head (c) below applies, where the claimant provides in respect of the employment a statement of his earnings and expenses for the six consecutive complete months up to and including the last complete month immediately preceding the date of claim, over that period of six months; or
- 536 (c) where the claimant provides in respect of the employment a profit and loss account and, where appropriate, a trading account or a balance sheet<sup>17</sup> or both, and the profit and loss account is in respect of a period of at least six months but not exceeding 15 months and that period terminates within the 12 months preceding the date of claim, over that period; or
- 537 (d) over such other period of weeks or months preceding the week in which the date of claim falls as may, in any particular case, enable his normal weekly earnings to be determined more accurately<sup>18</sup>.

For the purposes of ascertaining a claimant's normal weekly earnings there is to be disregarded, where the claimant is a self-employed earner, any week or period of weeks in his assessment period during which no activities have been carried out for the purposes of the business, and his normal weekly earnings are to be determined by reference to his earnings in the remainder of that period<sup>19</sup>.

Where a claimant's normal weekly income does not consist of earnings, or includes income that does not consist of earnings, that income is to be determined by reference to his weekly income over a period of 26 weeks immediately preceding the week in which the date of claim falls, or over such period immediately preceding that week as may, in any particular case, enable his normal weekly income to be determined more accurately<sup>20</sup>.

1     Ie for the purposes of the Social Security Contributions and Benefits Act 1992 s 128(1): see the Interpretation Act 1978 s 17(2)(b). For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, reg 13(1) (as amended) 'income' includes capital treated as income under reg 25 (as amended) and income which a claimant is treated as possessing under reg 26 (as amended) (notional income): reg 13(2) (substituted by SI 1991/1520).

2     Ie in accordance with the Family Credit (General) Regulations 1987, SI 1987/1973, Pt IV Chs II (regs 13-18) (as amended), V (regs 24-27) (as amended).

3     Ie calculated under *ibid* reg 36 (as amended) (calculation of tariff income from capital)

4     Ie to which *ibid* reg 13A (as added and amended) applies. As to the treatment of child care charges see reg 13A (as added and amended). A challenge to the lack of any such provision prior to that date was mounted in Decision CFC/19/1990, which was considered as Case C-116/94 *Meyers v Adjudication Officer* [1995] ECR I-2131, 1995] All ER (EC) 705, ECJ, where it was held that family credit is sufficiently concerned with employment to come within the scope of the Equal Treatment Directive (ie EC Council Directive 76/207 (L39, 14.2.76, p 40), thus giving substance to the challenge. As to EC social security law see PARA 451 *et seq* post.

5     See the Family Credit (General) Regulations 1987, SI 1987/1973, reg 13(1) (amended by SI 1994/1924; and SI 1996/599). As to capital treated as income see PARA 211 post; as to notional capital see PARA 215 post; and as to tariff income see PARA 213 post. As to the calculation of weekly amount of income see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 18 (as amended). As to the special rules relating to the income of children and young persons see reg 27 (as amended).

6     For the meaning of 'employed earner' see PARA 32 ante. As to the normal weekly earnings of directors see reg 14A (as added and amended). As to the calculation of net earnings of directors see reg 20ZA (as added and amended).

7     Ie subject *ibid* reg 14(3)-(6) (as substituted and amended).

8     Ie in accordance with the provisions of *ibid* reg 14(2)-(7) (as substituted and amended): see reg 14(1) (reg 14 substituted by SI 1992/573; amended by SI 1994/527; and SI 1996/3137). A claimant's assessment period, subject to the Family Credit (General) Regulations 1987, SI 1987/1973, reg 14(2A)-(6) (as substituted and amended), is in respect of a claimant whose pay period is: (1) a week: (a) except where head (1)(b) *infra* applies, a period of six consecutive weeks immediately preceding the week of claim; or (b) where the adjudication officer has insufficient information for the claimant's normal weekly earnings to be determined in accordance with head (1)(a) *supra*, a period of six consecutive weeks ending with the week before the week immediately preceding the week of claim; (2) a fortnight: (a) except where head (2)(b) *infra* applies, a period of three consecutive fortnights immediately preceding the week of claim; or (b) where the adjudication officer has insufficient information for the claimant's normal weekly earnings to be determined in accordance with head (1) (a) *supra*, a period of three consecutive fortnights ending with the fortnight before the week immediately preceding the week of claim; (3) four weeks or a month, a period of 12 consecutive weeks or, as the case may be, three consecutive months, immediately preceding the week of claim; (4) any period of less than one month (a shorter period), other than one to which head (1) or head (3) *supra* refers, six consecutive shorter periods immediately preceding the week of claim; (5) any period of more than one month (a longer period), a period of one year ending immediately before the week of claim: see reg 14(2) (as so substituted; amended by SI 1994/2139; and SI 1996/462).

As to the special provisions applying where there is a trade dispute during the assessment period see reg 14(3) (as so substituted). Where a claimant's earnings, whether during his assessment period or not, include a bonus or commission which is paid within 52 weeks preceding the week of claim and that bonus or commission is paid separately from his other earnings or is paid in respect of a period longer than the pay period relating to the other earnings with which it is paid, his normal weekly earnings are to be treated as including an amount in

respect of that bonus or commission calculated in accordance with reg 20A (as added and amended) (calculation of bonus or commission): see reg 14(4) (as so substituted).

Where at the date of claim: (i) the claimant: (A) has been in his employment, or (B) after a continuous period of interruption exceeding four weeks, has resumed his employment, or (C) has changed the number of hours for which he is contracted to work; and (ii) the period of his employment or the period since he resumed his employment or the period since the change in the number of hours took place, as the case may be, is less than the assessment period in reg 14(2) (as substituted and amended) appropriate in his case, his normal weekly earnings must be determined in accordance with reg 14(6) (as substituted and amended): see reg 14(5) (as so substituted).

In a case to which reg 14(6) (as substituted and amended) applies, the Secretary of State must require the claimant's employer to furnish him with an estimate of the claimant's likely earnings for the pay period for which he is or will normally be paid and the claimant's normal earnings must be determined by taking account of that estimate: see reg 14(6) (as so substituted; and amended by SI 1996/3137). As to the Secretary of State see PARA 1 ante.

9     le the assessment period referred to in the Family Credit (General) Regulations 1987, SI 1987/1973, reg 14(2) (as substituted and amended); see note 8 supra.

10    le but for ibid reg 14(2A) (as added and amended).

11    le the period determined in accordance with ibid reg 14(2) (as substituted and amended); see note 8 supra.

12    See ibid reg 14(2A) (added by SI 1994/2139; amended by SI 1996/3137).

13    le subject to the Family Credit (General) Regulations 1987, SI 1987/1973, reg 17 (as substituted) (periods to be disregarded): see PARA 208 post.

14    For the meaning of 'self-employed earner' see PARA 32 ante.

15    le determined subject to the Family Credit (General) Regulations 1987, SI 1987/1973, reg 15(2) (as substituted); see note 18 infra.

16    A 'complete month' begins on the first day of the month and ends on the last day of the month: ibid reg 15(4) (added by SI 1994/527).

17    'Balance sheet' means a statement of the financial position of the employment disclosing its assets, liabilities and capital at the end of the period in question: Family Credit (General) Regulations 1987, SI 1987/1973, reg 15(1A)(a) (reg 15(1A) added by SI 1988/1970). 'Profit and loss account' means a financial statement showing the net profit or loss of the employment for the period in question: Family Credit (General) Regulations 1987, SI 1987/1973, reg 15(1A)(b) (as so added). 'Trading account' means a financial statement showing the revenue from sales, the cost of those sales and the gross profit arising during the period in question: reg 15(1A)(c) (as so added).

18    See ibid reg 15(1) (amended by SI 1988/1970; SI 1994/527; and SI 1994/2139). The residual head (d) in the text is an alternative to any of the others: Decision CFC/5/1993. Subject to the Family Credit (General) Regulations 1987, SI 1987/1973, reg 17 (as substituted), in a case where the claimant has been in employment as a self-employed earner for less than seven complete months, his normal weekly earnings are to be determined over a period of six consecutive complete months commencing with the first complete month after the claimant began that employment, and that determination is to be based on either:

62    (1)    where the claimant provides in relation to that employment a statement of his earnings and expenses for the complete months up to and including the last complete month immediately preceding the date of claim, the earnings he received in those months; or

63    (2)    where no such statement is provided, any earnings he received in the period up to and including the second last complete month immediately preceding the date of claim,

in either head (1) supra or head (2) supra together with an estimate of the earnings likely to be received in the balance of the six month period: see reg 15(2) (substituted by SI 1994/527).

19    See the Family Credit (General) Regulations 1987, SI 1987/1973, reg 17(a) (reg 17 substituted by SI 1994/527).

20    See the Family Credit (General) Regulations 1987, SI 1987/1973, reg 16(1) (amended by SI 1988/1970; SI 1993/315; and SI 1993/2119). As to special provisions which apply to maintenance and child support payments

see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 16(2) (as amended), reg 16(2A) (as added and amended), reg 16(3).

## **UPDATE**

### **202-217 [Working Families' Tax Credit]**

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of

facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **208 Calculation of income**

NOTE 1--Subject to savings (SI 2003/962), Social Security Contributions and Benefits Act 1992 s 128 repealed: Tax Credits Act 2002 Sch 6. See further PARA 227A.

NOTE 4--SI 1987/1973 reg 13A renumbered as reg 46A (amended by SI 1999/714, SI 1999/2487, SI 2000/795, SI 2001/892, SI 2002/14, SI 2002/525, SI 2002/1696, SI 2003/44, SI 2003/44). EC Council Directive 76/207 repealed (from 15 August 2009) and replaced (member state implementation measures to be in place by 15 August 2008) by European Parliament and EC Council Directive 2006/54 (OJ L204 26.7.2006 p 23): see DISCRIMINATION vol 13 (2007 Reissue) PARA 305.

TEXT AND NOTES 6-8--Reference to SI 1987/1973 reg 14(2A)-(6) is now to reg 14(2A)-(6C): reg 14(2) (amended by SI 2001/892). Extra-statutory payments made by an employer to an employee to supplement statutory maternity payments are taken into account for the purposes of computing the amount of working families' tax credit to be paid to the employee: see SI 1987/1973 regs 2(1), 14(6A)-(6C) (reg 2(1) amended, reg 14(6A)-(6C) added, by SI 2001/892).

NOTE 7--Now subject to SI 1987/1973 reg 14(3)-(6C): reg 14(1) (amended by SI 2001/892).

NOTE 8--An absence from work by reason of jury service does not affect the claimant's entitlement to working families' tax credit: SI 1987/1973 reg 14(3) (amended by SI 2000/2978).

TEXT AND NOTE 9--For 'adjudication officer' read 'appropriate officer': SI 1987/1973 reg 14(2A) (amended by SI 1999/2487).

TEXT AND NOTE 11--For 'family credit' read 'working families' tax credit': SI 1987/1973 reg 14(2A) (amended by SI 1999/2487).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(iii) Income/209. Earnings of employed earners.

## **209. Earnings of employed earners.**

In the case of employment as an employed earner, 'earnings' means any remuneration or profit derived from that employment and includes, subject to heads (i)-(iv) below:

- 538 (1) any bonus or commission;
- 539 (2) any holiday pay except any payable more than four weeks after termination of the employment;
- 540 (3) any payment by way of a retainer;
- 541 (4) any payment made by the claimant's employer in respect of any expenses not wholly, exclusively and necessarily incurred in the performance of the duties of the employment, including any payment made by the claimant's employer in respect of:
- 45 53. (a) travelling expenses incurred by the claimant between his home and place of employment;
- 54. (b) Expenses incurred by the claimant under arrangements made for the care of a member of his family owing to the claimant's absence from home<sup>1</sup>;
- 46 542 (5) any award of compensation made under statutory provision for unfair dismissal<sup>2</sup>;
- 543 (6) certain sums deemed to be earnings for social security purposes<sup>3</sup>;
- 544 (7) any statutory sick pay<sup>4</sup>,

but earnings do not include:

- 545 (i) any payment in kind<sup>5</sup>;
- 546 (ii) any payment in respect of expense wholly, exclusively and necessarily incurred in the performance of the duties of the employment<sup>6</sup>;
- 547 (iii) any occupational pension;
- 548 (iv) any statutory maternity pay or a corresponding benefit under any enactment having effect in Northern Ireland<sup>7</sup>.

For the purposes of the normal weekly earnings of employed earners<sup>8</sup> the earnings of a claimant to be taken into account are his average weekly net earnings and where an estimate of earnings has been made in his case, as estimated, and those weekly net earnings are to be determined in accordance with statutory provision<sup>9</sup>. A claimant's net earnings are<sup>10</sup> to be calculated by taking into account his gross earnings<sup>11</sup> from that employment, less:

- 549 (A) any amount deducted from those earnings by way of income tax, primary Class 1 contributions under the Social Security Act 1986; and
- 550 (B) one-half of any sum paid by the claimant in respect of a pay period by way of a contribution towards an occupational or personal pension scheme<sup>12</sup>; and
- 551 (C) the net amount of bonus or commission if any which is paid separately from his other earnings or is paid in respect of a period longer than the pay period relating to the other earnings with which it is paid and that net amount is the gross

amount of that bonus or commission after deducting from it sums calculated in accordance with statutory provision<sup>13</sup>.

The average is then worked out on a formula basis<sup>14</sup>, with any fluctuations in net earnings having been removed, also on a formula basis<sup>15</sup>. There must be disregarded from a claimant's net earnings, any sum, where applicable, specified by statutory provision<sup>16</sup>.

1 There is, however, a disregard of child care charges up to a set maximum: see PARA 208 note 4 ante.

2 See generally EMPLOYMENT vol 40 (2009) PARA 712 et seq.

3 Ie any such sum as is referred to in the Social Security Contributions and Benefits Act 1992 s 112(3) (as amended): see PARA 33 note 23 ante.

4 As to statutory sick pay see EMPLOYMENT vol 39 (2009) PARA 498 et seq.

5 Ie subject to the Family Credit (General) Regulations 1987, SI 1987/1973, reg 19(3). Where living accommodation is provided for a claimant by reason of his employment, the claimant is treated as being in receipt of weekly earnings of an amount equal to:

64 (1) where no charge is made in respect of the provision of that accommodation, £12;

65 (2) where a charge is made and that weekly charge is less than £12, the amount of the difference,

except that where the claimant satisfies the adjudication officer that the weekly value to him of the provision of that accommodation is an amount less than the amount in head (1) or head (2) supra, as the case may be, he is to be treated as being in receipt of that lesser value: see reg 19(3); and Decisions R(FC)2/90; R(FC)1/94.

6 This only applies to amounts paid by the employer in respect of expenses: Decision R(FC)1/90. Any amounts paid out by the claimant himself must be taken into account when calculating his net earnings under the Family Credit (General) Regulations 1987, SI 1987/1973, reg 20 (as amended); see notes 9-16 infra.

7 See *ibid* reg 19(2) (amended by SI 1993/315). For the meaning of 'employed earner' see PARA 32 ante.

8 Ie for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, reg 14 (as substituted and amended): see PARA 208 ante.

9 Ie in accordance with *ibid* reg 20(2)-(6) (as added and amended): see reg 20(1) (substituted by SI 1992/573; and amended by SI 1996/3137).

10 Ie except where the Family Credit (General) Regulations 1987, SI 1987/1973, reg 20(4) (as amended) applies: see note 13 infra.

11 The use of the word 'earnings' means that there can be deducted from the gross income any amounts of expenses wholly, exclusively and necessarily incurred in the performance of the duties of the employment: Decision R(FC)1/90, applying *Parsons v Hogg* [1985] 2 All ER 897, sub nom *Chief Adjudication Officer v Hogg* [1985] 1 WLR 1100, CA, which was decided under the previous family income supplement legislation.

12 Where the claimant contributes to an occupational scheme and a personal scheme, half of each of the contributions is allowable: Decision R(FC)1/90. As to personal and occupational pension schemes see PARA 710 et seq post.

13 Ie in accordance with the Family Credit (General) Regulations 1987, SI 1987/1973, reg 20A(a)-(c) (as added and amended) (calculation of bonus or commission): reg 20(3) (amended by SI 1992/573; SI 1994/2139; and SI 1996/3137). As to the special provisions for the calculation of the average weekly net earnings where the claimant's earnings have had to be estimated see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 20(4) (as amended).

14 Where a claimant's average net earnings for his pay period have been calculated in accordance with *ibid* reg 20(5) (as added) and his pay period is:

66 (1) a week, a fortnight or four weeks, his average net earnings for his pay period are divided by the number of weeks in that period;

67 (2) a month, his average net earnings are multiplied by 12, the resulting product divided by 52;

68 (3) any shorter or longer period than those referred to in head (1) or head (2) supra, his average net earnings for his pay period are multiplied by seven and the product divided by the number equal to the number of days in his pay period,

and the resulting amount is his average weekly net earnings: see reg 20(6) (added by SI 1992/573).

15 When a claimant's net earnings have been calculated in accordance with the Family Credit (General) Regulations 1987, SI 1987/1973, reg 20(3) (as amended), his average net earnings in respect of his pay period are to be calculated as follows (see reg 20(5)) (added by SI 1992/573):

69 (1) the net earnings in each of the pay periods in his assessment period are to be aggregated, that total is then to be divided by the number of pay periods in his assessment period and the resulting amount is the average net earnings for his pay period;

70 (2) where in respect of any pay period, a claimant's net earnings are 20% or more higher, or 20% or more lower, than his average net earnings, those net earnings and that pay period are to be omitted, his assessment period must be reduced accordingly and his average net earnings must, subject to head (3) infra, be re-calculated in accordance with head (1) supra;

71 (3) where the operation of head (2) supra results in no pay period remaining in a claimant's assessment period there must be omitted from the assessment period any pay period in which no earnings are received or in which the net earnings received are for a period longer than his normal pay period and his average net earnings must be re-calculated in accordance with head (1) supra;

72 (4) where the operation of head (3) supra results in no pay periods remaining, regs 14(6) (as substituted and amended) (normal weekly earnings of employed earners), and 20(4) (as amended) applies in his case.

Fluctuating earnings have always caused problems in family credit law; the initial approach was to deal with them largely on a discretionary basis, but that was replaced in 1992 by a formulaic approach which is simpler mathematically, but may produce a less realistic result, more dependent on the possibly fortuitous factors of when the claim was made and the earnings pattern immediately before that.

16 As specified in the Family Credit (General) Regulations 1987, SI 1987/1973, Sch 1: see reg 20(2), Sch 1. The sums specified in Sch 1 are: (1) any earnings derived from employment which are payable in a country outside the United Kingdom where there is a prohibition against the transfer to the United Kingdom of those earnings; (2) any earnings of a child or young person; (3) where a payment of earnings is made in a currency other than sterling, any banking charge or commission payable in converting that payment to sterling.

## UPDATE

### 202-217 [Working Families' Tax Credit]

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a

training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any

such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **209 Earnings of employed earners**

TEXT AND NOTES 5-7--Maternity allowance and statutory maternity pay paid to an employed earner are not to be treated as earnings for these purposes: see SI 1987/1973 reg 19(5), (6) (added by SI 2001/892). For the meaning of 'maternity allowance' and 'statutory maternity pay' see PARA 206.

NOTE 7--SI 1987/1973 reg 19(2) amended: SI 2003/44.

NOTE 13--SI 1987/1973 reg 20(4) further amended: SI 2001/892.

NOTE 15--Subject to savings (see SI 2003/962) family credit (working families' tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(iii) Income/210. Earnings of self-employed earners.

## **210. Earnings of self-employed earners.**

Subject to statutory provision<sup>1</sup>, in the case of employment as a self-employed earner, 'earnings' means the gross receipts of the employment<sup>2</sup>.

The earnings of a claimant to be taken into account are<sup>3</sup> in the case of a self-employed earner who is engaged in employment on his own account<sup>4</sup>, the net profit derived from that employment<sup>5</sup>. For this purpose<sup>6</sup> the net profit of the employment is<sup>7</sup> to be calculated by taking into account the earnings of the employment received in the assessment period, less:

- 552 (1) subject to statutory provision<sup>8</sup>, any expenses wholly and exclusively defrayed<sup>9</sup> in that period for the purposes of that employment;
- 553 (2) an amount in respect of income tax and social security contributions<sup>10</sup>; and
- 554 (3) one-half of the amount in respect of any qualifying premium<sup>11</sup>.

With regard to expenses, it is provided that no deduction is to be made<sup>12</sup> in respect of:

- 555 (a) any capital expenditure;
- 556 (b) the depreciation of any capital asset<sup>13</sup>;
- 557 (c) any sum employed, or intended to be employed, in the setting up or expansion of the employment;
- 558 (d) any loss incurred before the beginning of the assessment period;
- 559 (e) the repayment of capital on any loan taken out for the purposes of the employment;
- 560 (f) any expenses incurred in providing business entertainment<sup>14</sup>.

A deduction is to be made under statutory provision<sup>15</sup> in respect of:

- 561 (i) the repayment of capital on any loan used for the replacement in the course of business of equipment or machinery, and the repair of an existing business asset except to the extent that any sum is payable under an insurance policy for its repair<sup>16</sup>;
- 562 (ii) the excess of any VAT paid over VAT received in the assessment period<sup>17</sup>;
- 563 (iii) any income expended in the repair of an existing business asset except to the extent that any sum is payable under an insurance policy for its repair<sup>18</sup>;
- 564 (iv) any payment of interest on a loan taken out for the purposes of the employment<sup>19</sup>.

On general principles, where expense is incurred partly for business purposes and partly for private purposes, it may be apportioned, preferably in a similar manner to that operated for income tax purposes<sup>20</sup>.

There is to be disregarded from a claimant's net profit any sum, where applicable, specified under statutory provision<sup>21</sup>.

Where a claimant is engaged in employment as a self-employed earner and he is also engaged in one or more other employments as a self-employed or employed earner any loss incurred in

any one of his employments must not be offset against his earnings in any other of his employments<sup>22</sup>.

1     le subject to the Family Credit (General) Regulations 1987, SI 1987/1973, reg 21(2) (as amended), and reg 21(3) (as added): see note 2 infra.

2     See *ibid* reg 21(1) (amended by SI 1994/2139). For the meaning of 'self-employed earner' see PARA 32 ante.

The gross receipts of the employment include any allowance paid under the Employment and Training Act 1973 s 2 (as substituted and amended) to the claimant for the purpose of assisting him in carrying on his business, unless at the date of claim the allowance has been terminated (see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 21(1) (as so amended)) but do not include any payments to which Sch 2 para 24 refers (see reg 21(3) (as added)) (any payment made by a health authority, local authority or voluntary organisation to the claimant in respect of a person who is not normally a member of the claimant's household but is temporarily in his care (see Sch 2 para 24)). On general principles, the receipts must be of an income nature, and so do not include capital receipts, including business loans or the proceeds of sale of capital items: Decision CFC/3/1992. As to the equivalent provisions in relation to income support see PARA 189 ante. If a dispute arises as to whether an item is income or capital, commercial accounting principles should be followed unless they conflict with the regulations: see Decision R(FC)1/91 para 38.

3     le for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, reg 15 (as amended): see PARA 208 ante.

4     In the case of a self-employed earner whose employment is carried on in partnership or is that of a share fisherman within the meaning of the Social Security (Mariner's Benefits) Regulations 1975, SI 1975/529, there are provisions for calculating his share of the net profit: see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 22(1)(b), (4), (5) (as amended).

5     See *ibid* reg 22(1)(a).

6     le for the purpose of *ibid* reg 22(1)(a): see the text to note 5 supra.

7     le except where *ibid* reg 22(3A) (as added), reg 22(9) (as amended) or reg 22(10) (as substituted) applies.

8     le subject to *ibid* reg 22(5)-(7) (as amended).

9     A deduction may not be made under *ibid* reg 22(3)(a) (as amended), reg 22(3A)(a) (as added), reg 22(4) (as amended) or reg 22(4A) (as added), as the case may be, in respect of any sum unless it has been expended for the purposes of the business: reg 22(8)(a) (amended by SI 1988/1970). An adjudication officer must refuse to make a deduction in respect of any expenses under any of those provisions where he is not satisfied that expense has been defrayed or given the nature and the amount of the expense that it has been reasonably incurred: see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 22(7) (amended by SI 1988/1970).

10    As to the calculations for the amounts deductible for income tax and contributions see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 23 (as amended).

11    *Ibid* reg 22(3) (amended by SI 1988/1970; and SI 1994/527). As to the qualifying premium see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 22(13) (as added). As to the special provisions which apply where the claimant has provided a profit and loss account or a balance sheet or both under reg 15(1)(b) (as substituted) (see PARA 208 ante) see reg 22(3A) (as added and amended), reg 22(4A) (as added). As to the special provisions which apply where the claimant has only recently commenced employment as a self-employed earner see reg 22(10) (as substituted). 'Qualifying premium' means any premium which at the date of claim is payable periodically in respect of a retirement annuity contract or a personal pension scheme: reg 22(12)(a) (reg 22(12) substituted by SI 1993/2119; and amended by SI 1994/527). Its amount in relation to the assessment period is calculated under the Family Credit (General) Regulations 1987, SI 1987/1973, reg 22(13) (as added).

Where a claimant is engaged in employment as a child minder the net profit of the employment is one-third of the earnings of that employment less the usual deductions for income tax and social security contributions and qualifying premia: see reg 22(9) (as amended). As to the calculation of income on a weekly basis see reg 13 (as amended). As to the deduction of tax and contributions for self-employed earners see reg 23 (as amended).

12    le under *ibid* reg 22(3)(a) (as amended), reg 22(3A) (as added), reg 22(4) (as amended) or reg 22(4A) (as added) as the case may be.

13 Where, however, the claimant's earnings are being assessed from a profit and loss account or balance sheet, it is necessary to take into account opening and closing stock: Decision CFC/041/1993, following Decision CFC/019/1993, though cf Decision CFC/010/1993.

14 See the Family Credit (General) Regulations 1987, SI 1987/1973, reg 22(5) (amended by SI 1988/1970).

15 See note 12 *supra*.

16 See the Family Credit (General) Regulations 1987, SI 1987/1973, reg 22(6) (amended by SI 1988/1970).

17 See the Family Credit (General) Regulations 1987, SI 1987/1973, reg 22(8)(b)(i).

18 See *ibid* reg 22(8)(b)(ii).

19 See *ibid* reg 22(8)(b)(iii).

20 Decision R(FC)1/91.

21 As specified in the Family Credit (General) Regulations 1987, SI 1987/1973, Sch 1: see reg 22(2). As to the sums specified in Sch 1 see PARA 209 note 16 *ante*.

22 See *ibid* reg 22(11); Decision R(FC)1/93. However, before calculating any profit and loss in a case where there are two or more employments, it may be necessary to apportion the expenses incurred between those employments and this does not fall foul of the Family Credit (General) Regulations 1987, SI 1987/1973 reg 22(11): see Decision CFC/836/1995.

## UPDATE

### 202-217 [Working Families' Tax Credit]

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during

that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **210 Earnings of self-employed earners**

NOTE 2--Maternity allowance paid to a self-employed earner is not to be treated as earnings for these purposes: SI 1987/1973 reg 21(4) (added by SI 2001/892). For the meaning of 'maternity allowance' see PARA 206.

SI 1987/1973 Sch 1 para 24 amended by SI 2002/2469 to take account of primary care trusts.

NOTE 9--For 'adjudication officer' read 'appropriate officer': SI 1987/1973 reg 22(7) (amended by SI 1999/2487).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(iii) Income/211. Calculation of income other than earnings.

## **211. Calculation of income other than earnings.**

The income of a claimant which does not consist of earnings to be taken into account<sup>1</sup> must, subject to statutory provision<sup>2</sup>, be his gross income and any capital treated as income<sup>3</sup>. There must be disregarded from the calculation of a claimant's gross income<sup>4</sup> any sum, where applicable, specified in a prescribed provision<sup>5</sup>.

The forms of capital which are to be treated as income are:

- 565 (1) any capital payable by instalments which are outstanding at the date of claim, if the aggregate of the instalments outstanding and the amount of the claimant's capital otherwise calculated in accordance with statutory provision<sup>6</sup> exceeds a prescribed amount<sup>7</sup>;
- 566 (2) any payment received under an annuity;
- 567 (3) any career development loan paid pursuant to statutory provision<sup>8</sup>.

<sup>1</sup> See PARA 208 note 20 ante.

<sup>2</sup> I.e. subject to the Family Credit (General) Regulations 1987, SI 1987/1973, reg 24(2)-(4A) (as added and amended): see note 5 infra.

<sup>3</sup> I.e. any capital treated as income under *ibid* regs 25 and 27 (both as amended): see reg 24(1) (amended by SI 1990/1549; and SI 1993/2119). There is included as income to be taken into account under reg 24(1) (as amended) any payment to which reg 19(2) (as amended) applies (payments not earnings) (see PARA 209 note 7 ante): reg 24(5). Where the payment of any benefit under the Social Security Contributions and Benefits Act 1992 and the Jobseekers Act 1995 is subject to any deduction by way of recovery, the amount to be taken into account under the Family Credit (General) Regulations 1987, SI 1987/1973, reg 24(1) (as amended) is the gross amount payable: reg 24(4); and see reg 2(1) (relevant definition added by SI 1996/1345).

<sup>4</sup> I.e. under the Family Credit (General) Regulations 1987, SI 1987/1973, reg 24(1) (as amended): see the text to note 3 *supra*.

<sup>5</sup> I.e. specified in *ibid* Sch 2 (as amended): see reg 24(2). As well as many very specific payments to the claimant, particularly noticeable are the disregards in respect of housing benefit, income-based jobseeker's allowance, income support, mobility allowance, disability living allowance, disability working allowance, child benefit, statutory maternity pay and community charge benefit (now replaced by council tax benefit).

<sup>6</sup> I.e. in accordance with *ibid* Pt IV Ch VI (regs 28-36) (as amended).

<sup>7</sup> The prescribed amount is £8,000: see *ibid* reg 25(1) (amended by SI 1990/671).

<sup>8</sup> I.e. pursuant to the Employment and Training Act 1973 s 2 (as substituted and amended): see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 25 (amended by SI 1990/671; and SI 1997/65).

## **UPDATE**

### **202-217 [Working Families' Tax Credit]**

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed

to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **211 Calculation of income other than earnings**

NOTE 5--SI 1987/1973 Sch 2 further amended: SI 1997/2863, SI 1998/563, SI 1998/1173, SI 1998/1174, SI 1998/2117, SI 1999/1677, SI 1999/2165, SI 1999/2487, SI 1999/3156, SI 2000/421, SI 2000/795, SI 2000/2978, SI 2001/19, SI 2001/1082, SI 2001/1334, SI 2001/2220, SI 2002/525, SI 2007/2128. Subject to savings (see SI 2003/962) disability working allowance (disabled person's tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

NOTE 6--SI 1987/1967 reg 35 amended: SI 1998/2250.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(iii) Income/212. Notional income.

## 212. Notional income.

The family credit legislation contains provisions deeming a claimant to have income he does not actually possess ('notional income'<sup>1</sup>) in circumstances similar to those covered by the income support legislation, namely:

- 568 (1) a claimant is treated as possessing income of which he has deprived himself for the purpose of securing entitlement to family credit or increasing the amount of that benefit<sup>2</sup>;
- 569 (2) any income which would become available to the claimant upon application being made, but which has not been acquired by him, is treated as possessed by the claimant<sup>3</sup>;
- 570 (3) where a person, aged not less than 60, is a member of, or a person deriving entitlement to a pension under, a personal pension scheme, or is a party to, or a person deriving entitlement to a pension under, a retirement annuity contract, and:  
47
- 55. (a) in the case of a personal pension scheme, he fails to purchase an annuity with the funds available in that scheme where: (i) he defers, in whole or in part, the payment of any income which would have been payable to him by his pension fund holder; (ii) he fails to take any necessary action to secure that the whole of any income which would be payable to him by his pension fund holder upon his applying for it, is so paid; or (iii) income withdrawal is not available to him under that scheme; or
- 56. (b) in the case of a retirement annuity contract, he fails to purchase an annuity with the funds available under that contract,  
48
- 571 the amount of any income foregone is treated as possessed by him, but only from the date on which it could be expected to be acquired were an application for it to be made<sup>4</sup>;
- 572 (4) any payment of income, other than a payment of income made under specified trusts<sup>5</sup>, made:  
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- 57. (a) to a third party in respect of a member of the family but not a member of the third party's family is treated as possessed by that member to the extent that it is used for specified purposes<sup>6</sup>;
- 58. (b) to a member of the family in respect of a third party but not in respect of another member of that family is treated as possessed by that member to the extent that it is kept by him or used by or on behalf of any member of the family<sup>7</sup>;
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- 573 (5) where:  
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- 59. (a) a claimant performs a service for another person; and
- 60. (b) that person makes no payment of earnings or pays less than that paid for a comparable employment in the area; and
- 61. (c) the adjudication officer is satisfied that the means of that person are sufficient for him to pay or to pay more for the service,  
52
- 574 the adjudication officer must treat the claimant as possessing such earnings if any as are reasonable for that employment<sup>8</sup>.

- 1 As to the calculation of the amount of income or earnings where the claimant is treated as possessing any income or earnings see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 26(5), (6) (as amended).
- 2 Ibid reg 26(1); and see PARA 192 ante.
- 3 See ibid reg 26(2) (amended by SI 1995/2303). This does not apply to a discretionary trust, a trust derived from a payment made in consequence of a personal injury or a personal pension scheme or retirement annuity contract where the claimant is aged under 60: see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 26(2) (as so amended); and see PARA 192 ante.
- 4 See ibid reg 26(2A) (added by SI 1995/2303); and see PARA 192 ante. As to the amounts of any income foregone see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 26(2B) and (2C) (both as so added).
- 5 As to the specified trusts see ibid reg 26(3) (as amended).
- 6 As to the specified purposes see ibid reg 26(3)(a) (as amended).
- 7 See ibid reg 26(3) (subject to frequent amendment); and see PARA 192 ante.
- 8 See ibid reg 26(4) (amended by SI 1995/516). However the Family Credit (General) Regulations 1987, SI 1987/1973, reg 26(4) (as amended) does not apply to a claimant who is engaged by a charitable or voluntary organisation or is a volunteer if the adjudication officer is satisfied in any of those cases that it is reasonable for him to provide his services free of charge: see reg 26(4) (as so amended); and see PARA 192 ante.

## UPDATE

### 202-217 [Working Families' Tax Credit]

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to

him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving

assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **212 Notional income**

TEXT AND NOTES 1, 2--For 'family credit' read 'working families' tax credit': SI 1987/1973 reg 26(1) (amended by SI 1999/2487).

NOTE 3--SI 1987/1973 reg 26(2) further amended: SI 1998/563.

TEXT AND NOTES 5-7--Also, head (c) payments made (i) under the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No 2) Trust, the Eileen Trust or the Independent Living Funds; (ii) under the Coal Industry Act 1994 s 19(1)(a); or (iii) under the Employment and Training Act 1973 s 2 in respect of a person's participation in an employment programme, a training scheme, the Intensive Activity Period or the Intensive Activity Period for 50 plus, a qualifying course, or (to a limited extent) the programme known as the intensive activity period of the New Deal pilots for 25 plus: SI 1987/1973 reg 26(3A) (added by SI 1998/2117; and amended by SI 1999/3156, SI 2001/1334).

NOTE 8--For 'adjudication officer' read 'appropriate officer': SI 1987/1973 reg 26(4) (amended by SI 1999/2487).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(iv) Capital/213. The capital limit; tariff income from capital.

#### **(iv) Capital**

##### **213. The capital limit; tariff income from capital.**

No person is entitled to an income-related benefit if his capital or a prescribed part of it exceeds the prescribed amount<sup>1</sup>.

<sup>1</sup> Social Security Contributions and Benefits Act 1992 s 134(1). For the purposes of s 134(1) as it applies to family credit the prescribed amount is £8,000: Family Credit (General) Regulations 1987, SI 1987/1973, reg 28 (amended by SI 1990/671); Interpretation Act 1978 s 17(2)(b). The capital of a child or young person who is a member of the claimant's family is not to be treated as capital of the claimant: Family Credit (General) Regulations 1987, SI 1987/1973, reg 30. Where, however, the child or young person's capital exceeds £3,000, then no amount is included in the family credit assessment in respect of him: see PARA 204 note 13 ante.

Where the claimant's capital calculated in accordance with Pt IV Ch VI (regs 28-36) (as amended) exceeds £8,000, it must be treated as equivalent to a weekly income of £1 for each complete £250 in excess of £3,000 but not exceeding £8,000: reg 36(1) (as so amended). Notwithstanding reg 36(1) (as amended), where any part of the excess is not a complete £250 that part must be treated as equivalent to a weekly income of £1: reg 36(2). For the purposes of reg 36(1) (as amended), capital includes any income treated as capital under reg 31 (as amended) (income treated as capital): reg 36(3).

#### **UPDATE**

##### **202-217 [Working Families' Tax Credit]**

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is

participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same

household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **213 The capital limit; tariff income from capital**

NOTE 1--For 'family credit' read 'working families' tax credit': SI 1987/1973 regs 28, 29 (both amended by SI 1999/2487). SI 1987/1973 reg 31 amended: SI 1998/1174, SI 2000/795, SI 2000/2978, SI 2001/3454. SI 1987/1973 reg 34 amended: SI 1998/2117, SI 1999/2487, SI 1999/3156, SI 2001/1334. SI 1987/1973 reg 35 amended: SI 1998/2250.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(iv) Capital/214. Calculation of capital.

## 214. Calculation of capital.

For the purposes of family credit<sup>1</sup>, the capital of a claimant to be taken into account is, subject to statutory provision<sup>2</sup>, the whole of his capital calculated in accordance with statutory provision<sup>3</sup> and any income treated as capital<sup>4</sup>. Any capital, where applicable, specified in a prescribed provision<sup>5</sup> is to be disregarded from the calculation of a claimant's capital<sup>6</sup>.

Capital which a claimant possesses in the United Kingdom is to be calculated at its current market or surrender value less (1) where there would be expenses attributable to sale, ten per cent; and (2) the amount of any incumbrance secured on it<sup>7</sup>.

1    le for the purposes of the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended) (income-related benefits) as it applies to family credit: see PARA 202 ante.

2    le subject to the Family Credit (General) Regulations 1987, SI 1987/1973, reg 29(2): see note 6 infra.

3    le calculated in accordance with ibid Pt IV (regs 10-45) (as amended).

4    le any income treated as capital under ibid reg 31 (as amended) (income treated as capital): reg 29(1). Income is to be treated as capital as follows:

- 73    (1)   any amount by way of a refund of income tax deducted from profits or emoluments chargeable to income tax under Schedule D or E is to be treated as capital (reg 31(1));
- 74    (2)   any holiday pay which is not earnings under reg 19(1)(b) (earnings of employed earners) is to be treated as capital (reg 31(2));
- 75    (3)   any charitable or voluntary payment which is not made or is not due to be made at regular intervals, other than a payment which is made under specified trusts or funds is to be treated as capital (see reg 31(3) (as amended));
- 76    (4)   Except any income derived from capital disregarded under Sch 3 paras 1, 2 (as amended), Sch 3 para 4 (as amended), Sch 3 para 6 (as amended), Sch 3 para 13 (as substituted) or Sch 3 paras 26-30 (as added and amended), any income derived from capital is to be treated as capital but only from the date it is normally due to be credited to the claimant's account (see reg 31(4) (amended by SI 1988/1970));
- 77    (5)   in the case of employment as an employed earner, any advance of earnings or any loan made by the claimant's employer is to be treated as capital (Family Credit (General) Regulations 1987, SI 1987/1973, reg 31(5); and for the meaning of 'employed earner' see PARA 32 ante);
- 78    (6)   any maintenance payment other than one to which reg 16(2) (as amended) or reg 16(2A) (as added and amended) (normal weekly income other than earnings) applies is to be treated as capital (reg 31(6) (amended by SI 1994/2139)).

5    le specified in the Family Credit (General) Regulations 1987, SI 1987/1973, Sch 3 (as amended).

6    le calculated under ibid reg 29(1) (see the text to note 4 supra): see reg 29(2). As to capital to be disregarded see Sch 3 (as amended). As to equivalent income support legislation see PARA 195 ante.

7    See ibid reg 32(a). As to the special rules which apply to National Savings Certificates see reg 32(b). As to the equivalent provisions applying to income support see PARA 195 ante. Capital which a claimant possesses in a country outside the United Kingdom is to be calculated: (1) in a case where there is no prohibition in that country against the transfer to the United Kingdom of an amount equal to its current market or surrender value in that country, at that value; (2) in a case where there is such a prohibition, at the price which it would realise if sold in the United Kingdom to a willing buyer, less, where there would be expenses attributable to sale, 10% and the amount of any incumbrance secured on it: see reg 33. For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

**UPDATE****202-217 [Working Families' Tax Credit]**

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI

2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **214 Calculation of capital**

TEXT AND NOTE 1--For 'family credit' read 'working families' tax credit': SI 1987/1973 reg 29(1) (amended by SI 1999/2487).

NOTE 3--SI 1987/1973 reg 19 amended: SI 1999/1509. SI 1987/1973 reg 35 amended: SI 1998/2250.

NOTE 4--Also, heads (7) the gross receipts of any commercial activity carried on by a person in respect of which assistance is received under an employment programme specified in the Jobseeker's Allowance Regulations 1996, SI 1996/207 (self-employment route of the Employment Option of the New Deal), but only in so far as those receipts were payable into a special account during the period in which that person was receiving such assistance (SI 1987/1973 reg 31(7) (added by SI 1998/1174)); (8) any arrears of subsistence allowance which are paid to a claimant as a lump sum (SI 1987/1973 reg 31(8) (added by SI 2000/795)); and (9) any bounty derived from employment as a member of any territorial or reserve force prescribed in the Social Security (Contributions) Regulations 1979, SI 1979/591, Sch 3 Pt I (now Social Security (Contributions) Regulations 2001, SI 2001/1004, Sch 6 Pt I) and paid at intervals of at least one year (SI 1987/1973 reg 31(9) (added by SI 2000/2978)).

NOTES 5, 6--SI 1987/1973 Sch 3 further amended: SI 1997/2863, SI 1998/1174, SI 1998/2117, SI 1999/2165, SI 1999/3156, SI 2000/421, SI 2000/795, SI 2000/2978, SI 2001/19, SI 2001/1082, SI 2001/1334, SI 2001/2220, SI 2001/3085, SI 2001/3454, SI 2007/2128.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(iv) Capital/215. Notional capital.

## 215. Notional capital.

The family credit legislation contains provisions deeming a claimant to have capital he does not actually possess ('notional capital')<sup>1</sup>, namely:

- 575 (1) a claimant is to be treated as possessing capital of which he has deprived himself for the purpose of securing entitlement to family credit or increasing the amount of that benefit<sup>2</sup>;
- 576 (2) any capital which would become available to the claimant upon application being made but which has not been acquired by him is to be treated as possessed by him<sup>3</sup>;
- 577 (3) any payment of capital, other than a payment of capital made under specified trusts or funds<sup>4</sup>, made:
- 53 62. (a) to a third party in respect of a member of the family (but not a member of the third party's family) is treated as possessed by that member of the family to the extent that it is used for specified purposes<sup>5</sup>;
- 63. (b) to a member of the family in respect of a third party (but not in respect of another member of the family) is to be treated as possessed by that member to the extent that it is kept by him or used on behalf of any member of the family<sup>6</sup>;
- 54 578 (4) where a claimant stands in relation to a company in a position analogous to that of a sole owner or partner in the business of that company, he is to be treated as if he were such sole owner or partner and in such a case:
- 55 64. (a) the value of his holding in that company must, notwithstanding statutory provision<sup>7</sup>, be disregarded; and
- 65. (b) he must, subject to statutory provision<sup>8</sup>, be treated as possessing an amount of capital equal to the value or, as the case may be, his share of the value of the capital of that company and prescribed provisions<sup>9</sup> must apply for the purposes of calculating that amount as if it were actual capital which he does possess<sup>10</sup>.
- 56

1 Where a claimant is treated as possessing capital under any of the Family Credit (General) Regulations 1987, SI 1987/1973, reg 34(1)-(4) (as amended), the provisions of regs 28-33 (as amended) are to apply for the purposes of calculating its amount as if it were actual capital which he does possess: see reg 34(6). As to the similar circumstances covered by the income support legislation see PARA 196 ante.

2 See *ibid* reg 34(1) (amended by SI 1990/1774). This does not apply (1) where that capital is derived from a payment made in consequence of any personal injury and is placed on trust for the benefit of the claimant; or (2) to the extent that the capital which he is treated as possessing is reduced in accordance with the Family Credit (General) Regulations 1987, SI 1987/1973, reg 34A (as added and amended) (diminishing notional capital rule): see reg 34(1) (as so amended). A claimant is to be treated as possessing capital under reg 34(1) (as amended) only if the capital of which he has deprived himself is actual capital: reg 34(7) (added by SI 1988/660). As to the equivalent rule in the income support legislation and the case law see PARA 196 ante.

Where a claimant is treated as possessing capital under reg 34(1) (as amended) (see head (1) in the text), the amount which he is treated as possessing is to be reduced under a similar 'diminishing notional capital rule' to that applying for income support purposes. As to the diminishing notional capital rule see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 34A (as so added and amended). As to the equivalent income support provision see PARA 196 ante.

3 See *ibid* reg 34(2) (amended by SI 1995/2303). This does not apply to: (1) a discretionary trust; (2) a trust derived from a payment made in consequence of a personal injury; or (3) any loan which would be obtainable only if secured against capital disregarded under Sch 3 (as amended); or (4) a personal pension scheme or retirement annuity contract: see reg 34(2) (as so amended); and PARA 196 ante. As to personal pension schemes see PARA 710 et seq post; and as to retirement annuity contracts see PARA 677 et seq post.

4 As to the specified trusts or funds see *ibid* reg 34(3) (as amended).

5 As to the specified purposes see *ibid* reg 34(3)(a) (as amended).

6 See *ibid* reg 34(3) (as frequently amended); and PARA 196 ante.

7 *Ie* notwithstanding *ibid* reg 29 (calculation of capital): see PARA 214 ante.

8 *Ie* subject to *ibid* reg 34(5): see note 10 *infra*.

9 *Ie* the provisions of *ibid* regs 28-33 (as amended) apply.

10 See *ibid* reg 34(4). For so long as the claimant undertakes activities in the course of the business of the company, the amount which he is treated as possessing under reg 34(4) must be disregarded: reg 34(5).

## UPDATE

### 202-217 [Working Families' Tax Credit]

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the

intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **215 Notional capital**

TEXT AND NOTES 1, 2--For 'family credit' read 'working families' tax credit': SI 1987/1973 reg 34(1) (amended by SI 1999/2487).

TEXT AND NOTES 4-6--Also, head (c) payments made (i) under the Macfarlane Trust, the Macfarlane (Special Payments) Trust, the Macfarlane (Special Payments) (No 2) Trust, the Eileen Trust or the Independent Living Funds; or (ii) under the Employment and Training Act 1973 s 2 in respect of a person's participation in an employment programme, a training scheme or a qualifying course (all as defined): SI 1987/1973 reg 34(3A) (added by SI 1998/2117).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(iv) Capital/216. Capital jointly held.

## **216. Capital jointly held.**

Except where a claimant possesses capital which is disregarded under statutory provision<sup>1</sup>, where a claimant and one or more persons are beneficially entitled in possession to any capital asset they are to be treated as if each of them were entitled in possession to an equal share of the whole beneficial interest therein; and the value of that equal share is to be calculated by taking the value of the whole beneficial interest calculated in accordance with statutory provisions<sup>2</sup>, as though:

- 579 (1) that interest is solely owned by the claimant; and
- 580 (2) in the case of a dwelling, none of the other joint owners occupies the dwelling concerned,

and dividing the same by the number of persons who have a beneficial interest in the capital in question<sup>3</sup>.

<sup>1</sup> Is disregarded under the Family Credit (General) Regulations 1987, SI 1987/1973, reg 34(4) (notional capital); see PARA 215 note 10 ante.

<sup>2</sup> Is calculated in accordance with the provisions of *ibid* regs 28-34A (as amended).

<sup>3</sup> See *ibid* reg 35 (amended by SI 1995/2303). As to the equivalent income support provision, and the effect of the 1995 amendment, see PARA 197 ante.

## **UPDATE**

### **202-217 [Working Families' Tax Credit]**

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment

of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that

name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **216 Capital jointly held**

TEXT AND NOTES 2, 3--For 'to an equal share ... capital in question' read 'to the whole beneficial interest therein in an equal share and SI 1987/1973 regs 28-34A apply for the purposes of calculating the amount of capital which the claimant is treated as possessing as if it were actual capital which the claimant does possess': reg 35 (amended by SI 1998/2250).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(3) FAMILY CREDIT/(v) Students/217. Calculation of a student's income.

## **(v) Students**

### **217. Calculation of a student's income.**

Where the person or one of the persons whose income has to be calculated for family credit purposes is a student, there are special provisions applying to that calculation which are analogous with the equivalent provision applying for income support purposes<sup>1</sup>; these relate to the calculation of grant income<sup>2</sup>, the calculation of covenant income<sup>3</sup>, the relationship with amounts to be disregarded<sup>4</sup>, the treatment of student loans<sup>5</sup> and miscellaneous matters<sup>6</sup>.

1 See the Income Support (General) Regulations 1987, SI 1987/1967, Pt V Ch VIII (regs 61-69) (as amended); and PARAS 198-199 ante.

2 As to the calculation of grant income see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 38 (as amended); and as to the equivalent provisions in the Income Support (General) Regulations 1987, SI 1987/1967 (as amended), see reg 62 (as amended); and PARA 199 ante.

3 As to the calculation of covenant income where a contribution is assessed see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 39 (as amended). As to covenant income where there is no grant income or no contribution is assessed see reg 40 (as amended). As to the equivalent provisions in the Income Support (General) Regulations 1987, SI 1987/1967 (as amended), see regs 63 (as amended), 64 (as amended); and PARA 199 ante.

4 As to the relationship with amounts to be disregarded under the Family Credit (General) Regulations 1987, SI 1987/1973, Sch 2 see reg 41 (as amended). As to other amounts to be disregarded see reg 42 (as amended). As to the equivalent provisions in the Income Support (General) Regulations 1987, SI 1987/1967 (as amended), see regs 65 (as amended), 66 (as amended); and PARA 199 ante.

5 As to the treatment of student loans see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 42A (as added and amended). As to the equivalent provisions in the Income Support (General) Regulations 1987, SI 1987/1967 (as amended), see reg 66A (as added and amended); and PARA 199 ante.

6 As to the disregard of contribution see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 43 (as amended). As to the disregard of tax refund see reg 44. As to the disregard of changes occurring during summer vacation see reg 45. As to the equivalent provisions of reg 43 (as amended) and reg 45 see the Income Support (General) Regulations 1987, SI 1987/1967, reg 67 (as amended) and reg 69; and PARA 199 ante. The Family Credit (General) Regulations 1987, SI 1987/1973, reg 44 is specific to family credit.

## **UPDATE**

### **202-217 [Working Families' Tax Credit]**

Subject to transitional provisions and savings (see SI 2003/962) working families' tax credit (formerly 'family credit') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period

in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a

participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Family Credit (General) Regulations 1987, SI 1987/1973, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **217 Calculation of a student's income**

TEXT AND NOTES--Subject to savings (see SI 2003/962) family credit (working families' tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

NOTE 2--SI 1987/1973 reg 38 further amended: SI 1999/1935, SI 2000/1807, SI 2001/2539, SI 2002/1333.

NOTE 4--SI 1987/1973 Sch 2 further amended: SI 1997/2863, SI 1998/563, SI 1998/1173, SI 1998/1174, SI 1998/2117, SI 1999/2165, SI 1999/2487, SI 2000/421, SI 2000/795, SI 2000/2978, SI 2001/19, SI 2001/1082, SI 2001/1334, SI 2001/2220, SI 2002/14, SI 2002/525, SI 2002/2469, SI 2003/44, SI 2007/2128. SI 1987/1973 reg 42 further amended: SI 1999/1935.

NOTE 5--SI 1987/1973 reg 42A further amended: SI 1999/1935, SI 2000/1807, SI 2001/2539, SI 2002/1333. As to the treatment of lump sum access fund payments see SI 1987/1973 reg 42ZA (added by SI 2000/1807).

NOTE 6--SI 1987/1973 reg 43 further amended: SI 1999/1935. As to further disregard of student's income see SI 1987/1973 reg 43A (added by SI 1998/563; and amended by SI 1999/1935. As to the equivalent provision in SI 1987/1967 see reg 67A; and PARA 199.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(4) DISABILITY WORKING ALLOWANCE/(i) Entitlement/218. Conditions of entitlement.

## **(4) DISABILITY WORKING ALLOWANCE**

### **(i) Entitlement**

#### **218. Conditions of entitlement.**

A person in Great Britain<sup>1</sup> who has attained the age of 16 and satisfies certain statutory qualifications<sup>2</sup> is entitled to a disability working allowance if, when the claim for it is made or is treated as made:

- 581 (1) he is engaged and normally engaged in remunerative work<sup>3</sup>;
- 582 (2) he has a physical or mental disability which puts him at a disadvantage in getting a job<sup>4</sup>;
- 583 (3) his income:
- 57 66. (a) does not exceed the amount which is the applicable amount at such date as may be prescribed; or
- 67. (b) Exceeds it, but only by such an amount that there is an amount remaining if the statutory deduction<sup>5</sup> is made; and
- 58 584 (4) Except in such circumstances as may be prescribed, neither he nor, if he has a family<sup>6</sup>, any member of it, is entitled to family credit<sup>7</sup>.

1 As to the circumstances in which a person is treated as being or not being in Great Britain see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 5 (as amended). As to the equivalent family credit provision see PARA 205 ante.

2 Ie under the Social Security Contributions and Benefits Act 1992 s 129(2) (as amended), or s 129(2A) (as added); see PARA 221 post. As to when a person attains a particular age see PARA 19 note 11 ante.

3 For the meaning of 'remunerative work' see PARA 223 post.

4 See PARA 222 post.

5 Ie the deduction for which the Social Security Contributions and Benefits Act 1992 s 129(5)(b) provides: see PARA 220 note 5 post. As to the calculation of the entitlement see PARA 220 post.

6 For the meaning of 'family' see PARA 175 note 1 ante. As to the provisions relating to membership of a family see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, regs 8-11 (as amended). As to the equivalent family credit provisions see PARA 207 ante.

7 See the Social Security Contributions and Benefits Act 1992 s 129(1) (amended by the Social Security (Incapacity for Work) Act 1994 s 10). For the purposes of the Social Security Contributions and Benefits Act 1992 s 129(1)(d) (see head (4) in the text) (prescribed circumstances) where a claimant or a member of his family is entitled to family credit, he is entitled to disability working allowance, if: (1) at the date of the claim for disability working allowance the award of family credit for him or a member of his family will expire within 28 days; and (2) the claimant is or would be otherwise entitled to disability working allowance by virtue of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887; and (3) the claim for disability working allowance is made in respect of a period which commences immediately after the expiry of the award of family credit: see reg 57; Interpretation Act 1978 s 17(2)(b).

The provisions of the Social Security Contributions and Benefits Act 1992 relating to disability working allowance apply in relation to persons employed by or under the Crown as they apply in relation to persons employed otherwise than by or under the Crown: s 129(9).

## **UPDATE**

### **218-227 [Disabled Person's Tax Credit]**

Subject to transitional provisions and savings (see SI 2003/962) disabled person's tax credit (formerly 'disability working allowance') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887 if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any

payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **218 Conditions of entitlement**

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 s 129 and Social Security (Incapacity for Work) Act 1994 s 10 repealed (subject to savings: see SI 2003/962): Tax Credits Act 2002 Sch 6. See further PARA 227A.

NOTE 1--SI 1991/2887 reg 5 further amended: SI 2000/795, SI 2000/2978.

NOTE 6--SI 1991/2887 reg 8 further amended: SI 1999/2487, SI 2001/1082.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(4) DISABILITY WORKING ALLOWANCE/(i) Entitlement/219. Duration of an award of disability working allowance.

## **219. Duration of an award of disability working allowance.**

A disability working allowance is payable for a period of 26 weeks or such other period as may be prescribed and, subject to regulations, an award of a disability working allowance and the rate at which it is payable, are not affected by any change of circumstances during that period or by any up-rating order<sup>1</sup> under statutory provision<sup>2</sup>. There are specific exceptions to this rule in the case of: the death of the claimant<sup>3</sup>, prevention of duplication of awards of family credit, disability working allowance and income support<sup>4</sup> or a reduced benefit direction<sup>5</sup>.

Regulations may provide that an award of a disability working allowance to a person must terminate if:

- 585 (1) a disability working allowance becomes payable in respect of some other person who was a member of his family at the date of his claim for a disability working allowance; or
- 586 (2) income support, an income-based jobseeker's allowance or family credit becomes payable in respect of a person who was a member of the family at that date<sup>6</sup>.

<sup>1</sup> ie under the Social Security Administration Act 1992 s 150 (as amended): see PARA 17 ante.

<sup>2</sup> Social Security Contributions and Benefits Act 1992 s 129(6). The procedural power to review an award of disability working allowance is made subject to s 129(6); see the Social Security Administration Act 1992 s 30(1); and PARA 376 post.

<sup>3</sup> As to the death of the claimant see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 54. As to the equivalent family credit provision see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 49; and PARA 203 note 4 ante.

<sup>4</sup> Where provision is made for the same child or young person in awards for overlapping periods, the first being an award of disability working allowance and the second an award of disability working allowance, family credit, income-based jobseeker's allowance or income support, and at the start of the period of overlap that child or young person is no longer a member of the household of the claimant under the first award, the first award must terminate with effect from the start of the period of overlap: Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 55 (amended by SI 1996/1345). An award of disability working allowance (the new award) which is made in consequence of a claim in respect of a period beginning before the commencement of an existing award of disability working allowance (the existing award) and which overlaps with the period of the existing award, must be treated as a relevant change of circumstances affecting the existing award and the existing award must be reviewed and must terminate with effect from the date on which the decision of the adjudication officer making the new award is notified to the claimant: see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 56(1) (reg 56 substituted by SI 1994/2139). An award of family credit which is made in consequence of a claim in respect of a period beginning on or before the commencement of an existing award of disability working allowance (the existing award) and which overlaps with the period of the existing award, must be treated as a change of circumstances affecting the existing award and the existing award must be reviewed and must terminate with effect from the date on which the decision of the adjudication officer awarding family credit is notified to the claimant: see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 56(2) (as so substituted; and amended by SI 1996/1944).

<sup>5</sup> As to reduced benefit direction see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 56A (added by SI 1993/315). As to the equivalent family credit provision see the Family Credit (General) Regulations 1987, SI 1987/1973, reg 51A (as added); and PARA 203 note 6 ante.

<sup>6</sup> Social Security Contributions and Benefits Act 1992 s 129(7) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 34).

**UPDATE****218-227 [Disabled Person's Tax Credit]**

Subject to transitional provisions and savings (see SI 2003/962) disabled person's tax credit (formerly 'disability working allowance') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887 if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order

2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus; art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **219 Duration of an award of disability working allowance**

TEXT AND NOTES--Subject to savings (SI 2003/962), Social Security Contributions and Benefits Act 1992 s 129 repealed: Tax Credits Act 2002 Sch 6. See further PARA 227A.

TEXT AND NOTE 1--Where an award of disabled person's tax credit becomes payable on or after 4 June 2002, the prescribed period begins on the date on which it becomes payable and ends on 7 April 2003: Tax Credits (Prescribed Periods of Awards) Regulations 2002, SI 2002/1334, reg 2.

NOTE 5--SI 1987/1973 reg 51A revoked: SI 1999/2487.

TEXT AND NOTE 6--An existing award of disability working allowance is terminated if the claimant or partner elects to surrender it following the birth of a child, the adoption of a child or young person or the granting of a parental order for a surrogate child: SI 1991/2887 reg 54A (added by SI 2001/892). 'Surrogate child' means a child in respect of whom an order has been made under the Human Fertilisation and Embryology Act 1990 s 30 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 106) or the Human Fertilisation and Embryology Act 2008 s 54 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 112A.5): SI 1991/2887 reg 2(1) (definition added by SI 2001/892 and amended by SI 2010/986).



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(4) DISABILITY WORKING ALLOWANCE/(i) Entitlement/220. Calculation of an award.

## 220. Calculation of an award.

Where a person is entitled to a disability working allowance<sup>1</sup>, then:

- 587 (1) if his income does not exceed the amount which is the applicable amount at the date prescribed under statutory provision<sup>2</sup>, the amount of the disability working allowance is the amount which is the appropriate maximum disability working allowance in his case<sup>3</sup>; and
- 588 (2) if his income exceeds that amount, the amount of the disability working allowance is what remains after the deduction from the appropriate maximum disability working allowance of a prescribed percentage<sup>4</sup> of the excess of his income over that amount<sup>5</sup>.

The applicable amount<sup>6</sup> is, in the case of a claimant who is:

- 589 (a) single, a prescribed amount per week;
- 590 (b) a member of a married or unmarried couple, or a lone parent, a prescribed amount per week<sup>7</sup>.

Subject to statutory provision<sup>8</sup>, the appropriate maximum disability working allowance is the aggregate of the following allowances:

- 591 (i) in respect of a single claimant, the specified allowance<sup>9</sup>;
- 592 (ii) in respect of a claimant who is a member of a married or unmarried couple, or who is a lone parent who is treated as responsible for a child or young person by virtue of statutory provision, the specified allowance<sup>10</sup>;
- 593 (iii) in respect of a claimant who is:
  - 59 68. (A) a single claimant or lone parent who works, or
  - 60 69. (B) a member of a married or unmarried couple either or both of whom work,
  - 594 for not less than 30 hours per week, the allowance specified<sup>11</sup>;
  - 595 (iv) in respect of any child or young person for whom the claimant or his partner is treated as responsible by virtue of statutory provision<sup>12</sup>, the allowance specified<sup>13</sup>;
  - 596 (v) in respect of any child<sup>14</sup> or young person to whom a statutory provision applies<sup>15</sup>, the allowance specified<sup>16</sup>.

1 As to the conditions of entitlement see PARA 218 ante.

2 I.e. the date prescribed under the Social Security Contributions and Benefits Act 1992 s 129(1)(c)(i) (as amended); see PARA 218 text to note 7 ante. The prescribed date is the date on which the period under s 129(6) (period of award) (see PARA 219 note 1 ante) begins: see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 52(2); Interpretation Act 1978 s 17(2)(b).

3 See the Social Security Contributions and Benefits Act 1992 s 129(5)(a). Regulations must prescribe the manner in which the appropriate maximum disability working allowance is to be determined in any case: s 129(8); and see the text to notes 8-16 infra.

4 The prescribed percentage for these purposes is 70%: see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 53.

5 See the Social Security Contributions and Benefits Act 1992 s 129(5)(b).

6 Ie for the purposes of ibid s 129(1) (as amended): see PARA 218 text to note 7 ante.

7 See the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 52(1) (amended by SI 1992/2155; SI 1996/559; and SI 1997/543). As to the prescribed amounts see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 52(1) (as amended). For the meaning of 'married or unmarried couple' see PARA 175 note 1 ante. For the meaning of 'lone parent' see PARA 204 note 9 ante.

8 Ie subject to ibid reg 51(2)-(7) (as amended).

9 Ie the allowance specified in ibid Sch 5 para 1 col (2) (substituted by SI 1997/543 and subject to frequent amendment): see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 51(1)(a).

10 Ie by virtue of ibid reg 9. The allowance is specified in Sch 5 para 2 col (2) (as substituted): see reg 51(1)(b). As to the special provisions relating to polygamous marriages see reg 51(2) (as amended), reg 51(3).

11 Ie the allowance specified in ibid Sch 5 para 2A col (2) (as substituted): see reg 51(1)(bb) (added by SI 1995/1339).

12 Ie by virtue of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 9.

13 Ie the allowance specified in ibid Sch 5 col (2) (as substituted) at whichever description in Sch 5 col (1) PARA 3 or 4 fits in respect of the period specified in either or both of those provisions as appropriate to the child or young person concerned: see reg 51(1)(c) (amended by SI 1996/2545).

For the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 51 (as amended) the amount of any disability working allowance and the age period during which that amount is appropriate in respect of any child or young person must be determined by reference to the allowance specified in Sch 5 (as substituted) and the age of the child or young person at relevant period which includes the date on which the period under the Social Security Contributions and Benefits Act 1992 s 129(6) (period of award) begins: see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 51(7) (amended by SI 1995/516; and SI 1996/2545). The allowance in respect of a child or young person is nil:

- 79 (1) where the capital of a child or young person, if calculated in accordance with the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, Pt V (regs 12-50) (as amended) (income and capital) in like manner as for the claimant, except as provided in reg 30(1) (as amended) (modifications in respect of children and young persons), would exceed £3,000 (see reg 51(4) (amended by SI 1993/2119);
- 80 (2) where the weekly income of a child or young person, other than income consisting of any payment of maintenance whether under a court order or not, calculated in accordance with the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, Pt V (regs 12-50) (as amended), exceeds the amount specified for that child or young person in Sch 5 (as substituted) (see reg 51(5) (amended by SI 1992/2155));
- 81 (3) where a child or young person is, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 10(2)(a) (membership of the same household), a patient or in residential accommodation on account of physical or mental handicap or physical or mental illness and has been so accommodated for the 52 weeks immediately before the date of claim (see reg 51(6)).

Apart from head (2) supra, the general rule is that any earnings of a child or young person are sums to be disregarded in the calculation of earnings: see Sch 2 para 2.

14 Ibid reg 51(1A) (as added) applies to a child or young person for whom the claimant or his partner is responsible and who is a member of the claimant's household, and: (1) in respect of whom disability living allowance is payable, or has ceased to be payable solely because he is a patient; or (2) who is registered as blind in a register compiled by a local authority under the National Assistance Act 1948 s 29 (as amended) (welfare services) or, in Scotland, has been certified as blind and in consequence he is registered as blind in a register maintained by or on behalf of a regional or islands council; or (3) who ceased to be registered as blind in such a register within the 28 weeks immediately preceding the date of claim: see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 51(1A) (added by SI 1995/482). For the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 51(1A)(a) (reg 51(1A) as added), 'patient' has the same meaning it has in reg 10(3)(a): reg 51(1B) (added by SI 1995/482).

15 le any child or young person to whom the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 51(1A) (as added) applies: see note 14 *supra*.

16 le the allowance specified in *ibid* Sch 5 para 5 col (2) (as substituted and subject to frequent amendment): see reg 51(1)(d) (added by SI 1995/482). This disabled child premium is specific to this allowance and does not appear in the family credit provisions.

## UPDATE

### 218-227 [Disabled Person's Tax Credit]

Subject to transitional provisions and savings (see SI 2003/962) disabled person's tax credit (formerly 'disability working allowance') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887 if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of

his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **220 Calculation of award**

TEXT AND NOTES--Subject to savings (SI 2003/962), Social Security Contributions and Benefits Act 1992 s 129 repealed: Tax Credits Act 2002 Sch 6. See further PARA 227A.

NOTE 3--The Tax Credit (New Category of Child Care Provider) Regulations 1999, SI 1999/3110 (made under the Tax Credits Act 1999 s 15 (repealed subject to savings: SI 2003/962)), make a scheme for establishing a new category of persons, to be approved by an organisation accredited by the Secretary of State, whose charges for providing child care are to be taken into account for the purposes of determining the appropriate amount of disabled person's tax credit.

TEXT AND NOTE 4--The prescribed amount for the purpose of the Social Security Contributions and Benefits Act 1992 s 129(2E)(a)(ii) is £15 per week: SI 1991/2887 reg 53A (added by SI 2000/1807).

NOTE 4--Prescribed percentage now 55 per cent: SI 1991/2887 reg 53 (amended by SI 1999/2487).

NOTE 7--SI 1991/2887 reg 52(1) amended: SI 1999/2487, SI 2000/931, SI 2000/440, SI 2001/1141, SI 2002/829.

TEXT AND NOTES 8-16--SI 1991/2887 reg 51(1), Sch 5 substituted: SI 2001/367. SI 1991/2887 Sch 5 (as substituted) amended: SI 2001/1141, SI 2001/1351, SI 2002/829, SI 2002/1333.

Subject to SI 1991/2887 reg 51(2)-(7), the appropriate maximum disabled person's tax credit is the aggregate of the following credits: (i) in respect of a single claimant, the allowance specified in Sch 5 para 1 col (2); (ii) in a case to which reg 51A (see NOTE 13) applies, a credit ('childcare tax credit') equal to 70 per cent of the amount of any relevant childcare charges as mentioned and calculated on a weekly basis in reg 51A, subject to a maximum in respect of the claimant's family of whichever the amounts specified in reg 51(1AA) (added by SI 1999/2487; and amended by SI 2001/367, SI 2001/1351, SI 2002/829) applies in the claimant's case; (iii) in respect of a claimant who is a member of a married or unmarried couple, or who is a lone parent who is treated as responsible for a child or young person by virtue of SI 1991/2887 reg 9, the credit specified in Sch 5 para 2 col (2); (iv) in respect of a claimant who is (A) a single claimant or lone parent who works, or (B) a member of a married or unmarried couple either or both of whom work, for not less than 30 hours per week, the credit specified in Sch 5 para 3 col (2); (v) in respect of a claimant who is a lone parent to whom reg 51(1C) applies, or, where a claimant is a member of a married or unmarried couple to either or both of whom reg(1C) applies, in respect of the couple, the credit specified in Sch 5 para 4 col (2); (vi) in respect of a claimant to whom reg 51(1C) applies but who is neither a lone parent nor a member of a married or unmarried couple, the credit specified in Sch 5 para 5 col (2); (vii) in respect of any child or young person for whom the claimant or his partner is treated as responsible by virtue of reg 9, the credit specified in Sch 5 para 6 col (2) or Sch 5 para 7 col (2) as appropriate in respect of the period specified therein; (viii) in respect of any child or young person for whom the claimant or his partner is treated as responsible by virtue of reg 9 and who is a member of the claimant's household, (aa) where reg 51(1A) applies, and reg 51(1C) does not apply, to the child or young person, the credit specified in Sch 5 para 8(a) col (2), (bb) where reg 51(1C) applies to the child or young person, the credit specified in Sch 5 para 8(b) col (2): reg 51(1) (as substituted).

NOTE 10--SI 1991/2887 Sch 5 para 2 col (2) amended: SI 2002/1333.

NOTE 13--For 'allowance specified in Sch 5' read 'credit specified in Sch 5': SI 1991/2887 reg 51(7) (amended by SI 1999/2487). For 'The allowance in respect of a child or young person' read 'The credit in respect of a child or young person': SI 1991/2887 reg 51(4)-(6) (amended by SI 1999/2487, SI 2000/440, SI 2000/931, SI 2001/1141, SI 2002/829).

Head (1) now refers to the amount or amounts: SI 1991/2887 reg 51(5) (amended by SI 2001/367).

Heads (1), (2) SI 1991/2887 reg 15 amended: SI 1997/2793, SI 1999/2487. SI 1991/2887 reg 15A renumbered as 51A by SI 1999/2487; and amended by SI 2000/795, SI 2001/892, SI 2002/14, SI 2002/525, SI 2002/1696, SI 2003/44. SI 1991/2887 reg 16 amended: SI 2000/2978, SI 2001/892. SI 1991/2887 reg 21 amended: SI 1999/1509, SI 1999/2487, SI 2001/892. SI 1991/2887 reg 22 amended: SI 2001/892. SI 1991/2887 reg 24 amended: SI 1999/2165, SI 2001/892. SI 1991/2887 reg 25 amended: SI 1999/2487. SI 1991/2887 reg 29 amended: SI 1998/563, SI 1998/2117, SI 1999/2487, SI 1999/3156, SI 2001/1334. SI 1991/2887 regs 31, 32 amended: SI 1999/2487. SI 1991/2887 reg 34 amended: SI 1998/1174, SI 1999/1677, SI 2000/421, SI 2000/795, SI 2000/2978, SI 2000/3134, SI 2001/3454. SI 1991/2887 reg 37

amended: SI 1999/2487, SI 1999/3156, SI 2001/1334. SI 1991/2887 reg 38 amended: SI 1999/2487. SI 1991/2887 reg 39 amended: SI 1998/2250. SI 1991/2887 reg 41 amended: SI 1998/563, SI 1999/1935, SI 2000/1807, SI 2000/2978, SI 2001/2539. SI 1991/2887 reg 42 amended: SI 1999/1935, SI 2000/1807, SI 2001/2539, SI 2002/1333. SI 1991/2887 reg 46 amended: SI 1999/1935. SI 1991/2887 reg 46A added by SI 2000/1807. SI 1991/2887 reg 47 amended: SI 2002/1333. SI 1991/2887 reg 48 amended: SI 1999/1935. SI 1991/2887 reg 48A added by SI 1998/563 and amended by SI 1999/1935. SI 1991/2887 Sch 3 amended: SI 1997/2863, SI 1998/563, SI 1998/1173, SI 1998/1174, SI 1999/1677, SI 1999/2165, SI 1999/2487, SI 1999/3156, SI 2000/421, SI 2000/795, SI 2000/2978, SI 2001/19, SI 2001/1082, SI 2001/1334, SI 2001/2220, SI 2002/14, SI 2002/525, SI 2002/2469, SI 2003/44, SI 2007/2128. SI 1991/2887 Sch 4 amended: SI 1997/2863, SI 1998/1174, SI 1998/2117, SI 1999/1677, SI 1999/2165, SI 1999/3156, SI 2000/421, SI 2000/795, SI 2000/2978, SI 2001/19, SI 2001/1082, SI 2001/1334, SI 2001/2220, SI 2001/3085, SI 2001/3454, SI 2007/2128.

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## (ii) Defining the Conditions of Entitlement

### 221. Qualifying benefits.

Subject to statutory provision<sup>1</sup>, a person qualifies for disability working allowance<sup>2</sup> if:

- 597 (1) for one or more of the 56 days immediately preceding the date when the claim for a disability working allowance is made or is treated as made there was payable to him one or more of the following:
- 61
- 70. (a) the higher rate of short-term incapacity benefit or long-term incapacity benefit;
- 71. (b) a severe disablement allowance;
- 72. (c) income support, an income-based jobseeker's allowance, housing benefit or council tax benefit,
- 62
- 598 or a corresponding benefit under any enactment having effect in Northern Ireland<sup>3</sup>;
- 599 (2) when the claim for a disability working allowance is made or is treated as made, there is payable to him one or more of the following:
- 63
- 73. (a) an attendance allowance;
- 74. (b) a disability living allowance;
- 75. (c) an increase of disablement pension under statutory provision<sup>4</sup>;
- 76. (d) an analogous pension increase under a war pension scheme or an industrial injuries scheme,
- 64
- 600 or a corresponding benefit under any enactment having effect in Northern Ireland; or
- 601 (3) when the claim for a disability working allowance is made or is treated as made, he has an invalid carriage or other vehicle provided<sup>5</sup> by the Secretary of State<sup>6</sup>.

A person qualifies for disability working allowance under statutory provision<sup>7</sup> if:

- 602 (i) on one or more of the 56 days immediately preceding the date when the claim for a disability working allowance is made or is treated as made he was engaged in training for work;<sup>8</sup> and
- 603 (ii) a relevant benefit<sup>9</sup> was payable to him for one or more of the 56 days immediately preceding:
- 65
- 77. (A) the first day of training for work falling within the 56 days mentioned in head (i) above; or
- 78. (B) an earlier day of training for work which formed part of the same period of training for work<sup>10</sup> as that day<sup>11</sup>.
- 66

<sup>1</sup> ie subject to the Social Security Contributions and Benefits Act 1992 s 129(4): see note 3 infra.

2 le under *ibid* s 129(2) (as amended); see the text to notes 3-4, 6 *infra*.

3 See *ibid* s 129(2)(a) (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 32; the Jobseekers Act 1995 s 41(4), Sch 2 para 34; and the Local Government Finance Act 1992 s 103, Sch 9 para 2). If the only benefit mentioned in head (1) in the text which is payable to a person as there mentioned is a benefit mentioned in head (1)(c) in the text or a corresponding benefit under any enactment having effect in Northern Ireland, he only qualifies under the Social Security Contributions and Benefits Act 1992 s 129(2) (as amended) in prescribed circumstances: see s 129(4).

4 le under *ibid* s 104: see PARA 147 *ante*.

5 le under the National Health Service Act 1977 s 5(2)(a), Sch 2 (as amended) or under corresponding legislation for Scotland or Northern Ireland: see the Social Security Contributions and Benefits Act 1992 s 129(2) (c). See further HEALTH SERVICES vol 54 (2008) PARA 35.

6 See *ibid* s 129(2)(b), (c).

7 le under *ibid* s 129(2A) (as added): see the text to note 11 *infra*.

8 'Training for work' means training for work in pursuance of arrangements made under the Employment and Training Act 1973 s 2(1) (as substituted) or the Enterprise and New Towns (Scotland) Act 1990 s 2(3) or training of such other description as may be prescribed: Social Security Contributions and Benefits Act 1992 s 129(2B)(b) (s 129(2B) added by the Social Security (Incapacity for Work) Act 1994 s 10). It also includes any training received on a course which a person attends for 16 hours or more a week, the primary purpose of which is the teaching of occupational or vocational skills: see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 7A (added by SI 1995/482).

9 For the purposes of the Social Security Contributions and Benefits Act 1992 s 129(2A) (as added) the following are relevant benefits: (1) the higher rate of short-term incapacity benefit; (2) long-term incapacity benefit; (3) a severe disablement allowance, or a corresponding benefit under any enactment having effect in Northern Ireland: see s 129(2B)(a) (as added: see note 8 *supra*).

10 A 'period of training for work' means a series of consecutive days of training for work, there being disregarded for this purpose such days as may be prescribed: *ibid* s 129(2B)(c) (as added: see note 8 *supra*). For the purposes of s 129(2B)(c) (as added) there must be disregarded any day on which the claimant was: (1) on holiday; (2) attending court as a justice of the peace, a party to any proceedings, a witness or a juror; (3) suffering from some disease or bodily or mental disablement as a result of which he was unable to attend training for work, or his attendance would have put at risk the health of other persons; (4) unable to participate in training for work because: (a) he was looking after a child because the person who usually looked after that child was unable to do so; (b) he was looking after a member of his family who was ill; (c) he was required to deal with some domestic emergency; or (d) he was arranging or attending the funeral of his partner or a relative; or (5) authorised by the training provider to be absent from training for work: Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 7B(1) (reg 7B added by SI 1995/482). For the purposes of head (4)(d) *supra*, 'relative' means close relative, grandparent, grandchild, uncle, aunt, nephew or niece: see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 7B(2) (as so added).

11 See the Social Security Contributions and Benefits Act 1992 s 129(2A) (added by the Social Security (Incapacity for Work) Act 1994 s 10).

## UPDATE

### 218-227 [Disabled Person's Tax Credit]

Subject to transitional provisions and savings (see SI 2003/962) disabled person's tax credit (formerly 'disability working allowance') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887 if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to

such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of

State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **221 Qualifying benefits**

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 s 129, Local Government Finance Act 1992 Sch 9 para 2, Social Security (Incapacity for Work) Act 1994, s 10, Sch 1 para 32, Jobseekers Act 1995 Sch 2 para 34 and Tax Credits Act 1999 repealed (subject to savings: see SI 2003/962): Tax Credits Act 2002 Sch 6. See further PARA 227A.

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## 222. The disability qualification.

A person in Great Britain who has attained the age of 16 and qualifies by reason of the statutory provision in relation to qualifying benefits<sup>1</sup> is entitled to a disability working allowance if, when the claim for it is made or is treated as made he has a physical or mental disability which puts him at a disadvantage in getting a job<sup>2</sup>.

On an initial claim<sup>3</sup>, a declaration by the claimant that he has a physical or mental disability which puts him at a disadvantage in getting a job is conclusive, except in such circumstances as may be prescribed, that for the above purposes<sup>4</sup> he has such a disability<sup>5</sup>.

<sup>1</sup> He qualifies under the Social Security Contributions and Benefits Act 1992 s 129(2) (as amended) or s 129(2A) (as added): see PARA 221 ante. As to when a person attains a particular age see PARA 19 note 11 ante.

<sup>2</sup> See *ibid* s 129(1)(b) (amended by the Social Security (Incapacity for Work) Act 1994 s 10); and PARA 218 ante. For these purposes, a person has a disability which puts him at a disadvantage in getting a job only if he satisfies prescribed conditions or prescribed circumstances exist in relation to him: s 129(3). A person has a disability which puts him at a disadvantage in getting a job where: (1) in respect of an initial claim one or more of heads (1)-(20), (a)-(d) *infra* and the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, Sch 1 Pt III apply to him; (2) in respect of a repeat claim one or more of heads (1)-(20), (a)-(d) *infra* apply to him: see reg 3(1). The Disability Working Allowance (General) Regulations 1991, SI 1991/2887, Sch 1 Pt I (amended by SI 1995/2303) prescribes a list of 20 disabilities which put a person at a disadvantage in getting a job, as follows:

- 82 (1) when standing he cannot keep his balance unless he continually holds onto something;
- 83 (2) using any crutches, walking frame, walking stick, prosthesis or similar walking aid which he habitually uses, he cannot walk a continuous distance of 100 metres along level ground without stopping or without suffering severe pain;
- 84 (3) he can use neither of his hands behind his back as in the process of putting on a jacket or of tucking a shirt into trousers;
- 85 (4) he can extend neither of his arms in front of him so as to shake hands with another person without difficulty;
- 86 (5) he can put neither of his hands up to his head without difficulty so as to put on a hat;
- 87 (6) due to lack of manual dexterity he cannot, with one hand, pick up a coin which is not more than 2.5 cm in diameter;
- 88 (7) he is not able to use his hands or arms to pick up a full jug of one litre capacity and pour from it into a cup, without difficulty;
- 89 (8) he can turn neither of his hands sideways through 180 degrees;
- 90 (9) he is registered as blind or registered as partially sighted in a register compiled by a local authority under the National Assistance Act 1948 s 29(4)(g) (welfare services) or, in Scotland, has been certified as blind or as partially sighted and in consequence registered as blind or partially sighted in a register maintained by or on behalf of a regional or island council;
- 91 (10) he cannot see to read 16 point print at a distance greater than 20 cm, if appropriate, wearing the glasses he normally uses;
- 92 (11) he cannot hear a telephone ring when he is in the same room as the telephone, if appropriate, using a hearing aid he normally uses;

- 93 (12) in a quiet room he has difficulty in hearing what someone talking in a loud voice at a distance of 2 metres says, if appropriate, using a hearing aid he normally uses;
- 94 (13) people who know him well have difficulty in understanding what he says;
- 95 (14) when a person he knows well speaks to him, he has difficulty in understanding what that person says;
- 96 (15) at least once a year during waking hours he is in a coma or has a fit in which he loses consciousness;
- 97 (16) he has a mental illness for which he receives regular treatment under the supervision of a medically qualified person;
- 98 (17) due to mental disability he is often confused or forgetful;
- 99 (18) he cannot do the simplest addition and subtraction;
- 100 (19) due to mental disability he strikes people or damages property or is unable to form normal social relationships;
- 101 (20) he cannot normally sustain an eight hour working day or a five day working week due to a medical condition or intermittent or continuous severe pain.

The Disability Working Allowance (General) Regulations 1991, SI 1991/2887, Sch 1 Pt II prescribes circumstances where a person is at a disadvantage in getting a job as follows:

- 102 (a) there is payable to him (i) the highest or middle rate of the care component of disability living allowance (see PARA 104 ante); (ii) the higher rate of the mobility component of disability living allowance (see PARA 106 ante); (iii) an attendance allowance under the Social Security Contributions and Benefits Act 1992 s 65 (see PARA 114 ante); (iv) disablement benefit where the extent of the disablement is assessed at not less than 80% in accordance with s 103, Sch 6 (as amended) (see PARA 142 ante); (v) a war pension in respect of which the degree of disablement is certified at not less than 80%; and for these purposes 'war pension' means a war pension in accordance with the Social Security Act 1989 s 25(4) (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 618); (vi) mobility supplement (see PARA 94 note 7 ante) or (vii) a benefit corresponding to a benefit mentioned in heads (i)-(vi) supra under any enactment having effect in Northern Ireland;
- 103 (b) subject to head (d) infra, for one or more of the 56 days immediately preceding the date when the initial claim for disability working allowance was made or treated as made, there was payable to him severe disablement allowance or a corresponding benefit under any enactment having effect in Northern Ireland;
- 104 (c) subject to head (d) infra, he has an invalid carriage or other vehicle provided by the Secretary of State under the National Health Service Act 1977 s 5(2)(a), Sch 2 (as amended) or under corresponding legislation for Scotland or Northern Ireland; but
- 105 (d) heads (a)-(c) supra are subject to the condition that no evidence is before the adjudication officer which gives him reasonable grounds for believing, whether in respect of an initial or a repeat claim, that none of heads (1)-(20) supra apply to the claimant, and in respect of an initial claim that the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, Sch 1 Pt III does not apply to him either.

Schedule 1 Pt III provides that a person is at a disadvantage in getting a job if as a result of an illness or accident he is undergoing a period of habilitation or rehabilitation: Sch 1 Pt III (para 25). See further HEALTH SERVICES vol 54 (2008) PARA 35.

3 'Initial claim' means a claim for a disability working allowance made by a person: (1) to whom it has not previously been payable; or (2) to whom it has not been payable during the period of two years immediately preceding the date on which the claim is made or is treated as made; and 'repeat claim' means any other claim for a disability working allowance: Social Security Administration Act 1992 s 11(1). If (1) a repeat claim is made or treated as made not later than the end of the period of eight weeks commencing with the last day of the claimant's previous award; and (2) on the claim which resulted in that award he qualified under the Social Security Contributions and Benefits Act 1992 s 129(2) (as amended) (see PARA 221 ante) by virtue of s 129(2)(a) (as amended) (see PARA 221 head (1) ante), or by virtue of there being payable to him a benefit under an enactment having effect in Northern Ireland and corresponding to a benefit mentioned in that head, he is treated on the repeat claim as if he still so qualified: Social Security Administration Act 1992 s 11(3).

4 le the Social Security Contributions and Benefits Act 1992 s 129(1)(b) (as amended): see the text to note 2 supra.

5 le in accordance with regulations under *ibid* s 129(3): see the Social Security Administration Act 1992 s 11(2). On an initial claim, a declaration by the claimant that he has a physical or mental disability which puts him at a disadvantage in getting a job is not conclusive that he has a disability which puts him at a disadvantage in getting a job, where the claim itself contains contrary indications, or the adjudication officer has before him other evidence which contradicts that declaration: see the Disability Working Allowance (General) Regulations 1991, SI 1991/3887, reg 4. Appeal from an adjudication officer's decision on this disability qualification, being a 'disability question', lies to a disability appeal tribunal, not to a social security appeal tribunal: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 27(1), (2)(a). As to disability appeal tribunals see PARA 378 post.

## UPDATE

### 218-227 [Disabled Person's Tax Credit]

Subject to transitional provisions and savings (see SI 2003/962) disabled person's tax credit (formerly 'disability working allowance') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887 if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **222 The disability qualification**

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 s 129, Social Security Administration Act 1992 s 11, Social Security (Incapacity for Work) Act 1994 s 10 and Tax Credits Act 1999 repealed (subject to savings: see SI 2003/962): Tax Credits Act 2002 Sch 6. See further PARA 227A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(4) DISABILITY WORKING ALLOWANCE/(ii) Defining the Conditions of Entitlement/223. Remunerative work.

## 223. Remunerative work.

For the purposes of the law relating to income-related benefits<sup>1</sup> as it applies to disability working allowance and subject to statutory provision<sup>2</sup>, a person is to be treated as engaged in remunerative work where:

- 604 (1) the work<sup>3</sup> he undertakes is for not less than 16 hours per week;
- 605 (2) the work is done for payment or in expectation of payment<sup>4</sup>; and
- 606 (3) he is employed at the date of claim and satisfies the specified<sup>5</sup> requirements<sup>6</sup>.

Subject to statutory provision<sup>7</sup>, in determining for the purposes of head (1) above whether a person has undertaken work of not less than 16 hours per week:

- 607 (a) there must be included in the calculation any time allowed:
  - 67 79. (i) for meals or refreshment; or
  - 80. (ii) for visits to a hospital, clinic or other establishment for the purpose only of treating or monitoring the person's disability,
  - 68 608 but only where the person is, or expects to be, paid earnings in respect of that time; and
  - 609 (b) where at the date of claim the claimant has within the previous five weeks:
    - 69 81. (i) started a new job;
    - 82. (ii) resumed work after a break of at least 13 weeks; or
    - 83. (iii) changed his hours,
    - 70 610 the hours worked are to be calculated by reference to the number of hours, or where these are expected to fluctuate, the average number of hours, which he is expected to work in a week; or
    - 611 (c) where none of heads (b)(i) to (iii) apply, and:
      - 71 84. (i) a recognised cycle of working has been established at the date of claim, the hours worked must be calculated by reference to the average number of hours worked in a week over the period of one complete cycle (including where the cycle involves periods in which the person does not work, those periods, but disregarding any other absences<sup>8</sup>); or
      - 85. (ii) no recognised cycle of working has been established at that date, the hours worked must be calculated by reference to the average number of hours worked over the five weeks immediately preceding the week in which the claim is made, or such other length of time preceding that week as may, in the particular case, enable the person's weekly average hours of work to be determined more accurately<sup>9</sup>.

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1 ie the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended).

2 le subject to the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 6(3) (as substituted); see note 5 infra.

3 See PARA 206 note 2 ante.

4 For the meaning of this phrase see PARA 179 note 4 ante.

5 le the requirements of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 6(5) (as amended): see reg 6(1) (amended by SI 1992/2155).

6 See the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 6(1) as amended. As to the further requirements of remunerative work see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 6(5) (as amended), reg 6(6) (as substituted). As to the analogous provisions of the Family Credit (General) Regulations 1987, SI 1987/1973, see reg 4(5), (6) (as substituted); and PARA 206 note 4 ante. A person who does not satisfy all the requirements of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 6(1)(a)-(c) (as amended) is not to be treated as engaged in remunerative work: see reg 6(2) (amended by SI 1992/2155).

Where a person is treated as engaged in remunerative work in accordance with the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 6(1)-(6) (as amended), he must also be treated as normally engaged in remunerative work: see reg 6(7) (added by SI 1992/2155). As to cases where a person who otherwise satisfies the requirements of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 6(1) (as amended) is not to be treated as in remunerative work see reg 6(3) (as substituted). As to the analogous provisions in the Family Credit (General) Regulations 1987, SI 1987/1973, see reg 4(3) (as substituted); and PARA 206 note 4 ante.

7 le subject to the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 6(4A) (as added): see note 7 infra.

8 As to the position of persons on academic year cycles see *ibid* reg 6(4A) (as added). As to the analogous provisions in the Family Credit (General) Regulations 1987, SI 1987/1973, see reg 4(4A) (as substituted); and PARA 206 note 6 ante.

9 See the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 6(4) (amended by SI 1992/2155; and SI 1995/516).

Apart from these particular provisions, the general rules as to what hours count for family credit purposes should also apply in this context: see PARA 206 notes 8-9 ante.

## UPDATE

### 218-227 [Disabled Person's Tax Credit]

Subject to transitional provisions and savings (see SI 2003/962) disabled person's tax credit (formerly 'disability working allowance') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887 if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during

that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI

2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **223 Remunerative work**

TEXT AND NOTE 2--For 'disability working allowance' read 'disabled person's tax credit': SI 1991/2887 reg 6(4) (amended by SI 1999/2487).

NOTE 6--SI 1991/2887 reg 6(3) amended by SI 1999/2165, SI 2000/2978, SI 2001/1334; and modified by SI 2000/3134. SI 1991/2887 reg 6(4), (5) amended, reg 6(4B) added: SI 2000/2978.

NOTES 7-9--SI 1991/2887 reg 6(4) amended: SI 2001/892, SI 2003/44.

NOTE 8--See *Taylor v IRC* [2004] EWCA Civ 174, [2004] STC 683.

NOTE 9--Subject to savings (see SI 2003/962) family credit (working families' tax credit) abolished and replaced; see Tax Credits Act 2002; and PARA 227A. SI 1991/2887 reg 6(4) amended: SI 2000/2978, SI 2003/44.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(4) DISABILITY WORKING ALLOWANCE/(iii) Income and Capital/224. Income.

### (iii) Income and Capital

#### 224. Income.

The provisions governing the calculation of the income of a claimant for disability working allowance are the same as those in relation to a claimant for family credit<sup>1</sup>, with two exceptions:

- 612 (1) the rules relating to the calculation of the normal weekly earnings of employed earners differ<sup>2</sup>;
- 613 (2) as the capital limit for the allowance is £16,000<sup>3</sup> rather than £8,000, the normal rule on capital treated as income<sup>4</sup> operates if the aggregate of the instalments of capital outstanding and any other capital exceeds £16,000<sup>5</sup>.

<sup>1</sup> See PARAS 208-212 ante.

<sup>2</sup> As to the disability working allowance provisions see PARA 225 post.

<sup>3</sup> See PARA 226 post.

<sup>4</sup> I.e. by virtue of the Social Security Contributions and Benefits Act 1992 s 136(2): see PARA 174 note 4 ante.

<sup>5</sup> See the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 28 (as amended). As to the family credit rule see PARA 211 ante.

### UPDATE

#### 218-227 [Disabled Person's Tax Credit]

Subject to transitional provisions and savings (see SI 2003/962) disabled person's tax credit (formerly 'disability working allowance') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887 if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during

that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI

2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **224-227 Income and Capital**

The provisions of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, Pt V (regs 12-50), relating to the calculation of income and capital, are further amended: see PARA 220 NOTE 13. Such amendments generally follow those made to the analogous provisions of the Family Credit (General) Regulations 1987, SI 1987/1973. Following the structure of vol 44(2) (Reissue), detailed amendments are noted to paras 208-217, except where they differ from family credit or are peculiar to disability working allowance.

## **224 Income**

TEXT AND NOTE 1--Subject to savings (see SI 2003/962) disability working allowance (disabled person's tax credit) and family credit (working families' tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(4) DISABILITY WORKING ALLOWANCE/(iii) Income and Capital/225. Normal weekly earnings of employed earners.

## **225. Normal weekly earnings of employed earners.**

The rules relating to the normal weekly earnings of employed earners in relation to disability working allowance differ from those applying to family credit<sup>1</sup>.

Subject to statutory provision<sup>2</sup>, where the claimant is paid weekly, his normal weekly earnings are to be determined by taking account of his earnings over five consecutive weeks in the six weeks immediately preceding the week in which the date of claim falls<sup>3</sup>. Subject to statutory provision<sup>4</sup>, where the claimant is paid monthly, his normal weekly earnings are to be determined by taking account of his earnings over a period of two months immediately preceding the week in which the date of claim falls<sup>5</sup>.

Subject to statutory provision<sup>6</sup>, whether or not the prescribed provision<sup>7</sup> applies, where a claimant's earnings fluctuate or are not likely to represent his weekly earnings, his normal weekly earnings must be determined by taking account of his weekly earnings over such other period preceding the week in which the date of claim falls as may, in any particular case, enable his normal weekly earnings to be determined more accurately<sup>8</sup>.

Where at the date of claim:

614 (1) the claimant:

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86. (a) has been in his employment; or

87. (b) after a continuous period of interruption exceeding 13 weeks, has resumed his employment; or

88. (c) has changed the number of hours for which he is contracted to work; and

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615 (2) the period of his employment or the period since he resumed his employment or the period since the change in the number of hours took place, as the case may be, is less than the assessment period<sup>9</sup> appropriate in his case,

his normal weekly earnings must be determined as follows<sup>10</sup>. The Secretary of State must require the claimant's employer to furnish an estimate of the claimant's average likely earnings for the period for which he will normally be paid and the claimant's normal weekly earnings must be determined by taking account of that estimate<sup>11</sup>.

1 See PARA 208 ante.

2 le subject to the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 16(7) (as amended); see note 9 infra.

3 See *ibid* reg 16(2) (amended by SI 1996/3137). Subject to the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 16(7) (as amended), where at the date of claim there is a trade dispute or period of short-time working at the claimant's place of employment, then his normal weekly earnings must be determined by taking account of his earnings over the five weeks immediately preceding the start of that dispute or period of short-time working: reg 16(3) (amended by SI 1996/3137). 'A period of short-time working' means a continuous period not exceeding 13 weeks during which the claimant is not required by his employer to be available to work the full number of hours normal in his case under the terms of his employment: Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 16(9)(b).

4 le subject to *ibid* reg 16(7) (as amended); see note 9 infra.

5 See *ibid* reg 16(4)(a) (amended by SI 1996/3137). However, where, at the date of claim, there is a trade dispute or a period of short-time working (see note 3 *supra*) at his place of employment, the relevant period is a period of two months immediately preceding the date of the start of that dispute or period of short-time working: see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 16(4)(b) (as so amended).

6 *Ie* subject to *ibid* reg 16(7) (as amended); see note 9 *infra*.

7 *Ie* whether or not *ibid* reg 16(2), (3) or (4) (as amended) applies.

8 *Ibid* reg 16(5) (amended by SI 1996/3137). This retains a discretionary power (to look at a more realistic period) that no longer exists in the equivalent family credit provisions since they were substituted in 1992: see PARA 209 *ante*.

Where a claimant's earnings include a bonus or commission which is paid within 52 weeks preceding the week in which the date of claim falls, and the bonus or commission is paid separately or relates to a period longer than the period relating to the other earnings with which it is paid, his normal weekly earnings must be treated as including an amount calculated in accordance with the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 23 (as amended) (calculation of bonus or commission): reg 16(6).

For the purposes of ascertaining a claimant's normal weekly earnings there must be disregarded for the purposes of reg 16(1) (as amended) (normal weekly earnings of employed earners), in the case of an employed earner: (1) any period in the assessment period where the earnings of the claimant are irregular or unusual; (2) any period in the assessment period in which a bonus or commission to which reg 16(6) applies is paid where that bonus or commission is in respect of a period longer than the period relating to the other earnings with which it is paid: see reg 19(1)(a).

9 *Ie* is less than the assessment period in *ibid* reg 16(2)-(5): see notes 3-8 *supra*.

10 *Ie* in accordance with *ibid* reg 16(8) (as amended): see reg 16(7) (amended by SI 1996/1944).

11 See the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 16(8) (amended by SI 1996/3137). As to the Secretary of State see PARA 1 *ante*.

## UPDATE

### 218-227 [Disabled Person's Tax Credit]

Subject to transitional provisions and savings (see SI 2003/962) disabled person's tax credit (formerly 'disability working allowance') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887 if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are

designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **224-227 Income and Capital**

The provisions of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, Pt V (regs 12-50), relating to the calculation of income and capital, are further amended: see PARA 220 NOTE 13. Such amendments generally follow those made to the analogous provisions of the Family Credit (General) Regulations 1987, SI 1987/1973. Following the structure of vol 44(2) (Reissue), detailed amendments are noted to paras 208-217, except where they differ from family credit or are peculiar to disability working allowance.

## **225 Normal weekly earnings of employed earners**

TEXT AND NOTE 1--Subject to savings (see SI 2003/962) disability working allowance (disabled person's tax credit) and family credit (working families' tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

TEXT AND NOTE 11--Reference to the Secretary of State now to the Commissioners of Inland Revenue: SI 1991/2887 reg 16(8) (amended by SI 1999/2487).

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## 226. Capital.

The principal difference between the family credit provisions on capital<sup>1</sup> and those applying for disability working allowance purposes is that in the latter the capital limit, beyond which there is no entitlement to the allowance, is set at £16,000<sup>2</sup>, not £8,000<sup>3</sup>. Tariff income<sup>4</sup> still starts once the claimant has £3,000, but goes up to £16,000 (on the same basis of £1 of notional income for each £250 or part thereof)<sup>5</sup>. Other than that, the provisions are analogous with those in the family credit legislation<sup>6</sup>.

1 See PARAS 213-216 ante.

2 As to the capital limit see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 31.

3 As to the capital limit for family credit purposes see PARA 213 ante.

4 See PARA 213 ante.

5 As to the calculation of tariff income from capital see the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 40.

6 See PARAS 213-216 ante.

## UPDATE

### 218-227 [Disabled Person's Tax Credit]

Subject to transitional provisions and savings (see SI 2003/962) disabled person's tax credit (formerly 'disability working allowance') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887 if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are

designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **224-227 Income and Capital**

The provisions of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, Pt V (regs 12-50), relating to the calculation of income and capital, are further amended: see PARA 220 NOTE 13. Such amendments generally follow those made to the analogous provisions of the Family Credit (General) Regulations 1987, SI 1987/1973. Following the structure of vol 44(2) (Reissue), detailed amendments are noted to paras 208-217, except where they differ from family credit or are peculiar to disability working allowance.

## **226 Capital**

TEXT AND NOTE 1--Subject to savings (see SI 2003/962) family credit (working families' tax credit) and disability working allowance (disabled person's tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(4) DISABILITY WORKING ALLOWANCE/(iii) Income and Capital/227. Calculation of a student's income.

## **227. Calculation of a student's income.**

Where the person or one of the persons whose income has to be calculated for disability working allowance purposes is a student, there are special provisions<sup>1</sup> applying to that calculation which are analogous with the equivalent provisions relating to family credit<sup>2</sup>; those in turn largely replicate the income support provisions<sup>3</sup>.

<sup>1</sup> As to the provisions of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, regarding income and capital that apply to students see Pt V Ch VII (regs 41-50) (as amended).

<sup>2</sup> See PARA 217 ante.

<sup>3</sup> See PARAS 198-199 ante. However the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 49 (disregard of tax refund) differs from the Income Support (General) Regulations 1987, SI 1987/1967, reg 68 (tax refund to be treated as capital) (see PARA 199 note 3 ante) and is in fact akin to the Family Credit (General) Regulations 1987, SI 1987/1973, reg 44 (disregard of tax refund) (see PARA 217 note 6 ante).

## **UPDATE**

### **218-227 [Disabled Person's Tax Credit]**

Subject to transitional provisions and savings (see SI 2003/962) disabled person's tax credit (formerly 'disability working allowance') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887 if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or

other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment

route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **224-227 Income and Capital**

The provisions of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, Pt V (regs 12-50), relating to the calculation of income and capital, are further amended: see PARA 220 NOTE 13. Such amendments generally follow those made to the analogous provisions of the Family Credit (General) Regulations 1987, SI 1987/1973. Following the structure of vol 44(2) (Reissue), detailed amendments are noted to paras 208-217, except where they differ from family credit or are peculiar to disability working allowance.

## **227 Calculation of a student's income**

TEXT AND NOTES--Subject to savings (see SI 2003/962) disability working allowance (disabled person's tax credit) and family credit (working families' tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/7. INCOME-RELATED BENEFITS/(4) DISABILITY WORKING ALLOWANCE/(iii) Income and Capital/227A. Tax Credits.

## **227A. Tax Credits.**

The Tax Credits Act 2002 makes provision for the child tax credit for families with children and the working tax credit for working households facing low income, including those in which a worker has a disability. Part 1 (ss 1-48) establishes the administrative framework for the new tax credits and sets out the conditions of entitlement to, and the elements of, those tax credits.

For consequential amendments and repeals see ss 47, 60, Schs 3, 6. For transitional provisions and savings see s 62; Tax Credits Act 2002 (Transitional Provisions) Order 2008, SI 2008/3151. There is to be paid out of money provided by Parliament any expenditure of a minister of the Crown or government department under the Tax Credits Act 2002, and any increase attributable to the Tax Credits Act 2002 in sums payable out of money provided by Parliament under any other Act: s 68(1). There is to be paid into the Consolidated Fund any sums received by a government department by virtue of the Tax Credits Act 2002 (apart from any required by any other enactment to be paid into the National Insurance Fund): s 68(2).

The Tax Credits Act 1999, by virtue of which family credit was known as working families' tax credit and disability working allowance as disabled person's tax credit, is repealed (subject to savings: see SI 2003/962): Tax Credits Act 2002 s 60, Sch 6.

For modifications to the Tax Credits Act 2002 Pt 1 for members of polygamous units see Tax Credits (Polygamous Marriages) Regulations 2003, SI 2003/742 (amended by SI 2004/762).

### **1. Introductory**

The Tax Credits Act 2002 makes provision for (1) a tax credit to be known as child tax credit, and (2) a tax credit to be known as working tax credit<sup>1</sup>.

<sup>1</sup> Tax Credits Act 2002 s 1(1) (in force for all purposes of Pt 1 (ss 1-48) and, as respects tax credits, Pt 3 (ss 58-70): SI 2002/1727). In the Tax Credits Act 2002 references to a tax credit are to either of those tax credits and references to tax credits are to both of them: s 1(2) (in force for all purposes of Pt 1 and, as respects tax credits, Pt 3: SI 2002/1727).

The following (which are superseded by tax credits) are abolished: (1) children's tax credit under the Income and Corporation Taxes Act 1988 s 257AA (see INCOME TAXATION vol 23(2) (Reissue) PARA 996), (2) working families' tax credit (see PARA 202-217), (3) disabled person's tax credit (see PARA 218-227), (4) the amounts which, in relation to income support and income-based jobseeker's allowance, are prescribed as part of the applicable amount in respect of a child or young person, the family premium, the enhanced disability premium in respect of a child or young person and the disabled child premium (see PARAS 184, 272), (5) increases in benefits in respect of children under the Social Security Contributions and Benefits Act 1992 ss 80 (see PARA 122), 90 (see PARA 590) and the Social Security Contributions and Benefits (Northern Ireland) Act 1992 ss 80, 90, and (6) the employment credit under the schemes under the Employment and Training Act 1973 s 2(2) and the Employment and Training Act (Northern Ireland) 1950 s 1 known as 'New Deal 50plus' (see INCOME TAXATION vol 23(2) (Reissue) PARA 1240): Tax Credits Act 2002 s 1(3) (heads (1)-(3), (5), (6) in force: SI 2003/938, SI 2003/962); head (4) in force 31 December 2011: SI 2003/962 (amended by SI 2006/3369, SI 2008/3151). The Secretary of State may by order make any transitional provisions or savings which appear appropriate in connection with the commencement of the abolition of the increases referred to in the 2002 Act s 1(3)(e) (head (5)): s 62(1). See the Tax Credits Act 2002 (Transitional Provisions) Order 2005, SI 2005/773 (amended by SI 2006/3369). As to orders generally see 2002 Act s 65; and PARA 227A.47.

### **2. Functions of Board**

The Commissioners for Her Majesty's Revenue and Customs are responsible for the payment and management of tax credits<sup>1</sup>.

1 Tax Credits Act 2002 s 2 (substituted by the Commissioners for Revenue and Customs Act 2005 Sch 4 para 88). 'Tax credit' and 'tax credits' have the meanings given in the 2002 Act 1(2) (see PARA 227A.1): s 67.

### 3. Claims: general

Entitlement to a tax credit<sup>1</sup> for the whole or part of a tax year<sup>2</sup> is dependent on the making of a claim for it<sup>3</sup>. Where the Board<sup>4</sup> (1) decides<sup>5</sup> not to make an award of a tax credit on a claim, or (2) decides<sup>6</sup> to terminate an award of a tax credit made on a claim, (subject to any appeal) any entitlement, or subsequent entitlement, to the tax credit for any part of the same tax year is dependent on the making of a new claim<sup>7</sup>. A claim for a tax credit may be made (a) jointly by the members of a couple<sup>8</sup> both of whom are aged at least 16 and are in the United Kingdom, or (b) by a person who is aged at least 16 and is in the United Kingdom but is not entitled to make a claim under head (a) above (jointly with another)<sup>9</sup>. Entitlement to a tax credit pursuant to a claim ceases (i) in the case of a joint claim<sup>10</sup>, if the persons by whom it was made could no longer jointly make a joint claim, and (ii) in the case of a single claim<sup>11</sup>, if the person by whom it was made could no longer make a single claim<sup>12</sup>. Circumstances may be prescribed<sup>13</sup> in which a person is to be treated for the purposes of Part 1 of the Tax Credits Act 2002 as being, or as not being, in the United Kingdom<sup>14</sup>.

1 For the meaning of 'tax credit' see PARA 227A.2.

2 'Tax year' means a period beginning with 6 April in one year and ending with 5 April in the next: Tax Credits Act 2002 s 48.

3 Ibid s 3(1).

4 For the meaning of 'the Board' see PARA 227A.2.

5 Under the Tax Credits Act 2002 s 14: see PARA 227A.14.

6 Under ibid s 16: see PARA 227A.16.

7 Ibid s 3(2).

8 In ibid Pt 1 'couple' means (1) a man and woman who are married to each other and are neither (a) separated under a court order, nor (b) separated in circumstances in which the separation is likely to be permanent, (2) a man and woman who are not married to each other but are living together as husband and wife, (3) two people of the same sex who are civil partners of each other and are neither (i) separated under a court order, nor (ii) separated in circumstances in which the separation is likely to be permanent, or (4) two people of the same sex who are not civil partners of each other but are living together as if they were civil partners: s 3(5A) (substituted by Civil Partnership Act 2004 Sch 24 para 144(3)). For the purposes of the 2002 Act Pt 1, two people of the same sex are to be regarded as living together as if they were civil partners if, but only if, they would be regarded as living together as husband and wife were they instead two people of the opposite sex: s 48(2) (added by Civil Partnership Act 2004 Sch 24 para 147(3)). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

9 Tax Credits Act 2002 s 3(3) (amended by Civil Partnership Act 2004 Sch 24 para 144(2)).

10 In the Tax Credits Act 2002 Pt 1 'joint claim' means a claim under head (a) in the text: s 3(8).

11 In ibid Pt 1 'single claim' means a claim under head (b) in the text: s 3(8).

12 Ibid s 3(4).

13 In ibid 'prescribed' means prescribed by regulations: s 67. As to regulations generally see s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

14 Ibid s 3(7). See Tax Credits (Residence) Regulations 2003, SI 2003/654 (amended by SI 2003/742, SI 2004/1243, SI 2005/2919, SI 2006/766).

#### 4. Claims: supplementary

Regulations may (1) require a claim for a tax credit<sup>1</sup> to be made in a prescribed<sup>2</sup> manner and within a prescribed time, (2) provide for a claim for a tax credit made in prescribed circumstances to be treated as having been made on a prescribed date earlier or later than that on which it is made, (3) provide that, in prescribed circumstances, a claim for a tax credit may be made for a period wholly or partly after the date on which it is made, (4) provide that, in prescribed circumstances, an award on a claim for a tax credit may be made subject to the condition that the requirements for entitlement are satisfied at a prescribed time, (5) provide for a claim for a tax credit to be made or proceeded with in the name of a person who has died, (6) provide that, in prescribed circumstances, one person may act for another in making a claim for a tax credit, (7) provide that, in prescribed circumstances, a claim for a tax credit made by one member of a couple<sup>3</sup> is to be treated as also made by the other member of the couple, and (8) provide that a claim for a tax credit is to be treated as made by a person or persons in such other circumstances as may be prescribed<sup>4</sup>. The Board<sup>5</sup> may supply to a person who has made a claim for a tax credit (whether or not jointly with another) (a) any information relating to the claim, to an award made on the claim or to any change of circumstances relevant to the claim or such an award, (b) any communication made or received relating to such an award or any such change of circumstances, and (c) any other information which is relevant to any entitlement to tax credits pursuant to the claim or any such change of circumstances or which appeared to be so relevant at the time the information was supplied<sup>6</sup>.

1 For the meaning of 'tax credit' see PARA 227A.2.

2 For the meaning of 'prescribed' see PARA 227A.3.

3 'Couple' has the meaning given by the Tax Credits Act 2002 s 3(5A) (see PARA 227A.3): s 48(1) (amended by Civil Partnership Act 2004 Sch 24 para 147(1), (2)).

4 Tax Credits Act 2002 s 4(1) (amended by Civil Partnership Act 2004 Sch 24 paras 145, 146). See Tax Credits (Claims and Notifications) Regulations 2002, SI 2002/2014 (amended by SI 2003/723, SI 2003/742, SI 2003/3240, SI 2004/762, SI 2004/1241, SI 2005/2919, SI 2006/766, SI 2007/824, SI 2008/2169, SI 2009/697). As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

5 For the meaning of 'the Board' see PARA 227A.2.

6 Tax Credits Act 2002 s 4(2) (in force for all purposes mentioned in s 4(2): SI 2002/172).

## 5. Period of awards

Where a tax credit<sup>1</sup> is claimed for a tax year<sup>2</sup> by making a claim before the tax year begins, any award of the tax credit on the claim is for the whole of the tax year<sup>3</sup>. An award on any other claim for a tax credit is for the period beginning with the date on which the claim is made and ending at the end of the tax year in which that date falls<sup>4</sup>.

The above provisions<sup>5</sup> are subject to any decision by the Board<sup>6</sup> to terminate an award<sup>7</sup>.

1 For the meaning of 'tax credit' see PARA 227A.2.

2 For the meaning of 'tax year' see PARA 227A.3.

3 Tax Credits Act 2002 s 5(1).

4 Ibid s 5(2).

5 Ie ibid s 5(1) and (2).

6 Under ibid s 16: see PARA 227A.16. For the meaning of 'the Board' see PARA 227A.2.

7 Ibid s 5(3).

## 6. Notifications of changes of circumstances

Regulations may provide that any change of circumstances of a prescribed<sup>1</sup> description which may increase the maximum rate at which a person or persons may be entitled to a tax credit<sup>2</sup> is to do so only if notification of it has been given<sup>3</sup>. Regulations<sup>4</sup> may provide (1) for notification of a change of circumstances given in prescribed circumstances to be treated as having been given on a prescribed date earlier or later than that on which it is given, (2) that, in prescribed circumstances, a notification of a change of circumstances may be given for a period wholly or partly after the date on which it is given, and (3) that, in prescribed circumstances, an amendment of an award of a tax credit in consequence of a notification of a change of circumstances may be made subject to the condition that the requirements for entitlement to the amended amount of the tax credit are satisfied at a prescribed time<sup>5</sup>. Regulations may require that, where a person has or persons have claimed a tax credit, notification is to be given if there is a change of circumstances of a prescribed description which may decrease the rate at which he is or they are entitled to the tax credit or mean that he ceases or they cease to be entitled to the tax credit<sup>6</sup>. Regulations under the above provisions may (a) require a notification to be given in a prescribed manner and within a prescribed time, (b) specify the person or persons by whom a notification may be, or is to be, given, and (c) provide that, in prescribed circumstances, one person may act for another in giving a notification<sup>7</sup>.

1 For the meaning of 'prescribed' see PARA 227A.3.

2 For the meaning of 'tax credit' see PARA 227A.2.

3 Tax Credits Act 2002 s 6(1). See Tax Credits (Claims and Notifications) Regulations 2002, SI 2002/2014 (see PARA 227A.4). As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

4 Ie under ibid s 6(1).

5 Ibid s 6(2).

6 Ibid s 6(3).

7 Ibid s 6(4).

## 7. Income test

The entitlement of a person or persons of any description to a tax credit<sup>1</sup> is dependent on the relevant income<sup>2</sup> (1) not exceeding the amount determined in the manner prescribed for the purposes of this provision<sup>3</sup> in relation to the tax credit and a person or persons of that description (referred to in Part 1 of the Tax Credits Act 2002 as the income threshold), or (2) exceeding the income threshold by only so much that a determination<sup>4</sup> provides a rate of the tax credit in his or their case<sup>5</sup>.

For the purposes of Part 1 of the Tax Credits Act 2002 regulations have been made which make provision (a) as to what is, or is not, income, and (b) as to the calculation of income<sup>6</sup>. The regulations also provide that, for the purposes of Part 1 of the Tax Credits Act 2002, a person is to be treated (i) as having income which he does not in fact have, or (ii) as not having income which he does in fact have<sup>7</sup>.

The Board<sup>8</sup> may estimate the amount of the income of a person, or the aggregate income of persons, for any tax year for the purpose of making, amending or terminating an award of a tax credit; but such an estimate does not affect the rate at which he is, or they are, entitled to the tax credit for that or any other tax year<sup>9</sup>.

1 For the meaning of 'tax credit' see PARA 227A.2.

2 In the Tax Credits Act 2002 Pt 1 (ss 1-48) 'the relevant income' means (1) if an amount is prescribed for the purposes of this provision and the current year income exceeds the previous year income by not more than that amount, the previous year income, (2) if an amount is prescribed for the purposes of this provision and the current year income exceeds the previous year income by more than that amount, the current year income reduced by that amount, (3) if an amount is prescribed for the purposes of this provision and the previous year income exceeds the current year income by not more than that amount, the previous year income, (4) if an amount is prescribed for the purposes of this provision and the previous year income exceeds the current year income by more than that amount, the current year income increased by that amount, and (5) otherwise, the current year income: s 7(3). See Tax Credits (Income Thresholds and Determination of Rates) Regulations 2002, SI 2002/2008 (amended by SI 2004/941, SI 2006/963, SI 2007/828, SI 2008/1879, SI 2009/800). For the meaning of 'prescribed' see PARA 227A.3. As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48. In Pt 1 'the current year income' means (a) in relation to persons by whom a joint claim for a tax credit is made, the aggregate income of the persons for the tax year to which the claim relates, and (b) in relation to a person by whom a single claim for a tax credit is made, the income of the person for that tax year: s 7(4). For the meaning of 'joint claim', 'tax year' and 'single claim' see PARA 227A.3. In Pt 1 'the previous year income' means (i) in relation to persons by whom a joint claim for a tax credit is made, the aggregate income of the persons for the tax year preceding that to which the claim relates, and (ii) in relation to a person by whom a single claim for a tax credit is made, the income of the person for that preceding tax year: s 7(5).

Regulations may provide that, for the purposes of Pt 1, income of a prescribed description is to be treated as being, or as not being, income for a particular tax year: s 7(6) (in force for the purpose of making regulations: SI

2002/1727). In particular, regulations may provide that income of a prescribed description of a person for the tax year immediately before the preceding tax year referred to in the Tax Credits Act 2002 s 7(5) is to be treated as being income of that preceding tax year (instead of any actual income of that description of the person for that preceding tax year): s 7(7).

3 le for the purposes of *ibid* s 7(1)(a).

4 In accordance with regulations under *ibid* s 13(2): see PARA 227A.13.

5 *Ibid* s 7(1). For the purposes of s 7(1)(a) (head (1) in the text), in the case of a person or persons entitled to working tax credit, the amount in relation to that tax credit is £5,060; and in the case of a person or persons entitled to child tax credit, the amount in relation to that tax credit is £13,230: see SI 2002/2008. As to working tax credit see generally PARA 227A.10. As to child tax credit see generally PARA 227A.8. The Tax Credits Act 2002 s 7(1) does not apply in relation to the entitlement of a person or persons to a tax credit for so long as the person, or either of the persons, is entitled to any social security benefit prescribed for the purposes of this provision in relation to the tax credit: s 7(2). As to the social security benefits prescribed for the purposes of s 7(2) see SI 2002/2008.

6 See Tax Credits Act 2002 s 7(8); and Tax Credits (Definition and Calculation of Income) Regulations 2002, SI 2002/2006 (amended by SI 2003/732, SI 2003/742, SI 2004/762, SI 2004/2663, SI 2005/2919, SI 2006/766, SI 2007/824, SI 2007/1305, SI 2007/2538, SI 2008/604, SI 2008/2006, SI 2008/2169, SI 2009/697).

7 See Tax Credits Act 2002 s 7(9); SI 2002/2006; and NOTE 6.

8 For the meaning of 'the Board' see PARA 227A.2.

9 Tax Credits Act 2002 s 7(10).

## 8. Child tax credit: entitlement

The entitlement of the person or persons by whom a claim for child tax credit<sup>1</sup> has been made is dependent on him, or either or both of them, being responsible for one or more children<sup>2</sup> or qualifying young persons<sup>3</sup>. Regulations make provision for the purposes of child tax credit as to the circumstances in which a person is or is not responsible for a child or qualifying young person<sup>4</sup>. Circumstances are prescribed in which a person is to be entitled to child tax credit for a prescribed period in respect of a child or qualifying young person who has died<sup>5</sup>.

1 See generally PARA 227A.1.

2 For the purposes of the Tax Credits Act 2002 Pt 1 (ss 1-48) a person is a child if he has not attained the age of 16; but regulations make provision for a person who has attained that age to remain a child for the purposes of Pt 1 after attaining that age for a prescribed period or until a prescribed date: s 8(3). See Child Tax Credit Regulations 2002, SI 2002/2007 (amended by SI 2003/738, SI 2003/742, SI 2003/2815, SI 2004/762, SI 2004/941, SI 2005/681, SI 2005/2919, SI 2005/3238, SI 2006/222, SI 2006/766, SI 2006/963, SI 2006/1163, SI 2007/828, SI 2007/2151, SI 2008/796, SI 2008/1879, SI 2008/2169, SI 2009/697, SI 2009/800). For the meaning of 'prescribed' see PARA 227A.3. As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

3 *Ibid* 8(1). In Pt 1 'qualifying young person' means a person, other than a child, who (1) has not attained such age (greater than 16) as is prescribed, and (2) satisfies prescribed conditions: s 8(4).

4 See *ibid* s 8(2); SI 2002/2007; and NOTE 2. The entitlement of only the primary carer to child tax credit under SI 2002/2007 is not not unlawfully discriminatory against men: *Humphreys v Revenue and Customs Comrs* [2010] EWCA Civ 56, [2010] 1 FCR 630.

5 See Tax Credits Act 2002 s 8(5); SI 2002/2007; and NOTE 2.

## 9. Child tax credit: maximum rate

The maximum rate at which a person or persons may be entitled to child tax credit<sup>1</sup> is to be determined in the prescribed<sup>2</sup> manner<sup>3</sup>. The prescribed manner of determination must involve the inclusion of (1) an element which is to be included in the case of all persons entitled to child

tax credit, and (2) an element in respect of each child<sup>4</sup> or qualifying young person<sup>5</sup> for whom the person is, or either or both of them is or are, responsible<sup>6</sup>. The element specified in head (1) above is to be known as the family element of child tax credit and that specified in head (2) above is to be known as the individual element of child tax credit<sup>7</sup>. The prescribed manner of determination may involve the inclusion of such other elements as may be prescribed<sup>8</sup>. The prescribed manner of determination (a) may include provision for the amount of the family element of child tax credit to vary according to the age of any of the children or qualifying young persons or according to any such other factors as may be prescribed, (b) may include provision for the amount of the individual element of child tax credit to vary according to the age of the child or qualifying young person or according to any such other factors as may be prescribed, and (c) must include provision for the amount of the individual element of child tax credit to be increased in the case of a child or qualifying young person who is disabled and to be further increased in the case of a child or qualifying young person who is severely disabled<sup>9</sup>. If more than one claimant<sup>10</sup> may be entitled<sup>11</sup> to child tax credit in respect of the same child or qualifying young person, the prescribed manner of determination may include provision for the amount of any element of child tax credit included in the case of any one or more of them to be less than it would be if only one claimant were so entitled<sup>12</sup>.

1 See generally PARA 227A.1. As to entitlement to child tax credit see PARA 227A.8.

2 For the meaning of 'prescribed' see PARA 227A.3.

3 Tax Credits Act 2002 s 9(1). See Child Tax Credit Regulations 2002, SI 2002/2007 (see PARA 227A.8). As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

4 'Child' has the meaning given by the Tax Credits Act 2002 s 8(3) (see PARA 227A.8): s 48.

5 'Qualifying young person' has the meaning given by *ibid* s 8(4) (see PARA 227A.8): s 48.

6 *Ibid* s 9(2). 'Responsible', in relation to a child or qualifying young person, has the meaning given by regulations under s 8(2) (see PARA 227A.8): s 48.

7 *Ibid* s 9(3).

8 *Ibid* s 9(4).

9 *Ibid* s 9(5). A child or qualifying young person is disabled, or severely disabled, for the purposes of s 9 only if (1) he satisfies prescribed conditions, or (2) prescribed conditions exist in relation to him: s 9(6). See SI 2002/2007.

10 'Claimant' means (1) in the case of a single claim, the person who makes the claim, and (2) in the case of a joint claim, the persons who make the claim: *ibid* s 9(8). For the meaning of 'single claim' and 'joint claim' see PARA 227A.3.

11 In accordance with regulations under *ibid* s 8(2).

12 *Ibid* s 9(7).

## 10. Working tax credit: entitlement

The entitlement of the person or persons by whom a claim for working tax credit<sup>1</sup> has been made is dependent on him, or either or both of them, being engaged in qualifying remunerative work<sup>2</sup>. Regulations have made provision for the purposes of Part 1 of the Tax Credits Act 2002<sup>3</sup> (1) as to what is, or is not, qualifying remunerative work, and (2) as to the circumstances in which a person is, or is not, engaged in it<sup>4</sup>. The circumstances prescribed under head (2) above may differ by reference to (a) the age of the person or either of the persons, (b) whether the person, or either of the persons, is disabled, (c) whether the person, or either of the persons, is responsible<sup>5</sup> for one or more children or qualifying young persons, or (d) any other factors<sup>6</sup>.

1 See generally PARA 227A.1.

2 Tax Credits Act 2002 s 10(1).

3 *Ibid* ss 1-48.

4 See *ibid* s 10(2); and Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002, SI 2002/2005 (amended by SI 2003/701, SI 2003/742, SI 2004/762, SI 2004/941, SI 2004/1276, SI 2004/2663, SI 2005/769, SI 2005/2919, SI 2006/766, SI 2006/963, SI 2006/2689, SI 2007/824, SI 2007/828, SI 2007/968, SI 2007/2479, SI 2008/604, SI 2008/1879, SI 2008/2169, SI 2009/697, SI 2009/800, SI 2009/1829, SI 2009/2887, SI 2010/986). As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

5 Regulations may make provision for the purposes of working tax credit as to the circumstances in which a person is or is not responsible for a child or qualifying young person: *ibid* s 10(4). See SI 2002/2005, and NOTE 4. For the meaning of 'child' and 'qualifying young person' see PARA 227A.8.

6 Tax Credits Act 2002 s 10(3).

## 11. Working tax credit: maximum rate

The maximum rate at which a person or persons may be entitled to working tax credit<sup>1</sup> is to be determined in the prescribed<sup>2</sup> manner<sup>3</sup>. The prescribed manner of determination must involve the inclusion of an element which is to be included in the case of all persons entitled to working tax credit<sup>4</sup>. The prescribed manner of determination must also involve the inclusion of an element in respect of the person, or either or both of the persons, engaged in qualifying remunerative work<sup>5</sup> (1) having a physical or mental disability which puts him at a disadvantage in getting a job<sup>6</sup>, and (2) satisfying such other conditions as may be prescribed<sup>7</sup>. The prescribed manner of determination may involve the inclusion of such other elements as may be prescribed<sup>8</sup>. The other elements may (in particular) include (a) an element in respect of the person, or either of the persons or the two of them taken together, being engaged in qualifying remunerative work to an extent prescribed for the purposes of this provision, (b) an element in respect of the persons being the members of a couple<sup>9</sup>, (c) an element in respect of the person not being a member of a couple but being responsible<sup>10</sup> for a child<sup>11</sup> or qualifying young person<sup>12</sup>, (d) an element in respect of the person, or either or both of the persons, being severely disabled, and (e) an element in respect of the person, or either or both of the persons, being over a prescribed age, satisfying prescribed conditions and having been engaged in qualifying remunerative work for not longer than a prescribed period<sup>13</sup>.

1 See generally PARA 227A.1. As to entitlement to working tax credit see PARA 227A.8.

2 For the meaning of 'prescribed' see PARA 227A.3.

3 Tax Credits Act 2002 s 11(1). See Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002, SI 2002/2005; and PARA 227A.10. As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

4 *Ibid* s 11(2). The element specified in s 11(2) is known as the basic element of working tax credit: s 11(4).

5 'Qualifying remunerative work', and being engaged in it, have the meaning given by regulations under *ibid* s 10(2) (see PARA 227A.10): s 48.

6 A person has a physical or mental disability which puts him at a disadvantage in getting a job, or is severely disabled, for the purposes of *ibid* s 11 only if (1) he satisfies prescribed conditions, or (2) prescribed conditions exist in relation to him: s 11(7). See SI 2002/2005; and NOTE 3.

7 Tax Credits Act 2002 s 11(3). The element specified in s 11(3) is known as the disability element of working tax credit: s 11(4).

8 Ibid s 11(5).

9 For the meaning of 'couple' see PARA 227A.3.

10 'Responsible', in relation to a child or qualifying young person, has the meaning given by regulations under the Tax Credits Act 2002 s 10(4) (see PARA 227A.10): s 48.

11 For the meaning of 'child' see PARA 227A.8.

12 For the meaning of 'qualifying young person' see PARA 227A.8.

13 Tax Credits Act 2002 s 11(6) (amended by Civil Partnership Act 2004 Sch 24 para 145).

## 12. Working tax credit: child care element

The prescribed<sup>1</sup> manner of determination of the maximum rate at which a person or persons may be entitled to working tax credit<sup>2</sup> may involve the inclusion, in prescribed circumstances, of a child care element<sup>3</sup>. A child care element is an element in respect of a prescribed proportion of so much of any relevant child care charges as does not exceed a prescribed amount<sup>4</sup>. Child care charges are charges of a prescribed description incurred in respect of child care<sup>5</sup> by the person, or either or both of the persons, by whom a claim for working tax credit is made<sup>6</sup>.

1 For the meaning of 'prescribed' see PARA 227A.3.

2 See generally PARA 227A.1. As to entitlement to working tax credit see PARA 227A.8.

3 Tax Credits Act 2002 s 12(1). See Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002, SI 2002/2005; and PARA 227A.10.

4 Tax Credits Act 2002 s 12(2).

5 'Child care', in relation to a person or persons, means care provided (1) for a child of a prescribed description for whom the person is responsible, or for whom either or both of the persons is or are responsible, and (2) by a person of a prescribed description: s 12(4). For the meaning of 'child' see PARA 227A.8. For the meaning of 'responsible' in this context see PARA 227A.10. The descriptions of persons prescribed under head (2) may include descriptions of persons approved in accordance with a scheme made by the appropriate national authority under this provision: s 12(5). See further s 66; and PARA 227A.48. See the Tax Credits (Approval of Child Care Providers) (Wales) Scheme 2007, SI 2007/226 (amended by SI 2008/2687). 'The appropriate national authority' means (a) in relation to care provided in England, the Secretary of State, (b) in relation to care provided in Scotland, the Scottish ministers, (c) in relation to care provided in Wales, the National Assembly for Wales, and (d) in relation to care provided in Northern Ireland, the Department of Health, Social Services and Public Safety: Tax Credits Act 2002 s 12(6). The provision made by a scheme under s 12(5) must involve the giving of approvals, in accordance with criteria determined by or under the scheme, by such of the following as the scheme specifies (i) the appropriate national authority making the scheme, (ii) one or more specified persons or bodies or persons or bodies of a specified description, and (iii) persons or bodies accredited under the scheme in accordance with criteria determined by or under it: s 12(7). A scheme under s 12(5) may authorise (A) the making of grants or loans to, and (B) the charging of reasonable fees by, persons and bodies giving approvals: s 12(8).

6 Ibid s 12(3).

## 13. Rate

Where, in the case of a person or persons entitled to a tax credit<sup>1</sup>, the relevant income<sup>2</sup> does not exceed the income threshold<sup>3</sup>, the rate at which he is or they are entitled to the tax credit is the maximum rate for his or their case<sup>4</sup>. Regulations have made provision as to the manner of determining the rate (if any) at which a person is, or persons are, entitled to a tax credit in any other case<sup>5</sup>.

1 For the meaning of 'tax credit' see PARA 227A.2.

2 'The relevant income' has the meaning given by the Tax Credits Act 2002 s 7(3) (see PARA 227A.7): s 48.

3 Or his or their entitlement arises by virtue of *ibid* s 7(2) (see PARA 227A.7): s 13(1). 'The income threshold' has the meaning given by s 7(1)(a) (see PARA 227A.7 head (1)): s 48.

4 *Ibid* s 13(1).

5 See *ibid* s 13(2); and Tax Credits (Income Thresholds and Determination of Rates) Regulations 2002, SI 2002/2008 (see PARA 227A.7). As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48. The manner of determination prescribed under s 13(2) (1) may involve the making of adjustments so as to avoid fractional amounts, and (2) may include provision for securing that, where the rate at which a person or persons would be entitled to a tax credit would be less than a prescribed rate, there is no rate in his or their case: s 13(3). See SI 2002/2008.

## 14. Initial decisions

On a claim for a tax credit<sup>1</sup> the Board<sup>2</sup> must decide (1) whether to make an award of the tax credit, and (2) if so, the rate at which to award it<sup>3</sup>. Before making its decision the Board may by notice (a) require the person, or either or both of the persons, by whom the claim is made to provide any information or evidence which the Board considers it may need for making its decision, or (b) require any person of a prescribed<sup>4</sup> description to provide any information or evidence of a prescribed description which the Board considers it may need for that purpose, by the date specified in the notice<sup>5</sup>. The Board's power to decide the rate at which to award a tax credit includes power to decide to award it at a nil rate<sup>6</sup>.

1 For the meaning of 'tax credit' see PARA 227A.2.

2 For the meaning of 'the Board' see PARA 227A.2.

3 Tax Credits Act 2002 s 14(1).

4 For the meaning of 'prescribed' see PARA 227A.3.

5 Tax Credits Act 2002 s 14(2). See Tax Credits (Claims and Notifications) Regulations 2002, SI 2002/2014 (see PARA 227A.4). As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

6 *Ibid* s 14(3).

## 15. Revised decisions after notifications

Where notification of a change of circumstances increasing the maximum rate at which a person or persons may be entitled to a tax credit<sup>1</sup> is given<sup>2</sup>, the Board<sup>3</sup> must decide whether (and, if so, how) to amend the award of the tax credit made to him or them<sup>4</sup>. Before making its decision the Board may by notice (1) require the person by whom the notification is given to provide any information or evidence which the Board considers it may need for making its decision, or (2) require any person of a prescribed<sup>5</sup> description to provide any information or evidence of a prescribed description which the Board considers it may need for that purpose, by the date specified in the notice<sup>6</sup>.

1 For the meaning of 'tax credit' see PARA 227A.2.

2 *Ie* in accordance with regulations under the Tax Credits Act 2002 s 6(1): see PARA 227A.6.

3 For the meaning of 'the Board' see PARA 227A.2.

4 Tax Credits Act 2002 s 15(1).

5 For the meaning of 'prescribed' see PARA 227A.3.

6 Tax Credits Act 2002 s 15(2). See Tax Credits (Claims and Notifications) Regulations 2002, SI 2002/2014 (see PARA 227A.4). As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

## 16. Other revised decisions

Where, at any time during the period for which an award of a tax credit<sup>1</sup> is made to a person or persons, the Board<sup>2</sup> has reasonable grounds for believing (1) that the rate at which the tax credit has been awarded to him or them for the period differs from the rate at which he is, or they are, entitled to the tax credit for the period, or (2) that he has, or they have, ceased to be, or never been, entitled to the tax credit for the period, the Board may decide to amend or terminate the award<sup>3</sup>. Where, at any time during the period for which an award of a tax credit is made to a person or persons, the Board believes (a) that the rate at which a tax credit has been awarded to him or them for the period may differ from the rate at which he is, or they are, entitled to it for the period, or (b) that he or they may have ceased to be, or never been, entitled to the tax credit for the period, the Board may give a notice<sup>4</sup>. A notice<sup>5</sup> may (i) require the person, or either or both of the persons, to whom the tax credit was awarded to provide any information or evidence which the Board considers it may need for considering whether to amend or terminate the award<sup>6</sup>, or (ii) require any person of a prescribed<sup>7</sup> description to provide any information or evidence of a prescribed description which the Board considers it may need for that purpose, by the date specified in the notice<sup>8</sup>.

1 For the meaning of 'tax credit' see PARA 227A.2.

2 For the meaning of 'the Board' see PARA 227A.2.

3 Tax Credits Act 2002 s 16(1).

4 I.e. a notice under *ibid* s 16(3): s 16(2).

5 Under s 16(3).

6 Under *ibid* s 16(1).

7 For the meaning of 'prescribed' see PARA 227A.3.

8 Tax Credits Act 2002 s 16(3). See Tax Credits (Claims and Notifications) Regulations 2002, SI 2002/2014 (see PARA 227A.4). As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

## 17. Final notice

Where a tax credit<sup>1</sup> has been awarded for the whole or part of a tax year<sup>2</sup> (1) for awards made on single claims<sup>3</sup>, the Board<sup>4</sup> must give a notice relating to the tax year to the person to whom the tax credit was awarded, and (2) for awards made on joint claims<sup>5</sup>, the Board must give such a notice to the persons to whom the tax credit was awarded (with separate copies of the notice for each of them if the Board considers appropriate)<sup>6</sup>. The notice must either (a) require that the person or persons must, by the date specified<sup>7</sup> for these purposes, declare that the relevant circumstances<sup>8</sup> were as specified or state any respects in which they were not, or (b) inform the person or persons that he or they will be treated as having declared in response to the notice that the relevant circumstances were as specified unless, by that date, he states or they state any respects in which they were not<sup>9</sup>.

Regulations may (i) provide that, in prescribed<sup>10</sup> circumstances, one person may act for another in response to a notice under the above provisions, and (ii) provide that, in prescribed circumstances, anything done by one member of a couple<sup>11</sup> in response to a notice given under the above provisions is to be treated as also done by the other member of the couple<sup>12</sup>.

- 1 For the meaning of 'tax credit' see PARA 227A.2.
- 2 For the meaning of 'tax year' see PARA 227A.3.
- 3 For the meaning of 'single claim' see PARA 227A.3.
- 4 For the meaning of 'the Board' see PARA 227A.2.
- 5 For the meaning of 'joint claim' see PARA 227A.3.
- 6 Tax Credits Act 2002 s 17(1).
- 7 'Specified', in relation to a notice, means specified in the notice: *ibid* s 17(9).
- 8 'Relevant circumstances' means circumstances (other than income) affecting (1) the entitlement of the person, or joint entitlement of the persons, to the tax credit, or (2) the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year: *ibid* s 17(3).
- 9 *Ibid* s 17(2).

The notice must either (1) require that the person or persons must, by the date specified for these purposes, declare that the amount of the current year income or estimated current year income (depending on which is specified) was the amount, or fell within the range, specified or comply with s 17(5), or (2) inform the person or persons that he or they will be treated as having declared in response to the notice that the amount of the current year income or estimated current year income (depending on which is specified) was the amount, or fell within the range, specified unless, by that date, he complies or they comply with s 17(5): s 17(4). 'The current year income' has the meaning given by s 7(4) (see PARA 227A.7): s 48. To comply s 17(5) the person or persons must either (a) state the current year income or his or their estimate of the current year income (making clear which), or (b) declare that, throughout the period to which the award related, s 7(1) (see PARA 227A.7) did not apply to him or them by virtue of s 7(2): s 17(5). The notice may (i) require that the person or persons must, by the date specified for the purposes of s 17(4), declare that the amount of the previous year income was the amount, or fell within the range, specified or comply with s 17(7), or (ii) inform the person or persons that he or they will be treated as having declared in response to the notice that the amount of the previous year income was the amount, or fell within the range, specified unless, by that date, he complies or they comply with s 17(7): s 17(6). 'The previous year income' has the meaning given by s 7(5) (see PARA 227A.7): s 48. To comply with s 17(7) the person or persons must either (A) state the previous year income, or (B) make the declaration specified in s 17(5)(b) (see head (b)): s 17(7). The notice must inform the person or persons that if he or they makes or make a declaration under s 17(4)(a) (see head (1)), or is or are treated as making a declaration under s 17(4)(b) (see head (2)), in relation to estimated current year income (or the range within which estimated current year income fell), or states or state under s 17(5)(a) (see head (a)) his or their estimate of the current year income, he or they will be treated as having declared in response to the notice that the amount of the (actual) current year income was as estimated unless, by the date specified for the purposes of this provision, he states or they state the current year income: s 17(8).

- 10 For the meaning of 'prescribed' see PARA 227A.3.
- 11 For the meaning of 'couple' see PARA 227A.3.
- 12 Tax Credits Act 2002 s 17(10) (amended by Civil Partnership Act 2004 Sch 24 paras 145, 146) (in force for the purpose of making regulations: SI 2002/1727). See Tax Credits (Claims and Notifications) Regulations 2002, SI 2002/2014 (see PARA 227A.4). As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

## 18. Decisions after final notice

After giving a notice<sup>1</sup> the Board<sup>2</sup> must decide (1) whether the person was entitled, or the persons were jointly entitled, to the tax credit<sup>3</sup>, and (2) if so, the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year<sup>4</sup>, but<sup>5</sup> that decision must not be made before a declaration or statement has been made in response to the relevant provisions<sup>6</sup> of the notice<sup>7</sup>. If a declaration or statement has not been made in response to the relevant provisions of the notice on or before the date specified<sup>8</sup>, that decision may be made after that date<sup>9</sup>. If the person or persons to whom a notice<sup>10</sup> is given is or are within specified provisions<sup>11</sup>, the Board must decide again (a) whether the person was entitled, or the persons

were jointly entitled, to the tax credit, and (b) if so, the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year<sup>12</sup>.

Before exercising a function imposed or conferred on them<sup>13</sup>, the Board may by notice require the person, or either or both of the persons, to whom the notice<sup>14</sup> was given to provide any further information or evidence which the Board considers it may need for exercising the function by the date specified in the notice<sup>15</sup>.

It is provided that a final decision is conclusive as to the entitlement of the person or persons to whom it relates, subject to certain provisions<sup>16</sup>.

1 Under the Tax Credits Act 2002 s 17: see PARA 227A.17.

2 For the meaning of 'the Board' see PARA 227A.2.

3 For the meaning of 'tax credit' see PARA 227A.2.

4 Tax Credits Act 2002 s 18(1). For the meaning of 'tax year' see PARA 227A.3.

5 Subject to ibid s 18(3).

6 In ibid s 18(2) and (3) 'the relevant provisions of the notice' means (1) the provision included in the notice by virtue of s 17(2) (see PARA 227A.17), (2) the provision included in the notice by virtue of s 17(4), and (3) any provision included in the notice by virtue of s 17(6): s 18(4).

7 Ibid s 18(2).

8 For the purposes of ibid s 17(4): see PARA 227A.17.

9 Ibid s 18(3). Where the Board makes a decision under s 18(1) on or before the date referred to in s 18(3), it may revise it if a new declaration or statement is made on or before that date: s 18(5).

10 Under ibid s 17 (see PARA 227A.17).

11 Ie within ibid s 17(8)(a) or (b): see PARA 227A.17 NOTE 9.

12 Ibid s 18(6). But, subject to s 18(8), that decision must not be made before a statement has been made in response to the provision included in the notice by virtue of s 17(8) (see PARA 227A.17): s 18(7). If a statement has not been made in response to the provision included in the notice by virtue of s 17(8) on or before the date specified for the purposes of s 17(8), that decision may be made after that date: s 18(8). Where the Board makes a decision under s 18(6) on or before the date referred to in s 18(8), it may revise it if a new statement is made on or before that date: s 18(9).

13 By ibid s 18(1), (5), (6) or (9).

14 Under ibid s 17: see PARA 227A.17.

15 Ibid s 18(10).

16 Subject to ibid ss 19 (see PARA 227A.19) and 20 (see PARA 227A.20) and regulations under s 21 (see PARA 227A.21) (and to any revision under s 18(5) or (9) and any appeal) (1) in a case in which a decision is made under s 18(6) in relation to a person or persons and a tax credit for a tax year, that decision, and (2) in any other case, the decision under s 18(1) in relation to a person or persons and a tax credit for a tax year, is conclusive as to the entitlement of the person, or the joint entitlement of the persons, to the tax credit for the tax year and the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year: s 18(11).

## 19. Power to inquire

The Board<sup>1</sup> may inquire into (1) the entitlement of a person, or the joint entitlement of persons, to a tax credit<sup>2</sup> for a tax year<sup>3</sup>, and (2) the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year, if it gives notice to the person, or each of the persons, during the period allowed for the initiation of an inquiry<sup>4</sup>. As part of the inquiry the

Board may by notice (a) require the person, or either or both of the persons, to provide any information or evidence which the Board considers it may need for the purposes of the inquiry, or (b) require any person of a prescribed<sup>5</sup> description to provide any information or evidence of a prescribed description which the Board considers it may need for those purposes, by the date specified in the notice<sup>6</sup>. On an inquiry the Board must decide (i) whether the person was entitled, or the persons were jointly entitled, to the tax credit, and (ii) if so, the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year<sup>7</sup>. Provision is made with respect to the period allowed for beginning an inquiry<sup>8</sup>. A return becomes final (A) if it is inquired into<sup>9</sup>, when the inquiries are completed<sup>10</sup>, or (B) otherwise, at the end of the period specified<sup>11</sup> in relation to the return<sup>12</sup>. An inquiry is completed at the time when the Board gives notice to the person or persons of its decision<sup>13</sup>; but if the Board gives notice to the persons at different times the inquiry is completed at the later of those times<sup>14</sup>. The person, or either of the persons, to whom the inquiry relates may at any time before such notice is given apply for a direction that the Board must give such a notice<sup>15</sup>. Such an application must be heard and determined in the same way as an appeal against a decision<sup>16</sup>; and the General Commissioners<sup>17</sup> or Special Commissioners<sup>18</sup> hearing the application must give the direction applied for unless satisfied that the Board has reasonable grounds for not making the decision or giving the notice<sup>19</sup>. Where the entitlement of a person, or the joint entitlement of persons, to a tax credit for a tax year has been inquired into under the above provisions, it is not the subject of a further notice<sup>20</sup>.

It is provided that a decision on an inquiry is conclusive as to the entitlement to a tax credit, subject to certain provisions<sup>21</sup>.

1 For the meaning of 'the Board' see PARA 227A.2.

2 For the meaning of 'tax credit' see PARA 227A.2.

3 For the meaning of 'tax year' see PARA 227A.3.

4 Tax Credits Act 2002 s 19(1).

5 For the meaning of 'prescribed' see PARA 227A.3.

6 Tax Credits Act 2002 s 19(2). See Tax Credits (Claims and Notifications) Regulations 2002, SI 2002/2014 (see PARA 227A.4). As to regulations generally see the Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

7 Ibid s 19(3).

8 The period allowed for the initiation of an inquiry is the period beginning immediately after the relevant s 18 decision and ending (1) if the person, or either of the persons, to whom the inquiry relates is required by the Taxes Management Act 1970 s 8 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1667) to make a return, with the day on which the return becomes final (or, if both of the persons are so required and their returns become final on different days, with the later of those days), or (2) in any other case, one year after the beginning of the relevant s 17 date: Tax Credits Act 2002 s 19(4). 'The relevant section 18 decision' means (a) in a case in which a decision must be made under s 18(6) (see PARA 227A.18) in relation to the person or persons and the tax year to which the inquiry relates, that decision, and (b) in any other case, the decision under s 18(1) in relation to the person or persons and that tax year: s 19(5). 'The relevant section 17 date' means (i) in a case in which a statement may be made by the person or persons in response to provision included by virtue of s 17(8) (see PARA 227A.17) in the notice given to him or them under s 17 in relation to the tax year, the date specified in the notice for the purposes of s 17(8), and (ii) in any other case, the date specified for the purposes of s 17(4) in the notice given to him or them under s 17 in relation to the tax year: s 19(6).

9 Under the Taxes Management Act 1970 s 9A: see INCOME TAXATION vol 23(2) (Reissue) PARA 1675.

10 Within the meaning of ibid s 28A: see INCOME TAXATION vol 23(2) (Reissue) PARA 1675.

11 In ibid s 28A(2).

12 Tax Credits Act 2002 s 19(7).

13 Under ibid s 19(3).

14 Ibid s 19(8).

15 Ibid s 19(9).

16 Under ibid s 19(3).

17 'The General Commissioners' means the Commissioners for the general purposes of the income tax appointed under the Taxes Management Act 1970 s 2 (see INCOME TAXATION vol 23(1) (Reissue) PARAS 35-37): Tax Credits Act 2002 s 48.

18 'The Special Commissioners' means the Commissioners for the special purposes of the Income Tax Acts appointed under the Taxes Management Act 1970 s 4 (see INCOME TAXATION vol 23(1) (Reissue) PARA 39): Tax Credits Act 2002 s 48.

19 Ibid s 19(10).

20 Ie a further notice under ibid s 19(1): s 19(11).

21 Subject to ibid s 20 (see PARA 227A.20) and regulations under s 21 (see PARA 227A.21) (and to any appeal), a decision under s 19(3) in relation to a person or persons and a tax credit for a tax year is conclusive as to the entitlement of the person, or the joint entitlement of the persons, to the tax credit for the tax year and the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year: s 19(12).

## 20. Decisions on discovery

Where in consequence of a person's income tax liability being revised<sup>1</sup> the Board<sup>2</sup> has reasonable grounds for believing that a conclusive decision<sup>3</sup> relating to his entitlement to a tax credit for a tax year (whether or not jointly with another person) is not correct, the Board may decide to revise that decision<sup>4</sup>. Where the Board has reasonable grounds for believing that (1) a conclusive decision relating to the entitlement of a person, or the joint entitlement of persons, to a tax credit for a tax year is not correct, and (2) that is attributable to fraud or neglect on the part of the person, or of either of the persons, or on the part of any person acting for him, or either of them, the Board may decide to revise that decision<sup>5</sup>.

Subject to any subsequent decision<sup>6</sup> and to regulations<sup>7</sup> (and to any appeal), a decision<sup>8</sup> in relation to a person or persons and a tax credit for a tax year is conclusive as to the entitlement of the person, or the joint entitlement of the persons, to the tax credit for the tax year and the amount of the tax credit to which he was entitled, or they were jointly entitled, for the tax year<sup>9</sup>.

1 A person's income tax liability is revised (1) on the taking effect of an amendment of a return of his under the Taxes Management Act 1970 s 9ZA(1) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1672), (2) on the issue of a notice of correction under s 9ZB (see INCOME TAXATION vol 23(2) (Reissue) PARA 1672) amending a return of his (provided that he does not give a notice of rejection before the end of the period of 30 days beginning with the date of issue of the notice of correction), (3) on the amendment of an assessment of his by notice under s 9C (see INCOME TAXATION vol 23(2) (Reissue) PARA 1672), (4) on the amendment of a return of his under s 12ABA(3)(a) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1672), (5) on the amendment of a return of his under s 12ABB(6)(a) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1672) after the correction of a partnership return under that provision (provided that the amendment does not cease to have effect by reason of the rejection of the correction under s 12ABB(4)), (6) on the issue of a closure notice under s 28A (see INCOME TAXATION vol 23(2) (Reissue) PARA 1675) making amendments of a return of his, (7) on the amendment of a return of his under s 28B(4)(a) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1675), (8) on the making of an assessment as regards him under s 29(1) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1728), (9) on the vacation of the whole or part of an assessment of his under s 32 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1737), (10) on giving him relief under s 33 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1733), or (11) on the determination (or settlement) of an appeal against the making, amendment or vacation of an assessment or return, or a decision on a claim for relief, under any of the provisions mentioned in heads (3), (6) and (8)-(10): Tax Credits Act 2002 s 20(2).

2 For the meaning of 'the Board' see PARA 227A.2.

3 'Conclusive decision', in relation to the entitlement of a person, or joint entitlement of persons, to a tax credit for a tax year, means (1) a decision in relation to it under the Tax Credits Act 2002 s 18(1), (5), (6) or (9) (see PARA 227A.18) or 19(3) (see PARA 227A.19) or a previous decision under s 20, or (2) a decision under regulations under s 21 (see PARA 227A.21) relating to a decision within head (1), including a decision made on an appeal against such a decision: s 20(6). For the meaning of 'tax credit' see PARA 227A.2. For the meaning of 'tax year' see PARA 227A.3.

4 Ibid s 20(1). But no decision may be made under s 20(1) (1) unless it is too late to inquire into the person's entitlement under s 19 (see PARA 227A.19), or (2) after the period of one year beginning when the person's income tax liability is revised: s 20(3).

5 Ibid s 20(4). But no decision may be made under s 20(4) (1) unless it is too late to inquire into the entitlement, or joint entitlement, under s 19 (see PARA 227A.19), or (2) after the period of five years beginning with the end of the tax year to which the conclusive decision relates: s 20(5).

6 Under ibid s 20.

7 Under ibid s 21: see PARA 227A.21.

8 Under ibid s 20(1) or (4).

9 Ibid s 20(7).

## 21. Decisions subject to official error

Regulations may make provision for a decision<sup>1</sup> to be revised in favour of the person or persons to whom it relates if it is incorrect by reason of official error (as defined by the regulations)<sup>2</sup>.

1 Under the Tax Credits Act 2002 s 14(1) (see PARA 227A.14), 15(1) (see PARA 227A.15), 16(1) (see PARA 227A.16), 18(1), (5), (6) or (9) (see PARA 227A.18), 19(3) (see PARA 227A.19) or 20(1) or (4) (see PARA 227A.20).

2 Ibid s 21. See Tax Credits (Official Error) Regulations 2003, SI 2003/692. As to regulations generally see the Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

## 22. Information etc requirements: supplementary

Regulations may make provision as to the manner and form in which (1) information or evidence is to be provided in compliance with a requirement imposed by a notice<sup>1</sup>, or (2) a declaration or statement is to be made in response to a notice<sup>2</sup>. Regulations may make provision as to the dates which may be specified in a notice<sup>3</sup>.

1 Under the Tax Credits Act 2002 s 14(2) (see PARA 227A.14), 15(2) (see PARA 227A.15), 16(3) (see PARA 227A.16), 18(10) (see PARA 227A.18) or 19(2) (see PARA 227A.19).

2 Ibid s 22(1), referring to a notice under s 17 (see PARA 227A.17). See Tax Credits (Claims and Notifications) Regulations 2002, SI 2002/2014 (see PARA 227A.4). As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

3 Ibid s 22(2), referring to a notice under s 14(2), 15(2), 16(3), 17, 18(10) or 19(2). See SI 2002/2014; and NOTE 2.

## 23. Notice of decisions

When a decision is made<sup>1</sup>, the Board<sup>2</sup> must give notice of the decision to the person, or each of the persons, to whom it relates<sup>3</sup>. Notice of a decision must state the date on which it is given and include details of any right to appeal against the decision<sup>4</sup>.

1 le under the Tax Credits Act 2002 s 14(1) (see PARA 227A.14), 15(1) (see PARA 227A.15), 16(1) (see PARA 227A.16), 18(1), (5), (6) or (9) (see PARA 227A.18), 19(3) (see PARA 227A.19) or 20(1) or (4) (see PARA 227A.20) or regulations under s 21 (see PARA 227A.21).

2 For the meaning of 'the Board' see PARA 227A.2.

3 Tax Credits Act 2002 s 23(1).

4 Under *ibid* s 38 (see PARA 227A.37): s 23(2).

Notice need not be given of a decision made under s 14(1) or 18(1) or (6) on the basis of declarations made or treated as made by the person or persons in response to the notice given to him or them under s 17 (see PARA 227A.17) if (1) that notice, or (2) in the case of a decision under s 18(6), that notice or the notice of the decision under s 18(1), stated what the decision would be and the date on which it would be made: s 23(3).

## 24. Payments

Where the Board<sup>1</sup> has made an award of a tax credit<sup>2</sup>, the amount of the tax credit awarded must be paid to the person to whom the award is made<sup>3</sup>. Where an award of a tax credit is made to the members of a couple<sup>4</sup>, payments of the tax credit, or of any element of the tax credit, are to be made to whichever of them is prescribed<sup>5</sup>. Where an award of a tax credit is made on a claim which was made by one person on behalf of another, payments of the tax credit, or of any element of the tax credit, are to be made to whichever of those persons is prescribed<sup>6</sup>. Where an award of a tax credit has been made to a person or persons for the whole or part of a tax year<sup>7</sup>, payments may, in prescribed circumstances, continue to be made for any period, after the tax year, within which he is or they are entitled to make a claim for the tax credit for the next tax year<sup>8</sup>. Payments of a tax credit must be made by the Board<sup>9</sup>. Regulations may make provision about the time when and the manner in which a tax credit, or any element of a tax credit, is to be paid by the Board<sup>10</sup>. If the regulations make provision for payments of a tax credit, or any element of a tax credit, to be made by the Board by way of a credit to a bank account or other account notified to the Board, the regulations may provide that entitlement to the tax credit or element is dependent on an account having been notified to the Board in accordance with the regulations<sup>11</sup>.

1 For the meaning of 'the Board' see PARA 227A.2.

2 For the meaning of 'tax credit' see PARA 227A.2.

3 Tax Credits Act 2002 s 24(1). This provision is subject to s 24(2) and (3): s 24(1).

4 For the meaning of 'couple' see PARA 227A.3.

5 Tax Credits Act 2002 s 24(2) (amended by Civil Partnership Act 2004 Sch 24 para 145). See Tax Credits (Payments by the Commissioners) Regulations 2002, SI 2002/2173 (amended by SI 2003/723, SI 2003/742, SI 2004/762, SI 2004/1241, SI 2005/2919, SI 2005/2200, SI 2007/824, SI 2008/604, SI 2008/2683). For the meaning of 'prescribed' see PARA 227A.3. As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

6 Tax Credits Act 2002 s 24(3). See SI 2002/2173; and NOTE 5.

7 For the meaning of 'tax year' see PARA 227A.3.

8 Tax Credits Act 2002 s 24(4). See SI 2002/2173; and NOTE 5. Payments made under the Tax Credits Act 2002 s 24(4) are to be treated for the purposes of s 24 and ss 25-48 as if they were payments of the tax credit for the next tax year: s 24(5).

9 *Ibid* s 24(6). This provision is subject to s 25 (see PARA 227A.25): s 24(6).

10 *Ibid* s 24(7). See SI 2002/2173; and NOTE 5.

11 Tax Credits Act 2002 s 24(8). See SI 2002/2173; and NOTE 5.

## 25. Payments of working tax credit by employers

Regulations may require employers<sup>1</sup>, when making payments of, or on account of, PAYE income and in any such other circumstances as may be prescribed<sup>2</sup>, to pay working tax credit<sup>3</sup>, or prescribed elements of working tax credit, to employees<sup>4</sup>. The regulations may, in particular, include provision (1) requiring employers to make payments of working tax credit, or prescribed elements of working tax credit, in accordance with notices given to them by the Board<sup>5</sup>, (2) for the payment by the Board of working tax credit in cases where an employer does not make payments of working tax credit, or prescribed elements of working tax credit, in accordance with the regulations and with any notices given by the Board, (3) prescribing circumstances in which employers are not required to make, or to continue making, payments of working tax credit, or prescribed elements of working tax credit, (4) for the provision of information or evidence for the purpose of enabling the Board to be satisfied whether employers are complying with notices given by the Board and with the regulations, (5) requiring employers to provide information to employees (in their itemised pay statements or otherwise), (6) for the funding by the Board of working tax credit paid or to be paid by employers (whether by way of set off against income tax, national insurance contributions or student loan deductions<sup>6</sup> for which they are accountable to the Board or otherwise), (7) for the recovery by the Board from an employer of funding under head (6) above to the extent that it exceeds the amount of working tax credit paid by the employer, (8) for the payment of interest at the prescribed rate on sums due from or to the Board, and for determining the date from which interest is to be calculated, and (9) for appeals with respect to matters arising under the regulations which would otherwise not be the subject of an appeal<sup>7</sup>.

1 In the Tax Credits Act Pt 1 (ss 1-48) 'employer', in relation to an employee, means a person who makes any payment of, or on account of, PAYE income; and 'employee' means a person who receives any such payment: s 25(5) (amended by the Income Tax (Earnings and Pensions) Act 2003 Sch 6 para 265(3)).

2 For the meaning of 'prescribed' see PARA 227A.3.

3 See PARAS 227A.10-227A.12.

4 Tax Credits Act 2002 s 25(1) (amended by the 2003 Act Sch 6 para 265(2)). See Working Tax Credit (Payment by Employers) Regulations 2002, SI 2002/2172 (amended by SI 2003/715, SI 2004/762, SI 2005/2200). As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

5 For the meaning of 'the Board' see PARA 227A.2.

6 'Student loan deductions' means deductions in accordance with regulations under the Teaching and Higher Education Act 1998 s 22(5) (see EDUCATION vol 15(2) (2006 Reissue) PARA 1047), the Education (Scotland) Act 1980 s 73B(3) or the Education (Student Support) (Northern Ireland) Order 1998, SI 1998/1760 (NI 14) art 3(5): Tax Credits Act 2002 s 25(7).

7 Ibid s 25(2). See SI 2002/2172. Regulations may not be made under the Tax Credits Act 2002 s 25 in relation to appeals in Scotland without the consent of the Scottish ministers: s 65(5).

The Taxes Management Act 1970 s 20 (power to call for documents etc: see INCOME TAXATION vol 23(2) (Reissue) PARA 1698 et seq) applies (with ss 20B and 20BB) in relation to an employer's compliance with regulations under the Tax Credits Act s 25 as in relation to a person's tax liability (but subject to the modifications provided by s 25(4)): s 25(3). 'Modifications' includes alterations, additions and omissions, and 'modifies' is to be construed accordingly: s 67. Those provisions apply by virtue of s 25(3) as if (1) the references to the taxpayer, a taxpayer or a class of taxpayers were to the employer, an employer or a class of employers, (2) the reference to any provision of the Taxes Acts were to regulations under the Tax Credits Act 2002 s 25, (3) the references to the

proper assessment or collection of tax were to the proper award or payment of working tax credit, (4) the reference to an appeal relating to tax were to an appeal relating to compliance with regulations under s 25, and (5) the reference to believing that tax has been, or may have been, lost to the Crown were to believing that the Crown has, or may have, incurred a loss: s 25(4).

## **26. Liability of officers for sums paid to employers**

Regulations may provide that where (1) an employer<sup>1</sup> which is a body corporate has failed to repay any funding to the Board<sup>2</sup> in accordance with regulations<sup>3</sup>, and (2) the provision of the funding, or the failure by the employer to repay the funding, appears to the Board to be attributable to fraud or neglect on the part of one or more individuals who, at the time of the fraud or neglect, were officers<sup>4</sup> of the body corporate ('culpable officers'), the culpable officers are required to pay to the Board the amount of funding recoverable by the Board from the employer<sup>5</sup>. Regulations under these provisions<sup>6</sup> must include provision (a) for any amount paid to the Board by a culpable officer in accordance with the regulations to be deducted from the amount of funding liable to be repaid by the employer, (b) for the amount which a culpable officer is liable to pay under the regulations to be reduced where the amount of funding recoverable from the employer is reduced by payments made to the Board by the employer, and (c) for the Board to repay to a culpable officer the amount (if any) by which the amount that he has paid to the Board pursuant to the regulations exceeds the reduced amount that he is liable to pay by virtue of head (b) above<sup>7</sup>. Regulations under these provisions<sup>8</sup> may include provision (i) requiring payments by culpable officers to be made in accordance with notices given to them by the Board, (ii) for determining, in cases of an employer in relation to which there is more than one culpable officer, the proportion of the amount of funding recoverable from the employer that is payable by each culpable officer, (iii) for the payment of interest at the prescribed<sup>9</sup> rate on sums due to or from the Board, and for determining the date from which interest is to be calculated, and (iv) for appeals with respect to matters arising under the regulations<sup>10</sup>.

1 'Employer' has the meaning given by the Tax Credits Act 2002 s 25(5) (see PARA 227A.25): s 48.

2 For the meaning of 'the Board' see PARA 227A.2.

3 Made under the Tax Credits Act 2002 s 25(2)(g): see PARA 227A.25 head (7).

4 'Officer', in relation to a body corporate, means (1) any director, manager, secretary or other similar officer of the body corporate, or any person purporting to act as such, and (2) in a case where the affairs of the body corporate are managed by its members, any member of the body corporate exercising functions of management with respect to it or purporting to do so: *ibid* s 26(4).

5 *Ibid* s 26(1). As to regulations generally see s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

6 *Ie* *ibid* s 26.

7 *Ibid* s 26(2).

8 *Ie* *ibid* s 26.

9 For the meaning of 'prescribed' see PARA 227A.3.

10 Tax Credits Act 2002 s 26(3). Regulations may not be made under s 26 in relation to appeals in Scotland without the consent of the Scottish ministers: s 65(5).

## **27. Rights of employees**

The following provisions are in force on 1 September 2002 for the purpose of rights conferred on employees by virtue of regulations under the Tax Credits Act 2002 s 25 (see PARA 227A.25): SI 2002/1727.

Provision is made to ensure that employees<sup>1</sup> do not to suffer unfair dismissal or other detriment because of their employer's<sup>2</sup> obligation to pay working tax credit<sup>3</sup>.

1 'Employee' has the meaning given by the Tax Credits Act 2002 s 25(5) (see PARA 227A.25): s 48.

2 For the meaning of 'employer' see PARA 227A.25.

3 See Tax Credits Act 2002 s 27, Sch 1. As to working tax credit see PARAS 227A.10-227A.12.

## **28. Overpayments**

The following provisions are in force: SI 2002/1727.

Where the amount of a tax credit<sup>1</sup> paid for a tax year<sup>2</sup> to a person or persons exceeds the amount of the tax credit to which he is entitled, or they are jointly entitled, for the tax year<sup>3</sup>, the Board<sup>4</sup> may decide that the excess, or any part of it, is to be repaid to the Board<sup>5</sup>. For overpayments made under awards on single claims<sup>6</sup>, the person to whom the tax credit was awarded is liable to repay the amount which the Board decides is to be repaid<sup>7</sup>. For overpayments made under awards on joint claims<sup>8</sup>, the persons to whom the tax credit was awarded are jointly and severally liable to repay the amount which the Board decides is to be repaid unless the Board decides that each is to repay a specified part of that amount<sup>9</sup>. Where it appears to the Board that there is likely to be an overpayment of a tax credit for a tax year under an award made to a person or persons, the Board may, with a view to reducing or eliminating the overpayment, amend the award or any other award of any tax credit made to the person or persons<sup>10</sup>. Where the Board decides<sup>11</sup> to terminate an award of a tax credit made to a person or persons on the ground that at no time during the period to which the award related did the person or persons satisfy certain provisions<sup>12</sup> the Board may decide that the amount paid under the award, or any part of it, is to be treated for the purposes of Part I of the Tax Credits Act 2002<sup>13</sup> as an overpayment<sup>14</sup>.

1 For the meaning of 'tax credit' see PARA 227A.2.

2 For the meaning of 'tax year' see PARA 227A.3.

3 As determined in accordance with the provision made by and by virtue of the Tax Credits Act 2002 ss 18-21: see PARAS 227A.18-227A.21).

4 For the meaning of 'the Board' see PARA 227A.2.

5 Tax Credits Act 2002 s 28(1). In Pt 1 (ss 1-48) such an excess is referred to as an overpayment: s 28(2).

6 For the meaning of 'single claim' see PARA 227A.3.

7 Tax Credits Act 2002 s 28(3).

8 For the meaning of 'joint claim' see PARA 227A.3.

9 Tax Credits Act 2002 s 28(4).

10 Ibid s 28(5), which does not apply once a decision is taken in relation to the person or persons for the tax year under s 18(1) (see PARA 227A.18): s 28(5).

11 Ie under ibid s 16: see PARA 227A.16.

12 le (1) *ibid* s 8(1) (if the award related to child tax credit: see PARA 227A.8), or (2) s 10(1) (if it related to working tax credit: see PARA 227A.10).

13 le apart from *ibid* s 28(5).

14 *Ibid* s 28(6).

## **29. Recovery of overpayments**

The following provisions are in force: SI 2002/1727.

Where an amount is liable to be repaid by a person or persons<sup>1</sup>, the Board<sup>2</sup> must give him, or each of them, a notice specifying the amount<sup>3</sup>.

1 le under the Tax Credits Act 2002 s 28: see PARA 227A.28.

2 For the meaning of 'the Board' see PARA 227A.2.

3 Tax Credits Act 2002 s 29(1).

The notice must state which of s 29(3)-(5) is to apply in relation to the amount or any specified part of the amount; and a notice may at any time be replaced by another notice containing a different statement: s 29(2). Where a notice states that s 29(3) applies in relation to an amount (or part of an amount), it is to be treated for the purposes of the Taxes Management Act 1970 Pt VI (ss 60-70: collection and recovery) as if it were tax charged in an assessment and due and payable by the person or persons to whom the notice was given at the end of the period of 30 days beginning with the day on which the notice is given: Tax Credits Act 2002 s 29(3). Where a notice states that s 29(4) applies in relation to an amount (or part of an amount), it may, subject to provision made by regulations, be recovered by deduction from payments of any tax credit under an award made for any period to the person, or either or both of the persons, to whom the notice was given: s 29(4). As to regulations generally see s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48. Where a notice states that s 29(5) applies in relation to an amount (or part of an amount), regulations under the Income and Corporation Taxes Act 1988 s 203(2)(a) (see INCOME TAXATION vol 23(1) (Reissue) PARA 759) apply to it as if it were an underpayment of tax for a previous year of assessment by the person or persons to whom the notice was given: Tax Credits Act 2002 s 29(5).

## **30. Underpayments**

Where it has been determined<sup>1</sup> that a person was entitled, or persons were jointly entitled, to a tax credit<sup>2</sup> for a tax year<sup>3</sup> and either (1) the amount of the tax credit paid to him or them for that tax year was less than the amount of the tax credit to which it was so determined that he is entitled or they are jointly entitled, or (2) no payment of the tax credit was made to him or them for that tax year, the amount of the difference, or of his entitlement or their joint entitlement, must be paid to him or to whichever of them is prescribed<sup>4</sup>. Where the claim for the tax credit was made by one person on behalf of another, the payment is to be made to whichever of those persons is prescribed<sup>5</sup>.

1 In accordance with the provision made by and by virtue of the Tax Credits Act 2002 ss 18-21 (see PARAS 227A.18-227A.21).

2 For the meaning of 'tax credit' see PARA 227A.2.

3 For the meaning of 'tax year' see PARA 227A.3.

4 Tax Credits Act 2002 s 30(1). For the meaning of 'prescribed' see PARA 227A.3.

5 *Ibid* s 30(2).

## **31. Incorrect statements etc**

Where a person fraudulently or negligently (1) makes an incorrect statement or declaration in or in connection with a claim for a tax credit<sup>1</sup> or a notification of a change of circumstances given in accordance with regulations<sup>2</sup> or in response to a notice<sup>3</sup>, or (2) gives incorrect information or evidence in response to a requirement imposed on him<sup>4</sup>, a penalty not exceeding £3,000 may be imposed on him<sup>5</sup>. Where a person liable to a penalty under the above provision<sup>6</sup> is a person making, or who has made, a claim for a tax credit for a period jointly with another and the penalty is imposed (a) under head (1) above in respect of the claim, a notification relating to the tax credit claimed or a notice relating to the tax credit awarded on the claim, or (b) under head (2) above in respect of a requirement imposed on him with respect to the tax credit for the period, a penalty of an amount not exceeding £3,000 may be imposed on the other person<sup>7</sup>.

1 For the meaning of 'tax credit' see PARA 227A.2.

2 Ie under the Tax Credits Act 2002 s 6: see PARA 227A.6.

3 Ie under ibid s 17: see PARA 227A.17.

4 By virtue of ibid s 14(2) (see PARA 227A.14), 15(2) (see PARA 227A.15), 16(3) (see PARA 227A.16), 18(10) (see PARA 227A.18) or 19(2) (see PARA 227A.19) or regulations under s 25 (see PARA 227A.25).

5 Ibid s 31(1). Where a person acts for another (1) in or in connection with a claim or notification referred to in s 31(1), or (2) in response to a notice so referred to, s 31(1) applies to him (as well as to any person to whom it applies apart from this provision): s 31(5). See further NOTE 7.

6 Ie ibid s 31(1).

7 Unless ibid s 31(3) applies: s 31(2). Where penalties are imposed under s 31(1) and (2) in respect of the same statement, declaration, information or evidence, their aggregate amount must not exceed £3,000: s 31(4).

Section 31(3) applies if the other person was not, and could not reasonably have been expected to have been, aware that the person liable to the penalty under s 31(1) had fraudulently or negligently made the incorrect statement or declaration or given the incorrect information or evidence: s 31(3).

## **32. Failure to comply with requirements**

Where a person fails (1) to provide any information or evidence which he is required to provide<sup>1</sup>, or (2) to comply with a requirement imposed on him by a notice<sup>2</sup>, the penalties specified below<sup>3</sup> may be imposed on him<sup>4</sup>. The penalties are (a) a penalty not exceeding £300, and (b) if the failure continues after a penalty is imposed under head (a) above, a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which the penalty under that head was imposed (but excluding any day for which a penalty under this head has already been imposed)<sup>5</sup>. Where a person fails to give a notification<sup>6</sup>, a penalty not exceeding £300 may be imposed on him<sup>7</sup>.

For the purposes of the above provisions a person is to be taken not to have failed to provide information or evidence, comply with a requirement or give a notification which must be provided, complied with or given by a particular time (i) if he provided, complied with or gave it within such further time (if any) as the Board<sup>8</sup> may have allowed, (ii) if he had a reasonable excuse for not providing, complying with or giving it by that time, or (iii) if, after having had such an excuse, he provided, complied with or gave it without unreasonable delay<sup>9</sup>.

1 By virtue of the Tax Credits Act 2002 s 14(2) (see PARA 227A.14), 15(2) (see PARA 227A.15), 16(3) (see PARA 227A.16), 18(10) (see PARA 227A.18) or 19(2) (see PARA 227A.19) or regulations under s 25 (see PARA 227A.25).

2 Under ibid s 17 (see PARA 227A.17) by virtue of s 17(2)(a), (4)(a) or (6)(a).

3 Ie the penalties specified in ibid s 32(2).

4 Ibid s 32(1).

5 Ibid s 32(2). No penalty under s 32(2) may be imposed on a person in respect of a failure after the failure has been remedied: s 32(4). Where the members of a couple both fail as mentioned in head (2) in the text, the aggregate amount of any penalties under s 32(2) imposed on them in relation to their failures must not exceed the amounts specified in that provision: s 32(6) (amended by Civil Partnership Act 2004 Sch 24 para 145). For the meaning of 'couple' see PARA 227A.3.

6 Required by regulations under the Tax Credits Act 2002 s 6(3): see PARA 227A.6.

7 Ibid s 32(3). Where the members of a couple both fail as mentioned in s 32(3), the aggregate amount of any penalties imposed on them in relation to their failures must not exceed £300: s 32(6) (amended by Civil Partnership Act 2004 Sch 24 para 145).

8 For the meaning of 'the Board' see PARA 227A.2.

9 Tax Credits Act 2002 s 32(5).

### **33. Failure to employers to make correct payments**

Where an employer<sup>1</sup> refuses or repeatedly fails to make to an employee<sup>2</sup> payments of tax credits<sup>3</sup> which he is required to make to him by regulations<sup>4</sup> and, as a result, the Board<sup>5</sup> makes payments to the employee in accordance with regulations<sup>6</sup>, a penalty not exceeding £3,000 may be imposed on the employer<sup>7</sup>. Where an employer has, by reason of his fraud or neglect, not paid to an employee for a tax year<sup>8</sup> the correct amount of any tax credit which he is required by regulations<sup>9</sup> to pay to him for that tax year, a penalty not exceeding £3,000 may be imposed on the employer<sup>10</sup>.

1 For the meaning of 'employer' see PARA 227A.25.

2 For the meaning of 'employee' see PARA 227A.25.

3 For the meaning of 'tax credit' see PARA 227A.2.

4 Under the Tax Credits Act 2002 s 25: see PARA 227A.25.

5 For the meaning of 'the Board' see PARA 227A.2.

6 Under the Tax Credits Act 2002 s 25(2)(b).

7 Ibid s 33(1).

8 For the meaning of 'tax year' see PARA 227A.3.

9 Under the Tax Credits Act 2002 s 25.

10 Ibid s 33(2). But no penalty may be imposed on an employer under s 33(2) in respect of payments which are incorrect only because of a refusal or failure in respect of which a penalty is imposed on him under s 33(1): s 33(3).

### **34. Penalties: supplementary**

Procedural and supplemental provision is made in relation to penalties<sup>1</sup>.

1 See Tax Credits Act 2002 s 34, Sch 2.

### **35. Fraud**

A person commits an offence if he is knowingly concerned in any fraudulent activity undertaken with a view to obtaining payments of a tax credit<sup>1</sup> by him or any other person<sup>2</sup>. A person who commits an offence under the above provision<sup>3</sup> is liable (1) on summary conviction, to imprisonment for a term not exceeding six months, or a fine not exceeding the statutory maximum<sup>4</sup>, or both, or (2) on conviction on indictment, to imprisonment for a term not exceeding seven years, or a fine, or both<sup>5</sup>.

1 For the meaning of 'tax credit' see PARA 227A.2.

2 Tax Credits Act 2002 s 35(1).

3 *le ibid* s 35(1).

4 As to the statutory maximum, see PARA 403 NOTE 2.

5 Tax Credits Act 2002 s 35(2).

The Taxes Management Act 1970 s 20BA (see INCOME TAXATION vol 23(2) (Reissue) PARA 1704) applies (with Sch 1AA and s 20BB: see INCOME TAXATION vol 23(2) (Reissue) PARAS 1704, 1705) in relation to offences involving fraud in connection with, or in relation to, tax credits as in relation to offences involving serious fraud in connection with, or in relation to, tax: Tax Credits Act 2002 s 36(1). The Taxes Management Act 1970 s 20C (see INCOME TAXATION vol 23(2) (Reissue) PARA 1706) applies (with s 20CC: see INCOME TAXATION vol 23(2) (Reissue) PARA 1707) in relation to offences involving serious fraud in connection with, or in relation to, tax credits as in relation to offences involving serious fraud in connection with, or in relation to, tax (but subject to the modification provided by the Tax Credits Act 2002 s 36(3)): s 36(2). For the meaning of 'modifications' see PARA 227A.25. The Taxes Management Act 1970 s 20C(1A) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1706) applies by virtue of the Tax Credits Act 2002 s 36(2) as if the references to the proper assessment or collection of tax were to the proper award or payment of a tax credit: s 36(3). Any regulations under the Taxes Management Act 1970 Sch 1AA which are in force immediately before the commencement of the Tax Credits Act 2002 s 36(1) apply, subject to any necessary modifications, for the purposes of the Taxes Management Act 1970 Sch 1AA as they apply by virtue of the Tax Credits Act 2002 s 36(1) (until amended or revoked): s 36(4).

### 36. Interest

If an overpayment<sup>1</sup> of a tax credit<sup>2</sup> for a period is attributable to fraud or neglect on the part of the person, or either or both of the persons, to whom the award of the tax credit was made (or a person acting for him, or for either or both of them, in making the claim for the tax credit), the Board<sup>3</sup> may decide that the whole or any part of the overpayment is to carry interest<sup>4</sup>. Where the Board so decides the overpayment (or part of the overpayment) carries interest at a prescribed<sup>5</sup> rate from the date 30 days after the appropriate date<sup>6</sup>. The Board must give notice of a decision<sup>7</sup> to the person, or each of the persons, to whom it relates; and the notice must state the date on which it is given and include details of the right to appeal against the decision<sup>8</sup>. A penalty<sup>9</sup> carries interest at the prescribed rate from the date on which it becomes due and payable; but the Board may in its discretion mitigate any interest or entirely remit any interest which would otherwise be carried by a penalty<sup>10</sup>.

1 'Overpayment' has the meaning given by the Tax Credits Act 2002 s 28(2) and (6) (see PARA 227A.28): s 48.

2 For the meaning of 'tax credit' see PARA 227A.2.

3 For the meaning of 'the Board' see PARA 227A.2.

4 Tax Credits Act 2002 s 37(1).

5 For the meaning of 'prescribed' see PARA 227A.3.

6 Tax Credits Act 2002 s 37(2). 'The appropriate date' is (1) in the case of an amount treated as an overpayment by virtue of s 28(6) (see PARA 227A.28), the date of the decision under s 16 (see PARA 227A.16) to terminate the award, and (2) in any other case, the date specified for the purposes of s 17(4) (see PARA

227A.17) in the notice given to the person or persons under s 17 in relation to the tax credit: s 37(3). See the Tax Credits (Interest Rate) Regulations 2003, SI 2003/123.

7 Under the Tax Credits Act 2002 s 37(1).

8 Under *ibid* s 38 (see PARA 227A.37): s 37(4).

9 Under any of *ibid* ss 31-33: see PARAS 227A.31-227A.33.

10 *Ibid* s 37(5).

Any interest carried under s 37 by an overpayment or penalty is to be regarded for the purposes of s 29(3)-(5) (see PARA 227A.29) or Sch 2 para 7 (see PARA 227A.34) as if it were part of the overpayment or penalty: s 37(6), SI 2003/123, NOTE 6.

## 37. Appeals

For transitional arrangements with respect to tax credit appeals see Tax Credits Act 2002 s 63 (tax credit appeals etc: temporary modifications) (amended by SI 2008/2833); the Tax Credits (Appeals) Regulations 2002, SI 2002/2926 (amended by SI 2004/372, SI 2008/2683); and the Tax Credits (Appeals) (No 2) Regulations 2002, SI 2002/3196 (amended by SI 2004/3368, SI 2005/2877, SI 2008/2683).

An appeal may be brought against certain decisions and determinations<sup>1</sup>.

Notice of an appeal<sup>2</sup> against a decision must be given to the Board<sup>3</sup> in the prescribed<sup>4</sup> manner within the period of 30 days after the date on which notice of the decision was given<sup>5</sup>. Notice of such an appeal must specify the grounds of appeal<sup>6</sup>. An appeal<sup>7</sup> is to the General Commissioners<sup>8</sup> but the appellant may elect<sup>9</sup> to bring the appeal before the Special Commissioners<sup>10</sup> instead<sup>11</sup>. On the hearing of an appeal<sup>12</sup> the General Commissioners or Special Commissioners may allow the appellant to put forward grounds not specified in the notice, and take them into consideration if satisfied that the omission was not wilful or unreasonable<sup>13</sup>.

1 *Ie* (1) a decision under the Tax Credits Act 2002 s 14(1) (see PARA 227A.14), 15(1) (see PARA 227A.15), 16(1) (see PARA 227A.16), 19(3) (see PARA 227A.19) or 20(1) or (4) (see PARA 227A.20) or regulations under s 21 (see PARA 227A.21); (2) the relevant section 18 decision in relation to a person or persons and a tax credit for a tax year and any revision of that decision under s 18 (see PARA 227A.18); (3) a determination of a penalty under Sch 2 para 1 (see PARA 227A.34); and (4) a decision under s 37(1) (see PARA 227A.36): s 38(1). 'The relevant section 18 decision' means (a) in a case in which a decision must be made under s 18(6) in relation to the person or persons and the tax credit for the tax year, that decision, and (b) in any other case, the decision under s 18(1) in relation to the person or persons and the tax credit for the tax year: s 38(2). For the meaning of 'tax credit' see PARA 227A.2. For the meaning of 'tax year' see PARA 227A.3.

2 *Ie* under *ibid* s 38.

3 For the meaning of 'the Board' see PARA 227A.2.

4 For the meaning of 'prescribed' see PARA 227A.3.

5 Tax Credits Act 2002 s 39(1). In the case of a decision to which the Tax Credits Act 2002 s 23(3) (see PARA 227A.23) applies, notice of an appeal must be given within the period of 30 days of the date of the decision: s 39(1). See the Tax Credits (Notice of Appeal) Regulations 2002, SI 2002/3119.

6 Tax Credits Act 2002 s 39(2).

7 Under *ibid* s 38.

8 For the meaning of 'General Commissioners' see PARA 227A.19.

9 In accordance with the Taxes Management Act 1970 s 46(1): see INCOME TAXATION vol 23(2) (Reissue) PARA 1760.

10 For the meaning of 'Special Commissioners' see PARA 227A.19.

11 Tax Credits Act 2002 s 39(3). The Taxes Management Act 1970 s 31D(2)-(7) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1760) has effect in relation to an election under the Tax Credits Act 2002 s 39(3) (as in relation to an election under the Taxes Management Act 1970 s 31D(1)): Tax Credits Act 2002 s 39(4).

12 Under *ibid* s 38.

13 *Ibid* s 39(5).

The Taxes Management Act 1970 Pt V (ss 44-59: appeals to Commissioners) applies in relation to appeals under the Tax Credits Act 2002 s 38 (as in relation to appeals under the Taxes Acts, within the meaning of the Taxes Management Act 1970), but subject to such modifications as are prescribed: Tax Credits Act 2002 s 39(6). See the Tax Credits (Employer Penalty Appeals) Regulations 2003, SI 2003/1382. For the meaning of 'modifications' see PARA 227A.25. Regulations may not be made under the Tax Credits Act 2002 s 39(6) without the consent of the Lord Chancellor and the Scottish ministers: s 65(6). Any regulations under the Taxes Management Act 1970 s 56B (see INCOME TAXATION vol 23(2) (Reissue) PARA 1762) which are in force immediately before the commencement of the Tax Credits Act 2002 s 39(6) apply, subject to any necessary modifications, for the purposes of appeals under s 38 (until amended or revoked): s 39(7). See also Constitutional Reform Act 2005 s 19, Sch 7 para 4 (protected functions of the Lord Chancellor); and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

### 38. Annual reports

The Board<sup>1</sup> must make to the Treasury an annual report about (1) the number of awards of child tax credit<sup>2</sup> and of working tax credit<sup>3</sup>, (2) the number of inquiries conducted<sup>4</sup>, (3) the number of penalties imposed under Part I of the Tax Credits Act 2002<sup>5</sup>, and (4) the number of prosecutions and convictions for offences connected with tax credits<sup>6</sup>. The Treasury must publish each annual report made to it<sup>7</sup> and lay a copy before each House of Parliament<sup>8</sup>.

1 For the meaning of 'the Board' see PARA 227A.2.

2 See PARA 227A.8.

3 See PARA 227A.10.

4 Under the Tax Credits Act 2002 s 19: see PARA 227A.19.

5 *Ibid* ss 1-48.

6 *Ibid* s 40(1) (amended by the Commissioners for Revenue and Customs Act 2005 Sch 4 para 89, Sch 5). For the meaning of 'tax credit' see PARA 227A.2.

7 Under the 2002 Act s 40(1).

8 *Ibid* s 40(2).

### 39. Annual review

The Treasury must, in each tax year<sup>1</sup>, review specified amounts<sup>2</sup> in order to determine whether they have retained their value in relation to the general level of prices in the United Kingdom as estimated by the Treasury in such manner as it considers appropriate<sup>3</sup>. The Treasury must prepare a report of each review<sup>4</sup>. The report must include a statement of what each amount would be if it had fully retained its value<sup>5</sup>. The Treasury must publish the report and lay a copy of it before each House of Parliament<sup>6</sup>.

1 For the meaning of 'tax year' see PARA 227A.3.

2 The amounts are monetary amounts prescribed (1) under the Tax Credits Act 2002 s 7(1)(a) (see PARA 227A.7 head (1)), (2) for the purposes of any of s 7(3)(a)-(d) (see PARA 227A.7 NOTE 2 heads (1)-(4)), (3) under s 9 (see PARA 227A.9), (4) under s 11 (see PARA 227A.11), otherwise than by virtue of s 12 (see PARA 227A.12), or (5) under s 13(2) (see PARA 227A.13), otherwise than by virtue of s 13(3): s 41(2).

3 *Ibid* s 41(1).

4 Ibid s 41(3).

5 Ibid s 41(4).

6 Ibid s 41(5).

#### **40. Persons subject to immigration control**

Regulations may make provision in relation to persons subject to immigration control<sup>1</sup> or in relation to prescribed<sup>2</sup> descriptions of such persons (1) for excluding entitlement to, or to a prescribed element of, child tax credit<sup>3</sup> or working tax credit<sup>4</sup> (or both), or (2) for Part 1 of the Tax Credits Act 2002<sup>5</sup> to apply subject to other prescribed modifications<sup>6</sup>.

1 'Person subject to immigration control' has the same meaning as in the Immigration and Asylum Act 1999 s 115 (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 257); Tax Credits Act 2002 s 42(2).

2 For the meaning of 'prescribed' see PARA 227A.3.

3 See PARA 227A.8.

4 See PARA 227A.10.

5 Ie the Tax Credits Act 2002 ss 1-48, Sch 1-3.

6 Ibid s 42(1). See Tax Credits (Immigration) Regulations 2003, SI 2003/653 (amended by SI 2003/742, SI 2005/2919). For the meaning of 'modifications' see PARA 227A.25. As to regulations generally see Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

#### **41. Polygamous marriages**

Regulations may make provision for Part 1 of the Tax Credits Act 2002<sup>1</sup> to apply in relation to persons who are parties to polygamous marriages<sup>2</sup> subject to prescribed<sup>3</sup> modifications<sup>4</sup>.

1 Ie the Tax Credits Act 2002 ss 1-48, Sch 1-3.

2 A person is a party to a polygamous marriage if (1) he is a party to a marriage entered into under a law which permits polygamy, and (2) either party to the marriage has a spouse additional to the other party: ibid s 43(2).

3 For the meaning of 'prescribed' see PARA 227A.3.

4 Tax Credits Act 2002 s 43(1). For the meaning of 'modifications' see PARA 227A.25. As to regulations generally see s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

#### **42. Crown employment**

Part 1 of the Tax Credits Act 2002<sup>1</sup> applies in relation to persons employed by or under the Crown (as in relation to other employees<sup>2</sup>)<sup>3</sup>.

1 Ie the Tax Credits Act 2002 ss 1-48.

2 For the meaning of 'employee' see PARA 227A.25.

3 Tax Credits Act 2002 s 44.

#### **43. Inalienability**

Every assignment of or charge on a tax credit<sup>1</sup>, and every agreement to assign or charge a tax credit, is void; and, on the bankruptcy of a person entitled to a tax credit, the entitlement to the tax credit does not pass to any trustee or other person acting on behalf of his creditors<sup>2</sup>.

1 For the meaning of 'tax credit' see PARA 227A.2.

2 Tax Credits Act 2002 s 45(1).

#### **44. Giving of notices by Board**

The Board<sup>1</sup> may give any notice which it is required or permitted to give under Part 1 of the Tax Credits Act 2002<sup>2</sup> in any manner and form which the Board considers appropriate in the circumstances<sup>3</sup>.

1 For the meaning of 'the Board' see PARA 227A.2.

2 Ie the Tax Credits Act 2002 ss 1-48, Sch 1-3.

3 Tax Credits Act 2002 s 46.

#### **45. Administrative arrangements**

Where the following provisions<sup>1</sup> apply<sup>2</sup>, regulations may make provision for (1) information or evidence relating to tax credits to be provided to the relevant authority (whether by persons by whom such claims and notifications are or have been made or given, by the Board<sup>3</sup> or by other persons), (2) the giving of information or advice by a relevant authority to persons by whom such claims or notifications are or have been made or given, and (3) the recording, verification and holding, and the forwarding to the Board or a person providing services to the Board, of claims and notifications received by virtue of regulations<sup>4</sup> and information or evidence received by virtue of head (1) above<sup>5</sup>.

1 Ie the Tax Credits Act 2002 s 58.

2 Ibid s 58 applies where regulations under s 4 (see PARA 227A.4) or 6 (see PARA 227A.6), permit or require a claim or notification relating to a tax credit to be made or given to a relevant authority: s 58(1). For the meaning of 'tax credit' see PARA 227A.2. 'Relevant authority' means the Secretary of State, or a person providing services to the Secretary of State: s 58(3).

3 For the meaning of 'the Board' see PARA 227A.2.

4 Ie the regulations referred to in the Tax Credits Act 2002 s 58(1).

5 Ibid s 58(2). See the Tax Credits (Administrative Arrangements) Regulations 2002, SI 2002/3036. As to regulations generally see the Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

#### **46. Use and disclosure of information**

The Board<sup>1</sup> has power to disclose tax credits<sup>2</sup> information to other government departments in certain circumstances; and to obtain information from other government departments for the purpose of carrying out its functions under the Tax Credits Act 2002<sup>3</sup>.

1 For the meaning of 'the Board' see PARA 227A.2.

2 For the meaning of 'tax credit' see PARA 227A.2.

<sup>3</sup> See Tax Credits Act 2002 s 59, Sch 5 (amended by the Children Act 2004 s 63(1); the Commissioners for Revenue and Customs Act 2005 Sch 4 para 91, Sch 5; and the Child Maintenance and Other Payments Act 2008 Sch 7 para 4; prospectively amended by Education and Skills Act 2008 Sch 1 para 78, Sch 2). See further Tax Credits (Provision of Information) (Functions Relating to Health) Regulations 2003, SI 2003/731 (amended by SI 2005/2919); Tax Credits (Provision of Information) (Functions Relating to Health ) (No 2) Regulations 2003, SI 2003/1650; Tax Credits (Provision of Information) (Function Relating to Employment and Training) Regulations 2003, SI 2003/2041.

## **47. Regulations, orders and schemes**

Any power to make regulations under certain specified provisions<sup>1</sup> and any power to make regulations under the Tax Credits Act 2002 prescribing a rate of interest, is exercisable by the Treasury<sup>2</sup>. Any other power to make regulations under the Tax Credits Act 2002 is exercisable by the Board<sup>3</sup>. Any power to make regulations, orders or schemes under the Tax Credits Act 2002 is exercisable by statutory instrument<sup>4</sup>. Any power to make regulations under the Tax Credits Act 2002 may be exercised (1) in relation to all cases to which it extends, to all those cases with prescribed<sup>5</sup> exceptions or to prescribed cases or classes of case, (2) so as to make as respects the cases in relation to which it is exercised the full provision to which it extends or any less provision (whether by way of exception or otherwise), (3) so as to make the same provision for all cases in relation to which it is exercised or different provision for different cases or classes of case or different provision as respects the same case or class of case for different purposes, (4) so as to make provision unconditionally or subject to any prescribed condition, (5) so as to provide for a person to exercise a discretion in dealing with any matter<sup>6</sup>. Any regulations made under a power under the Tax Credits Act 2002 to prescribe a rate of interest may (a) either themselves specify a rate of interest or make provision for any such rate to be determined by reference to such rate or the average of such rates as may be referred to in the regulations, (b) provide for rates to be reduced below, or increased above, what they otherwise would be by specified amounts or by reference to specified formulae, (c) provide for rates arrived at by reference to averages to be rounded up or down, (d) provide for circumstances in which alteration of a rate of interest is or is not to take place, and (e) provide that alterations of rates are to have effect for periods beginning on or after a day determined in accordance with the regulations in relation to interest running from before that day as well as from or from after that day<sup>7</sup>. Any power to make regulations or a scheme under the Tax Credits Act 2002 includes power to make any incidental, supplementary, consequential or transitional provision which appears appropriate for the purposes of, or in connection with, the regulations or scheme<sup>8</sup>.

<sup>1</sup> ie under the Tax Credits Act 2002 ss 3 (see PARA 227A.3), 7-13 (see PARAS 227A.7-227A.13), 42 (see PARA 227A.40) and 43 (see PARA 227A.41).

<sup>2</sup> Ibid s 65(1).

<sup>3</sup> Ibid s 65(2). For the meaning of 'the Board' see PARA 227A.2.

<sup>4</sup> Ibid s 65(3). Section s 65(3) is subject to s 65(4): s 65(3). The power (1) of the Department of Health, Social Services and Public Safety to make schemes under s 12(5) (see PARA 227A.12), and (2) of the Northern Ireland Department to make orders under s 62(1) (see PARA 227A.1), is exercisable by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979, SI 1979/1573 (NI 12)): Tax Credits Act 2002 s 65(4). For the meaning of 'the Northern Ireland Department' see PARA 227A.1.

<sup>5</sup> For the meaning of 'prescribed' see PARA 227A.3.

<sup>6</sup> Tax Credits Act 2002 s 65(7).

<sup>7</sup> Ibid s 65(8).

<sup>8</sup> Ibid s 65(9).

## **48. Parliamentary etc control of instruments**

No regulations to which this provision<sup>1</sup> applies<sup>2</sup> may be made unless a draft of the instrument containing them (whether or not together with other provisions) has been laid before, and approved by a resolution of, each House of Parliament<sup>3</sup>. A statutory instrument containing (1) regulations under the Tax Credits Act 2002, or (2) a scheme made by the Secretary of State<sup>4</sup>, is (unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament) subject to annulment in pursuance of a resolution of either House of Parliament<sup>5</sup>.

1    Ie the Tax Credits Act 2002 s 66(1).

2    Ibid s 66(1) applies to (1) regulations prescribing monetary amounts that are required to be reviewed under s 41 (see PARA 227A.39), (2) regulations made by virtue of s 12(2) (see PARA 227A.12) prescribing the amount in excess of which charges are not taken into account for the purposes of s 12(2), and (3) the first regulations made under ss 7(8) and (9) (see PARA 227A.7), 9 (see PARA 227A.9), 11 (see PARA 227A.11), 12 (see PARA 227A.12) and 13(2) (see PARA 227A.13): s 66(2).

3    Ibid s 66(1).

4    Ie under ibid s 12(5): see PARA 227A.12.

5    Ibid s 66(3). A statutory instrument containing a scheme made by the Scottish ministers under s 12(5) is subject to annulment in pursuance of a resolution of the Scottish Parliament: s 66(4). A statutory rule containing a scheme made by the Department of Health, Social Services and Public Safety under s 12(5) is subject to negative resolution within the meaning of the Interpretation Act (Northern Ireland) 1954 s 41(6): Tax Credits Act 2002 s 66(5).

## **UPDATE**

### **218-227 [Disabled Person's Tax Credit]**

Subject to transitional provisions and savings (see SI 2003/962) disabled person's tax credit (formerly 'disability working allowance') is abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

For the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887 if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule (art 2 substituted by SI 1998/1425). If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule. See further PARA 31-46.

Also for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, during any period or periods commencing with or falling after 2 April

1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and

a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

#### **224-227 Income and Capital**

The provisions of the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, Pt V (regs 12-50), relating to the calculation of income and capital, are further amended: see PARA 220 NOTE 13. Such amendments generally follow those made to the analogous provisions of the Family Credit (General) Regulations 1987, SI 1987/1973. Following the structure of vol 44(2) (Reissue), detailed amendments are noted to paras 208-217, except where they differ from family credit or are peculiar to disability working allowance.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/8. THE SOCIAL FUND/228. Payments out of the social fund.

## 8. THE SOCIAL FUND

### 228. Payments out of the social fund.

The social fund<sup>1</sup> is maintained under the control and management of the Secretary of State<sup>2</sup>, and payments out of it are made by him<sup>3</sup>. Payments may be made out of the social fund, in accordance with the Social Security Contributions and Benefits Act 1992<sup>4</sup>:

- 616 (1) of prescribed amounts, whether in respect of prescribed items or otherwise, to meet, in prescribed circumstances, maternity expenses and funeral expenses<sup>5</sup>; and
- 617 (2) to meet other needs<sup>6</sup> in accordance with directions given or guidance issued by the Secretary of State<sup>7</sup>;
- 618 (3) of a prescribed amount or a number of prescribed amounts to prescribed descriptions of persons, in prescribed circumstances to meet expenses for heating which appear to the Secretary of State to have been or to be likely to be incurred in cold weather<sup>8</sup>.

Adjudication in relation to head (1) above or head (3) above is by adjudication officers<sup>9</sup>, with appeal lying to a social security appeal tribunal and then to a social security commissioner<sup>10</sup>. The question whether a payment such as is mentioned in head (2) above is to be awarded and how much it is to be is determined by a social fund officer<sup>11</sup>. A social fund officer may determine that an award is payable in specified instalments at specified times<sup>12</sup>. This decision is then subject to a system of internal reviews by another such officer and then by a social fund inspector<sup>13</sup>.

In determining whether to make an award to the applicant or the amount or value to be awarded a social fund officer is to have regard, subject to statutory provision<sup>14</sup>, to all the circumstances of the case and, in particular:

- 619 (a) the nature, extent and urgency of the need<sup>15</sup>;
- 620 (b) the existence of resources from which the need may be met<sup>16</sup>;
- 621 (c) the possibility that some other person or body may wholly or partly meet it<sup>17</sup>;
- 622 (d) where the payment is repayable, the likelihood of repayment and the time within which repayment is likely<sup>18</sup>;
- 623 (e) any relevant allocation under statutory provision<sup>19</sup>.

A social fund officer must determine any question in accordance with any general directions issued by the Secretary of State and in determining any question must take account of any general guidance issued by him<sup>20</sup>. In determining a question a social fund officer must take account<sup>21</sup> of any guidance issued by the social fund officer nominated for his area<sup>22</sup>. Social Fund Directions issued by the Secretary of State restrict the permissible payments to three categories: (i) budgeting loans; (ii) crisis loans; and (iii) community care grants<sup>23</sup>.

<sup>1</sup> As to provisions relating to allocations from and payments into and out of the fund see PARA 11 ante. As to the benefits which may be paid out of the fund see PARA 229 et seq post. This fund was established by the Social Security Act 1986 s 32(1) (repealed) and is continued in being by the Social Security Administration Act 1992 s

167(1). As to the maintenance of the fund see PARA 11 ante; and as to adjustments between the fund and other sources of finance see PARA 13 ante.

2 As to the Secretary of State see PARA 1 ante.

3 See the Social Security Administration Act 1992 s 167(2); and PARA 11 ante.

4 Ie in accordance with the Social Security Contributions and Benefits Act 1992 Pt VIII (ss 138-140): see PARAS 229-236 post.

5 Ibid s 138(1)(a); and see PARA 229 post. For these purposes, 'prescribed' means specified in or determined in accordance with regulations: s 138(4). As to the exercise of this power see the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481 (as amended); and PARA 229 post.

6 As to the determination of the questions whether a payment such as is mentioned in the Social Security Contributions and Benefits Act 1992 s 138(1)(b) is to be awarded and how much it is to be by a social fund officer, and for further provisions as to awards see notes 11-12 infra. As to the principles of determination see notes 14-20 infra. A social fund payment such as is mentioned in s 138(1)(b) may be awarded to a person only if an application for such a payment has been made by him or on his behalf in such form and manner as may be prescribed: Social Security Administration Act 1992 s 12(1). The Secretary of State may by regulations (1) make provision with respect to the time at which an application for such a social fund payment is to be treated as made; (2) prescribe conditions that must be satisfied before any determination in connection with such an application may be made or any award of such a payment may be paid; (3) prescribe circumstances in which such an award becomes extinguished: s 12(2). At the date at which this volume states the law, no such regulations had been made but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Fund (Applications) Regulations 1988, SI 1988/524 (as amended); and the Social Fund (Miscellaneous Provisions) Regulations 1990, SI 1990/1788, have effect as if so made. As to making an application see PARA 232 post.

7 Social Security Contributions and Benefits Act 1992 s 138(1)(b); and see PARAS 232-236 post. The power to make a payment out of the social fund such as is mentioned in s 138(1)(b) may be exercised by making a payment to a third party with a view to the third party providing, or arranging for the provision of, goods or services for the applicant: s 138(3).

8 See ibid s 138(2); and PARA 231 post.

9 See the Social Security Administration Act 1992 s 20(6)(e); and PARA 359 post.

10 See PARAS 359-362 post.

11 See the Social Security Contributions and Benefits Act 1992 s 139(1). Payment of an award must be made to the applicant unless the social fund officer determines otherwise: s 139(5). As to the appointment of officers see PARA 383 post. As to the review of determinations see the Social Security Administration Act 1992 s 66; and PARA 384 post.

12 Social Security Contributions and Benefits Act 1992 s 139(2). A social fund officer may determine that an award is to be repayable: s 139(3). An award that is to be repayable must be repayable upon such terms and conditions as before the award is paid the Secretary of State notifies to the person by or on behalf of whom the application for it was made: s 139(4).

13 See PARA 384 post.

14 Ie the Social Security Contributions and Benefits Act 1992 s 140(2): see the text and note 20 infra.

15 Ibid s 140(1)(a).

16 Ibid s 140(1)(b).

17 Ibid s 140(1)(c).

18 Ibid s 140(1)(d).

19 Ie under the Social Security Administration Act 1992 s 168(1)-(4) (see PARA 11 ante): Social Security Contributions and Benefits Act 1992 s 140(1)(e).

20 Ibid s 140(2). Without prejudice to the generality of s 140(2), the Secretary of State may issue directions under s 140(2) for the purpose of securing that a social fund officer or group of social fund officers must not in any specified period make awards of any specified description which in the aggregate exceed the amount, or a

specified portion of the amount, allocated to that officer or group of officers under the Social Security Administration Act 1992 s 168(1)-(4) for payments under awards of that description in that period: see the Social Security Contributions and Benefits Act 1992 s 140(3). Without prejudice to the generality of s 140(2), the power to issue general directions conferred on the Secretary of State by s 140(2) includes power to direct:

- 106 (1) that in circumstances specified in the direction a social fund officer must not determine an application and, without prejudice to the generality of this provision, that a social fund officer must not determine an application which is made before the end of a specified period after the making of an application by the same person for a payment such as is mentioned in s 138(1)(b) to meet the same need and without there having been any relevant change of circumstances since the previous application;
- 107 (2) that for a category of need specified in the direction a social fund officer must not award less than an amount specified in the direction;
- 108 (3) that for a category of need specified in the direction a social fund officer must not award more than an amount so specified;
- 109 (4) that payments to meet a category of need specified in the direction must in all cases or in no case be made by instalments;
- 110 (5) that payments to meet a category of need specified in the direction must in all cases or in no case be repayable; and
- 111 (6) that a payment such as is mentioned in s 138(1)(b) must only be awarded to a person if either: (a) he is in receipt of a benefit which is specified in the direction and the circumstances are such as are so specified; or (b) in a case where the conditions specified in head (a) above are not satisfied, the circumstances are such as are specified in the direction,

and the power to issue general guidance conferred on him by that subsection includes power to give social fund officers guidance as to any matter to which directions under that subsection may relate: s 140(4).

21 Ie subject to any directions or guidance issued by the Secretary of State under *ibid* s 140.

22 Ie under the Social Security Administration Act 1992 s 64 (see PARA 383 post): Social Security Contributions and Benefits Act 1992 s 140(5).

23 See the Social Fund Directions, Directions 1-4.

## UPDATE

### 228 Payments out of the social fund

TEXT AND NOTES--The Secretary of State may nominate for an area an appropriate officer who must issue general guidance to other such officers in the area about such matters relating to the social fund as the Secretary of State may specify: Social Security Act 1998 s 36(2). 'Appropriate officer' means an officer of the Secretary of State who, acting under his authority, is exercising functions of the Secretary of State in relation to such payments out of the social fund as are mentioned in the Social Security Contributions and Benefits Act 1992 s 138(1)(b) (see head (2)): 1998 Act s 36(1). In relation to any decision of an appropriate officer, s 38 (see PARA 384) applies in substitution for ss 9 (see PARA 356A.2), 10 (see PARA 356A.3): s 36(3).

As to the making of age-related payments see PARA 228A.

TEXT AND NOTES 4-7--Social Security Contributions and Benefits Act 1992 s 138(1) now as substituted by 1998 Act s 70(1). Now, head (2) payments by way of community care grant, crisis loan or budgeting loan to meet other needs in accordance with directions given or guidance issued by the Secretary of State: Social Security Contributions and Benefits Act 1992 s 138(1)(b) (s 138(1) as substituted). 'Budgeting loan' means a loan awarded in circumstances specified in directions issued by the Secretary of State for the purpose of defraying an intermittent expense; 'community care grant' means a grant awarded in circumstances so specified for the purpose of meeting a need for

community care; and 'crisis loan' means a loan awarded in circumstances so specified for the purpose of meeting an immediate short term need: s 138(5) (added by the 1998 Act s 70(2)). Any reference in the Social Security Contributions and Benefits Act 1992 s 138(5) to meeting a need or defraying an expense includes a reference to helping to meet the need or to defray the expense: s 138(5) (as added).

NOTE 5--SI 1987/481 replaced: Social Fund Maternity and Funeral Expenses (General) Regulations 2005, SI 2005/3061.

TEXT AND NOTE 11--Replaced. Whether a payment mentioned in the Social Security Contributions and Benefits Act 1992 s 138(1)(b) (see TEXT AND NOTES 4-7) is to be awarded, and how much it is to be, is to be determined by an appropriate officer, that is to say, an officer of the Secretary of State who, acting under his authority, is exercising functions of the Secretary of State in relation to payments so mentioned: s 139(1) (substituted by the 1998 Act Sch 7 para 72(1) (in force except for certain purposes: SI 1999/3178)).

NOTE 11--For 'the social fund officer' read 'the appropriate officer': Social Security Contributions and Benefits Act 1992 s 139(5) (amended by the 1998 Act Sch 7 para 72(5)).

TEXT AND NOTE 12--For 'A social fund officer' read 'An appropriate officer': Social Security Contributions and Benefits Act 1992 s 139(2) (amended by the 1998 Act Sch 7 para 72(2)).

NOTE 12--Section 139(3) repealed: 1998 Act Sch 7 para 72(3), Sch 8. In the Social Security Contributions and Benefits Act 1992 s 139(4) (amended by the 1998 Act Sch 7 para 72(4)) for 'an award that is to be repayable' read 'an award of a crisis loan or a budgeting loan'.

TEXT AND NOTES 14-19--Subject to the Social Security Contributions and Benefits Act 1992 s 140(2) (see TEXT AND NOTE 20), in determining whether to make an award of a budgeting loan to the applicant, or the amount or value to be awarded, a social fund officer must have regard to (i) such of the applicant's personal circumstances as are of a description specified in directions issued by the Secretary of State, and (ii) the criteria specified in s 140(1)(b), (d) and (e): s 140(1A) (added by the 1998 Act s 71(2); and amended by Welfare Reform Act 2007 s 54, Sch 8).

An appropriate officer must review a social fund determination if an application for a review is made, within such time and in such form and manner as may be prescribed, by or on behalf of the person who applied for the payment to which the determination relates; and a social fund determination which has been reviewed must be further reviewed by a social fund inspector if an application is made, within such time and in such form and manner as may be prescribed, by or on behalf of the person who applied for the payment to which the determination relates: 1998 Act s 38(1)(a), (3) (in force except for certain purposes: SI 1999/528, SI 1999/3178).

The question of the applicant's need should be assessed before any budgetary restraints are considered; in general, if the need has been assessed at a level for which funds have been allocated, an award ought to be made if it will help the applicant to remain in the community rather than to enter institutional or residential care: *R v Social Fund Inspector, ex p Taylor* (1997) 41 BMLR 31.

TEXT AND NOTE 14--For 'an award' read 'an award of a community care grant or a crisis loan': Social Security Contributions and Benefits Act 1992 s 140(1) (amended by the 1998 Act s 71(1)).

TEXT AND NOTES 20-22--References to a social fund officer are now to an appropriate officer: Social Security Contributions and Benefits Act 1992 s 140 (amended by the 1998 Act Sch 7 para 73).

NOTE 20--Without prejudice to the generality of the 1992 Act s 140(2), the Secretary of State may issue directions under s 140(2) for the purpose of securing that allocations under the Social Security Administration Act 1992 s 168 are not exceeded: Social Security Contributions and Benefits Act 1992 s 140(3) (substituted by Welfare Reform Act 2007 Sch 7 para 2(3)).

New head (7) that in circumstances specified in the direction an application for an award of a community care grant may be treated as an application for an award of a crisis loan, and vice versa; and head (5) omitted: Social Security Contributions and Benefits Act 1992 s 140(4) (amended by the 1998 Act s 71(3), Sch 8).

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## 228A. Age-Related Payments.

### 1. Basic cases

A qualifying individual<sup>1</sup> is entitled to a payment of £100 if at any time in the relevant week he is single<sup>2</sup> and either (1) he is not living with another qualifying individual; or (2) he is in receipt of state pension credit<sup>3</sup>. A qualifying individual is entitled to a payment of £50 if at any time in the relevant week (a) he is single; (b) he is not in receipt of state pension credit; and (c) he is living with another qualifying individual<sup>4</sup>. A qualifying individual is entitled to a payment of £100 if at any time in the relevant week (i) the other member of the couple is not a qualifying individual<sup>5</sup>; or (ii) either member of the couple is in receipt of state pension credit, an income-based jobseeker's allowance<sup>6</sup> or income support<sup>7</sup>. A qualifying individual is entitled to a payment of £50 if at any time in the relevant week he is part of a couple and (A) the other member of the couple is a qualifying individual; and (B) neither member of the couple is in receipt of state pension credit<sup>8</sup>.

A qualifying individual who would be entitled to an age-related payment<sup>9</sup> is not entitled to the payment if (aa) he is in receipt of free in-patient treatment<sup>10</sup> throughout the period of 52 weeks ending with the relevant week; (bb) he is in custody<sup>11</sup> throughout the relevant week; or (cc) he is subject to immigration control<sup>12</sup> throughout the relevant week<sup>13</sup>.

1 'Qualifying individual' means an individual who is ordinarily resident in Great Britain on at least one day in the relevant week and who attains the age of 70 years on or before the last day of the relevant week: Age-Related Payments Act 2004 s 1(1). 'Relevant week' means the week beginning with 20 September 2004 and ending with 26 September 2004: s 1(2).

2 For this purpose, 'single' means not part of a couple: *ibid* s 8(1). 'Couple' means a man and a woman who share a household and who are, or who live as, husband and wife: s 8(1). The Act applies, with any necessary modifications, to the parties to a polygamous marriage as if they together formed one couple: s 8(2).

3 *Ibid* s 2(1). 'State pension credit' has the meaning given by the State Pension Credit Act 2002 s 1(1) (see PARA 201A.1): Age-Related Payments Act 2004 s 8(1). Section 2 is subject to s 3 (see PARA 228A.2): s 2(5).

4 *Ibid* s 2(2).

5 *Ibid* s 2(3)(a).

6 'Income-based jobseeker's allowance' has the meaning given by the Jobseekers Act 1995 s 1(1), (4) (see PARA 259): Age-Related Payments Act 2004 s 8(1).

7 *Ibid* s 2(3)(b). 'Income support' means income support under the Social Security Contributions and Benefits Act 1992 s 124 (see PARA 176): Age-Related Payments Act 2004 s 8(1).

8 *Ibid* s 2(4).

9 *Ie* a payment under *ibid* s 2 or 3 (see PARA 228A.2).

10 The reference to the receipt of free in-patient treatment is to be construed in accordance with the Social Security (Hospital In-Patients) Regulations 1975, SI 1975/555, reg 2(2), (2A) (see PARA 21 NOTE 8): Age-Related Payments Act 2004 s 4(2).

11 A person is in custody if he is detained in custody under a sentence imposed by a court: *ibid* s 4(2).

12 The reference to being subject to immigration control is to be construed in accordance with the Immigration and Asylum Act 1999 s 115(9) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 257 NOTE 1): Age-Related Payments Act 2004 s 4(2).

13 Ibid s 4(1). Where a person to whom s 4 applies is part of a couple, in the application of s 2(3), (4) to the other member of the couple, the person to whom s 4 applies is to be treated as a non-qualifying individual: s 4(3).

## 2. Special cases

Where two or more couples<sup>1</sup> live together and two or more individuals, each of whom is part of one of the couples, would be entitled to an age-related payment because the other member of the couple is not a qualifying individual<sup>2</sup>, each of those individuals is instead entitled to a payment of £50<sup>3</sup>. Where each member of a couple would be entitled to an age-related payment because either member of the couple is in receipt of state pension credit, an income-based jobseeker's allowance or income support<sup>4</sup>, the member who is to receive a winter fuel payment<sup>5</sup> in 2004 is entitled to the age-related payment and the other member is not entitled to such a payment<sup>6</sup>. Where (1) only one member of a couple is a qualifying individual; (2) the individual would be entitled to an age-related payment because the other member of the couple is not a qualifying individual, or because either member of the couple is in receipt of state pension credit, an income-based jobseeker's allowance or income support<sup>7</sup>; (3) the other member of the couple is to receive a winter fuel payment in 2004; and (4) the qualifying individual is not to receive a winter fuel payment in 2004, then (a) the other member of the couple is entitled to a payment of £100; and (b) the qualifying individual is not entitled to the relevant age-related payment<sup>8</sup>. Where a qualifying individual is living in a care home<sup>9</sup> on the last day of the relevant week<sup>10</sup>, and throughout the period of 13 weeks ending with the relevant week his ordinary place of residence was a care home, then (i) if he is not in receipt of state pension credit at any time in the relevant week, he is entitled to a payment of £50<sup>11</sup>; and (ii) if at any time in the relevant week he is in receipt of state pension credit he is not entitled to an age-related payment<sup>12</sup>.

In certain circumstances a qualifying individual is disqualified from receiving an age-related payment<sup>13</sup>.

1 For the meaning of 'couple' see PARA 228A.1 NOTE 2.

2 I.e. a payment under the Age-Related Payments Act 2004 s 2(3)(a): see PARA 228A.1 TEXT AND NOTE 5. For the meaning of 'qualifying individual' see PARA 228A.1 NOTE 1.

3 Ibid s 3(1).

4 I.e. a payment under ibid s 2(3)(b): see PARA 228A.1 TEXT AND NOTES 5-7.

5 I.e. a payment under the Social Fund Winter Fuel Payment Regulations 2000, SI 2000/729 (see PARA 231).

6 Age-Related Payments Act 2004 s 3(2).

7 I.e. a payment under ibid s 2(3): see PARA 228A.1 TEXT AND NOTES 5-7.

8 I.e. the payment under ibid s 2(3): s 3(3).

9 'Care home' has the same meaning as that given by the Care Standards Act 2000 s 3 (see CHILDREN AND YOUNG PERSONS vol 5(4) (2008 Reissue) PARA 985): Age-Related Payments Act 2004 s 8(1).

10 For the meaning of 'relevant week' see PARA 228A.1 NOTE 1.

11 Age-Related Payments Act 2004 s 3(4), (5)(a). Such a person is not entitled to a payment under s 2 (see PARA 228A.1): s 3(4), (5)(a).

12 Ibid s 3(4), (5)(b). Where a person to whom s 3(5) applies is part of a couple, in the application of s 2(3), (4) (see PARA 228A.1 TEXT AND NOTES 5-8) to the other member of the couple, the person to whom s 3(5) applies is to be treated as a non-qualifying individual: s 3(6).

13 See PARA 228A.1 TEXT AND NOTES 9-13.

### 3. Procedure

Where before 31 December 2004 the Secretary of State<sup>1</sup> thinks that a person is entitled to an age-related payment<sup>2</sup>, the Secretary of State must make the payment before that date, without a claim being required<sup>3</sup>. A person who is entitled to an age-related payment and who does not receive it before 31 December 2004 may claim the payment<sup>4</sup>. Such a claim must (1) be in writing to the Secretary of State; (2) be received by the Secretary of State before 31 March 2005; (3) specify (a) the claimant's name, address, date of birth and national insurance number (if he has one); and (b) the date on which the claim is sent to the Secretary of State; and (4) include a declaration that the claimant was ordinarily resident in Great Britain on at least one day in the relevant week<sup>5</sup>. If the Secretary of State thinks that a person making such a claim is entitled to an age-related payment, the Secretary of State must make the payment<sup>6</sup>.

No account is to be taken of entitlement to an age-related payment in considering a person's liability to tax, entitlement to benefit under an enactment relating to social security (irrespective of the name or nature of the benefit), or entitlement to a tax credit<sup>7</sup>.

1 As to the Secretary of State see PARA 1.

2 Is a payment under the Age-Related Payments Act 2004 s 2 (see PARA 228A.1) or s 3 (see PARA 228A.2).

3 Ibid s 5(1).

4 Ibid s 5(2).

5 Ibid s 5(3). For the meaning of 'relevant week' see PARA 228A.1 NOTE 1.

6 Ibid s 5(4). The provisions of the Social Security Act 1998 Pt I Ch II (ss 8-39) (see PARA 356A) apply to a decision of the Secretary of State about a person's entitlement to a payment under the Age-Related Payments Act 2004 s 2 or 3, whether or not following a claim, as they apply to a decision of the Secretary of State under the Social Security Act 1998 s 8: Age-Related Payments Act 2004 s 5(5).

7 Ibid s 6.

### 4. Power to provide for payments

The Secretary of State<sup>1</sup> may make regulations providing for the making of payments by him to persons who have attained the age of 60 years<sup>2</sup>. Such regulations may provide for payments to be made to persons in a specified class (which may be defined by reference to age or otherwise), and in specified circumstances<sup>3</sup>. Such regulations may, in particular (1) provide for payments to be made only once, at specified times or over a specified period; (2) provide for exceptions; (3) apply (with or without modifications) an enactment relating to social security (including, in particular, an enactment relating to claims, payments, evidence, revision of decisions, appeals or recovery of payment in error); and (4) make different provision for different cases or circumstances<sup>4</sup>.

1 As to the Secretary of State see PARA 1.

2 Age-Related Payments Act 2004 s 7(1). Regulations made under s 7 must be made by statutory instrument and may not be made unless a draft has been laid before and approved by resolution of each House of Parliament: s 7(4). See the Age-Related Payments Regulations 2005, SI 2005/1983 (amended by SI 2008/1554), which provides for a one-off lump sum payment.

3 Age-Related Payments Act 2004 s 7(2).

4 Ibid s 7(3).



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## 229. Maternity payments.

Subject to statutory provision<sup>1</sup> a payment<sup>2</sup> to meet maternity expenses<sup>3</sup> is made only where:

- 624 (1) the claimant or the claimant's partner<sup>4</sup> has, in respect of the date of the claim for a maternity payment, been awarded either income support, or income-based jobseeker's allowance, family credit or disability working allowance; and
- 625 (2) Either:
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- 89. (a) the claimant or, if the claimant is a member of a family<sup>5</sup>, one of the family is pregnant or has given birth to a child or still-born child<sup>6</sup>; or
- 90. (b) the claimant or the claimant's partner or both of them have adopted a child not exceeding the age of 12 months at the date of the claim; or
- 91. (c) the claimant and the claimant's spouse have been granted a parental order in respect of a child pursuant to the Human Fertilisation and Embryology Act 1990<sup>7</sup>; and
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- 626 (3) the claim is made within the prescribed time for claiming a maternity payment<sup>8</sup>.

Where:

- 627 (i) a claimant or a claimant's partner is aged 60 or over and the claimant has capital which is in excess of £1,000; or
- 628 (ii) the claimant is or, if he has a partner, both he and his partner are, aged under 60 and the claimant has capital which is in excess of £500,

a maternity payment or funeral payment which, but for statutory provision<sup>9</sup> would be payable is payable only if, and to the extent that, the amount of the payment is more than the excess<sup>10</sup>.

1    le subject to the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 6 (as amended) and Pt IV (reg 9) (as amended) and Pt V (regs 11-13).

2    Subject to the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, Pt IV (as amended) the amount of a maternity payment is:

- 112 (1) where the claim is made before confinement, £100 in respect of each expected child;
- 113 (2) where the claim is made after confinement, £100 in respect of each child, including any still-born child;
- 114 (3) where the claim is made after a child has already been adopted, £100 in respect of that child;
- 115 (4) where the claim is made after an order referred to in reg 5(1)(b)(iii) has already been granted in respect of a child, £100 in respect of that child: see reg 5(2) (substituted by SI 1992/2149).

3    'Maternity expenses' are referred to in the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481 as a 'maternity payment': reg 5(1).

4 'Partner' means where a person: (1) is a member of a married or unmarried couple, the other member of that couple; (2) is married polygamously to two or more members of his household, any such member: *ibid* reg 3(1) (definition substituted by SI 1995/1229). 'Unmarried couple' means a man and a woman who are not married to each other but are living together as husband and wife (as to which see *PARA 83 ante*): Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481 reg 3(1). 'Married couple' means a man and a woman who are married to each other and are members of the same household: reg 3(1).

5 'Family' means: a married or unmarried couple and any children who are members of the same household and for whom one of the couple is or both are responsible; a person who is not a member of a married or unmarried couple and any children who are members of the same household and for whom that person is responsible; persons who are members of the same household and between whom there is a polygamous relationship and any children who are also members of the same household and for whom a member of the polygamous relationship is responsible: *ibid* reg 3(1).

6 'Still-born child' has the same meaning as in the Births and Deaths Registration Act 1926 s 12 (as amended) and the Registrations of Births, Deaths and Marriages (Scotland) Act 1965 s 56(1) (as amended): see the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 3(1) (definition added by SI 1992/2149).

7 *Ie* pursuant to the Human Fertilisation and Embryology Act 1990 s 30: see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) *PARA 106*.

8 See the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 5(1) (amended by SI 1988/36; SI 1991/2742; SI 1992/2149; SI 1996/1443; and SI 1997/792). As to the specified period see *PARA 340 post*. As to limitations on entitlement where the claimant or partner is affected by a trade dispute see the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 6 (as amended).

9 *Ie* but for *ibid* reg 9 (as amended): see reg 9(1) (as substituted).

10 *Ibid* reg 9(1) (substituted by SI 1990/580). In general, capital is to be calculated in the same way as for income support purposes: see the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 9(2), (3) (as substituted and amended).

## UPDATE

### 229 [Sure start maternity grant]

TEXT AND NOTES--SI 1987/481 replaced: Social Fund Maternity and Funeral Expenses (General) Regulations 2005, SI 2005/3061 (amended by SI 2005/3391, SI 2006/588, SI 2006/1026, SI 2008/1554, SI 2010/986). References to maternity payment are now to sure start maternity grant: see SI 2005/3061 reg 5(1) (amended by SI 2008/1554).

As to the payment of health in pregnancy grants, see the Social Security Contributions and Benefits Act 1992 ss 140A, 140B; and *PARAS 236A, 236B*.

TEXT AND NOTES 1-8--Also, head (4) subject to SI 2005/3061 reg 5(3), (a) the claimant or partner has received advice on health and welfare matters relating to the child from a health professional; and (b) where the claim is made before the child is born, the claimant or partner has received advice on health and welfare matters relating to maternal health from a health professional: reg 5(1). 'Health professional' means a registered medical practitioner or a registered nurse or registered midwife: reg 3(1). Head (4)(a) does not apply where a claim is made after the birth of a still-born child: reg 5(3).

NOTE 1--SI 1987/481 reg 9 revoked: SI 2001/3023.

NOTE 2--Payment under heads (1)-(4) now £500: SI 2005/3061 reg 5(2).

TEXT AND NOTE 5--Head (1) refers also to award of child tax credit, and for 'family credit or disability working allowance' read 'working tax credit where the disability element or the severe disability element of working tax credit as specified in the Working Tax

Credit (Entitlement and Maximum Rate) Regulations 2002, SI 2002/2005, reg 20(1)(b), (f) (see PARA 227A.10) is included in the award': SI 2005/3061 reg 5(1).

TEXT AND NOTES 7, 8--In head 2(c) for 'spouse' read 'partner'. Head 2(c) also applies where the claimant and the claimant's partner have been granted a parental order in respect of a child pursuant to the Human Fertilisation and Embryology Act 2008 s 54 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 112A.5); SI 2005/3061 reg 5(1) (amended by SI 2010/986).

TEXT AND NOTES 9, 10--SI 1987/481 reg 9 revoked: SI 2001/3023. See *Francis v Secretary of State for Work and Pensions* [2005] EWCA Civ 1303, [2006] 1 All ER 748.

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### 230. Funeral payments.

A social fund payment<sup>1</sup> to meet funeral expenses may be made only where<sup>2</sup>:

629 (1) the claimant or his partner<sup>3</sup>, at the date of the claim for a funeral payment:

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92. (a) has an award of income support, income-based jobseeker's allowance, family credit, disability working allowance, housing benefit or council tax benefit<sup>4</sup>; or

93. (b) is a person to whom, by virtue of statutory provision<sup>5</sup>, the Social Security Contributions and Benefits Act 1992<sup>6</sup> applies where, on a claim for council tax benefit, the conditions of entitlement specified<sup>7</sup> for an award of an alternative maximum council tax benefit are fulfilled;

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630 (2) the funeral of the deceased takes place in the United Kingdom<sup>8</sup>;

631 (3) the deceased was ordinarily resident in the United Kingdom at the date of his death;

632 (4) the claim is made within the prescribed time for claiming a funeral payment; and

633 (5) the claimant or his partner accepts responsibility for those expenses and:

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94. (i) the responsible person was the partner of the deceased at the date of death; or

95. (ii) in a case where the deceased was a child or a still-born child and: (A) there is no absent parent; or (B) there is an absent parent who, or whose partner, was awarded a benefit to which head (1) above refers at the date of death, the responsible person was the person or the partner of a person responsible for that child for the purposes of child benefit law<sup>9</sup> at the date of death, or, as the case may be, a parent of that still-born child; or

96. (iii) in a case where heads (i) and (ii) above do not apply, the responsible person was an immediate family member of the deceased and it is reasonable for the responsible person to accept responsibility for those expenses; or

97. (iv) in any other case, the responsible person was either: (A) a close relative<sup>10</sup> (other than an immediate family member) of the deceased, or (B) a close friend of the deceased, and it is reasonable for the responsible person to accept responsibility for those expenses<sup>11</sup>.

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Subject to statutory provision<sup>12</sup> the amount of a funeral payment is an amount sufficient to meet any of the costs<sup>13</sup> which fall to be met or have been met by the claimant or his partner or a person acting on their behalf and which are specified<sup>14</sup>, inclusive of any available discount on those costs allowed by the funeral director or by any other person who arranges the funeral<sup>15</sup>. From this amount there are to be deducted certain items<sup>16</sup>.

Eligibility for a funeral payment is subject to the same capital limit as that for a maternity payment<sup>17</sup>.

1 'A social fund payment' is referred to in the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481 as a 'funeral payment': reg 7(1) (reg 7 as substituted).

2 le subject to the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 7 (as substituted), reg 8 (as amended), and Pts IV (reg 9) (as amended) and V (reg 11-13): see reg 7(1) (as substituted).

3 The claimant or his partner is referred to in the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, Pt III (regs 7-8) (as amended) as 'the responsible person': see reg 7(1)(a) (as substituted). For the meaning of 'partner' see PARA 229 note 4 ante.

4 As to income support see PARA 176 et seq ante; as to jobseeker's allowance see PARA 258 et seq post; as to family credit see PARA 202 et seq ante; as to disability working allowance see PARA 218 ante; and as to housing benefit see generally HOUSING vol 22 (2006 Reissue) PARA 140 et seq. Council tax benefit is awarded by virtue of the claimant or his partner having fulfilled the conditions of entitlement specified in the Social Security Contributions and Benefits Act 1992 s 131(3)-(5) (s 131 as substituted) (certain conditions for entitlement to council tax benefit: see generally RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq): Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 7(1)(a)(i) (reg 7 substituted by 1997/792).

5 le by virtue of the Social Security Contributions and Benefits Act 1992 s 131(7) (as substituted): see the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 7(1)(a)(ii) (as substituted).

6 le the Social Security Contributions and Benefits Act 1992 s 131(6) (as substituted): see the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 7(1)(a)(ii) (as substituted).

7 le the conditions of entitlement specified in the Social Security Contributions and Benefits Act 1992 s 131(3), (6) (as substituted): see the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 7(1)(a)(ii) (as substituted).

8 For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

9 le for the purposes of the Social Security Contributions and Benefits Act 1992 Pt IX (s 141-147) (as amended); see PARA 237 et seq post.

10 'Close relative' means a parent, parent-in-law, son, son-in-law, daughter, daughter-in-law, step-parent, stepson, stepson-in-law, stepdaughter, stepdaughter-in-law, brother, brother-in-law, sister or sister-in-law: Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 3(1) (definition added by SI 1994/506; substituted by SI 1995/1229).

11 See the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 7(1) (substituted by SI 1997/792). In a case to which head (iii) or (iv) in the text applies, whether it is reasonable for a person to accept responsibility for meeting the expenses of a funeral is determined by the nature and extent of that person's contact with the deceased: see the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 7(5) (as so substituted).

12 le subject to ibid reg 7A(4), (5) (as substituted), reg 8 (as amended) and Pt IV (reg 9) (as amended).

13 The costs which may be met for these purposes are set out in ibid reg 7A(2) (reg 7A substituted by SI 1997/792) as follows:

116 (1) Except where the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 7A(2)(b) (as substituted) applies, in the case of a burial:

1. (a) the necessary costs of purchasing a new burial plot for the deceased, together with an exclusive right of burial in that plot;

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2. (b) the necessary costs of the burial;

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117 (2) in the case of a cremation:

3. (i) the necessary costs of the cremation, including medical references;

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4. (ii) the cost of any necessary registered medical practitioner's certificates;

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5. (iii) the fee payable for the removal of any device as defined for the purposes of the Active Implantable Medical Devices Regulations 1992, SI 1992/3146, save that where that removal is carried out by a person who is not a registered medical practitioner, no more than £20 is to be met in respect of that fee;

- 5
- 118 (3) the cost of obtaining any documentation, production of which is necessary in order to release any assets of the deceased which may be deducted from a funeral payment pursuant to the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 8 (as amended);
- 119 (4) where the deceased died at home or away from home and it is necessary to transport the deceased within the United Kingdom in excess of 50 miles to the funeral director's premises or to the place of rest, the reasonable cost of transport in excess of 50 miles;
- 120 (5) where transport is provided by a vehicle for the coffin and bearers and by one additional vehicle, from the funeral director's premises or the deceased's place of rest to the funeral and:
6. (A) that transportation necessarily exceeds 50 miles; or  
6
7. (B) that transportation exceeds 50 miles and the cost of that transportation together with the cost of the burial in an existing plot does not exceed the cost which would have been incurred under head (1) supra and, where appropriate, under head (A) supra,  
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- the reasonable cost of transport in excess of 50 miles;
- 121 (6) the reasonable expenses of one return journey within the United Kingdom for the responsible person, either for the arrangement of, or attendance at, the funeral;
- 122 (7) any other funeral expenses which must not exceed £600 in any case.
- Where there is no specific limit on amount allowable, there is to be implied the requirement that the amount must be reasonable, given that payment is being made out of public funds: Decision R(IS)14/92 (decided under a previous, less specific version of the current provision).
- 14 le specified in the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 7A(2) (as substituted).
- 15 See *ibid* reg 7A(1) (as substituted).
- 16 See *ibid* reg 8 (as amended). Subject to reg 8(2) (as added) there must be deducted from the amount of any award which would, but for reg 8 (as amended), be made under reg 7 (as substituted), as provided by reg 8(1) (amended by SI 1994/506; SI 1995/1229; SI 1996/1443; SI 1997/792) the following amounts:
- 123 (1) the amount of any assets of the deceased which are available to the responsible person (on application or otherwise) or any other member of his family without probate or letters of administration or in Scotland, confirmation, having been granted;
- 124 (2) the amount of any lump sum due to the responsible person or any other member of his family on the death of the deceased by virtue of any insurance policy, occupational pension scheme, or burial club or any analogous arrangement;
- 125 (3) the amount of any contribution towards funeral expenses which has been received by the responsible person or any other member of his family from a charity or a relative of his or of the deceased, but only to the extent that that amount or, if more than one contribution has been received, the aggregate of such amounts exceeds the cost of any funeral expenses other than those specified in the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 7(3), (4) (as substituted);
- 126 (4) the amount of any funeral grant, made out of public funds, in respect of the death of a person who was entitled to a war disablement pension;
- 127 (5) in relation to a pre-paid funeral plan or any analogous arrangement:
8. (a) where the plan or arrangement had not been paid for in full prior to the death of the deceased, the amount of any sum payable under that plan or arrangement in order to meet the deceased's funeral expenses;  
8
9. (b) where the plan or arrangement had been paid for in full prior to the death of the deceased, the amount of any allowance paid under that plan or arrangement in respect of funeral expenses.  
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Payments to meet funeral expenses may in all cases be recovered, as if they were funeral expenses, out of the estate of the deceased and (subject to the Social Security Administration Act 1992 s 71 (as amended) (see PARA 395 et seq post) by no other means: s 78(4).

17 See the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481, reg 9 (as amended); and PARA 229 ante.

## UPDATE

### 230 Funeral payments

TEXT AND NOTES--SI 1987/481 replaced: Social Fund Maternity and Funeral Expenses (General) Regulations 2005, SI 2005/3061 (see PARA 229).

NOTE 2--SI 1987/481 reg 9 revoked: SI 2001/3023.

TEXT AND NOTES 3, 4--In head (1) for 'at the date' read 'in respect of the date': SI 2005/3061 reg 7(1)(b), (2). Head (1)(a) refers also to state pension credit and to income-related employment and support allowance, and for 'family credit, disability working allowance' read 'working tax credit where the disability element or the severe disability element of working tax credit as specified in the Working Tax Credit (Entitlement and Maximum Rate) Regulations 2002, SI 2002/2005, reg 20(1)(b), (f) (see PARA 227A.10) is included in the award, child tax credit payable at a rate higher than the family element': SI 2005/3061 reg 7(4) (amended by SI 2008/1554).

See *Kerr v Department for Social Development* [2004] UKHL 23, [2004] 4 All ER 385 (Northern Ireland).

TEXT AND NOTE 8--Now, head (2) the funeral takes place (a) in a case where the responsible person or his partner is a specified person, in a member state of the European Union, Iceland, Liechtenstein, Norway or Switzerland, or (b) in any other case, in the United Kingdom': SI 2005/3061 reg 7(9) (amended by SI 2006/1026). Specified persons are those who are (1) workers for the purposes of EC Council Regulation 1612/68 or EC Commission Regulation 1251/70; (2) a member of the family of a worker for the purposes of EC Council Regulation 1612/68; (3) in the case of a worker who has died, a member of the family of that worker for the purposes of EC Commission Regulation 1251/70; or (4) a person with a right to reside in the United Kingdom pursuant to EC Council Directive 68/360 or 73/148: SI 2005/3061 reg 7(10) (substituted by SI 2006/1026). A refusal to pay for a funeral in an overseas country has been deemed non-discriminatory for the purposes of the European Convention on Human Rights: see *Esfandiari v Secretary of State for Work and Pensions* [2006] EWCA Civ 282, [2006] All ER (D) 339 (Mar). Note that EC Commission Regulation 1251/70 was repealed by EC Commission Regulation 635/2006 (OJ L112 26.4.2006 p 9); see now European Parliament and EC Council Directive 2004/38 (OJ L158 30.4.2004 p 77) on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states art 17.

TEXT AND NOTES 9-11--Now, head (5)(ii) in a case where the deceased was (A) a child and there is no absent parent or there is an absent parent who, or whose partner, had an award of a benefit to which head (1)(a) refers current as at the date of death, the responsible person was the person or the partner of the person responsible for that child for the purposes of child benefit law as at the date of death, or (B) a still-born child, the responsible person was a parent of that still-born child or the partner of a parent of that still-born child as at the date when the child was still-born: SI 2005/3061 reg 7(8)(a), (b).

Now, head (5)(iii) in a case where the deceased had no partner and head (5)(ii) does not apply, the responsible person was an immediate family member of the deceased

and it is reasonable for the responsible person to accept responsibility for those expenses: reg 7(8)(d).

Now, head (5)(iv) in a case where the deceased had no partner and heads (5)(ii) and (iii) do not apply, the responsible person was either a close relative of the deceased or a close friend of the deceased, and it is reasonable for the responsible person to accept responsibility for those expenses: reg 7(8)(e).

NOTE 13--Now, heads (1)(b) the fees levied in respect of a burial by the authority or person responsible for the provision and maintenance of cemeteries for the area where the burial takes place or the fees levied by a private grave digger, in so far as it is necessary to incur those fees; and (2)(i) the fees levied in respect of a cremation by the authority or person responsible for the provision and maintenance of crematoria for the area where the cremation takes place in so far as it is necessary to incur those fees; and also, head (2)(iv) the cost of any medical references: *ibid* reg 9(3).

Now, head (5) where transport is provided by a vehicle for the coffin and bearers and by one additional vehicle, from the funeral director's premises or the place of rest to the funeral and (A) the distance travelled, in the case of a funeral which consists of a burial where no costs have been incurred under head (1)(a), exceeds 80 kilometres; or (B) the distance travelled, in the case of any other funeral, necessarily exceeds 80 kilometres, subject to reg 9(5)-(10), the reasonable cost of the transport provided, other than the cost in respect of the first 80 kilometres of the distance travelled: reg 9(3)(e).

Now, head (6) subject to reg 9(5)-(10), the necessary cost of one return journey for the responsible person, either for the purpose of making arrangements for, or for attendance at, the funeral: reg 9(3)(f).

TEXT AND NOTE 17--SI 1987/481 reg 9 revoked: SI 2001/3023.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/8. THE SOCIAL FUND/231. Cold weather payments.

### 231. Cold weather payments.

The prescribed circumstances in which a payment may be made out of the social fund to meet expenses for heating<sup>1</sup> are:

634 (1) where, subject to statutory provision<sup>2</sup>:

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98. (a) there is a recorded period of cold weather at a station<sup>3</sup>; or

99. (b) there is a forecasted period of cold weather at a station<sup>4</sup>;

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635 (2) where the home<sup>5</sup> of the claimant<sup>6</sup> is, or by virtue of statutory provision<sup>7</sup> is treated as, situated in a postcode district in respect of which the station mentioned in head (a) above, or as the case may be, head (b) above is the designated station<sup>8</sup>.

1    Ie under the Social Security Contributions and Benefits Act 1992 s 138(2); Interpretation Act 1978 s 17(2) (b). As to the prescribed amount of the payment see the Social Fund Cold Weather Payments (General) Regulations 1988, SI 1988/1724, reg 3 (as amended).

2    Ie subject to *ibid* reg 2(1A), (1B), (3), (4), (5) (as amended).

3    Ie a station identified in *ibid* Sch 1 col (1) (Sch 1 substituted by SI 1997/2311 with effect from 1 November 1997). 'Recorded period of cold weather' means a period of seven consecutive days, during which the average of the mean daily temperature recorded for that period was equal to or below 0 degrees celsius; and for the purposes of this definition where a day forms part of a recorded period of cold weather it must not form part of any other such recorded period: Social Fund Cold Weather Payments (General) Regulations 1988, SI 1988/1724, reg 1(2) (definition added by SI 1991/2238). 'Station' means a station accredited by the Meteorological Office at which a period of cold weather may be forecasted or recorded for the purposes of the Social Fund Cold Weather Payments (General) Regulations 1988, SI 1988/1724: reg 1(2) (definition as added). For these purposes, where a station identified in Sch 1 col (1) ('the primary station') is unable to provide temperature information in respect of a particular day, the mean daily temperature on that day (1) at the alternative station for that primary station specified in Sch 2 col (2) (Sch 2 substituted by SI 1997/2311 with effect from 1 November 1997); or (2) where there is no such alternative station specified, at the nearest station to that primary station able to provide temperature information in respect of that day, must be used to determine whether or not there is a recorded period of cold weather at the relevant primary station: Social Fund Cold Weather Payments (General) Regulations 1988, SI 1988/1724, reg 2(1A) (added by SI 1997/2311).

4    Ie a station identified in the Social Fund Cold Weather Payments (General) Regulations 1988, SI 1988/1724, Sch 1 col (1) (Sch 1 as substituted: see note 3 *supra*). 'Forecasted period of cold weather' means a period of seven consecutive days, during which the average of the mean daily temperature for that period is forecasted to be equal to or below 0 degrees celsius; and for the purposes of this definition where a day forms part of a forecasted period of cold weather it must not form part of any other such forecasted period: reg 1(2) (definition added by SI 1991/2238). For these purposes, where the Meteorological Office is unable to produce a forecast in respect of a particular period at a primary station, any forecast produced in respect of that period (1) at the alternative station for that primary station specified in the Social Fund Cold Weather Payments (General) Regulations 1988, SI 1988/1724, Sch 2 col (2) (as substituted: see note 3 *supra*); or (2) where there is no such alternative station specified, at the nearest station to that primary station able to provide temperature information for that period, must be used to determine whether or not there is a forecasted period of cold weather at the relevant primary station: reg 2(1B) (added by SI 1997/2311).

5    'Home' means the dwelling, together with any garage, garden and outbuildings normally occupied by the claimant as his home, including any premises not so occupied which it is impracticable or unreasonable to sell separately and in particular, in Scotland, any croft land on which the dwelling is situated: Social Fund Cold Weather Payments (General) Regulations 1988, SI 1988/1724, reg 1(2).

6    'Claimant' means a person who is claiming or has claimed income support: *ibid* reg 1(2) (definition substituted by SI 1991/2238).

7 le by virtue of the Social Fund Cold Weather Payments (General) Regulations 1988, SI 1988/1724, reg 2(2) (b) (as amended).

8 See *ibid* reg 2(1) (amended by SI 1991/2448; SI 1992/2448; SI 1996/2544; and, with effect from 1 November 1997, by SI 1997/2311); Interpretation Act 1978 s 17(2)(b). As to the identification of stations and postcode districts see the Social Fund Cold Weather Payments (General) Regulations 1988, SI 1988/1724, Sch 1 (as substituted). As to specified alternative stations see Sch 2 (as substituted). As to the annual review for 1997 see 299 HC Official Report (6th series), 30 October 1997, written answers cols 855-856.

## UPDATE

### 231 Cold weather payments

TEXT AND NOTES--The fact that eligibility for winter fuel payments is based on the differing retirement age for men and women amounts to sex discrimination: Case C-382/98 *R v Secretary of State for Social Security, ex p Taylor* (2000) Times, 25 January, ECJ.

The Social Fund Winter Fuel Payment Regulations 2000, SI 2000/729 (amended by SI 2000/2229, SI 2000/2864, SI 2000/2997, SI 2001/3375, SI 2003/1121, SI 2003/1737, SI 2003/2192, SI 2004/2154, SI 2005/2687, SI 2005/2877, SI 2005/3360, SI 2008/729, modified by SI 2009/1489), provide for winter fuel payments to be made out of the social fund to any person who, in the third week of September in any year is aged 60 or over, ordinarily resident in Great Britain and satisfies certain specified conditions and exclusions. See *Walker-Fox v Secretary of State for Work and Pensions* [2005] EWCA Civ 1441, [2005] All ER (D) 397(Nov).

The Secretary of State and the National Assembly for Wales are required to prepare a strategy for reducing fuel poverty: see the Warm Homes and Energy Conservation Act 2000; and HOUSING vol 22 (2006 Reissue) PARA 674.

NOTE 1--SI 1988/1724 reg 3 modified: SI 2009/2649.

NOTE 3--SI 1988/1724 Schs 1, 2 further substituted: SI 2009/2649.

NOTE 6--'Claimant' includes a person who is claiming or has claimed state pension credit, within the meaning of the State Pension Credit Act 2002 s 1(1) (see PARA 201A.1), or income-based jobseeker's allowance or income-related employment and support allowance: SI 1988/1724 reg 1(2) (definition amended by SI 2005/2724, SI 2008/1554).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/8. THE SOCIAL FUND/232. Application for a discretionary social fund payment.

### **232. Application for a discretionary social fund payment.**

Payments may be made out of the social fund<sup>1</sup> to meet needs other than those relating to maternity, funerals or cold weather, in accordance with directions given or guidance issued by the Secretary of State<sup>2</sup>.

Every application for a payment out of the social fund must be made in writing, on a form approved by the Secretary of State and completed in accordance with the instructions on that form, or in such other manner, being in writing, as the Secretary of State may accept as sufficient in the circumstances of any particular case<sup>3</sup>. Every application is to be delivered or sent to an office of the Department of Social Security<sup>4</sup>. The time at which an application is to be treated as made is the date on which it is received in such an office<sup>5</sup>.

A social fund officer<sup>6</sup> may decide that an award is to be repayable<sup>7</sup>. An award that is to be repayable is repayable upon such terms and conditions as before the award is paid the Secretary of State notifies to the person by or on behalf of whom the application for it was made<sup>8</sup>. Before a payment of an award out of the social fund<sup>9</sup> is made for a category of need which is specified in directions given by the Secretary of State to be repayable, the person by or on behalf of whom the application was made must notify the Secretary of State in writing of his agreement to the terms and conditions of which he has been notified by the Secretary of State<sup>10</sup> within 14 days of the date on which that notification was issued to that person<sup>11</sup>.

A repeat application in respect of the same item of service may not be made within 26 weeks of a previous application being allowed or refused, unless (1) there has been a relevant change in the applicant's circumstances or (2) the application is for a budgeting loan and at the time of the previous application the applicant had not been in receipt of benefit for long enough<sup>12</sup>.

1    In accordance with the Social Security Contributions and Benefits Act 1992 Pt VIII (ss 138-140): see s 138(1)(b).

2    See *ibid* s 138(1)(b); and PARA 228 ante. Such payments may be budgeting loans (see PARA 233 post), crisis loans (see PARA 234 post) or community care grants (see PARA 235 post).

3    See the Social Fund (Applications) Regulations 1988, SI 1988/524, reg 2(1). Where it appears to the Secretary of State that an application which has been submitted is (1) incomplete in that the form approved has been used but it has not been completed in accordance with the instructions given on that form, the Secretary of State may return the form to the person making the application for proper completion by him; or (2) contains insufficient particulars to enable any material question to be determined, the Secretary of State may request that person to furnish in writing or by attendance at the appropriate office such further particulars as may reasonably be required to complete the application: see reg 2(5). The time at which an application to which reg 2 applies is to be treated as made is in the case of an application which does not meet the requirements of reg 2(1), but where the person complies with the requirements of the Secretary of State pursuant to reg 2(5), the date on which the application was received in an office of the Department of Social Security in the first instance: see reg 3(b) (reg 3 as added); and the Transfer of Functions (Health and Social Security) Order 1988, SI 1988/1843, art 5(3).

4    See the Social Fund (Applications) Regulations 1988, SI 1988/524, reg 2(3); and the Transfer of Functions (Health and Social Security) Order 1988, SI 1988/1843, art 5(3).

5    See the Social Fund (Applications) Regulations 1988, SI 1988/524, reg 3(a) (as added).

6    See PARA 383 post.

7    Social Security Contributions and Benefits Act 1992 s 139(3): see PARA 236 post.

8 Ibid s 139(4).

9 le under ibid s 138(1)(b); see the Interpretation Act 1978 s 17(2)(b).

10 le in accordance with the Social Security Contributions and Benefits Act 1992 s 139(4); see the Interpretation Act 1978 s 17(2)(b).

11 See the Social Fund (Miscellaneous Provisions) Regulations 1990, SI 1990/1788, reg 2(1). The time specified in reg 2(1) may be extended by the Secretary of State for special reasons, even though the time so specified may already have expired: reg 2(2). An award of a payment out of the social fund under the Social Security Contributions and Benefits Act 1992 s 138(1)(b) is extinguished where (1) the person by or on behalf of whom the application was made fails to satisfy the condition in the Social Fund (Miscellaneous Provisions) Regulations 1990, SI 1990/1788, reg 2(1), within the time there specified or as extended under reg 2(2), as the case may be; or (2) the payment has been made to the person by or on behalf of whom the application was made or to a third party but the person or the third party, as the case may be, has failed to present for payment the instrument of payment within 12 months of its issue: see reg 3.

12 Social Fund Directions, Direction 7. As to the conditions of eligibility for a budgeting loan see PARA 233 note 1 post.

## **UPDATE**

### **232 Application for a discretionary social fund payment**

TEXT AND NOTES 1-5, 9-11--SI 1988/524, SI 1990/1788 replaced: Social Fund (Applications and Miscellaneous Provisions) Regulations 2008, SI 2008/2265 (amended by SI 2009/2655, SI 2009/3033).

TEXT AND NOTES 6, 7--Repealed: Social Security Act 1998 Sch 8.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/8. THE SOCIAL FUND/233. Budgeting loans.

### **233. Budgeting loans.**

A social fund payment may be awarded to assist an applicant<sup>1</sup> to meet important intermittent expenses<sup>2</sup> for which it may be difficult to budget<sup>3</sup>. Minimum and maximum amounts are set out<sup>4</sup> and the applicant must be likely to be able to repay the amount awarded<sup>5</sup>. There is a capital limit on eligibility<sup>6</sup>.

1 To be eligible, the applicant must be in receipt of income support, have been so for each of the 26 weeks immediately preceding the date of determination of the application, and not be subject to a trade dispute disqualification (as to which see PARA 178 ante): see the Social Fund Directions, Direction 8. As to the making of such directions see PARA 228 ante.

2 See *ibid* Direction 12, which contains 16 types of expenditure for which a loan may not be made; these include education-related expenses, court or legal expenses, removal charges, domestic assistance, property repairs, work expenses, mains fuel costs, housing costs and council taxes. Also excluded is 'a medical, surgical, optical, aural or dental item or service'; in relation to this, an item is not a medical item only because the need for it arises from a medical condition: *R v Social Fund Inspector, ex p Connick* [1994] COD 75, DC (incontinence pads).

3 See the Social Fund Directions, Direction 2.

4 See *ibid* Direction 10.

5 See *ibid* Direction 11. Any award must include a determination that it is repayable: see Direction 5.

6 See *ibid* Direction 9. Where an applicant or partner is aged 60 or over and his or their total capital resources exceed £1,000, or the applicant and any partner is or are under 60 and his or their total capital resources exceed £500, a budgeting loan can only be awarded if, and to the extent that, the amount of the award is more than the excess: Direction 9.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/8. THE SOCIAL FUND/234. Crisis loans.

### **234. Crisis loans.**

A social fund payment may be awarded to assist an applicant<sup>1</sup> to meet expenses<sup>2</sup>:

- 636 (1) in an emergency, or as a consequence of a disaster, provided that the provision of such assistance is the only means by which serious damage or serious risk to the health and safety of that person or to a member of his family may be prevented; or
- 637 (2) where the expenses are rent in advance payable to a landlord (who is not a local authority) and a community care grant<sup>3</sup> is also being made to help the person re-establish himself in the community<sup>4</sup>.

Maximum amounts are set out<sup>5</sup> and the applicant must be likely to be able to pay the amount awarded<sup>6</sup>.

1 To be eligible, an applicant must be aged 16 or over and without sufficient resources to meet the immediate short-term needs of himself or his family or both: see the Social Fund Directions, Direction 14. A crisis loan may not be awarded to: (1) a resident in a nursing or care home or a hospital in-patient (unless the person is to be discharged within two weeks); (2) a prisoner (including on temporary licence); (3) a person who is a member of and fully maintained by a religious order; or (4) a person not entitled to income support because in full-time relevant education: see Direction 15. Where the applicant is not entitled to income support because he is a student or a person from abroad, a crisis loan may only be made in order to alleviate the consequences of a disaster: see Direction 16. Where the applicant or his partner is or would be subject to the trade dispute disqualification, a crisis loan may only be made in respect of expenses which are a consequence of a disaster, or other expenses in relation to items required only for the purpose of cooking or space heating (including fireguards): see Direction 17. As to the trade dispute disqualification see PARA 178 ante.

2 A crisis loan is subject to most of the same exclusions as a budgetary loan (see PARA 233 note 2 ante). In addition, there are exclusions in respect of expenses for a telephone, mobility needs, holidays, television or radio and garaging, purchasing or running a car: see *ibid* Direction 23.

3 See PARA 235 post.

4 See the Social Fund Directions, Direction 3.

5 See *ibid* Directions 18-21.

6 See *ibid* Direction 22. Any award must include a determination that it is repayable: see Direction 5.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/8. THE SOCIAL FUND/235. Community care grants.

### 235. Community care grants.

A social fund payment may be awarded to promote community care:

638 (1) by assisting an applicant<sup>1</sup> with expenses<sup>2</sup> (including expenses of travel within the United Kingdom) where such assistance will:

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100. (a) help the applicant, a member of his family or other person for whom he or they will be providing care to re-establish himself in the community following a stay in institutional or residential care<sup>3</sup>; or

101. (b) help such a person to remain in the community rather than enter institutional or residential care; or

102. (c) Ease exceptional pressures on the applicant and his family; or

103. (d) allow the applicant or his partner to care for a prisoner or young offender on release on temporary licence; or

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639 (2) by assisting an applicant and one or more members of his family (or any of those persons) with travel including any reasonable charges for overnight accommodation within the United Kingdom in order to:

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104. (a) visit someone who is ill; or

105. (b) attend a relative's funeral; or

106. (c) Ease a domestic crisis; or

107. (d) visit a child who is with the other parent pending a court decision; or

108. (e) move to suitable accommodation<sup>4</sup>.

86

A minimum amount for an award is set out<sup>5</sup>. A community care grant is not repayable<sup>6</sup>. There is a capital limit on eligibility<sup>7</sup>.

1 To be eligible, the applicant must be in receipt of income support (or, where about to be discharged from institutional or residential care within six weeks, be likely to receive income support upon discharge): see the Social Fund Directions, Direction 25. The purposes for which a grant may be made are significantly narrowed where the applicant or his partner is or would be affected by the trade dispute disqualification: see Direction 26. As to the trade dispute disqualification see PARA 178 ante.

2 A community care grant is subject to most of the same exclusions as a budgetary loan (see PARA 233 note 2 ante); in addition, there are exclusions in respect of expenses for a telephone, expenses to be met by a local authority, fuel costs, housing costs, council tax and other charges and any daily living expenses such as food and groceries (except where such expenses are incurred in caring for a prisoner or young offender on release on temporary licence, or where a crisis loan cannot be awarded for such expenses because the maximum for such a loan has already been reached): see *ibid* Direction 29.

3 The crucial factor here is the re-establishment in the community, which must be shown on the facts: *R v Social Fund Inspector, ex p Ibrahim* [1994] COD 260, DC. It is not enough that the person is moving between institutions: *R v Social Fund Inspector and the Secretary of State for Social Security, ex p Healey, Stitt and Ellison* [1992] COD 335, CA. A person cannot re-establish himself in the community if he has not previously been established in the community (because coming from abroad): *R v Social Fund Inspector, ex p Waris Ali* [1993] COD 263, DC.

4 See the Social Fund Directions, Direction 4.

- 5 See *ibid* Direction 28.
- 6 See *ibid* Direction 6.
- 7 See *ibid* Direction 27. Cf the terms applying to a budgetary loan: see *PARA 233* note 6 *ante*.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/8. THE SOCIAL FUND/236. Recovery of social fund loans.

### 236. Recovery of social fund loans.

A social fund award which is repayable<sup>1</sup> is recoverable by the Secretary of State<sup>2</sup>. Without prejudice to any other method of recovery, the Secretary of State may recover an award by deduction from prescribed benefits<sup>3</sup>. The Secretary of State may recover an award:

- 640 (1) from the person to or for the benefit of whom it was made;
- 641 (2) where that person is a member of a married or unmarried couple<sup>4</sup>, from the other member of the couple;
- 642 (3) from a person who is liable to maintain<sup>5</sup> the person by or on behalf of whom the application for the award was made or any person in relation to whose needs the award was made<sup>6</sup>.

1 Budgetary loans and crisis loans are repayable but community care grants are not: see PARAS 233-235 ante.

2 Social Security Administration Act 1992 s 78(1). Recovery can continue even after the bankruptcy of the claimant: *Mulvey v Secretary of State for Social Security* [1997] TLR 145, HL.

3 Social Security Administration Act 1992 s 78(2). The long list of benefits from which an award from the social fund may be recovered by deduction is set out in the Social Fund (Recovery by Deductions from Benefits) Regulations 1988, SI 1988/35, reg 3 (subject to frequent amendment). Where a jobseeker's allowance is payable to a person from whom an award is recoverable and that person is subject to a bankruptcy order, a sum deducted from that benefit is not treated as income of his for the purposes of the Insolvency Act 1986 (see generally BANKRUPTCY AND INDIVIDUAL INSOLVENCY): Social Security Administration Act 1992 s 78(3A) (added by the Jobseekers Act 1995 s 32(2)). As to jobseeker's allowance see PARA 258 et seq post.

4 For the purposes of the Social Security Administration Act 1992 s 78 (as amended) 'married couple' means a man and woman who are married to each other and are members of the same household; and 'unmarried couple' means a man and woman who are not married to each other but are living together as husband and wife (see PARA 83 ante) otherwise than in circumstances prescribed under the Social Security Contributions and Benefits Act 1992 s 132 (as amended) (council tax benefit: see generally RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq): Social Security Administration Act 1992 s 78(5).

5 For the purposes of ibid s 78 (as amended): (1) a man is liable to maintain his wife and any children of whom he is the father; (2) a woman is liable to maintain her husband and any children of whom she is the mother; (3) a person is liable to maintain another person throughout any period in respect of which the first-mentioned person has, on or after 23 May 1980 (the date of the passing of the Social Security Act 1980 (repealed)) and either alone or jointly with a further person, given an undertaking in writing in pursuance of immigration rules within the meaning of the Immigration Act 1971 to be responsible for the maintenance and accommodation of the other person: see the Social Security Administration Act 1992 s 78(6)(a)-(c). 'Child' includes a person who has attained the age of 16 but not the age of 19 and in respect of whom either parent, or some person acting in the place of either parent, is receiving income support or an income-based jobseeker's allowance: s 78(6)(d) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 51). For these purposes, any reference to children of whom the man or the woman is the father or the mother is to be construed in accordance with the Family Law Reform Act 1987 s 1 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 125): Social Security Administration Act 1992 s 78(7). A document bearing a certificate which (a) is signed by a person authorised in that behalf by the Secretary of State and (b) states that the document apart from the certificate is, or is a copy of, such an undertaking as is mentioned in head (3) supra, is conclusive of the undertaking in question for these purposes; and a certificate purporting to be so signed is deemed to be so signed until the contrary is proved: s 78(9).

6 Ibid s 78(3).

### UPDATE

### **236 Recovery of social fund loans**

NOTE 3--SI 1988/35 reg 3 amended: SI 2008/1554.

TEXT AND NOTE 4--For 'married or unmarried couple' read 'couple': Civil Partnership Act 2004 Sch 24 para 61(2).

NOTE 4--In Social Security Administration Act 1992 s 78 'couple' has the meaning given by the Social Security Contributions and Benefits Act 1992 s 137(1) (see PARA 175): Social Security Administration Act 1992 s 78(5) (substituted by Civil Partnership Act 2004 Sch 24 paras 61(3)).

NOTE 5--Social Security Administration Act 1992 s 78(6) amended: Civil Partnership Act 2004 Sch 24 paras 61(4).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/8A. HEALTH IN PREGNANCY GRANT/236A. Entitlement to health in pregnancy grant.

## **8A. HEALTH IN PREGNANCY GRANT**

### **236A. Entitlement to health in pregnancy grant.**

A woman who satisfies prescribed conditions in relation to a pregnancy of hers is entitled to payment of a lump sum (to be known as 'health in pregnancy grant'): Social Security Contributions and Benefits Act 1992 s 140A(1) (s 140A added by the Health and Social Care Act 2008 s 131). A condition prescribed under the Social Security Contributions and Benefits Act 1992 s 140A(1) may, in particular, require a woman to have reached a specified stage of her pregnancy: s 140A(2). The conditions so prescribed are that, she must, at the time of her claim: (1) be pregnant; (2) have reached the 25th week of her pregnancy; (3) have received advice from a health professional on matters relating to her maternal health; and (4) have a due date on or after 6 April 2009: Health in Pregnancy Grant (Entitlement and Amount) Regulations 2008, SI 2008/3108, reg 2.

A woman is not entitled to health in pregnancy grant unless (a) she has received advice on matters relating to maternal health from a health professional; and (b) she is in Great Britain at the time she makes a claim for the grant in accordance with the Social Security Administration Act 1992: Social Security Contributions and Benefits Act 1992 s 140A(3). Circumstances may be prescribed in which a woman is to be treated as being, or as not being, in Great Britain: s 140A(4). As to the circumstances which have been prescribed, see SI 2008/3108 regs 4-7. For these purposes 'health professional' has such meaning as may be prescribed; 'prescribed' means prescribed by regulations; and 'woman' means a female of any age: Social Security Contributions and Benefits Act 1992 s 140A(5). For the purposes of s 140A(5), 'health professional' means a person who provides maternity care to the woman and who is either a practicing midwife, who is registered with the Nursing and Midwifery Council; or an obstetrician or General Practitioner, who is registered with the General Medical Council: SI 2008/3108 reg 3.

The power to make regulations under the Social Security Contributions and Benefits Act 1992 s 140A is exercisable by the Treasury: s 140A(6).

No person is entitled to health in pregnancy grant unless she claims it in the manner, and within the time, prescribed in relation to health in pregnancy grant by regulations under the Social Security Administration Act 1992 s 5 (see PARA 330): s 12A(1) (s 12A added by the Health and Social Care Act 2008 s 132(3)). As to the regulations which have been made see the Health in Pregnancy Grant (Administration) Regulations 2008, SI 2008/3109. No person is entitled to health in pregnancy grant unless the Social Security Administration Act 1992 s 12A(3) or (4) is satisfied in relation to her: s 12A(2). Section 12A(3) is satisfied in relation to a person if her claim for health in pregnancy grant is accompanied by a statement of her national insurance number and information or evidence establishing that that number has been allocated to her, or information or evidence enabling the national insurance number that has been allocated to her to be ascertained: s 12A(3). Section 12A(4) is satisfied in relation to a person if she makes an application for a national insurance number to be allocated to her which is accompanied by information or evidence enabling a national insurance number to be allocated to her: s 12A(4). The Commissioners for Her Majesty's Revenue and Customs may by regulations make provision disapplying s 12A(2) in the case of prescribed descriptions of persons making a claim: s 12A(5). See SI 2008/3109 reg 5 which disapplies the Security Administration Act 1992 s 12A(2) where women are under the age of 16 at the time they make the claim.

As to offences in connection with fraudulently or negligently claiming health in pregnancy grant, see the Social Security Administration Act 1992 s 113C, Sch 3A; and PARA 404.

The Commissioners for Her Majesty's Revenue and Customs are responsible for the payment and management of health in pregnancy grant: Health and Social Care Act 2008 s 138(1).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/8A.  
HEALTH IN PREGNANCY GRANT/236B. Amount of health in pregnancy grant.

**236B. Amount of health in pregnancy grant.**

Health in pregnancy grant (see PARA 236A) is to be of an amount prescribed by regulations made by the Treasury: Social Security Contributions and Benefits Act 1992 s 140B(1) (s 140B added by the Health and Social Care Act 2008 s 131). Different amounts may be prescribed in relation to different cases: Social Security Contributions and Benefits Act 1992 s 140B(2). The amount currently prescribed is £190: see Health in Pregnancy Grant (Entitlement and Amount) Regulations 2008, SI 2008/3108, reg 10.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9.  
CHILD BENEFIT/STOP PRESS: CHILD BENEFIT ACT 2005

## **9. CHILD BENEFIT**

### **STOP PRESS:**

The Child Benefit Act 2005 makes provision for and in connection with altering descriptions of persons in respect of whom a person may be entitled to child benefit. The Act received the royal assent on 24 March 2005 and came into force for the purpose of making regulations on that day. Subject to that, the Act comes into force on 10 April 2006.

Section 1 amends the Social Security Contributions and Benefits Act 1992 ss 141, 142 so as to make child benefit payable to a person who is responsible for a child or children who have not attained the age of 16 or a qualifying young person or persons who have not attained a prescribed age greater than 16 and satisfy further prescribed conditions. Corresponding provision is made in relation to Northern Ireland: 2005 Act s 2. Section 3, Schs 1, 2 deal with consequential amendments and repeals. Financial provision is provided for by s 4. Section 5 deals with extent, s 6 with commencement, and s 7 with short title.

### ***Amendments and repeals***

The following parts of Acts will be amended or repealed: Social Security Contributions and Benefits Act 1992 ss 37, 39A, 77, 84(4), 85, 114, 122(1), 143, 144, 145(2), 145A, 146, 147, Sch 4 Pt 5, Schs 7, 9, 10; Social Security Administration Act 1992 ss 13, 73(2), 80, 155(6), 157(2), 158(1); Social Security Act 1998 s 18(2); and Tax Credits Act 2002 s 49(1).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9.  
CHILD BENEFIT/(1) IN GENERAL/237. Nature of child benefit.

## **(1) IN GENERAL**

### **237. Nature of child benefit.**

Child benefit<sup>1</sup> is a weekly, flat rate<sup>2</sup>, non-means-tested benefit payable in accordance with the relevant statutory provisions<sup>3</sup> to a person responsible for one or more children<sup>4</sup>. The payment of child benefit is not treated as income for any purpose of the Income Tax Acts<sup>5</sup>. Every assignment of or charge on child benefit, and every agreement to assign or charge it is void; and, on the bankruptcy of a beneficiary, the benefit does not pass to any trustee or other person acting on behalf of his creditors<sup>6</sup>.

1 As to child benefit see PARA 238 et seq post.

2 As to the rate of child benefit see PARA 256 post. At the date at which this volume states the law there are, in addition to the basic flat rate, extra amounts if the child is an only or eldest child, or if the claimant is a lone parent: see PARA 256 post.

3 The relevant statutory provisions are the Social Security Contributions and Benefits Act 1992 Pt IX (ss 141-147) (as amended) and the Child Benefit (General) Regulations 1976, SI 1976/965 (as amended).

4 As to entitlement to child benefit see PARA 238 post. For the meaning of 'child' see PARA 239 post.

5 Income and Corporation Taxes Act 1988 s 617(2)(b).

6 See the Social Security Administration Act 1992 s 187(1)(c).

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

### **237 Nature of child benefit**

NOTE 5--Now Income Tax (Earnings and Pensions) Act 2003 s 677(1) Table B Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/(1) IN GENERAL/238. Entitlement.

### 238. Entitlement.

A person who is responsible for one or more children<sup>1</sup> in any week<sup>2</sup> is entitled<sup>3</sup> to child benefit for that week in respect of the child or each of the children for whom he is responsible<sup>4</sup>. There are residence requirements relating to both the child and the claimant which are subject to modification by regulations<sup>5</sup>.

Subject to any provision made by regulations<sup>6</sup>, references<sup>7</sup> to any condition being satisfied or any facts existing in a week are to be construed as references to the condition being satisfied or the facts existing at the beginning of that week<sup>8</sup>.

Nothing in the statutory provisions relating to child benefit<sup>9</sup> is to be construed as conferring a right to child benefit on any body corporate<sup>10</sup>, but regulations may confer such a right on voluntary organisations<sup>11</sup> and for that purpose may make such modifications<sup>12</sup> as the Secretary of State thinks fit<sup>13</sup>.

Regulations may provide for adjusting child benefit payable in respect of any child in respect of whom any benefit is payable under the legislation of any member state other than the United Kingdom<sup>14</sup>.

1 As to the meaning of 'person responsible for a child' see PARA 240 post. For the meaning of 'child' see PARA 239 post.

2 'Week' means a period of seven days beginning with a Monday: Social Security Contributions and Benefits Act 1992 s 147(1); and see Decision R(F)1/82.

3 Ie subject to the provisions of the Social Security Contributions and Benefits Act 1992 Pt IX (ss 141-147) (as amended): s 141. As to exclusions from entitlement to child benefit see PARAS 244-249 post. As to priority between persons entitled to child benefit see PARA 241 post. Subject to the provisions of the Social Security Administration Act 1992, no person is entitled to child benefit unless he claims it in the prescribed manner and within the prescribed time: see s 13(1). Except where regulations otherwise provide, no person is entitled to child benefit for any week on a claim made by him after that week if child benefit in respect of the same child has already been paid for that week to another person, whether or not that other person was entitled to it: s 13(2).

4 Social Security Contributions and Benefits Act 1992 s 141.

5 See PARA 252 post.

6 Such contrary provision exists in relation to children in detention or care: see PARA 244 note 3 post.

7 Ie references in the Social Security Contributions and Benefits Act 1992 Pt IX (as amended).

8 Ibid s 147(2).

9 Ie ibid Pt IX (as amended).

10 As to bodies corporate see generally CORPORATIONS.

11 'Voluntary organisation' means a body, other than a public or local authority, the activities of which are carried on otherwise than for profit: Social Security Contributions and Benefits Act 1992 s 147(1). Subject to the Child Benefit (General) Regulations 1976, SI 1976/965, reg 17 (as amended) a voluntary organisation is for the purposes of benefit regarded as a person with whom a child is living, and the only person with whom that child is living, for any week in which that child is: (1) living in premises which are provided or managed by the voluntary organisation, being premises which are required to be registered with a government department or local authority or which are otherwise regulated under or by virtue of any enactment relating to England and Wales or Scotland; or (2) boarded out by the voluntary organisation in the home of any person in accordance

with relevant regulations: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 17(1) (amended by SI 1987/357). Prescribed periods of temporary absence are disregarded: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 17(2)-(7) (as amended); the Interpretation Act 1978 s 17(2)(b).

12 Regulations may make modifications of any provision of the Social Security Contributions and Benefits Act 1992 Pt IX (as amended), or of any provision of the Social Security Administration Act 1992 relating to child benefit: Social Security Contributions and Benefits Act 1992 s 147(6)(a), (b).

13 Ibid s 147(6). As to the Secretary of State see PARA 1 ante.

14 Social Security Administration Act 1992 s 80. At the date at which this volume states the law, no such regulations had been made and none had effect as if so made. For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

## UPDATE

### 237-257 Child Benefit

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

### 238 Entitlement

TEXT AND NOTES--For provision as to continuing entitlement after the death of a child see PARA 238A.

TEXT AND NOTE 1--After 'one or more children' add 'or qualifying young persons': Social Security Contributions and Benefits Act 1992 s 141 (amended by Child Benefit Act 2005 s 1(1)(a)). In the Social Security Contributions and Benefits Act 1992 Pt 9 'qualifying young person' means a person, other than a child, who (1) has not attained such age (greater than 16) as is prescribed by regulations made by the Treasury, and (2) satisfies conditions so prescribed: s 142(2) (substituted by Child Benefit Act 2005 s 1(2)).

NOTE 3--No person is entitled to child benefit unless the Social Security Administration Act 1992 s 13(1B) is satisfied in relation to him: s 13(1A) (s 13(1A)-(1C) added by the Welfare Reform and Pensions Act 1992 s 69; s 13(1C) amended by Child Benefit Act 2005 Sch 1 para 20(2)). The Social Security Administration Act 1992 s 13(1B) is satisfied in relation to a person if (1) his claim for child benefit is accompanied by (a) a statement of his national insurance number and information or evidence establishing that that number has been allocated to him; or (b) information or evidence enabling the national insurance number that has been allocated to him to be ascertained; or (2) he makes an application for a national insurance number to be allocated to him which is accompanied by information or evidence enabling such a number to be so allocated: s 13(1B) (as added). Regulations may make provision disapplying the Social Security Administration Act 1992 s 13(1A) in the case of (i) prescribed descriptions of persons making claims; or (ii) prescribed descriptions of children or qualifying young persons in respect of whom child benefit is claimed, or in other prescribed circumstances: s 13(1C) (as added and amended). Section 13(1A) does not apply to a claim for child benefit in respect of a child who is living with a voluntary organisation within the meaning of SI 1976/965 reg 17 (see NOTE 11); reg 17A (added by SI 2000/1082). Social Security Administration Act 1992 s 13(2) amended: Child Benefit Act 2005 Sch 1 para 20(3).

TEXT AND NOTE 4--For 'child or each of the children' read 'child or qualifying young person, or each of the children or qualifying young persons,': Social Security Contributions and Benefits Act 1992 s 141 (amended by Child Benefit Act 2005 s 1(1)(b)).

NOTE 11--Now, head (2) placed by the voluntary organisation in the home of any person in accordance with the provisions of the Foster Placement (Children) Regulations 1991, SI 1991/910 (replaced, by the Fostering Services Regulations 2002, SI 2002/57, which apply to England, and the Fostering Services Regulations 2003, SI 2003/237): SI 1976/965 reg 17(1) (amended by SI 2000/2891).

TEXT AND NOTE 14--Social Security Administration Act 1992 s 80 refers to any child or qualifying young person: Child Benefit Act 2005 Sch 1 para 22.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/(1) IN GENERAL/238A. Entitlement after death of child or qualifying young person.

**238A. Entitlement after death of child or qualifying young person.**

If a child or qualifying young person<sup>1</sup> dies and a person is entitled to child benefit<sup>2</sup> in respect of him for the week<sup>3</sup> in which his death occurs, that person is entitled to child benefit in respect of the child or qualifying young person for a prescribed<sup>4</sup> period following that week<sup>5</sup>. If the person entitled to child benefit<sup>6</sup> dies before the end of that prescribed period and, at the time of his death, was (1) a member of a married couple<sup>7</sup> or civil partnership<sup>8</sup> and living with the person to whom he was married or who was his civil partner, or (2) a member of an unmarried couple<sup>9</sup> or a cohabiting same-sex couple<sup>10</sup>, that other member of the couple or partnership is entitled to child benefit<sup>11</sup> but for his death<sup>12</sup>. If a child dies before the end of the week in which he is born, the above provisions<sup>13</sup> apply in his case as if references to the person entitled to child benefit in respect of a child for the week in which his death occurs were to the person who would have been so entitled if the child had been alive at the beginning of that week (and if any conditions which were satisfied, and any facts which existed, at the time of his death were satisfied or existed then)<sup>14</sup>.

1 For the meaning of 'child' see PARA 239. As to qualifying young persons see PARA 238.

2 As to entitlement to child benefit generally see PARA 238.

3 For the meaning of 'week' see PARA 238.

4 For the meaning of 'prescribed' see PARA 239.

5 Social Security Contributions and Benefits Act 1992 s 145A(1) (s 145A added by the Tax Credits Act 2002 s 55; amended by Civil Partnership Act 2004 Sch 24 para 48 and the Child Benefit Act 2005 Sch 1 para 12).

6 Under the Social Security Contributions and Benefits Act 1992 s 145A(1).

7 In *ibid* s 145A 'married couple' means a man and a woman who are married to each other and are neither (1) separated under a court order, nor (2) separated in circumstances in which the separation is likely to be permanent: s 145A(5).

8 'Civil partnership' means two people of the same sex who are civil partners of each other and are neither (1) separated under a court order, nor (2) separated in circumstances in which the separation is likely to be permanent: *ibid* s 145A(5). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

9 In *ibid* s 145A 'unmarried couple' means a man and a woman who are not a married couple but are living together as husband and wife: s 145A(5).

10 'Cohabiting same-sex couple' means two people of the same sex who are not civil partners of each other but are living together as if they were civil partners: *ibid* s 145A(5). For the purposes of s 145A, two people of the same sex are to be regarded as living together as if they were civil partners if, but only if, they would be regarded as living together as husband and wife were they instead two people of the opposite sex: s 145A(6) (s 145A(6) added by Civil Partnership Act 2004 Sch 24 para 48(4)).

11 Under the Social Security Contributions and Benefits Act 1992 s 145A(1).

12 *Ibid* s 145A(2).

13 *Ie* *ibid* s 145A(1) and (2).

14 *Ibid* s 145A(3).

Where a person is entitled to child benefit in respect of a child or qualifying young person under s 145A, s 77 (guardian's allowance: see PARA 117) applies with the omission of s 117(4)-(6): s 145A(4).

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/ (2) DEFINING THE CONDITIONS OF ENTITLEMENT/239. Meaning of 'child'.

## **(2) DEFINING THE CONDITIONS OF ENTITLEMENT**

### **239. Meaning of 'child'.**

For the purposes of child benefit<sup>1</sup>, a person is to be treated as a child for any week<sup>2</sup> in which:

- 643 (1) he is under the age of 16<sup>3</sup>; or
- 644 (2) he is under the age of 18, not receiving full-time education<sup>4</sup> and prescribed conditions<sup>5</sup> are satisfied in relation to him<sup>6</sup>; or
- 645 (3) he is under the age of 19 and receiving full-time education either by attendance at a recognised educational establishment<sup>7</sup> or, if the education is recognised by the Secretary of State<sup>8</sup>, elsewhere<sup>9</sup>.

In determining for the purposes of head (3) above whether a person is receiving full-time education, not being advanced education, no account is taken of a period (whether beginning before or after the person concerned attains the age of 16) of up to six months of any interruption to the extent to which it is accepted that the interruption is attributable to a cause which is reasonable in the particular circumstances of the case, and where the interruption or its continuance is attributable to the illness or disability of mind or body of the person concerned, the period of six months may be extended for such further period as is accepted as being reasonable in the particular circumstances of the case<sup>10</sup>.

A person who ceases to receive full-time education, not being advanced education may, if:

- 646 (a) he is under the age of 16 when he so ceases, from the date on which he attains that age; or
- 647 (b) he is 16 or over when he so ceases, from the date on which he so ceases,

continue to be treated as a child within heads (1), (2) and (3) above up to and including the terminal date<sup>11</sup> or if he attains the age of 19 on or before that date up to and including the week including the last Monday before he attains that age<sup>12</sup>.

1    Ie the Social Security Contributions and Benefits Act 1992 Pt IX (ss 141-147) (as amended).

2    For the meaning of 'week' see PARA 238 note 2 ante.

3    Social Security Contributions and Benefits Act 1992 s 142(1)(a). As to when a person attains a particular age see PARA 19 note 11 ante.

4    Regulations may prescribe the circumstances in which education is or is not to be treated for the purposes of the Social Security Contributions and Benefits Act 1992 Pt IX (s 141-147) (as amended) as full-time: s 142(3). For these purposes, education is treated as full-time education if it is received by a person attending a course of education at a recognised educational establishment and in the pursuit of that course, the time spent receiving instruction or tuition, undertaking supervised study, examination or practical work or taking part in any exercise, experiment or project for which provision is made in the curriculum of the course, exceeds 12 hours per week, so however that in calculating the time spent in pursuit of the course, no account is to be taken of time occupied by meal breaks or spent on unsupervised study, whether undertaken on or off the premises of the educational establishment: Child Benefit (General) Regulations 1976, SI 1976/965, reg 5 (substituted by SI 1987/357); Interpretation Act 1978 s 17(2)(b); and see note 7 infra.

5    'Prescribed' means prescribed by regulations: Social Security Contributions and Benefits Act 1992 s 147(1).

6 Ibid s 142(1)(b). For these purposes, in relation to a person under the age of 18 who is not receiving full-time education, the prescribed conditions are that:

- 128 (1) the person is registered for work or for training under the youth training scheme with (a) the Department for Education and Employment; (b) the Ministry of Defence; (c) in England and Wales, a local education authority within the meaning of the Education Act 1944 s 114(1) (interpretation); (d) in Scotland, an education authority within the meaning of the Education (Scotland) Act 1980 s 135(1) (interpretation); or (e) for the purposes of applying EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2) any corresponding body in another member state (Child Benefit (General) Regulations 1976, SI 1976/965, reg 7D(1)(a) (reg 7D added by SI 1988/1227));
- 129 (2) that person is not engaged in remunerative work (ie work of not less than 24 hours a week in respect of which payment is made, or which is done in expectation of payment: reg 1(2) (definition added by SI 1988/1227)) (Child Benefit (General) Regulations 1976, SI 1976/965, reg 7D(1)(b) (as so added));
- 130 (3) the extension period which applies in the case of that person has not expired (reg 7D(1)(c) (as so added));
- 131 (4) immediately before the extension period begins, the person who is responsible for him is entitled to benefit in respect of him without regard to this regulation (reg 7D(1)(d) (as so added)); and
- 132 (5) the person who is responsible for him has made a written request to the Department for the payment of benefit during the extension period (reg 7D(1)(e) (as so added)).

For the purposes of heads (3), (4) and (5) supra, the extension period begins on the first day of the week in which benefit would cease to be payable in respect of a person but for reg 7D (as added); and, where a person ceases to be treated as a child because he attains the age of 16 or ceases to receive full-time education: (i) on or after the first Monday in September, but before the first Monday in January of the following year, ends on the last day of the week which falls immediately before the week which includes the first Monday in January in that year; (ii) on or after the first Monday in January but before the Monday following Easter Monday in that year, ends on the last day of the week which falls 12 weeks after the week which includes the first Monday in January in that year; (iii) at any other time of the year, ends on the last day of the week which falls 12 weeks after the week which includes the Monday following Easter Monday in that year: see reg 7D(2) (as so added).

Child benefit is not payable by virtue of the Social Security Contributions and Benefits Act 1992 s 142(1)(b) in respect of a child aged 16 or over for any week in which he is engaged in training under the youth training scheme; or he is entitled to income support or income-based jobseeker's allowance within the meaning of the Jobseekers Act 1995 s 1(4): Child Benefit (General) Regulations 1976, SI 1976/965, reg 7D(3) (as so added; amended by SI 1996/1345); Interpretation Act 1978 s 17(2)(b).

7 'Recognised educational establishment' means an establishment recognised by the Secretary of State as being, or as comparable to, a university, college or school: Social Security Contributions and Benefits Act 1992 s 147(1).

8 As to the Secretary of State see PARA 1 ante.

9 Social Security Contributions and Benefits Act 1992 s 142(1)(c). The Secretary of State may recognise education provided otherwise than at a recognised educational establishment for a person who, in his opinion, could reasonably be expected to attend such an establishment only if he is satisfied that education was being so provided for that person immediately before he attained the age of 16: s 142(2). In spite of the apparent width of the wording, it may be that education at home does not come within s 142(1)(c), if the Secretary of State does not recognise it as education 'elsewhere', since the child cannot be said to 'attend' (for example) a correspondence course: Decision R(F)2/95. In determining for the purposes of head (3) in the text whether a person is receiving full-time education as mentioned in that head, no account is taken of such interruptions as may be prescribed: see the Social Security Contributions and Benefits Act 1992 s 142(4). Regulations may provide that child benefit is not payable by virtue of s 142(1)(b) (see head (2) in the text) and regulations made under it; or of s 142(1)(c) (see head (3) in the text), in such cases as may be prescribed: see s 144(1). Schedule 9 has effect for excluding entitlement to child benefit in other cases: s 144(2); and see PARAS 244-249 post.

10 Child Benefit (General) Regulations 1976, SI 1976/965, reg 6(1) (amended by SI 1977/534; and SI 1980/1045); Interpretation Act 1978 s 17(2)(b). These provisions do not apply to any period of interruption of a person's full-time education which is likely to be followed immediately or which is followed immediately by a period during which: (1) provision is made for the training of that person, and for an allowance to be payable to that person, under the youth training scheme; or (2) he is receiving education by virtue of his employment or of

any office held by him: Child Benefit (General) Regulations 1976, SI 1976/965, reg 6(2) (added by SI 1980/1045; and amended by SI 1988/1227).

11 In the Child Benefit (General) Regulations 1976, SI 1976/965, reg 7 (as amended) the 'terminal date' means: (1) the first Monday in January; or (2) the Monday following Easter Monday; or (3) the first Monday in September, whichever first occurs after the date on which the person's education ceased: reg 7(2) (reg 7 substituted by SI 1980/1054).

12 Child Benefit (General) Regulations 1976, SI 1976/965, reg 7(1) (as substituted (see note 11 supra); and amended by SI 1982/470; SI 1987/357); Interpretation Act 1978 s 17(2)(b). In the case of a person specified in either head (a) or head (b) in the text who had not attained compulsory school age when he ceased to receive full-time education, the terminal date in his case is the date specified in the Child Benefit (General) Regulations 1976, SI 1976/965, reg 7(2) (reg 7 as substituted) which next follows the date on which he would have attained that age: reg 7(1A) (added by SI 1987/357). In the Child Benefit (General) Regulations 1976, SI 1976/965, reg 7 (as amended) 'compulsory school age' means in England and Wales, the upper limit of compulsory school age: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 7(2A)(a) (reg 7(2A) added by SI 1987/357). Benefit is not payable to any person entitled to benefit in respect of a child by virtue of the Child Benefit (General) Regulations 1976, SI 1976/965, reg 7 (as amended) for any week in which that child is engaged in remunerative work: reg 7(3) (added by SI 1982/470; and amended by SI 1988/1227).

Subject to the Child Benefit (General) Regulations 1976, SI 1976/965, reg 7(3) (as added and amended), and reg 7(6) (as added), a person whose name was entered as a candidate for any external examination in connection with full-time education not being advanced education, which he was receiving at that time, is so long as his name continued to be so entered before ceasing to receive such education to be treated as a child for any week in the period specified in reg 7(5) (as added): see reg 7(4) (added by SI 1987/357). Subject to the Child Benefit (General) Regulations 1976, SI 1976/965, reg 7(6) (as added), the period specified for the purposes of reg 7(4) (as added) is the period beginning with the date when that person ceased to receive such education and ending with: (1) whichever of the dates in reg 7(2)(a), (b), and (c) (as substituted) first occurs after the conclusion of the examination (or last of them, if there are more than one); or (2) the expiry of the week which includes the last Monday before his nineteenth birthday, whichever is the earlier: see reg 7(5) (added by SI 1987/357). The period specified in the Child Benefit (General) Regulations 1976, SI 1976/965, reg 7(5) (as added) is to begin, in the case of a person who has not attained the age of 16 when he so ceased, with the date on which he attained that age: see reg 7(6) (added by SI 1987/357).

Regulations may provide that a person who in any week ceases to fall within the Social Security Contributions and Benefits Act 1992 s 142(1) is treated as continuing to do so for a prescribed period; but no person is by virtue of any such regulations to be treated as continuing to fall within s 142(1) for any week after that in which he attains the age of 19: s 142(5).

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

### **239 Meaning of 'child'**

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 s 142 substituted as follows. For the purposes of the Social Security Contributions and Benefits Act 1992 Pt 9 a person is a child if he has not attained the age of 16: s 142(1) (substituted by Child Benefit Act 2005 s 1(2)). In the Social Security Contributions and Benefits Act 1992 Pt 9 'qualifying young person' means a person, other than a child, who (1) has not attained such age (greater than 16) as is prescribed by regulations made by the Treasury, and (2) satisfies conditions so prescribed: s 142(2) (as so substituted).

NOTE 6--Now head (1)(c) in England and Wales, a person with whom the Secretary of State or, as the case may be, the National Assembly for Wales, has made arrangements under the Employment and Training Act 1973 s 10(1), or a local education authority to whom a direction has been given by the Secretary of State or

the National Assembly for Wales under s 10(2); and head (1)(d) in Scotland, a person with whom the Scottish ministers have made arrangements under s 10(1), or an education authority to whom a direction has been given by the Scottish ministers under s 10(2): SI 1976/965 reg 7D(1)(a); SI 2000/2891.

SI 1976/965 reg 7D(3) (amended by SI 2000/2891) also excludes a child entitled to incapacity benefit.

NOTE 7--Definition of 'recognised educational establishment' in Social Security Contributions and Benefits Act 1992 s 147(1) omitted: Child Benefit Act 2005 Sch 1 para 14(2), Sch 2 Pt 1.

For 'the youth training scheme' read 'a relevant training scheme': SI 1976/965 reg 7D(1)(a), (3); SI 2000/2891.

NOTE 9--Social Security Contributions and Benefits Act 1992 s 144(1) repealed, s 144(2) amended: Child Benefit Act 2005 Sch 1 para 10, Sch 2 Pt 1.

NOTE 10--In NOTE head (1) for 'the youth training scheme' read 'a relevant training scheme': SI 1976/965 reg 6(2); SI 2000/2891.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/ (2) DEFINING THE CONDITIONS OF ENTITLEMENT/240. Person responsible for child.

#### **240. Person responsible for child.**

For the purposes of child benefit law<sup>1</sup> a person is treated as responsible for a child<sup>2</sup> in any week<sup>3</sup> if:

- 648 (1) he has the child living with him in that week<sup>4</sup>; or
- 649 (2) he is contributing to the cost of providing for the child at a weekly rate which is not less than the weekly rate of child benefit payable in respect of the child for that week<sup>5</sup>.

Where a person has had a child living with him at some time before a particular week he is treated as having the child living with him in that week notwithstanding their absence from one another unless, in the 16 weeks preceding that week, they were absent from one another for more than 56 days<sup>6</sup>. For this purpose, a day of absence is disregarded if it is due solely to the child's:

- 650 (a) receiving full-time education by attendance at a recognised educational establishment<sup>7</sup>;
- 651 (b) undergoing medical or other treatment as an in-patient in a hospital or similar institution<sup>8</sup>; or
- 652 (c) being, in such circumstances as may be prescribed<sup>9</sup>, in residential accommodation<sup>10</sup>.

The number of days that may be disregarded under head (b) or head (c) above in the case of any child must not exceed the prescribed number unless the person claiming to be responsible for the child regularly incurs expenditure in respect of the child<sup>11</sup>.

Where spouses are residing together<sup>12</sup> a contribution made or expenditure incurred by one of them in respect of a child is, if they so agree, or in default of such agreement if the Secretary of State in his discretion so determines, to be treated as made or incurred by the other<sup>13</sup>. Where two or more people are contributing to the cost of providing for the same child and the aggregate weekly amount of their contributions is, but the weekly amount of their individual contributions is not, of an amount not less than the weekly rate of child benefit<sup>14</sup>, the aggregate weekly amount of their contributions is treated as having been contributed by such one of them as they by agreement nominate in writing or, in default of agreement, by such one of them as the Secretary of State may, in his discretion determine<sup>15</sup>.

1    le the Social Security Contributions and Benefits Act 1992 Pt IX (ss 141-147) (as amended).

2    For the meaning of 'child' see PARA 239 ante.

3    For the meaning of 'week' see PARA 238 note 2 ante. As to references to 'in a week' see PARA 238 text to note 8 ante.

4    Social Security Contributions and Benefits Act 1992 s 143(1)(a). 'Living with' is not statutorily defined; it is to be given its ordinary and natural meaning and is not synonymous with 'residing together' nor 'presence under the same roof'; care and control is a factor but not a necessary test: Decision R(F)2/79 (child spending part of his school holidays living with each of his divorced parents is 'living with' each of them); however, the

presence of a child at home for a few hours each weekend does not constitute 'living with' the parent 'in that week': Decision R(F)2/81. As to priority between persons entitled to child benefit see PARA 241 post.

5 Social Security Contributions and Benefits Act 1992 s 143(1)(b).

6 Ibid s 143(2). The 56 days does not include any day which is to be disregarded under s 143(3); see s 143(2); and notes 7-10 infra. As to separation caused by the absence abroad of certain categories of claimant see PARA 253 post.

7 Ibid s 143(3)(a). For the meaning of 'recognised educational establishment' see PARA 239 note 7 ante.

8 Ibid s 143(3)(b).

9 The prescribed circumstances for the purposes of ibid s 143(3)(c) are any circumstances in which a child: (1) who has attained the age of 18 is in residential accommodation pursuant to arrangements made under the National Health Service Act 1977 Sch 8 para 2 (as amended); or (2) is in residential accommodation pursuant to arrangements made under the Children Act 1989 s 17(1) and is a child to whom s 17(10)(b) (impairment of health or development) applies because his health is likely to be significantly impaired, or further impaired, without the provision of services for him; or s 17(10)(c) (disability) applies: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 3 (amended by SI 1991/2105); Interpretation Act 1978 s 17(2)(b).

10 Social Security Contributions and Benefits Act 1992 s 143(3)(c); and see note 9 supra. For a transitional modification see the Social Security (Consequential Provisions) Act 1992 s 6, Sch 4 paras 1, 5.

11 See the Social Security Contributions and Benefits Act 1992 s 143(4). The prescribed number of days under s 143(4) is 84 consecutive days: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 4(1); Interpretation Act 1978 s 17(2)(b). Two or more distinct relevant periods (ie periods to which Social Security Contributions and Benefits Act 1992 s 143(3)(b) or (c) applies) separated by one or more intervals each not exceeding 28 days, are treated as a continuous period equal in duration to the total of such distinct periods and ending on the last day of the latter or last of such periods: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 4(2), (3).

12 For the meaning of 'residing together' see PARA 242 post.

13 Child Benefit (General) Regulations 1976, SI 1976/965, reg 2(3). Regulations may prescribe the circumstances in which a person is or is not to be treated as contributing to the cost of providing for a child as required by head (2) in the text; or as regularly incurring expenditure in respect of a child as required by the Social Security Contributions and Benefits Act 1992 s 143(4); and such regulations may in particular make provision whereby a contribution made or expenditure incurred by two or more persons is to be treated as made or incurred by one of them or whereby a contribution made or expenditure incurred by one of two spouses residing together is to be treated as made or incurred by the other: see s 143(5).

14 Ie the weekly rate of child benefit which would be payable in respect of that child had the aggregate weekly amount of their contributions been contributed by only one of them: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 2(1).

15 See ibid reg 2(1) (amended by SI 1976/1758). Where pursuant to nomination or determination under reg 2(1) (as amended) a person is awarded benefit in respect of a child, the nomination ceases to have effect in the week following that in which benefit was awarded to that person, and accordingly that person is himself required to satisfy the requirement in the Social Security Contributions and Benefits Act 1992 s 143(1)(b) (see the text to note 5 supra), namely, that he is contributing to the cost of providing for the child at a weekly rate which is not less than the weekly rate of benefit payable in respect of the child: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 2(2).

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

### **240 Person responsible for child [or qualifying young person]**

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 s 143 further amended: Child Benefit Act 2005 Sch 1 para 9, Sch 2 Pt 1.

NOTES 9, 10--1992 Act s 143(3)(c) amended: National Health Service (Consequential Provisions) Act 2006 Sch 1 para 146.

NOTE 13--In Social Security Contributions and Benefits Act 1992 s 143(5) after 'spouses' add 'or civil partners': Civil Partnership Act 2004 Sch 24 para 47.

NOTE 15--As to nomination by electronic communication see SI 1976/965 reg 2A (added by SI 2002/1789).

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## **241. Priority between persons entitled to benefit.**

Where two or more persons would be entitled to child benefit<sup>1</sup> in respect of the same child<sup>2</sup> for the same week<sup>3</sup>, one of them only is entitled, and the question which of them is entitled is determined in accordance with the following statutory provisions<sup>4</sup>:

- 653 (1) as between a person claiming child benefit in respect of a child for any week and a person to whom child benefit in respect of that child for that week has already been awarded when the claim is made, the latter is entitled<sup>5</sup>, but this does not confer any priority where the week to which the claim relates is later than the third week following that in which the claim is made<sup>6</sup>;
- 654 (2) subject to head (1) above, a person entitled for any week by virtue of having the child living with him in that week<sup>7</sup> is entitled to child benefit over a person entitled by virtue of the fact that he is contributing to the cost of providing for the child<sup>8</sup> at the prescribed rate<sup>9</sup>;
- 655 (3) subject to heads (1) and (2) above, as between a husband and wife residing together the wife is entitled<sup>10</sup>;
- 656 (4) subject to heads (1) to (3) above, as between a person who is and one who is not a parent of the child the parent is entitled<sup>11</sup>, and as between two persons residing together who are parents of the child but not husband and wife, the mother is entitled<sup>12</sup>.

As between persons not falling within heads (1) to (4) above, such one of them is entitled as they may jointly elect or, in default of election, as the Secretary of State<sup>13</sup> may in his discretion determine<sup>14</sup>. Priority of title to benefit may be modified in certain circumstances<sup>15</sup>.

1 As to entitlement to child benefit see PARA 238 ante. As to exclusions from entitlement to child benefit see PARAS 244-249 post.

2 For the meaning of 'child' see PARA 239 ante.

3 For the meaning of 'week' see PARA 238 note 2 ante.

4 Ie the Social Security Contributions and Benefits Act 1992 s 144(3), Sch 10: see s 144(3).

5 See *ibid* Sch 10 para 1(1).

6 See *ibid* Sch 10 para 1(2).

7 Ie by virtue of *ibid* s 143(1)(a): see PARA 240 note 4 ante.

8 Ie by virtue of *ibid* s 143(1)(b): see PARA 240 note 5 ante.

9 See *ibid* Sch 10 para 2.

10 *Ibid* Sch 10 para 3. For the meaning of 'residing together' see PARA 242 post.

11 *Ibid* Sch 10 para 4(1). References in Pt IX (ss 141-147) (as amended) to a 'parent', 'father' or 'mother' of a child are construed as including references to a step-parent, step-father or step-mother: s 147(3). A person may continue to be treated as a step-father notwithstanding the death of the mother: Decision R(F)1/79.

12 Social Security Contributions and Benefits Act 1992 Sch 10 para 4(2). References to 'mother' are construed as including references to a step-mother: see s 147(3). As to the general rules on when a couple are considered to be living together as husband and wife see PARA 83 ante.

13 As to the Secretary of State see PARA 1 ante.

14 Social Security Contributions and Benefits Act 1992 Sch 10 para 5. Any election under Sch 10 must be made in the prescribed manner: Sch 10 para 6(1). Regulations may provide for exceptions from and modifications of the provisions of Sch 10 paras 1-5 (text and notes 5-14 supra) in relation to such cases as may be prescribed: Sch 10 para 6(2). An election under Sch 10 is made by giving notice in writing to the Secretary of State at an office of the department on a form approved by the Secretary of State or in such other manner being in writing as he may accept as sufficient in the circumstances of any particular case or class of cases: Child Benefit (General) Regulations 1976, SI 1976/965, reg 13(1); Interpretation Act 1978 s 17(2)(b). 'The department' means the Department of Social Security: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 1(2). An election is not effective to confer entitlement to benefit in respect of a child for any week earlier than the week following that in which it is made if the earlier week is one in respect of which benefit has been paid in respect of that child and has not been required to be repaid or voluntarily repaid or recovered: reg 13(2). Any such election may be superseded by another subsequent election made in accordance with reg 3: reg 13(3).

15 See *ibid* reg 14; Interpretation Act 1978 s 17(2)(b). Where a person has claimed benefit in respect of a child in respect of whom he would be entitled to benefit but for the fact that under the provisions of the Social Security Contributions and Benefits Act 1992 Sch 10 some other person is entitled to benefit in respect of that child in priority to him, if that other person gives the Secretary of State notice in writing at an office of the department that he does not wish to have priority of title to benefit in respect of that child the provisions of Sch 10 will, subject to the Child Benefit (General) Regulations 1976, SI 1976/965, reg 14(2), have effect with the modification that that other person does not have such priority: reg 14(1); Interpretation Act 1978 s 17(2)(b). Such a notice has effect unless and until the other person, subsequent to the giving of the notice, makes a further claim to benefit in respect of the child; but is not effective as respects any week in respect of which benefit in respect of the child is paid to the other person or to a person on his behalf: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 14(2).

## UPDATE

### 237-257 Child Benefit

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

### 241 Priority between persons entitled to child benefit

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 Sch 10 amended so as to include reference to qualifying young persons: Child Benefit Act 2005 Sch 1 para 18. As to qualifying young persons see PARA 238.

NOTE 4--The system under the 1992 Act s 144(3) of granting child benefit to one parent alone is efficient and economic and there is no reason to change it to allow split benefits in favour of both parents: *R (on the application of Barber) v Secretary of State for Work and Pensions* [2002] EWHC 1915 (Admin), [2002] 2 FLR 1181.

Social Security Contributions and Benefits Act 1992 s 144(3) amended: Child Benefit Act 2005 Sch 1 para 10(4).

NOTE 11--Social Security Contributions and Benefits Act 1992 s 147(3) amended: Child Benefit Act 2005 Sch 1 para 14(3).

NOTE 14--No appeal lies against a decision as to the exercise of the discretion under the Social Security Contributions and Benefits Act 1992 Sch 10 para 5: Social Security Act 1998 Sch 2 para 4.



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## **242. Meaning of 'residing together'.**

Where a person is married<sup>1</sup>, he and his spouse are treated for the purposes of child benefit law as residing together during any period of absence on which:

- 657 (1) they are separated under an order of a court of competent jurisdiction or deed of separation; or
- 658 (2) they have been absent the one from the other for at least 91 consecutive days,

and for any part of that period of absence from one another from the date on which they are separated as specified in head (1) above or have already been absent from one another as specified in head (2) above, the spouses are treated as not residing together where such absence is likely to be permanent but as residing together where such absence is not likely to be permanent<sup>2</sup>. Spouses are treated as residing together during any period in which any absence the one from the other is by reason only of the fact that either of them is, or they both are, undergoing medical or other treatment as an in-patient in a hospital or similar institution whether such absence is temporary or not<sup>3</sup>. Where two persons are parents<sup>4</sup> of a child<sup>5</sup> but not husband and wife they are treated as residing together during any period of temporary absence the one from the other where they would be so treated but for such temporary absence<sup>6</sup>.

1 As to the treatment of polygamous marriages see PARA 243 post.

2 Child Benefit (General) Regulations 1976, SI 1976/965, reg 11(1) (reg 11 substituted by SI 1978/540); Interpretation Act 1978 s 17(2)(b). Regulations may prescribe the circumstances in which persons are or are not to be treated for the purposes of the Social Security Contributions and Benefits Act 1992 Pt IX (ss 141-147) (as amended) as residing together: s 147(4). A decree nisi of divorce means that the parties are separated under a court order, even if they live under the same roof but in separate households: Decision R(F)1/81. In *Grove v Insurance Officer*, CA (reported as an appendix to Decision R(F)4/85) it was held that a couple could be held to reside together (on the basis of their absence not being permanent) even where they had never in fact lived together (prison visitor marrying prisoner still serving his imprisonment; held to be residing together).

3 See the Child Benefit (General) Regulations 1976, SI 1976/965, reg 11(2) (as substituted: see note 2 supra); Interpretation Act 1978 s 17(2)(b).

4 As to the meaning of 'parent' see PARA 241 note 11 ante.

5 For the meaning of 'child' see PARA 239 ante.

6 See the Child Benefit (General) Regulations 1976, SI 1976/965, reg 11(3) (as substituted: see note 2 supra); Interpretation Act 1978 s 17(2)(b). As to the general rules on when a couple are considered to be living together as husband and wife for the purposes of social security law see PARA 83 ante.

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/ (2) DEFINING THE CONDITIONS OF ENTITLEMENT/243. Polygamous marriages.

### **243. Polygamous marriages.**

For the purposes of child benefit<sup>1</sup>, a polygamous marriage<sup>2</sup> is treated as having the same consequences as a monogamous marriage<sup>3</sup> for any day, but only for any day, throughout which the polygamous marriage is in fact monogamous<sup>4</sup>.

1 See the Social Security Contributions and Benefits Act 1992 Pt IX (ss 141-147) (as amended) and any regulations under it: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 12(1); Interpretation Act 1978 s 17(2)(b). As to entitlement to child benefit see PARA 238 ante. As to priority between persons entitled to child benefit see PARA 241 ante; and as to exclusions from entitlement to child benefit see PARAS 244-249 post.

2 'Polygamous marriage' means a marriage celebrated under a law which, as it applies to the particular ceremony and to the parties thereto, permits polygamy: Child Benefit (General) Regulations 1976, SI 1976/965, reg 12(2)(a).

3 'Monogamous marriage' means a marriage celebrated under a law which does not permit polygamy: *ibid* reg 12(2)(b).

4 See *ibid* reg 12(1); Interpretation Act 1978 s 17(2)(b). A polygamous marriage is referred to as being in fact monogamous when neither party to it has any spouse additional to the other (reg 12(2)(c)); and the day on which a polygamous marriage is contracted, or on which it terminates for any reason, is treated as a day throughout which that marriage was in fact monogamous if at all times on that day after it was contracted, or as the case may be, before it terminated, it was in fact monogamous (reg 12(2)(d)). Regulations may make provision as to the circumstances in which a marriage during the subsistence of which a party to it is at any time married to more than one person is to be treated for the purposes of the Social Security Contributions and Benefits Act 1992 Pt IX (as amended) as having, or not having, the same consequences as any other marriage: s 147(5) (amended by the Private International Law (Miscellaneous Provisions) Act 1995 s 8(2), Schedule para 4(1), (3)).

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

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CHILD BENEFIT/ (3) EXCLUSIONS/244. General exclusions.

### (3) EXCLUSIONS

#### 244. General exclusions.

No person is entitled to child benefit<sup>1</sup> in respect of a child<sup>2</sup> for any week<sup>3</sup> if in that week the child is:

- 659 (1) undergoing imprisonment or detention in legal custody<sup>4</sup>;
- 660 (2) (in Scotland) subject to a supervision requirement<sup>5</sup> and is residing in a residential establishment<sup>6</sup>; or
- 661 (3) in the care of a local authority in such circumstances as may be prescribed<sup>7</sup>.

A person is not disentitled to benefit in respect of a child for any week by virtue of the fact that head (1), head (2) or head (3) above applies to that child unless that week is the ninth or a subsequent week in a series of consecutive weeks in which any of those heads have applied to that child<sup>8</sup> or notwithstanding that that week is the ninth or a subsequent week in a series of consecutive weeks in which any of those heads have applied to that child, if that week satisfies prescribed conditions<sup>9</sup> as to actual residence of the child with the person for certain numbers of consecutive days<sup>10</sup>.

1 He except where regulations otherwise provide: see the Social Security Contributions and Benefits Act 1992 s 144(2), Sch 9 para 1. As to entitlement to child benefit see PARA 238 ante. As to priority between persons entitled to child benefit see PARA 241 ante.

2 For the meaning of 'child' see PARA 239 ante.

3 For the meaning of 'week' see PARA 238 note 2 ante. Contrary to the normal rule (see PARA 238 text to note 8 ante), references here to any condition being satisfied or any facts existing in a week are to be construed as references to the condition being satisfied or the facts existing throughout any day in that week: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(1) (as amended); Interpretation Act 1978 s 17(2)(b).

4 Social Security Contributions and Benefits Act 1992 Sch 9 para 1(a). For the purposes of Sch 9 para 1(a), a child is not regarded as undergoing imprisonment or detention in legal custody in any week unless in connection with a charge brought or intended to be brought against him in criminal proceedings at the conclusion of those proceedings or, in the case of default of payment of a sum adjudged to be paid on conviction, in respect of such default, a court imposes a penalty upon him: Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(2); Interpretation Act 1978 s 17(2)(b). 'Court' means any court in the United Kingdom, the Channel Islands or the Isle of Man: Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(2)(a). 'Penalty' means, in the case of any court in Great Britain: (1) a sentence of imprisonment or detention in a young offender institution; (2) a sentence of detention under the Children and Young Persons Act 1933 s 53 (as amended) or the Criminal Procedure (Scotland) Act 1975 s 206 (as substituted and amended); or (3) an order for detention in a remand centre, a young offender institution or made under or by virtue of the Criminal Procedure (Scotland) Act 1975 s 198 (repealed), ss 406, 413 (as substituted and amended), and in the case of any court not in Great Britain, any comparable sentence or order: Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(2)(b) (amended by the Criminal Justice Act 1988, s 123(6), Sch 8 paras 1, 2, 3 (as amended)). For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

The Social Security Contributions and Benefits Act 1992 Sch 9 para 1(a) does not apply to a child in respect of any week in which that child is liable to be detained in a hospital or similar institution in Great Britain as a person suffering from mental disorder unless, subsequent to the imposition of a penalty: (a) he has undergone detention in a prison, a young offender institution or, if not in Great Britain, any comparable place; (b) he was removed to the hospital or similar institution while still liable to be detained as a result of that penalty and, in the case of a person who is liable to be detained in the hospital or similar institution by virtue of any provisions of the Mental Health Act 1983 or corresponding legislation for Scotland, a direction restricting his discharge has been given under either of those Acts and is still in force, and in the Child Benefit (General) Regulations 1976, SI

1976/965, reg 16(3) (as amended) 'hospital or similar institution' means a place (not being a prison, a young offender institution, a remand centre or, if not in Great Britain, any comparable place and not being at or in any such place) in which persons suffering from mental disorder are or may be received for care or treatment; 'mental disorder' is construed as including references to any mental disorder within the meaning of the Mental Health Act 1983 or corresponding legislation for Scotland; and a person who is liable to be detained by virtue of any provision of that Act or that legislation is treated as if a direction restricting his discharge had been given under those Acts if he is to be so treated for the purposes of either of them: Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(3) (amended by the Criminal Justice Act 1988, s 123(6), Sch 8 paras 1, 2, 3 (as amended)); Interpretation Act 1978 s 17(2)(b).

Where, as respects a child in relation to whom each of the conditions specified in heads (1), (b) *supra* is satisfied, a certificate given by or on behalf of the Home Secretary or the Secretary of State for Scotland shows the earliest date on which that child would have been expected to be discharged from detention pursuant to the said penalty if he had not been transferred to a hospital or similar institution, the statutory conditions are deemed not to be satisfied in relation to that child as from the day next following that date: Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(4).

5     le under the Social Work (Scotland) Act 1968 s 44 (as amended).

6     le within the meaning of *ibid* s 44 (as amended): see the Social Security Contributions and Benefits Act 1992 Sch 9 para 1(b).

7     *Ibid* Sch 9 para 1(c). For the meaning of 'prescribed' see PARA 239 note 5 *ante*. This may refer to voluntary care as well as to care under a care order: *McLavey v Secretary of State for Social Services* [1996] TLR 288, CA. For the prescribed circumstances for these purposes see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(5) (amended by SI 1983/3; SI 1984/337; SI 1987/357; and SI 1991/2105).

8     See the Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(6)(a); the Interpretation Act 1978 s 17(2)(b). The Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(6) (as amended) does not apply to a person in relation to a child for any week in which a child is boarded out by a local authority in the home of any person in accordance with the provisions of the relevant regulations: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(8) (amended by SI 1987/357). Living with other relatives under a care order may not be enough to constitute 'boarding out': see Decision CF/025/1994. The Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(6) (as amended) does not apply in respect of any child in the care of a local authority who has been placed for adoption in the home of a person proposing to adopt him, provided that a local authority is making a payment in respect of either the child's accommodation or maintenance or both, under the Children Act 1989 s 23 (as amended) or the Social Work (Scotland) Act 1968 s 21 (as amended): Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(9) (added by SI 1987/357; and amended by SI 1991/2105). For the purposes of the Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(9) (as added and amended), placing for adoption means placing for adoption in accordance with the Adoption Agencies Regulations 1983, SI 1983/1964, or the corresponding regulations for Scotland: Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(10) (added by SI 1987/357).

9     The prescribed conditions are: (1) that week is one in which falls the first day in a period of seven consecutive days in which the child lives with that person for at least a part of the first day and throughout the following six days; or (2) that week is one in which falls the first day in a period of seven consecutive days throughout which the child lives with that person, being a period of seven consecutive days which immediately follows either a similar period of seven consecutive days or the period of seven consecutive days referred to in head (1) *supra*; or (3) that week is one in which falls the day, or the first day in a period of less than seven consecutive days, throughout which the child lives with that person, being a day or days which immediately follow the period of seven consecutive days referred to in head (1) *supra* or a period of seven consecutive days referred to in head (2) *supra*; (4) as at that week that person establishes that he is a person with whom the child, while heads (1), (2) and (3) in the text apply to him, ordinarily lives throughout at least one day in each week: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(6)(b) (amended by SI 1983/3); Interpretation Act 1978 s 17(2)(b).

10    See the Child Benefit (General) Regulations 1976, SI 1976/965, reg 16(6)(b) (as amended: see note 9 *supra*). For the purposes of reg 16(6) (as amended), a person is not regarded as having a child living with him throughout any day or week unless he actually has that child living with him throughout that day or week (reg 16(7)); thus, where the child was at home but the parent was in a convalescent home, the child was not 'actually living with' the parent (Decision R(F)1/81).

## UPDATE

### 237-257 Child Benefit

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

#### **244 General exclusions**

TEXT AND NOTES 1-7--Social Security Contributions and Benefits Act 1992 Sch 9 para 1 amended: Child Benefit Act 2005 Sch 1 para 17(2).

NOTE 7--SI 1976/965 reg 16(5) now reg 16(5), (5A) (as substituted by SI 2000/2891).

NOTES 8-10--SI 1976/965 reg 16(6) does not apply (1) for any day in any week in which a child is placed by a local authority in the home of any person in accordance with the Arrangements for Placement of Children (General) Regulations 1991, SI 1991/890 (replaced, in relation to Wales, by the Placement of Children (Wales) Regulations 2007, SI 2007/310), or the Foster Placement (Children) Regulations 1991, SI 1991/910 (replaced by the Fostering Services Regulations 2002, SI 2002/57, which apply to England, and the Fostering Services (Wales) Regulations 2003, SI 2003/237), and that local authority is making a payment in respect of either the child's accommodation or maintenance or both under the Children Act 1989 s 23 (SI 1976/965 reg 16(8), substituted by SI 2000/2891); and (2) in respect of any child who is being looked after by a local authority, and has been placed for adoption by that authority in the home of a person proposing to adopt him, provided that a local authority is making a payment in respect of either the child's accommodation or maintenance or both under the Children Act 1989 s 23 (SI 1976/965 s 16(9), substituted by SI 2000/2891).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/ (3) EXCLUSIONS/245. Employed trainees.

## **245. Employed trainees.**

No person is entitled to child benefit<sup>1</sup> in respect of a child<sup>2</sup> if the education in question is received by that child by virtue of his employment or of any office held by him<sup>3</sup>. Where, but for the above provision, a person would be entitled to benefit in respect of a child, that child is not for any week treated as receiving education by virtue of his employment or of any office held by him if that week<sup>4</sup> begins in what has been or is likely to be a continuous period of not less than six months in respect of which that child receives no financial support by virtue of his employment or any office held by him<sup>5</sup>.

1 le by virtue of the Social Security Contributions and Benefits Act 1992 s 142(1)(c): see PARA 239 text to note 9 ante. As to entitlement to child benefit see PARA 238 ante. As to priority between persons entitled to child benefit see PARA 241 ante.

2 For the meaning of 'child' see PARA 239 ante.

3 Social Security Contributions and Benefits Act 1992 s 144(2), Sch 9 para 2(1). Regulations may specify the circumstances in which a child is or is not to be treated as receiving education as mentioned in Sch 9 para 2(1): Sch 9 para 2(2).

4 For the meaning of 'week' see PARA 238 note 2 ante.

5 Child Benefit (General) Regulations 1976, SI 1976/965, reg 8(1) (amended by SI 1980/1045; and SI 1982/470); Interpretation Act 1978 s 17(2)(b). Subject to this provision a child who is receiving education in any week is treated as receiving such education by virtue of his employment or of any office held by him if, in consideration of that education, that child receives financial support in respect of that week by virtue of his employment or any office held by him: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 8(1A) (added by SI 1978/1275). Any reimbursement of the cost of books, equipment, tuition, examination fees, travelling expenses and social security contributions is not to be treated as the receipt by the child of financial support: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 8(2) (amended by SI 1978/1275).

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

## **245 Employed trainees**

TEXT AND NOTE 3--Social Security Contributions and Benefits Act 1992 Sch 9 para 2 omitted: Child Benefit Act 2005 Sch 1 para 17(3), Sch 2 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/ (3) EXCLUSIONS/246. Married children.

## **246. Married children.**

No person is entitled to child benefit<sup>1</sup> in respect of a child<sup>2</sup> who is married<sup>3</sup>. A person is not disentitled to benefit in respect of a married child<sup>4</sup> if:

- 662 (1) that person is not the spouse<sup>5</sup> of that child; and
- 663 (2) that child is either not residing<sup>6</sup> with his spouse or, if he is, the spouse is receiving full-time education<sup>7</sup>.

1 He except where regulations otherwise provide: see the Social Security Contributions and Benefits Act 1992 s 144(2), Sch 9 para 3. As to entitlement to child benefit see PARA 238 ante. As to priority between persons entitled to child benefit see PARA 241 ante.

2 For the meaning of 'child' see PARA 239 ante.

3 Social Security Contributions and Benefits Act 1992 Sch 9 para 3.

4 By virtue of ibid Sch 9 para 3.

5 As to the treatment of polygamous marriages see PARA 243 ante.

6 For the meaning of 'residing together' see PARA 242 ante.

7 Child Benefit (General) Regulations 1976, SI 1976/965, reg 10. For the meaning of 'full-time education' see PARA 239 note 4 ante.

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

### **246 Married children [and qualifying young persons]**

TEXT AND NOTES 2, 3--Now refers to a child or qualifying young person who is married or a civil partner: Social Security Contributions and Benefits Act 1992 Sch 9 para 3 (amended by the Child Benefit Act 2005 Sch 1 para 17(4); and the Civil Partnership Act 2004 Sch 24 para 54).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/ (3) EXCLUSIONS/247. Children living with partners.

## 247. Children living with partners.

Benefit<sup>1</sup> is not payable to any person in respect of a child<sup>2</sup> for any week<sup>3</sup> in which that child is living with another person as his spouse<sup>4</sup> and that child: (1) is under the age of 18 and not receiving full-time education<sup>5</sup>; or (2) is under the age of 19 and receiving full-time education<sup>6</sup>. These provisions do not apply where (a) the person to whom benefit is payable is not the partner of that child; and (b) the partner of that child is receiving full-time education<sup>7</sup>.

1 He except in the circumstances specified in the Child Benefit (General) Regulations 1976, SI 1976/965, reg 9A(2): see the text to note 7 infra. As to entitlement to child benefit see PARA 238 ante. As to priority between persons entitled to child benefit see PARA 241 ante.

2 For the meaning of 'child' see PARA 239 ante.

3 For the meaning of 'week' see PARA 238 note 2 ante. As to references to 'in a week' see PARA 238 text to note 8 ante.

4 The person in question is referred to in the Child Benefit (General) Regulations 1976, SI 1976/965, reg 9A (as added) as 'the partner': reg 9A(1) (reg 9A added by SI 1996/1803). As to the general rules on when a couple are considered to be living together as husband and wife see PARA 83 ante.

5 For the meaning of 'full-time education' see PARA 239 note 4 ante.

6 Child Benefit (General) Regulations 1976, SI 1976/965, reg 9A(1) (as added: see note 4 supra). This does not apply in the case of any person who was entitled to child benefit on 6 April 1997 for so long as that entitlement continues: see the Child Benefit, Child Support and Social Security (Miscellaneous Amendments) Regulations 1996, SI 1996/1803, reg 4(2).

7 See the Child Benefit (General) Regulations 1976, SI 1976/965, reg 9A(2) (as added: see note 4 supra).

## UPDATE

### 237-257 Child Benefit

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/ (3) EXCLUSIONS/248. Persons exempt from tax.

## **248. Persons exempt from tax.**

In general<sup>1</sup>, no person is entitled to child benefit<sup>2</sup> in respect of a child<sup>3</sup> if either that person or such other person as may be prescribed<sup>4</sup> is exempt from tax under such provisions as may be prescribed<sup>5</sup>.

<sup>1</sup> le except where regulations otherwise provide: Social Security Contributions and Benefits Act 1992 s 144(2), Sch 9 para 4.

<sup>2</sup> As to entitlement to child benefit see PARA 238 ante. As to priority between persons entitled to child benefit see PARA 241 ante.

<sup>3</sup> For the meaning of 'child' see PARA 239 ante.

<sup>4</sup> For the meaning of 'prescribed' see PARA 239 note 5 ante.

<sup>5</sup> Security Contributions and Benefits Act 1992 Sch 9 para 4. For the purposes of Sch 9 para 4 a person and, if that person is residing with his spouse or partner, his spouse or partner, is not entitled to benefit in respect of a child for any week in respect of which he or, where they are residing together, his spouse or partner receives earnings or other emoluments which are exempted from United Kingdom income tax under certain statutory provisions: see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 9(1) (amended by SI 1996/1803); the Interpretation Act 1978 s 17(2)(b). 'Partner' means any person who is living with another person as his spouse: Child Benefit (General) Regulations 1976, SI 1976/965, reg 9(1A) (added by SI 1996/1803). As to the general rules on when a couple are considered to be living together as husband and wife see PARA 83 ante. The Child Benefit (General) Regulations 1976, SI 1976/965, reg 9(1) (as amended) does not affect the entitlement to benefit of any person who was previously entitled under reg 9(2), (3) (revoked): see reg 9(4) (added by SI 1984/337).

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

### **248 Persons exempt from tax**

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 Sch 9 para 4 omitted: Tax Credits Act 2002 s 57, Sch 6.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/ (3) EXCLUSIONS/249. Further exclusions.

## 249. Further exclusions.

No person is entitled to child benefit<sup>1</sup> in respect of a child<sup>2</sup> for any week<sup>3</sup> in which the child is entitled to a severe disablement allowance<sup>4</sup>. Further, benefit is not payable in respect of a child<sup>5</sup>:

664 (1) if that child is receiving advanced education<sup>6</sup>;

665 (2) aged 16 or over for any week:

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109. (a) in which training for that child is being provided under the youth training scheme; and

110. (b) in respect of which an allowance may be paid under that scheme to that child<sup>7</sup>;

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666 (3) for any week in respect of which that child receives income support or income-based jobseeker's allowance<sup>8</sup>.

1 See except where regulations otherwise provide: Social Security Contributions and Benefits Act 1992 s 144(2), Sch 9 para 5. As to entitlement to child benefit see PARA 238 ante. As to priority between persons entitled to child benefit see PARA 241 ante.

2 For the meaning of 'child' see PARA 239 ante.

3 For the meaning of 'week' see PARA 238 note 2 ante. As to references to 'in a week' see PARA 238 text to note 8 ante.

4 Social Security Contributions and Benefits Act 1992 Sch 9 para 5. As to severe disablement allowance see PARA 92 et seq ante.

5 By virtue of *ibid* s 142(1)(c).

6 See the Child Benefit (General) Regulations 1976, SI 1976/965, reg 7A (added by SI 1977/534); Interpretation Act 1978 s 17(2)(b). 'Advanced education' means full-time education (for the meaning of which see PARA 239 note 4 ante) for the purposes of: (1) a course in preparation for a degree, a diploma of higher education, a higher national diploma, a higher diploma of the Business and Technology Education Council or the Scottish Vocational Education Council or a teaching qualification; or (2) any other course which is of a standard above ordinary national diploma, a national diploma of the Business and Technology Education Council or a national certificate of the Scottish Vocational Education Council, a general certificate of education (advanced level), a Scottish certificate of education (higher grade) or a Scottish certificate of sixth year studies: Child Benefit (General) Regulations 1976, SI 1976/965, reg 1(2) (definition added by SI 1977/534; and amended by SI 1983/3; SI 1987/357).

7 See the Child Benefit (General) Regulations 1976, SI 1976/965, reg 7B (added by SI 1978/1275; and substituted by SI 1988/1227); Interpretation Act 1978 s 17(2)(b). 'Youth training scheme' means: (1) arrangements made under the Employment and Training Act 1973 s 2 (as substituted and amended) (functions of the Secretary of State); (2) arrangements made by the Secretary of State for persons enlisted in Her Majesty's forces for any special term of service specified in regulations made under the Armed Forces Act 1966 s 2 (as amended) (power of Defence Council to make regulations as to engagement of persons in regular forces); or (3) for the purposes of the application of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2), any corresponding provisions operated in another member state, for purposes which include the training of persons who, at the beginning of their training, are under the age of 18: Child Benefit (General) Regulations 1976, SI 1976/965, reg 1(2) (added by SI 1988/1227).

8 See the Child Benefit (General) Regulations 1976, SI 1976/965, reg 7C (added by SI 1980/1045; amended by SI 1988/521; and substituted by SI 1996/1345). As to the restricted circumstances in which a person under 18 can claim income support see PARAS 181, 184 note 4 ante.

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

### **249 Further exclusions**

TEXT AND NOTES 1-4--Subject to a saving in respect of existing severe disablement allowance beneficiaries (see SI 2000/2958 art 4), the Social Security Contributions and Benefits Act 1992 Sch 9 para 5 is repealed: Welfare Reform and Pensions Act 1999 Sch 13 Pt IV.

TEXT AND NOTE 7--Head (2) had referred to a relevant training scheme: SI 1976/965 reg 7B (substituted by SI 2000/2891). 'Relevant training scheme' has the same meaning as 'youth training scheme': SI 1976/965 reg 1(2) (amended by SI 2000/2891).

TEXT AND NOTE 8--Head (3) now includes incapacity benefit: SI 1976/965 reg 7C (substituted by SI 2000/2891).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/(4) RESIDENCE REQUIREMENTS/250. Basic rules as to residence.

## **(4) RESIDENCE REQUIREMENTS**

### **250. Basic rules as to residence.**

Subject to any relevant regulations<sup>1</sup>, no child benefit<sup>2</sup> is payable in respect of a child<sup>3</sup> for any week<sup>4</sup> unless:

- 667 (1) he is in Great Britain<sup>5</sup> in that week<sup>6</sup>; and
- 668 (2) Either he or at least one of his parents<sup>7</sup> has been in Great Britain for more than 182 days in the 52 weeks preceding that week<sup>8</sup>.

Subject to any such regulations<sup>9</sup>, no person is entitled to child benefit for any week unless:

- 669 (a) he is in Great Britain in that week<sup>10</sup>; and
- 670 (b) he has been in Great Britain for more than 182 days in the 52 weeks preceding that week<sup>11</sup>.

Regulations may modify the provisions of child benefit law<sup>12</sup> in their application to persons who are or have been outside Great Britain at any prescribed time or in any prescribed circumstances<sup>13</sup>. The residence rules have been extensively modified by regulations<sup>14</sup>.

1 He under the Social Security Contributions and Benefits Act 1992 s 146(1): see the text to note 13 infra.

2 As to entitlement to child benefit see PARA 238 ante. As to priority between persons entitled to child benefit see PARA 241 ante. As to exclusions from entitlement to child benefit see PARAS 244-249 ante.

3 For the meaning of 'child' see PARA 238 ante.

4 For the meaning of 'week' see PARA 238 note 2 ante; and see the text to note 11 infra. As to references to 'in a week' see PARA 238 text to note 8 ante.

5 For the meaning of 'Great Britain' see PARA 15 note 4 ante.

6 Social Security Contributions and Benefits Act 1992 s 146(2)(a).

7 As to the meaning of 'parent' see PARA 241 note 11 ante.

8 Social Security Contributions and Benefits Act 1992 s 146(2)(b). For the purpose of s 146(2)(b), a week in which under the provisions of the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 2 (as amended) (see PARA 252 post) a child is to be regarded as satisfying the requirement in the Social Security Contributions and Benefits Act 1992 s 146(2)(a) and any week for which a person is entitled to benefit in respect of that child is treated as a week in which that child is in Great Britain: Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 3(4); Interpretation Act 1978 s 17(2)(b). For the possible effects of EC law on these residence requirements see PARA 454 et seq post; and Decisions R(F)1/88, R(F)2/88.

9 See note 1 supra.

10 Social Security Contributions and Benefits Act 1992 s 146(3)(a).

11 Ibid s 146(3)(b). For the purposes of s 146(3)(b), a week in which under the provisions of the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 4 (as amended) (see PARA 252 post) a person is to be regarded as satisfying the requirement in the Social Security Contributions and Benefits Act 1992 s 146(3)(a) and any week for which a person is entitled to benefit in respect of a child is treated as a week

in which that person is in Great Britain: Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 5(4); Interpretation Act 1978 s 17(2)(b).

12     le the Social Security Contributions and Benefits Act 1992 Pt IX (ss 141-147) (as amended): s 146(1).

13     Ibid s 146(1).

14     See the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963; and PARAS 252, 254 post.

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

### **250 Basic rules as to residence**

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 s 146 substituted by the Tax Credits Act 2002 s 56(1); and amended by the Child Benefit Act 2005 Sch 1 para 13.

No child benefit is payable in respect of a child or qualifying young person for a week unless he is in Great Britain in that week: Social Security Contributions and Benefits Act 1992 s 146(1) (as so substituted and amended). No person is entitled to child benefit for a week unless he is in Great Britain in that week: s 146(2) (as so substituted). Circumstances may be prescribed in which any person is to be treated for the purposes of s 146(1) or (2) as being, or as not being, in Great Britain: s 146(3) (as so substituted and amended).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/(4) RESIDENCE REQUIREMENTS/251. Persons subject to immigration control.

## **251. Persons subject to immigration control.**

No person subject to immigration control within the meaning of the Asylum and Immigration Act 1996<sup>1</sup> is entitled to child benefit<sup>2</sup> for any week<sup>3</sup> unless he satisfies prescribed<sup>4</sup> conditions<sup>5</sup>.

1     le a person who under the Immigration Act 1971 requires leave to enter or remain in the United Kingdom, whether or not such leave has been given: see the Asylum and Immigration Act 1996 s 13(2). As to asylum and immigration generally see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM.

2     As to entitlement to child benefit see PARA 238 ante. As to priority between persons entitled to child benefit see PARA 241 ante.

3     For the meaning of 'week' see PARA 238 note 2 ante.

4     For the meaning of 'prescribed' see PARA 239 note 5 ante.

5     Social Security Contributions and Benefits Act 1992 s 146A (added by the Asylum and Immigration Act 1996 s 10). As to the prescribed conditions for the purposes of the Social Security Contributions and Benefits Act 1992 s 146A (as added) see the Child Benefit (General) Regulations 1976, SI 1976/965, reg 14B (as added and amended). These provisions are not intended to restrict access to benefit by persons settled in the United Kingdom with indefinite leave to enter or remain: see 268 HC Official Report (6th series), 11 December 1995, col 709; 580 HL Official Report (5th series), 14 March 1996, col 965. As to accommodation etc for asylum seekers see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1029.

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

## **251 Persons subject to immigration control**

NOTE 5--SI 1976/965 reg 14B further amended: SI 1998/563. See *R v Adjudication Officer, ex p Velasquez* (1999) Times, 30 April, CA ('is being paid' child benefit means is actually receiving payment).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/(4) RESIDENCE REQUIREMENTS/252. Modification of requirements as to child's presence and residence.

**252. Modification of requirements as to child's presence and residence.**

The requirement as to the child's<sup>1</sup> presence in Great Britain<sup>2</sup> in a week<sup>3</sup> for which benefit<sup>4</sup> is claimed<sup>5</sup> has effect subject to statutory provisions<sup>6</sup>. This requirement<sup>7</sup> does not operate to make benefit not payable in respect of a child for any week in which that child is absent from Great Britain if:

- 671 (1) a person is entitled to benefit in respect of that child for the week immediately preceding the first week of the child's absence from Great Britain<sup>8</sup>; and
- 672 (2) the child's absence was when it began intended to be temporary and has throughout continued to be so intended<sup>9</sup>; and
- 673 (3) that week:

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- 111. (a) falls within a period of eight weeks beginning with the first week of the child's absence<sup>10</sup>; or
- 112. (b) being a week in which the child's absence is by reason only of his receiving full-time education by attendance at a recognised educational establishment but not falling within the period specified in head (a) above, falls within a period of 156 weeks beginning with the first week of the child's absence<sup>11</sup>; or
- 113. (c) being a week in which the child's absence is for the specific purpose of being treated for illness or disability of mind or body which commenced before his absence began but not falling within the period specified in head (a) above, falls within such extended period of time (if any) as is determined by the Secretary of State in his discretion<sup>12</sup>.

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The requirement as to the residence in Great Britain of the child or a parent<sup>13</sup> has effect subject to statutory provisions<sup>14</sup>. This requirement<sup>15</sup> does not operate to make benefit not payable in respect of a child for any week if in that week:

- 674 (i) that child is in fact in Great Britain and at least one of his parents is to be regarded as satisfying the requirement<sup>16</sup> as to residence<sup>17</sup>; or
- 675 (ii) that child is in fact in Great Britain and is a child in respect of whom the conditions for entitlement to a guardian's allowance<sup>18</sup> could be satisfied by a person were that person entitled to benefit in respect of that child<sup>19</sup>; or
- 676 (iii) that child is in fact in Great Britain and

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- 114. (A) is not residing with any parent of his; and
- 115. (B) is living with another person with whom he is likely to continue to live permanently, being a person who satisfies or is to be regarded as satisfying the residence requirement<sup>20</sup>.

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1 For the meaning of 'child' see PARA 239 ante.

2 For the meaning of 'Great Britain' see PARA 15 note 4 ante.

3 For the meaning of 'week' see PARA 238 note 2 ante. As to references to 'in a week' see PARA 238 text to note 8 ante.

4 As to entitlement to child benefit see PARA 238 ante. As to priority between persons entitled to child benefit see PARA 241 ante. As to exclusions from entitlement to child benefit see PARAS 244-249 ante.

5 Ie under the Social Security Contributions and Benefits Act 1992 s 146(2)(a): see PARA 250 text to note 6 ante.

6 Ie the provisions of the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 2 (as amended); Pt II (regs 6-7) (as amended); and Pt III (reg 9): see reg 2(1); and the Interpretation Act 1978 s 17(2)(b).

7 Ie the Social Security Contributions and Benefits Act 1992 s 146(2)(a).

8 Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 2(2)(a).

9 Ibid reg 2(2)(b). A child cannot be 'temporarily absent' if he has never in fact lived in Great Britain: Decision R(F)1/88.

10 Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 2(2)(c)(i) (amended by SI 1984/875).

11 Ibid reg 2(2)(c)(ii). For the meaning of 'recognised educational establishment' see PARA 239 note 7 ante.

12 Ibid reg 2(2)(c)(iii). Where a child leaves Great Britain in the week in which he was born or is born while his mother is absent from Great Britain, the Social Security Contributions and Benefits Act 1992 s 146(2)(a) does not operate to make benefit not payable in respect of that child for any week in which, by virtue of the provisions of the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 4(3) (as amended), the Social Security Contributions and Benefits Act 1992 s 146(3)(a) does not operate to disentitle a person to benefit in respect of that child: Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 2(3).

13 Ie under the Social Security Contributions and Benefits Act s 146(2)(b): see PARA 250 text to note 8 ante. As to the meaning of 'parent' see PARA 241 note 11 ante.

14 Ie the provisions of the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 3; Pt II (regs 6-7) (as amended); and Pt III (reg 9): see reg 3(1).

15 Ie the Social Security Contributions and Benefits Act 1992 s 146(2)(b): see PARA 250 text to note 8 ante.

16 Ie under ibid 146(3)(b): see PARA 250 text to note 11 ante.

17 See the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 3(2)(a).

18 As to the guardian's allowance see PARAS 117-120 ante.

19 See the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 3(2)(b).

20 Ie the Social Security Contributions and Benefits Act 1992 s 146(3)(b): see the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 3(2)(c); and the Interpretation Act 1978 s 17(2)(b). The modification of the Social Security Contributions and Benefits Act 1992 s 146(2)(b) effected by the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 3(2)(c) applies only in relation to the person referred to in head (B) in the text; and for the purposes of head (A) in the text a child is not regarded as having ceased to reside with any parent of his by reason of any absence the one from the other which is likely to be temporary: see reg 3(3).

## UPDATE

### 237-257 Child Benefit

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

**252 Modification of requirements as to child's presence and residence**

TEXT AND NOTE 10--For 'eight' read 'twelve': SI 1999/198 reg 2(a), except where child benefit was payable in any of the 12 weeks immediately preceding 1 March 1999, by virtue of the 1976 Regulations reg 2(2)(c)(ii) as then in force, and that child is either continuously absent from Great Britain or returns to Great Britain for any period not exceeding 12 weeks, when SI 1999/198 will have no effect, up to and including either 6 September 1999 or the Monday of the 156th week following the date the child first started being educated abroad, whichever is the later: SI 1998/198 reg 3.

TEXT AND NOTE 11--1976 Regulations reg 2(2)(c)(ii) substituted: that week is a week, not falling within the period specified in reg 2(c)(i), in which the child's absence is by reason only of his receiving full-time education by attendance at a recognised educational establishment in another State which is a Contracting Party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992, as adjusted by the Protocol signed at Brussels on 17th March 1993, or his being engaged in an educational exchange or visit made with the written approval of the recognised educational establishment which he normally attends: SI 1999/198 reg 2(b), except where reg 3 applies, see TEXT AND NOTE 10.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/(4) RESIDENCE REQUIREMENTS/253. Modification of requirements as to claimant's presence and residence.

**253. Modification of requirements as to claimant's presence and residence.**

The requirement as to the claimant's presence in Great Britain<sup>1</sup> in a week<sup>2</sup> for which benefit<sup>3</sup> is claimed<sup>4</sup> has effect subject to statutory provisions<sup>5</sup>. This requirement<sup>6</sup> does not operate to disentitle a person to benefit in respect of a child<sup>7</sup> for any week in which that person is absent from Great Britain if:

- 677 (1) that person is entitled to benefit in respect of that child for the week immediately preceding the first week of that person's absence from Great Britain<sup>8</sup>; and
- 678 (2) that person's absence was when it began intended to be temporary and has throughout continued to be so intended<sup>9</sup>; and
- 679 (3) that week falls within a period of eight weeks beginning with the first week of that person's absence<sup>10</sup>.

The requirement as to the residence in Great Britain of the claimant<sup>11</sup> has effect subject to statutory provisions<sup>12</sup>. This requirement<sup>13</sup> does not operate to disentitle a person to benefit in respect of a child for any week if:

- 680 (a) in that week that child satisfies or, in certain circumstances<sup>14</sup>, is to be regarded as satisfying the specified requirements<sup>15</sup> and that person is in fact in Great Britain and responsible for that child<sup>16</sup>; or
- 681 (b) that week begins in a period of 183 consecutive days throughout which<sup>17</sup> that person is likely to be in Great Britain; and before that week but within that period that person, while in Great Britain, has been an employed earner or a self-employed earner<sup>18</sup>; or
- 682 (c) in that week that person is in fact in Great Britain and residing with his spouse who satisfies or is to be regarded as satisfying the requirements<sup>19</sup> as to residence<sup>20</sup>; or
- 683 (d) in that week that person is in fact in Great Britain; and that week begins in a period of 183 consecutive days throughout which<sup>21</sup> that person is likely to be in Great Britain; and for a week not more than 156 weeks before that week:

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- 116. (i) that person was entitled to benefit in respect of a child; or
- 117. (ii) that person's spouse (if any) was so entitled and when so entitled, or in that week, was residing with that person<sup>22</sup>.

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1 For the meaning of 'Great Britain' see PARA 15 note 4 ante.

2 For the meaning of 'week' see PARA 238 note 2 ante. As to references to 'in a week' see PARA 238 text to note 8 ante.

3 As to entitlement to child benefit see PARA 238 ante. As to priority between persons entitled to child benefit see PARA 241 ante. As to exclusions from entitlement to child benefit see PARAS 244-249 ante.

4 Ie under the Social Security Contributions and Benefits Act 1992 s 146(3)(a): see PARA 250 text to note 10 ante.

5 le the provisions of the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 4 (as amended); Pt II (regs 6-7) (as amended); and Pt III (reg 9): see reg 4(1); and the Interpretation Act 1978 s 17(2)(b).

6 le the Social Security Contributions and Benefits Act 1992 s 146(3)(a).

7 For the meaning of 'child' see PARA 239 ante.

8 Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 4(2)(a) (amended by SI 1976/1758). If in the week in which a woman gives birth to a child in Great Britain she subsequently leaves Great Britain or if she gives birth to a child while she is absent from Great Britain, then if:

133 (1) her absence from Great Britain was when it began intended to be temporary and has throughout continued to be so intended; and

134 (2) that child (if born outside Great Britain) was born within the period of 26 weeks beginning with the first week of his mother's absence; and

135 (3) had that child been born at the beginning of the week immediately preceding that in which his mother's absence began, she could have satisfied the requirements for entitlement to benefit in respect of that child,

the Social Security Contributions and Benefits Act 1992 s 146(3)(a) does not operate to disentitle a person to benefit in respect of that child for the period of eight weeks beginning with the first week of his mother's absence: Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 4(3) (amended by SI 1984/875).

9 Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 4(2)(b) (as amended: see note 8 supra).

10 Ibid reg 4(2)(c) (as amended (see note 8 supra); further amended by SI 1984/875). If a person dies while the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 4(2) (as amended) applies to him, the Social Security Contributions and Benefits Act 1992 s 146(3)(a) does not operate to disentitle another person to benefit in respect of a child, being a child in respect of whom the deceased was entitled to benefit immediately before his death, for any week which falls within a period of eight weeks beginning with the first week of the deceased's absence from Great Britain: Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 4(2A) (added by SI 1976/1758; and amended by SI 1984/875); Interpretation Act 1978 s 17(2)(b).

11 le under the Social Security Contributions and Benefits Act 1992 s 146(3)(b): see PARA 250 text to note 11 ante.

12 le the provisions of the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 5 (as amended); Pt II (regs 6-7) (as amended); and Pt III (reg 9): see reg 5(1).

13 le the Social Security Contributions and Benefits Act 1992 s 146(3)(b).

14 le otherwise than by virtue of the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 3(2)(a): see PARA 252 text to note 17 ante.

15 le in the Social Security Contributions and Benefits Act 1992 s 146(2)(a), (b): see PARA 250 ante.

16 See the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 5(2)(a) (amended by SI 1976/1758). 'Responsible for that child' means within the meaning of the Social Security Contributions and Benefits Act 1992 s 143(1); see the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 5(2)(a); and PARA 240 ante.

17 For this purpose, up to 28 days of temporary absence from Great Britain, whether consecutive or not, are disregarded: see *ibid* reg 5(2)(b).

18 See the *ibid* reg 5(2)(b). This does not apply to certain employed or self-employed earners who are not liable to pay contributions: see reg 5(2)(b). If a question arises as to whether a person has been such an employed earner or such a self-employed earner, it is to be determined by the Secretary of State: see reg 5(3). For the meaning of 'employed earner' and 'self-employed earner' see PARA 32 ante; and as to the Secretary of State see PARA 1 ante.

19 le in the Social Security Contributions and Benefits Act 1992 s 146(3)(b): see PARA 250 text to note 11 ante.

20 See the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 5(2)(c).

21 For this purpose up to 28 days of temporary absence from Great Britain, whether consecutive or not, are to be disregarded: see *ibid* reg 5(2)(d).

22 *Ibid* reg 5(2)(d).

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and *PARA 257A*.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/(4) RESIDENCE REQUIREMENTS/254. Exemptions.

## 254. Exemptions.

Any day on which or week in which:

- 684 (1) a person of a prescribed description<sup>1</sup> is absent from Great Britain by reason only of his being such a person is, in relation to child benefit<sup>2</sup>, to be treated for the purposes of the Social Security Contributions and Benefits Act 1992<sup>3</sup> as a day on which or week in which he is present in Great Britain<sup>4</sup>;
- 685 (2) a child<sup>5</sup> is absent from Great Britain will, in relation to child benefit, be treated<sup>6</sup> as a week in which or day on which that child is in Great Britain if in that week or on that day that child is living with a person in relation to whom head (1) above applies and that person is (a) a parent<sup>7</sup> of that child; or (b) a person who before that week was entitled to benefit in respect of that child<sup>8</sup>.

A person is of the description to whom these provisions apply<sup>9</sup> if he is: (i) a civil servant<sup>10</sup>; (ii) a serving member of the forces<sup>11</sup>; (iii) a person who on any day falling within or week beginning in an income tax year is temporarily absent from Great Britain by reason only of the fact that he is in employment outside Great Britain<sup>12</sup>; (iv) a spouse of a person mentioned in heads (i) to (iii) above who is residing with that person<sup>13</sup>; or (v) a person living with such a person as is mentioned in heads (i) to (iii) above as if he were that person's spouse<sup>14</sup> and who was so living when both of them were last in Great Britain<sup>15</sup>.

1    Ie such a person as is mentioned in the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 6 (as amended): see reg 7(1).

2    As to entitlement to child benefit see PARA 238 ante. As to priority between persons entitled to child benefit see PARA 241 ante. As to exclusions from entitlement to child benefit see PARAS 244-249 ante.

3    Ie the Social Security Contributions and Benefits Act 1992 s 146(2)(b), (3): see PARA 250 ante.

4    See the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 7(1); the Interpretation Act 1978 s 17(2)(b). For the meaning of 'Great Britain' see PARA 15 note 4 ante.

5    For the meaning of 'child' see PARA 239 ante.

6    Ie for the purposes of the Social Security Contributions and Benefits Act 1992 s 146(2): see PARA 250 ante.

7    As to the meaning of 'parent' see PARA 241 note 11 ante.

8    See the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 7(2). Unless in his discretion the Secretary of State otherwise determines in any case or class of cases, any day of absence from one another of a child and a person, being a day on which head (1) in the text applies to that person, will if that absence is due solely to that person being one to whom head (1) in the text applies, be a day which will be disregarded under the provisions of the Social Security Contributions and Benefits Act 1992 s 143(2) (see PARA 240 ante): see the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 7(3).

9    Ie *ibid* Pt II (regs 6-7) (as amended).

10   See *ibid* reg 6(1)(a). 'Civil servant' means a person who is employed by the civil service of the United Kingdom, and is paid a salary or wages by a government department of the United Kingdom, other than a person who is: (1) a serving member of the forces; or (2) a person who entered or was recruited for such employment outside the United Kingdom for service outside the United Kingdom, unless he entered or was recruited for such service immediately following a period during which he was a serving member of the forces:

reg 6(1)(a) (amended by SI 1992/2972) (negating the effect of Decision R(F)1/89 which was decided under the previous wording).

11 See the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 6(1)(b). As to the meaning of 'serving member of the forces' see the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 1(2).

12 See the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 6(1)(c). The employment may be under a contract of service or not: see reg 6(1)(c). At least half of the person's earnings or other emoluments from that employment must be liable to United Kingdom income tax in that income tax year: see reg 6(1)(c). For the purposes of reg 6(1)(c), 'income tax year' means the 12 months beginning with 6 April in any year: see reg 6(2).

13 See *ibid* reg 6(1)(d).

14 As to the general rules on when a couple are considered to be living together as husband and wife see PARA 83 ante.

15 See the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963, reg 6(1)(e).

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

### **254 Exemptions**

NOTE 11--1979 Regulations reg 1(2) now Social Security (Contributions) Regulations 2001, SI 2001/1004, reg 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/(5) RATE OF BENEFIT/255. Prescribed rates.

## **(5) RATE OF BENEFIT**

### **255. Prescribed rates.**

Child benefit<sup>1</sup> is payable at such weekly rate as may be prescribed<sup>2</sup>. Different rates may be prescribed in relation to different cases, whether by reference to the age of the child<sup>3</sup> in respect of whom the benefit is payable or otherwise<sup>4</sup>. No rate prescribed in place of a rate previously in force may be lower than the rate that it replaces<sup>5</sup>. The Secretary of State must in each tax year review the sums specified<sup>6</sup> in order to determine whether they have retained their value in relation to the general level of prices obtaining in Great Britain estimated in such manner as the Secretary of State thinks fit<sup>7</sup>.

The scheme has traditionally set a flat rate for each child, with a higher rate for an only, elder or eldest child, and a further amount payable where the person responsible for the child or children was a lone parent<sup>8</sup>. However, as from 7 April 1997, there are substituted composite rates to cover these two long-standing increases<sup>9</sup>. There remains the standard flat rate<sup>10</sup>. Where the standard flat rate does not apply, the weekly rate of child benefit payable in respect of a child<sup>11</sup> is, subject to statutory provision<sup>12</sup>:

- 686 (1) in a case where in any week a child (not being a child to whom head (2) below applies) is the only child or, if not the only child, the elder or eldest child in respect of whom child benefit is payable to a person, the prescribed middle rate<sup>13</sup>;
- 687 (2) in a case where in any week that child is the only child or, if not the only child, the elder or eldest child of a lone parent<sup>14</sup> in respect of whom child benefit is payable to a person, the prescribed higher rate<sup>15</sup>.

1 As to entitlement to child benefit see PARA 238 ante. As to priority between persons entitled to child benefit see PARA 241 ante. As to exclusions from entitlement to child benefit see PARAS 244-249 post.

2 Social Security Contributions and Benefits Act 1992 s 145(1); see the Child Benefit and Social Security (Fixing and Adjustment of Rates) Regulations 1976, SI 1976/1267 (as amended). For the meaning of 'prescribed' see PARA 239 note 5 ante. Regulations under the Social Security Contributions and Benefits Act 1992 s 145 must be made by the Secretary of State in conjunction with the Treasury: s 145(5). As to the Secretary of State see PARA 1 ante.

3 For the meaning of 'child' see PARA 239 ante.

4 Social Security Contributions and Benefits Act 1992 s 145(2). The power to prescribe different rates under s 145(2) is exercised so as to bring different rates into force on such day as the Secretary of State may by order specify: s 145(3). An order under s 145(3) may be varied or revoked at any time before the date specified thereby: s 145(6). Any such order must be laid before Parliament after being made: s 145(7).

5 Ibid s 145(4).

6 Ie the sums specified by virtue of ibid s 145(1).

7 Social Security Administration Act 1992 s 150(1)(i). As to the up-rating of benefits generally see PARA 17 ante.

8 Generally, if inaccurately, known as 'one parent benefit'. As to the proposed removal of the lone parent element of child benefit see PARA 6 text and note 12 ante; and see 300 HC Official Report (6th series), 3 November 1997, written answers col 87.

9 As to the weekly rates of child benefit see the Child Benefit and Social Security (Fixing and Adjustment of Rates) Regulations 1976, 1976/1267, reg 2(1) (as amended). As to payment of the higher rate in respect of the older child of twins see Decision R(F)2/96.

10 See the Child Benefit and Social Security (Fixing and Adjustment of Rates) Regulations 1976, 1976/1267, reg 2(1)(b) (as amended).

11 Subject to the Child Benefit (General) Regulations 1976, SI 1976/965, reg 20(1): see the Child Benefit and Social Security (Fixing and Adjustment of Rates) Regulations 1976, 1976/1267, reg 2(1) (as amended).

12 See subject to *ibid* regs 2(2ZA)-(4) (as added and amended); see reg 2(1)(a) (as amended).

13 See *ibid* reg 2(1)(a)(i) (as amended). Where in any week (1) a person is residing with his spouse, or is living with another person as his spouse or is a member of a polygamous marriage and is residing with other members of that marriage; and (2) child benefit would otherwise be payable to that person in respect of a child at the weekly rate specified in head (1) in the text; and (3) child benefit would otherwise be payable at that rate to his spouse or that other person or any other members of that polygamous marriage, as the case may be, in respect of another child, the rate specified in reg 2(1)(a)(i) (as amended) is payable in that week in respect of one only of the children mentioned heads (2)-(3) *supra*, being the elder, or if there are more than two children, the eldest of those children: see reg 2(2ZA) (as added and amended). For these purposes, a person is a member of a polygamous marriage if during the subsistence of the marriage any party to it is married to more than one person; and the ceremony of marriage took place under the law of a country which permits polygamy: reg 2(6) (added by SI 1991/502). Child benefit is not payable at the rate specified in head (1) or head (2) in the text where the person to whom child benefit is payable is a voluntary organisation: see the Child Benefit and Social Security (Fixing and Adjustment of Rates) Regulations 1976, 1976/1267, reg 2(2ZB) (as added and amended). As to voluntary organisations see PARA 238 note 11 *ante*. As to entitlement to child benefit for a person residing with a parent of a child see reg 2(2A) (as added and substituted), reg 2(2AB) (as added).

14 For the purpose of *ibid* reg 2(1)(a)(ii) (as amended) 'lone parent' means a person who is living with a child and, in any week, that person (1) either has no spouse, or is not residing with his spouse; and (2) is not living with any other person as his spouse: reg 2(2) (substituted by SI 1996/1803). As to the general rules as to when a couple are considered to be living together as husband and wife see PARA 83 *ante*.

15 See the Child Benefit and Social Security (Fixing and Adjustment of Rates) Regulations 1976, 1976/1267, reg 2(1)(a)(ii) (as amended). The higher rate of benefit is not payable to persons in receipt of certain specified allowances or increases of social security and analogous benefits: see reg 2(4) (as amended). The specified benefits referred to in reg 2(4) (as amended) are listed in reg 2(5) (as amended).

## UPDATE

### 237-257 Child Benefit

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

### 255 Prescribed rates

TEXT AND NOTES 2, 8-15--SI 1976/1267 replaced: Child Benefit (Rates) Regulations 2006, SI 2006/965 (amended by SI 2008/3246, SI 2010/982). The rates prescribed by SI 2010/982 come into force on 12 April 2010.

NOTE 2--Social Security Contributions and Benefits Act 1992 s 145(5) repealed: Tax Credits Act 2002 Sch 6.

TEXT AND NOTE 4--Social Security Contributions and Benefits Act 1992 s 145(2) amended: Child Benefit Act 2005 Sch 1 para 11.

TEXT AND NOTE 5--Notwithstanding anything in s 145(4), regulations may revoke any provision of regulations which prescribes a higher rate of child benefit in the case of a lone parent: Social Security Act 1998 s 72(1). 'Lone parent' means a parent who has no

spouse or civil partner or is not living with his spouse or civil partner, and is not living with any other person as his spouse or civil partner: s 72(2) (amended by Civil Partnership Act 2004 Sch 24 para 138(2)). For the purpose of the Social Security Act 1998 s 138, a parent is to be regarded as living with another person as his civil partner if, but only if, he would be regarded as living with the other person as his spouse, were they instead two people of the opposite sex: s 72(3) (added by Civil Partnership Act 2004 Sch 24 para 138(3)). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

NOTE 8--Lone parent element of child benefit removed: Child Benefit and Social Security (Fixing and Adjustment of Rates) (Amendment) Regulations 1998, SI 1998/1581.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/(5) RATE OF BENEFIT/256. Effect of alteration of rates of child benefit.

## **256. Effect of alteration of rates of child benefit.**

The general statutory provisions relating to an increase in benefit<sup>1</sup> have effect where there is an increase in the rate or any of the rates of child benefit<sup>2</sup> as they have effect in relation to the rate of contributory or non-contributory benefits<sup>3</sup> to which they apply<sup>4</sup>. Where in connection with child benefit:

- 688 (1) any question arises in respect of a period after the date fixed for the commencement of payment of child benefit at an increased rate:
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- 118. (a) as to the weekly rate at which a person is contributing to the cost of providing for a child<sup>5</sup>; or
- 119. (b) as to the expenditure that a person is incurring in respect of a child; and
- 96
- 689 (2) in determining that question account falls to be taken of contributions made or expenditure incurred for a period before that date,

the contributions made or expenditure incurred before that date must be treated as increased in proportion to the increase in the rate of benefit<sup>6</sup>.

- 1 le the Social Security Administration Act 1992 s 155(3), (4): see PARA 19 ante.
- 2 As to the rate of child benefit see PARA 256 ante.
- 3 le benefits under the Social Security Contributions and Benefits Act 1992 Pts II-V (ss 20-111) (as amended): see PARA 54 et seq ante.
- 4 Social Security Administration Act 1992 s 157(1).
- 5 As to when a person is contributing to the cost of providing for a child see PARA 240 ante.
- 6 Social Security Administration Act 1992 s 157(2).

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

## **256 Effect of alteration of rates of child benefit**

TEXT AND NOTE 6--Social Security Administration Act 1992 s 157(2) amended so as to include references to qualifying young persons: Child Benefit Act 2005 Sch 1 para 24. As to qualifying young persons see PARA 238.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/(5) RATE OF BENEFIT/257. Treatment of excess benefit as paid on account of child benefit.

## **257. Treatment of excess benefit as paid on account of child benefit.**

In any case where:

- 690 (1) any benefit<sup>1</sup> or any increase of such benefit ('the relevant benefit or increase') has been paid to a person for a period in respect of a child<sup>2</sup>; and  
 691 (2) subsequently child benefit<sup>3</sup> for that period in respect of the child becomes payable at a rate which is such that, had the relevant benefit or increase been awarded after the child benefit became payable, the rate of the relevant benefit or increase would have been reduced,

then, except in so far as regulations otherwise provide, the excess<sup>4</sup> must be treated as paid on account of child benefit for that period in respect of the child<sup>5</sup>.

1 The benefit within the meaning of the Social Security Contributions and Benefits Act 1992 s 122 (as amended); see PARA 13 note 8 ante.

2 For the meaning of 'child' see PARA 239 ante.

3 As to entitlement to child benefit see PARA 238 ante.

4 'The excess' means so much of the relevant benefit or increase as is equal to the difference between (1) the amount of it which was paid for the period referred to in the text; and (2) the amount of it which would have been paid for that period if it had been paid at the reduced rate referred to in head (2) in the text: Social Security Administration Act 1992 s 158(2).

5 Ibid s 158(1).

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

## **257 Treatment of excess benefit as paid on account of child benefit**

TEXT AND NOTE 5--Social Security Administration Act 1992 s 158(1) amended so as to include references to qualifying young persons: Child Benefit Act 2005 Sch 1 para 25. As to qualifying young persons see PARA 238.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/9. CHILD BENEFIT/(5) RATE OF BENEFIT/257A. Child benefit and guardian's allowance: transfer of functions.

## **257A. Child benefit and guardian's allowance: transfer of functions.**

The Tax Credits Act 2002 Pt 2 (ss 49-57) transfers responsibility for the administration of child benefit and guardian's allowance from the Department for Work and Pensions and, in Northern Ireland, the Department for Social Development to the Inland Revenue.

For consequential amendments and repeals see ss 51, 60, Schs 4, 6. For transitional provisions and savings see ss 54, 62. For provision relating to Northern Ireland see s 64. For financial provision see s 68; and PARA 227A.49.

### **1. Functions transferred to Treasury**

Certain functions relating to child benefit<sup>1</sup> and guardian's allowance<sup>2</sup> are transferred to the Treasury<sup>3</sup>.

1 See generally para 237 et seq.

2 See generally para 117 et seq.

3 Tax Credits Act 2002 s 49.

The functions of the Secretary of State under (1) the Social Security Contributions and Benefits Act 1992 s 77 (see PARA 117), (2) the Social Security Contributions and Benefits Act 1992 IX (ss 141-147) (see PARA 237 et seq), except Sch 10 paras 5 (see PARA 239) and 6(1) (see PARA 241), (3) the Social Security Administration Act 1992 s 80 (see PARA 238), and (4) the Social Security Act 1998 s 72 (see PARA 255), are transferred to the Treasury: Tax Credits Act 2002 s 49(1) (amended by Child Benefit Act 2005 Sch 2 Pt 1).

The functions of the Northern Ireland Department under (a) the Social Security Contributions and Benefits (Northern Ireland) Act 1992 s 77 (guardian's allowance: Northern Ireland), (b) the Social Security Contributions and Benefits (Northern Ireland) Act 1992 Pt IX (child benefit: Northern Ireland), except Sch 10 paras 5 and 6(1), (c) the Social Security Administration (Northern Ireland) Act 1992 s 76 (overlap with benefits under legislation of other member states: Northern Ireland), and (d) the Social Security (Northern Ireland) Order 1998, SI 1998/1506 (NI 10) art 68 (power to reduce child benefit for lone parents: Northern Ireland) are transferred to the Treasury: Tax Credits Act 2002 s 49(2) (amended by Child Benefit Act 2005 Sch 2 Pt 2). For the meaning of 'the Northern Ireland Department' see PARA 227A.1.

The functions of the Secretary of State under the Social Security Administration Act 1992 Pt X (ss 150-154) (review and alteration of benefits: Great Britain: see PARA 18) so far as relating to child benefit and guardian's allowance are transferred to the Treasury: Tax Credits Act 2002 s 49(3).

The functions of the Northern Ireland Department under the Social Security Administration (Northern Ireland) Act 1992 ss 132-134 (review and alteration of benefits: Northern Ireland) so far as relating to child benefit and guardian's allowance are transferred to the Treasury: Tax Credits Act 2002 s 49(4).

### **2. Functions transferred to Board**

The functions of the Secretary of State and the Northern Ireland Department<sup>1</sup> under specified provisions<sup>2</sup>, so far as relating to child benefit<sup>3</sup> and guardian's allowance<sup>4</sup>, are transferred to the Board<sup>5</sup>.

1 For the meaning of 'the Northern Ireland Department' see PARA 227A.1.

2 The specified provisions are (1) the Social Security Contributions and Benefits Act 1992, (2) the Social Security Administration Act 1992, except Pt XIII (ss 170-176) (see PARA 407 et seq), (3) the Social Security

Contributions and Benefits (Northern Ireland) Act 1992, (4) the Social Security Administration (Northern Ireland) Act 1992, except Pt XII (advisory bodies and consultation: Northern Ireland), (5) the Social Security Act 1998 Pt I Ch II (ss 8-39) (see PARA 356A), (6) the Social Security (Northern Ireland) Order 1998, SI 1998/1506 (NI 10) Pt II Ch II (social security decisions and appeals: Northern Ireland), and (7) any subordinate legislation made under any of the provisions specified in the Tax Credits Act 2002 s 49 (see PARA 257A.1) or any of the preceding provisions of s 50(2): s 50(2).

3 See generally para 237 et seq.

4 See generally para 117 et seq.

5 Tax Credits Act 2002 s 50(1). For the meaning of 'the Board' see PARA 227A.2. Section 50 has effect subject to s 49 (see PARA 257A.1): s 50(3).

### **3. Transfer of property, rights and liabilities**

Provision is made<sup>1</sup> to transfer to and vest in the Treasury the property, rights and liabilities to which the Secretary of State or the Northern Ireland Department<sup>2</sup> is entitled or subject in connection with functions transferred to the Treasury<sup>3</sup> immediately before they are transferred<sup>4</sup>. Provision is made<sup>5</sup> to transfer to and vest in the Board<sup>6</sup> the property, rights and liabilities to which the Secretary of State or the Northern Ireland Department is entitled or subject in connection with functions transferred to the Board<sup>7</sup> immediately before they are transferred<sup>8</sup>. A certificate given by the Treasury that any property has been transferred<sup>9</sup> is conclusive evidence of the transfer; and a certificate given by the Board that any property has been transferred<sup>10</sup> is conclusive evidence of the transfer<sup>11</sup>. Her Majesty may by Order in Council make such provision for the transfer to Her Majesty's Home Civil Service of persons employed in the Northern Ireland Civil Service as appears to Her Majesty to be appropriate in consequence of the transfer of functions<sup>12</sup>.

1 Ie by the Tax Credits Act 2002 s 52(1).

2 For the meaning of 'the Northern Ireland Department' see PARA 227A.1.

3 Ie by the Tax Credits Act 2002 s 49: see PARA 257A.1.

4 Ibid s 52(1). See further NOTE 8.

5 Ie by ibid s 52(2).

6 For the meaning of 'the Board' see PARA 227A.2.

7 Ie by the Tax Credits Act 2002 s 50: see PARA 257A.2.

8 Ibid s 52(2). Section 52(1), (2) has effect in relation to property, rights and liabilities in spite of any provision (of whatever nature) which would prevent or restrict transfer otherwise than by s 52: s 52(4).

Section 52(1), (2) does not apply to contracts within s 52(6); but any term of such a contract about the provision of goods or services to the Secretary of State (or a government department) or the Northern Ireland Department is to be taken to refer also to the Board in connection with any function transferred by s 49 (see PARA 257A.1) or 50 (see PARA 257A.2): s 52(5). The contracts within s 52(6) are contracts for the supply of goods or services to the Secretary of State or the Northern Ireland Department (a) which relate partly to functions transferred by s 49 or 50 and partly to other functions, or (b) the terms of which are wholly or partly determined by a contract within head (a): s 52(6).

9 Ie by ibid s 52(1).

10 Ie by ibid s 52(2).

11 Ibid s 52(3).

12 Ie made by ibid ss 49 and 50: s 52(7). A statutory instrument containing an Order in Council under s 52(7) is (unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament) subject to annulment in pursuance of a resolution of either House of Parliament: s 66(3).

#### **4. General functions of Commissioners for Her Majesty's Revenue and Customs**

The Commissioners for Her Majesty's Revenue and Customs are responsible for the payment and management of child benefit<sup>1</sup> and guardian's allowance<sup>2</sup>.

<sup>1</sup> See generally para 237 et seq.

<sup>2</sup> Tax Credits Act 2002 s 53 (substituted by the Commissioners for Revenue and Customs Act 2005 Sch 4 para 90). As to guardian's allowance, see generally para 117 et seq.

#### **5. Administrative arrangements**

Where the following provisions<sup>1</sup> apply<sup>2</sup>, regulations may make provision (1) for information or evidence relating to child benefit or guardian's allowance to be provided to the relevant authority (whether by persons by whom such claims and notifications are or have been made or given, by the Board<sup>3</sup> or by other persons), (2) for the giving of information or advice by a relevant authority to persons by whom such claims or notifications are or have been made or given, and (3) for the recording, verification and holding, and the forwarding to the Board or a person providing services to the Board, of claims and notifications received by virtue of regulations<sup>4</sup> and information or evidence received by virtue of head (1) above<sup>5</sup>.

<sup>1</sup> I.e the Tax Credits Act 2002 s 58.

<sup>2</sup> Ibid s 58 applies where regulations under (1) the Social Security Administration Act 1992 s 5 (see PARA 330), or (2) the Social Security Administration (Northern Ireland) Act 1992 s 5, permit or require a claim or notification relating to child benefit (see generally para 237 et seq) or guardian's allowance (see generally para 117 et seq) to be made or given to a relevant authority: Tax Credits Act 2002 s 58(1). 'Relevant authority' means (a) the Secretary of State, (b) the Northern Ireland Department, or (c) a person providing services to the Secretary of State or the Northern Ireland Department: s 58(3). For the meaning of 'the Northern Ireland Department' see PARA 227A.1.

<sup>3</sup> For the meaning of 'the Board' see PARA 227A.2.

<sup>4</sup> I.e the regulations referred to in the Tax Credits Act 2002 s 58(1).

<sup>5</sup> Ibid s 58(2). See the Tax Credits (Administrative Arrangements) Regulations 2002, SI 2002/3036. As to regulations generally see the Tax Credits Act 2002 s 65; and PARA 227A.47. As to parliamentary control of instruments see s 66; and PARA 227A.48.

#### **6. Use and disclosure of information**

The following provisions are in force for specified purposes: SI 2002/1727, SI 2003/392.

Provision is made giving powers to the Board<sup>1</sup> to disclose child benefit<sup>2</sup> and guardian's allowance<sup>3</sup> information to other government departments in certain circumstances; and to obtain information from other government departments for the purpose of carrying out its functions under the Tax Credits Act 2002<sup>4</sup>.

<sup>1</sup> For the meaning of 'the Board' see PARA 227A.2.

<sup>2</sup> See generally para 237 et seq.

<sup>3</sup> See generally para 117 et seq.

<sup>4</sup> See Tax Credits Act 2002 s 59, Sch 5 (Sch 5 amended by the Children Act 2004 s 63(1); and the Commissioners for Revenue and Customs Act 2005 Sch 4 para 91, Sch 5; prospectively amended by Education and Skills Act 2008 Sch 1 para 78, Sch 2). See further Tax Credits (Provision of Information) (Functions Relating

to Health) Regulations 2003, SI 2003/731 (amended by SI 2005/2919); Tax Credits (Provision of Information) (Functions Relating to Health ) (No 2) Regulations 2003, SI 2003/1650; Tax Credits (Provision of Information) (Function Relating to Employment and Training) Regulations 2003, SI 2003/2041.

## **UPDATE**

### **237-257 Child Benefit**

SI 1976/965 now replaced by Child Benefit (General) Regulations 2006/223 (amended by SI 2007/2150, SI 2008/1879, SI 2008/2683, SI 2009/3268).

As to the transfer of functions in relation to child benefit see the Tax Credits Act 2002 Pt 2 (ss 49-57); and PARA 257A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(1) IN GENERAL/(i) Replacement of Unemployment Benefit/258. The introduction of jobseeker's allowance.

## **10. JOBSEEKER'S ALLOWANCE**

### **(1) IN GENERAL**

#### **(i) Replacement of Unemployment Benefit**

##### **258. The introduction of jobseeker's allowance.**

Unemployment benefit was, together with sickness benefit, one of the original forms of social security, dating back to 1912<sup>1</sup>; its original basis of specific compulsory insurance was modernised in 1946 when it was incorporated into the general national insurance system<sup>2</sup>, but it retained its contributory nature. It was a non-means-tested benefit, payable at flat rates with certain dependants' increases, for a maximum period of one year. As an independent benefit, it had its own rules as to eligibility and such fundamental matters as the definition of unemployment, part-time working, terminal payments and disqualification. An unemployed claimant with responsibilities not covered by the amount of the benefit (in particular in relation to children and mortgage liabilities) could also claim income support to make the benefit up to the appropriate applicable amount. However, as part of the modern social security reforms<sup>3</sup>, the Jobseekers Act 1995 abolished unemployment benefit completely (subject to transitional provisions)<sup>4</sup> as from October 1996 and replaced it with jobseeker's allowance. The reform in fact goes further, since the new allowance also replaces income support for persons who are required to be available for work as a condition of entitlement<sup>5</sup>. This is achieved by creating two forms of the allowance: (1) contribution-based jobseeker's allowance (the equivalent of the former unemployment benefit, though restricted to the first six months of unemployment); and (2) income-based jobseeker's allowance<sup>6</sup>.

The replacement of unemployment benefit with jobseeker's allowance has two important basic consequences. First, because the existing income support model is adopted for most purposes, so that most of the old unemployment benefit rules are not re-enacted<sup>7</sup>, and even the contribution-based allowance is more subject to rules (for example in relation to income, and hours which may lawfully be worked) which evolved in the means-tested context of income support, rather than in the national insurance context of unemployment benefit, the former case law on unemployment benefit is now largely obsolete. Second, the income-based allowance is so closely modelled on income support that its basic rules<sup>8</sup> are in effect identical<sup>9</sup>.

The principal innovations in the jobseeker's allowance scheme lie in the areas of the extended jobseeking requirements and the 'back to work' schemes<sup>10</sup>.

1 Unemployment benefit was introduced by the National Insurance Act 1911 (repealed): see PARA 1 ante.

2 See PARA 2 ante.

3 See PARAS 4-6 ante.

4 The Secretary of State was given power to make, by regulations, such transitional provision, consequential provision or savings as he considered necessary or expedient for the purposes of or in connection with the coming into force of any provision of the Jobseekers Act 1995 or the operation of any enactment repealed or amended by any such provision during any period when the repeal or amendment was not wholly in force: see s 40(1). Such regulations may in particular make provision: (1) for the termination or cancellation of awards of unemployment benefit or income support; (2) for a person whose award of unemployment benefit or income

support has been terminated or cancelled under regulations made by virtue of head (1) supra to be treated as having been awarded a jobseeker's allowance (a 'transitional allowance') of such a kind, for such period, of such an amount and subject to such conditions, as may be determined in accordance with the regulations; (3) for a person's continuing entitlement to a transitional allowance to be determined by reference to such provision as may be made by the regulations; (4) for the termination of an award of a transitional allowance; (5) for the review of an award of a transitional allowance; (6) for a contribution-based jobseeker's allowance not to be payable for a prescribed period where a person is disqualified for receiving unemployment benefit; (7) that days which were days of unemployment for the purposes of entitlement to unemployment benefit, and such other days as may be prescribed, are to be treated as having been days during which a person was, or would have been, entitled to a jobseeker's allowance; (8) that days which were days of entitlement to unemployment benefit, and such other days as may be prescribed, are to be treated as having been days of entitlement to a contribution-based jobseeker's allowance; (9) that the rate of a contribution-based transitional allowance is to be calculated by reference to the rate of unemployment benefit paid or payable: s 40(2). As to the exercise of this power see the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567 (as amended). There are further transitional provisions covering certain persons in receipt of income support on the change to income-based jobseeker's allowance in the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 87 (as amended).

5 Income support is now, therefore, a residual means-tested benefit for those not entitled to the income-based jobseeker's allowance because not required to be available for work; the categories of persons still entitled to income support are set out in the Income Support (General) Regulations 1987, SI 1987/1967, Sch 1B (as added and amended): see PARA 177 ante.

6 See PARA 259 post.

7 Thus eg jobseeker's allowance rules no longer contain a basic definition of 'unemployment', concentrating instead on the (income support) concepts of 'remunerative work' and the deduction of any income earned. The principal area where the old unemployment benefit rules are carried over in substantially the same form is the area of disqualifications for the allowance (see PARA 301 et seq post); here, the existing case law will largely continue to be applicable.

8 Contained in the Jobseeker's Allowance Regulations 1996, SI 1996/207 (as amended).

9 Given that there are also rules on (in particular) income, capital, the treatment of families and the treatment of students in separate regulations for family credit and disability working allowance, again modelled largely on the income support rules, the amount of duplication of regulations in modern social security law (not to mention parallel provisions relating to housing benefit and council tax benefit) is remarkable.

10 See PARA 275 et seq, 310 et seq post.

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner

as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone

Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **258 The introduction of jobseeker's allowance**

NOTE 4--SI 1996/207 reg 87 applies in the case of an income-based jobseeker's allowance but not a joint-claim jobseeker's allowance: reg 82 (substituted by SI 2000/1978). For the meaning of 'joint-claim jobseeker's allowance' see PARA 260A.

NOTE 9--Subject to savings (see SI 2003/962) family credit (working families' tax credit) and disability working allowance (disabled person's tax credit) abolished and replaced: see Tax Credits Act 2002 and PARA 227A.

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## **(ii) Entitlement to Jobseeker's Allowance**

### **259. The nature of jobseeker's allowance.**

Jobseeker's allowance comprises:

- 692 (1) a contribution-based jobseeker's allowance, which is a flat rate<sup>1</sup>, contributory<sup>2</sup> benefit, payable for a maximum of 182 days in any one period<sup>3</sup>; and
- 693 (2) an income-based jobseeker's allowance, which is a means-tested<sup>4</sup> non-contributory benefit (based on income support)<sup>5</sup>, which may be payable at the end of entitlement to the contribution-based allowance, or to a person who does not satisfy the contribution-based conditions for that allowance, or in addition to that allowance where the claimant's needs exceed the amount of the flat rate payable in respect of that allowance<sup>6</sup>.

There are basic conditions of entitlement applicable to either<sup>7</sup>, and then further, specific conditions in the case of each<sup>8</sup>.

The allowance is payable in respect of a week<sup>9</sup>, through with formulae for determining any amount payable in respect of a part week<sup>10</sup>. As with the previous unemployment benefit, nothing is payable for the first three 'waiting days' of a claim<sup>11</sup>.

Every assignment of or charge on a jobseeker's allowance is void<sup>12</sup>.

1 There are three rates, depending on the claimant's age, and no increases for dependants or other responsibilities: see PARA 268 post.

2 The contribution-based conditions are set out in PARA 266 post.

3 For the duration of the allowance see PARA 267 post.

4 As to the calculation of the applicable amount in a particular claimant's case see PARA 272 post.

5 See PARA 258 ante.

6 Jobseeker's allowance is payable in accordance with the provisions of the Jobseekers Act 1995: s 1(1).

7 See *ibid* s 1(2)(a)-(c), (e)-(i); and PARA 260 post.

8 See *ibid* ss 1(2)(d), 2, 3; and PARAS 266, 271 post.

9 *Ibid* s 1(3).

10 Regulations may make provision in relation to entitlement to a jobseeker's allowance, or the amount payable by way of such an allowance, in respect of any period of less than a week: see *ibid* s 21, Sch 1 para 5; and the Jobseeker's Allowance Regulations 1996, SI 1996/207, regs 150-155 (amended by SI 1996/1516).

11 Except in prescribed circumstances, a person is not entitled to a jobseeker's allowance in respect of a prescribed number of days at the beginning of a jobseeking period: see the Jobseekers Act 1995 Sch 1 para 4; and PARA 261 post.

12 See the Social Security Administration Act 1992 s 187(1)(aa) (added by the Jobseekers Act 1995 s 41(4), Sch 2 para 72).

**UPDATE****258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any

payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **259 The nature of jobseeker's allowance**

NOTE 10--SI 1996/207 reg 150 amended: SI 2000/1978, SI 2003/511, SI 2008/1554. SI 1996/207 reg 151 revoked: SI 2001/3767. SI 1996/207 reg 152 amended: SI 2000/1978. SI 1996/207 reg 153 amended: SI 2000/1978, SI 2003/511, SI 2008/1554. SI 1996/207 reg 155 amended: SI 2000/1978.

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## **260. Conditions of entitlement.**

A claimant<sup>1</sup> is entitled<sup>2</sup> to a jobseeker's allowance if he:

- 694 (1) is available for employment<sup>3</sup>;
- 695 (2) has entered into a jobseeker's agreement<sup>4</sup> which remains in force;
- 696 (3) is actively seeking employment<sup>5</sup>;
- 697 (4) satisfies either the further conditions for a contribution-based allowance<sup>6</sup> or the further conditions for an income-based allowance<sup>7</sup>;
- 698 (5) is not engaged in remunerative work<sup>8</sup>;
- 699 (6) is capable of work<sup>9</sup>;
- 700 (7) is not receiving relevant education<sup>10</sup>;
- 701 (8) is under pensionable age<sup>11</sup>; and
- 702 (9) is in Great Britain<sup>12</sup>.

Regulations<sup>13</sup> may require additional conditions to be satisfied with respect to the payment of a jobseeker's allowance to any person who is, has been, or is to be, in employment which falls within a prescribed description<sup>14</sup> and may provide for a jobseeker's allowance, a contribution-based jobseeker's allowance<sup>15</sup> or an income-based jobseeker's allowance<sup>16</sup> to be treated, for prescribed purposes of the Social Security Contributions and Benefits Act 1992, as a benefit, or a benefit of a prescribed description<sup>17</sup>.

1 'Claimant' means a person who claims a jobseeker's allowance: Jobseekers Act 1995 s 35(1).

2 'Entitled', in relation to a jobseeker's allowance, is to be construed in accordance with the provisions of the Jobseekers Act 1995 relating to entitlement and in accordance with the Social Security Administration Act 1992 s 1 (as amended) (see PARA 337 post) and s 68 (as amended) (see PARA 371 post): Jobseekers Act 1995 s 35(1).

3 See PARA 276 et seq post.

4 See PARA 295 et seq post.

5 See PARA 285 et seq post.

6 Ie the conditions set out in the Jobseekers Act 1995 s 2: see PARA 266 post.

7 Ie the conditions set out in ibid s 3: see PARA 271 post.

8 See PARA 262 post.

9 See PARA 263 post.

10 See PARA 264 post.

11 For the meaning of 'pensionable age' see PARA 562 post (definition applied by the Jobseekers Act 1995 s 35(1)).

12 See PARA 265 post. For the meaning of 'Great Britain' see PARA 15 note 4 ante.

13 'Regulations' means regulations made by the Secretary of State: Jobseekers Act 1995 s 35(1). As to the Secretary of State see PARA 1 ante.

14 Ibid s 21, Sch 1 para 17. For the meaning of 'prescribed' see PARA 21 note 12 ante.

15 For the meaning of 'contribution-based jobseeker's allowance' see PARA 266 note 1 post.

16 For the meaning of 'income-based jobseeker's allowance' see PARA 271 note 1 post.

17 Jobseekers Act 1995 Sch 1 para 18.

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or

falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **260 Conditions of entitlement**

TEXT AND NOTES--A person to whom the Children (Leaving Care) Act 2000 s 6 (see PARA 176) applies is not entitled to income-based jobseeker's allowance under the Jobseekers Act 1995: s 6(1).

TEXT AND NOTES 1-9--Authority for text is *ibid* s 1(2) (amended by Welfare Reform Act 2007 Sch 3 para 12(2)).

Subject to the provisions of the 1995 Act, a claimant who is not a member of a joint-claim couple is entitled to a jobseeker's allowance if he satisfies (1) the conditions set out in s 1(2)(a)-(c), (e)-(i); and (2) the conditions set out in s 3 (as amended by 2007

Act Sch 3 para 12(3)): 1995 Act s 1(2A) (s 1(2A)-(2D) added by the Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 2(1), (3)). Subject to the provisions of the 1995 Act, a joint-claim couple are entitled to a jobseeker's allowance if (a) a claim for the allowance is made jointly by the couple; (b) each member of the couple satisfies the conditions set out in s 1(2)(a)-(c), (e)-(i); and (c) the conditions set out in s 3A (see PARA 260A) are satisfied in relation to the couple: s 1(2B). Regulations may prescribe circumstances in which s 1(2A) is to apply to a claimant who is a member of a joint-claim couple: s 1(2C). Regulations may, in respect of cases where a person would (but for the regulations) be a member of two or more joint-claim couples, make provision for only one of those couples to be a joint-claim couple; and the provision which may be so made includes provision for the couple which is to be the joint-claim couple to be nominated (i) by the persons who are the members of the couples; or (ii) in default of one of the couples being so nominated, by the Secretary of State: s 1(2D).

'A joint-claim couple' means a couple who are not members of any family whose members include a person in respect of whom a member of the couple is entitled to child benefit, and who are of a prescribed description: ss 1(4), 35(1) (amended by the 1999 Act Sch 7 paras 1, 2(1), (4)(b), 15(1), (3); and the Civil Partnership Act 2004 Sch 24 para 118). For the purposes of the 1995 Act s 1(4), a joint-claim couple includes any joint-claim couple within the meaning given in s 1(4) where at least one member is aged 18 or over and was born after 28 October 1947, unless a member of the couple is treated as responsible for a child or young person under the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 77(3), or the couple has care of a child or young person in one or more of the circumstances mentioned in reg 78(4), or a child or young person is living with either member of the couple in the circumstances mentioned in reg 78(8): reg 3A(1) (reg 3A added by SI 2000/1978, reg 3A(1) amended by SI 2001/518, SI 2002/1701, SI 2008/13). In a case where a person would (but for SI 1996/207) be a member of more than one joint-claim couple, a joint-claim couple means the couple of which he is a member which that person nominates (or in default of such nomination, which the Secretary of State nominates), to the exclusion of any other couple of which he is a member: reg 3A(2). 'Couple' means (1) a man and woman who are married to each other and are members of the same household; (2) a man and woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances; (3) two people of the same sex who are civil partners of each other and are members of the same household; or (4) two people of the same sex who are not civil partners of each other but are living together as if they were civil partners otherwise than in prescribed circumstances: 1995 Act s 35(1) (amended by the 2004 Act Sch 24 para 124(2)). For the purposes of the 1995 Act, two people of the same sex are to be regarded as living together as if they were civil partners if, but only if, they would be regarded as living together as husband and wife were they instead two people of the opposite sex: s 35(1A) (added by the 2004 Act Sch 24 para 124(5)). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

NOTE 1--In the definition of 'claimant', after 'allowance' insert 'except that in relation to a joint-claim couple (see TEXT AND NOTES 1-9) claiming a joint-claim jobseeker's allowance it means the couple, or each member of the couple, as the context requires': 1995 Act s 35(1) (amended by the 1999 Act Sch 7 paras 1, 15(1), (2)). For the meaning of 'joint-claim jobseeker's allowance' see PARA 260A.

TEXT AND NOTES 6, 7--Now, head (4) satisfies the conditions set out in 1995 Act s 2: s 1(2)(d) (substituted by the 1999 Act Sch 7 paras 1, 2(1), (2)).

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## **260A. Joint-claim couples.**

The conditions for claims for joint-claim couples<sup>1</sup> are

- 703 (1) that the income of the joint-claim couple does not exceed the applicable amount<sup>2</sup> or the couple have no income;
- 704 (2) that no member of a family of which the couple are members is entitled to income support;
- 705 (3) that no member of any such family (other than the couple) is entitled to an income-based jobseeker's allowance;
- 706 (4) that neither member of the couple is entitled to state pension credit;
- 707 (5) that neither member of the couple is entitled to an income-related employment and support allowance;
- 708 (6) that at least one member of the couple has reached the age of 18; and
- 709 (7) that if only one member of the couple has reached the age of 18, the other member of the couple is a person (a) in respect of whom a severe hardship direction is in force<sup>3</sup>; or (b) who has, in prescribed circumstances<sup>4</sup> to be taken into account for a prescribed period<sup>5</sup>, reached the age of 16<sup>6</sup>.

Where a joint-claim couple make a claim for joint-claim jobseeker's allowance<sup>7</sup>, they may nominate one of them as the member of the couple to whom the allowance is to be payable<sup>8</sup>. In default of one of them being so nominated, the allowance is payable to whichever of them is nominated by the Secretary of State<sup>9</sup>.

<sup>1</sup> Ie referred to in the Jobseekers Act 1995 s 1(2B)(c): see PARA 260. For the meaning of 'joint-claim couple' see PARA 260.

<sup>2</sup> Ie the amount determined in accordance with regulations under *ibid* s 4: see PARAS 268, 272.

<sup>3</sup> Ie under *ibid* s 16: see PARA 318.

<sup>4</sup> The young persons prescribed for these purposes are (1) those living away from home in the child benefit extension period, for the duration of that period (see the Jobseeker's Allowance Regulations 1996, SI 1996/207, regs 58, 59 (reg 58 substituted by SI 2000/1978)); (2) those who have ceased to live in local authority accommodation or have been discharged from custody, for a period of eight weeks (see regs 58, 60); (3) those in a miscellaneous series of categories, for the appropriate prescribed periods (see regs 58, 61 reg 61 amended by SI 2000/1978)).

<sup>5</sup> 'Period' is to be construed in accordance with the Jobseekers Act 1995 s 3(3) (see PARA 271): s 3A(3) (ss 3A, 3B added by the Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 4(2)).

<sup>6</sup> Jobseekers Act 1995 s 3A(1) (amended by the State Pension Credit Act 2002 Sch 2 para 38; and the Welfare Reform Act 2007 Sch 3 para 12(4)). The 1995 Act 3(2), (4) (see PARA 271) applies in relation to a member of the couple to whom TEXT head (7) (a) or (b) applies as it applies in relation to a claimant to whom s 3(1)(f)(ii) or (iii) (see PARA 271) applies: s 3A(2). See also the Jobseekers' Allowance Regulations 1996, SI 1996/207, reg 62 (amended by SI 2000/1978).

<sup>7</sup> 'A joint-claim jobseeker's allowance' means a jobseeker's allowance entitlement to which arises by virtue of the Jobseekers Act 1995 s 1(2B) (see PARA 260): ss 1(4), 35(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 2(1), 4(b), 15(1), (3)).

<sup>8</sup> Jobseekers Act 1995 s 3B(1).

9 Ibid s 3B(2). Section 3B(1), (2) has effect subject to s 4A(4), (7) (see PARA 272A): s 3B(3). Nothing in s 3B or 20A(7) (see PARA 304A) affects the operation of any statutory provision by virtue of which any amount of the allowance is required or authorised to be paid to someone other than the nominated member of the couple: s 3B(5). The nominated member of a joint-claim couple is, except where s 20A(7) applies, to the member of the couple nominated under s 3B(1) or (2); and where s 20A(7) applies, the nominated member of such a couple is the member of the couple to whom s 20A(7) provides for the allowance to be payable: s 3B(4).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or

falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

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**260B. Entitlement of a former joint-claim couple and a new joint-claim couple to a jobseeker's allowance.**

Where a joint-claim couple<sup>1</sup> cease to be a joint-claim couple because they become, or are treated as, responsible for one or more children (1) any claim made by both members of that couple for a jobseeker's allowance may be treated as a claim for a jobseeker's allowance made by either member of that couple; (2) any award of a joint-claim jobseeker's allowance in respect of that couple may be terminated and may be replaced by a replacement award<sup>2</sup>, where specified conditions have been complied with<sup>3</sup>. The specified conditions are that a member of the couple (a) provides such evidence as the Secretary of State may require confirming that the couple are responsible for one or more children; and (b) advises the Secretary of State as to which member of the couple is to be the claimant<sup>4</sup>. The claim by a member of the couple for a jobseeker's allowance referred to in head (1) above must be treated as made on the date on which he and his partner were treated as having claimed a jobseeker's allowance as a joint-claim couple<sup>5</sup>.

Where a couple become a joint-claim couple because the child, or all the children, for which they were responsible have (i) died; (ii) ceased to be a child or children for whom they are responsible; or (iii) reached the age of 16 and are not qualifying young persons<sup>6</sup>, (A) any claim made by either member of that couple for a jobseeker's allowance may be treated as a claim made by both members of the couple; (B) any award of an income-based jobseeker's allowance, or a replacement award, in respect of either member of that couple may be terminated and may be replaced by a new award<sup>7</sup> in respect of the couple, where specified conditions have been complied with<sup>8</sup>. The specified conditions are that the Secretary of State has sufficient evidence to decide whether a new award ought to be made, and that he is informed as to which member of the couple is to be the nominated member<sup>9</sup>. The claim by both members of the joint-claim couple for a jobseeker's allowance referred to in head (A) must be treated as made on the date on which the claim by a member of that couple was treated as made<sup>10</sup>.

Further circumstances are prescribed in which a joint-claim couple may be entitled to a joint-claim jobseeker's allowance<sup>11</sup>.

In certain circumstances, a member of a joint-claim couple may be entitled to a jobseeker's allowance without a claim having being made jointly by the couple<sup>12</sup>.

Where a claim for a jobseeker's allowance has been made jointly by a joint-claim couple, information relating to that claim may be supplied by the Secretary of State to either or both members of that couple for any purpose connected with that claim<sup>13</sup>.

1 For the meaning of 'joint-claim couple' see PARA 260.

2 'Replacement award' has the meaning ascribed to it by the Jobseekers Act 1995 Sch 1 para 9A (see PARA 271); Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 3B(4) (regs 3B-3E, 3G added by SI 2000/1978).

3 SI 1996/207 reg 3B(1).

4 Ibid reg 3B(2).

5 le in accordance with the Social Security Claims and Payments Regulations 1987, SI 1987/1968, reg 6 (see PARA 339): SI 1996/207 reg 3B(3).

6 le within the meaning of the Social Security Contributions and Benefits Act 1992 s 142: see PARA 239.

7 'New award' has the meaning ascribed to it by the Jobseekers Act 1995 Sch 1 para 9C (see PARA 271): SI 1996/207 reg 3C(6).

8 Ibid reg 3C(1), (2) (reg 3C(1) amended by SI 2006/718).

9 le for the purposes of the Jobseekers Act 1995 s 3B (see PARA 260A): SI 1996/207 reg 3C(3).

10 le in accordance with SI 1987/1968 reg 6: SI 1996/207 reg 3C(4).

11 A joint-claim couple are entitled to a joint-claim jobseeker's allowance where (1) the members of that couple claim a jobseeker's allowance jointly; (2) one member satisfies the conditions set out in the Jobseekers Act 1995 s 1(2)(a)-(c), (e)-(i) (see PARA 260 TEXT heads (1)-(3), (5)-(9)); (3) the other member satisfies the conditions in s 1(2)(e), (h) (see PARA 260 TEXT heads (5), (8)) but is not required to satisfy the other conditions in s 1(2B)(b) (see PARA 260) because he is a person to whom any paragraph in SI 1996/207 Sch A1 (added by SI 2000/1978; and amended by SI 2001/518, SI 2001/652, SI 2003/511, SI 2005/3238, SI 2006/718, SI 2006/1402, SI 2008/1554, SI 2009/583, SI 2009/3228) applies; and (4) the conditions set out in the Jobseekers Act 1995 s 3A (see PARA 260A) are satisfied in relation to the couple: SI 1996/207 reg 3D(1); amended by SI 2001/518). SI 1996/207 reg 3D(1) takes effect subject to certain conditions: see further reg 3D(1)-(4). Schedule A1 makes provision relating to various categories of members of a joint-claim couple, including members studying full time, members caring for another person, members incapable of work, members in employment living in residential care homes, nursing homes or residential accommodation, disabled workers, disabled students, deaf students, blind members, women incapable of work by reason of pregnancy, members aged 60 or over, refugees, members required to attend court, young persons in training and, in certain circumstances, members prevented from being entitled to jobseeker's allowance by virtue of a trade dispute.

12 A member of a joint-claim couple is entitled to a jobseeker's allowance if, without making a claim jointly for that allowance with the other member of the couple (1) he satisfies the conditions set out in the Jobseekers Act 1995 s 1(2)(a)-(c), (e)-(i); (2) he satisfies the conditions set out in s 3 (see PARA 271); and (3) the other member of that couple fails to meet the conditions of entitlement set out in s 1(2B)(b) and is a person to whom SI 1996/207 reg 3E(2) applies: reg 3E(1). Regulation 3E(2) applies to a member of a joint-claim couple (a) who has failed to attend at the time and place specified by the employment officer for the purposes of SI 1987/1968 reg 6; (b) in respect of whom it has been determined by the Secretary of State that the conditions in the Jobseekers Act 1995 s 1(2)(a)-(c) have not been satisfied but only for so long as it has been so determined in respect of that member; (c) who is temporarily absent from Great Britain; (d) who is a person from abroad as defined for the purposes of SI 1996/207 reg 85A, Sch 5 (see PARA 322); (e) who is subject to immigration control within the meaning of the Immigration and Asylum Act 1999 s 115(9) (see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM); (f) who is over pensionable age; (g) who is engaged, or has agreed to be engaged, in remunerative work for 16 hours or more per week but less than 24 hours per week; (h) who has claimed a maternity allowance payable in accordance with the Social Security Contributions and Benefits Act 1992 s 35 (see PARA 76 et seq) or who has claimed statutory maternity pay payable in accordance with Pt XII (ss 164-171) (see EMPLOYMENT vol 39 (2009) PARA 365 et seq); (i) who is or has been pregnant and to whom head (h) does not apply but only for the period commencing 11 weeks before the expected week of confinement and ending seven weeks after the date on which the pregnancy ends where the expected week of confinement begins prior to 6 April 2003 or 15 weeks after the date on which her pregnancy ends where the expected week of confinement begins on or after 6 April 2003; (j) in respect of whom there is an Order in Council under the Social Security Administration Act 1992 s 179 (see PARA 28) giving effect to a reciprocal agreement which, for the purposes of jobseeker's allowance, has effect as if a payment made by another country is to be treated as a payment of a jobseeker's allowance; (k) who is in receipt of statutory sick pay and who, immediately before he became incapable of work, was engaged in remunerative work for 16 hours or more per week; or (l) where the other member was entitled to an income-based jobseeker's allowance on 24 February 2008, save that this applies only until the day on which he is required to attend at a place specified by an employment officer in a notification given or sent to him: SI 1996/207 reg 3E(2) (reg 3E(2) amended by SI 2001/518; SI 2002/2689, SI 2002/1701, SI 2007/719, SI 2008/13).

13 SI 1996/207 reg 3G.

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's

employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(1) IN GENERAL/(ii) Entitlement to Jobseeker's Allowance/261. Waiting days, the jobseeking period and the linking rule.

## **261. Waiting days, the jobseeking period and the linking rule.**

A person is not entitled to a jobseeker's allowance in respect of the three days at the beginning of a jobseeking period<sup>1</sup>; and a jobseeking period is any period throughout which the claimant<sup>2</sup> satisfies, or is treated as satisfying, the basic conditions<sup>3</sup> for a jobseeker's allowance<sup>4</sup>.

In order to prevent the three waiting days applying repeatedly where there are separate but closely linked periods of unemployment, there is a 'linking rule' which is that two or more jobseeking periods are to be treated as one where they are separated by a period comprising only:

- 710 (1) any period of not more than 12 weeks;
- 711 (2) a linked period<sup>5</sup>;
- 712 (3) any period of not more than 12 weeks falling between any two linked periods or a jobseeking period and a linked period;
- 713 (4) a period in respect of which the claimant is summoned for jury service and is required to attend court<sup>6</sup>.

1 Jobseekers Act 1995 Sch 1 para 4; Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 46(2). This does not apply where (1) the person's entitlement to a jobseeker's allowance commences within 12 weeks of an entitlement of his to income support, incapacity benefit or invalid care allowance coming to an end; or (2) the claim falls within the severe hardship provisions relating to young persons (ie the person falls within the Jobseekers Act 1995 s 3(1)(f)(ii): see PARA 271 post); Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 46(1). For the purposes of the Jobseekers Act 1995 s 2(4)(b)(i) (see PARA 266 post) and for determining any waiting days, (a) where a linked period (see note 5 *infra*) commenced before 7 October 1996 and is still current on 1 December 1997, any days of unemployment which form part of a period of interruption of employment where the last day of unemployment in that period of interruption of employment was no more than eight weeks before the date upon which that linked period commenced; (b) where a jobseeking period or a linked period commenced on 7 October 1996, any period of interruption of employment ending within the eight weeks preceding that date; or (c) where a jobseeking period or a linked period commences after 7 October 1996, any period of interruption of employment ending within the 12 weeks preceding the day the jobseeking period or linked period commenced, is treated as a jobseeking period; and for the purposes of head (a) *supra*, a day is treated as being, or not being, a day of unemployment in accordance with the Social Security Contributions and Benefits Act 1992 s 25A (repealed) and with any regulations made under that section as in force on 6 October 1996: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 47A (added by SI 1996/2538; amended by SI 1997/2677).

2 For the meaning of 'claimant' see PARA 260 note 1 *ante*.

3 Ie the conditions set out in the Jobseekers Act 1995 s 1(2)(a)-(c), (e)-(i): see PARA 260 *ante*.

4 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 47(1). For these purposes, a claimant who does not satisfy any of the requirements of the Jobseekers Act 1995 s 1(2)(a)-(c) but to whom a jobseeker's allowance is payable on the grounds of hardship (see PARAS 318-321 *post*) is deemed to satisfy those requirements for the period in question (see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 47(2)); as is a person entitled to a transitional allowance (see reg 47(2A) (added by SI 1996/2538)). Where a claimant over 60 but under pensionable age is refused jobseeker's allowance because he has exhausted his entitlement to the contribution-based allowance, or he does not satisfy the contribution-based conditions, or he is entitled to a contribution-based allowance but the amount is reduced to nil because of deductions for pension payments, that claimant is still to be treated as satisfying the requirements of the Jobseekers Act 1995 s1(2)(a)-(c), (e)-(i) for the purposes of determining the jobseeking period: see reg 49(1), (2) (reg 49(2) substituted by SI 1996/1517). Where, however, a person is employed as an employed earner or a self-employed earner for a period of more than 12 weeks, then no day which falls within or follows that period is a day on which the person is treated as satisfying those conditions; but this does not prevent him from being treated as satisfying them if he makes a claim for a jobseeker's allowance after that period: see the Jobseeker's Allowance Regulations 1996,

SI 1996/207, reg 49(3) (amended by SI 1996/1517). Nor is any day which is, for the purposes of the Social Security Contributions and Benefits Act 1992 s 30C (as added) (see PARA 63 ante), a day of incapacity for work falling within a period of incapacity for work a day on which the person is treated as satisfying those conditions: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 49(4). For the meaning of 'employed earner' and 'self-employed earner' see PARA 32 ante.

The following are not part of a jobseeking period: (1) any period in respect of which no claim has been made; (2) any period before a claim is made (including a case where there is backdating for good cause); (3) any period in respect of which backdating of the claim is not permitted; (4) any period during which a claimant is disentitled under reg 25 (entitlement ceasing on a failure to comply: see PARAS 291, 293 post); (5) any week in which the claimant is disentitled under the Jobseekers Act 1995 s 14 (trade disputes: see PARAS 301-302 post): Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 47(3).

5 Regulations may provide for jobseeking periods which are separated by not more than a prescribed number of weeks to be treated as one jobseeking period and for prescribed periods ('linked periods') to be linked to any jobseeking period: Jobseekers Act 1995 s 21, Sch 1 para 3. 'Linked periods' are any of the following: (1) any period throughout which the claimant is entitled to invalid care allowance (to the extent that such linking enables him to satisfy contribution-based conditions for entitlement to a contribution-based allowance which he would otherwise be unable to satisfy); (2) any period throughout which he is incapable of work, or treated as such, under the Social Security Contributions and Benefits Act 1992 Pt XIA (ss 171A-171G) (as added) (see PARA 65 et seq ante); (3) any period throughout which she was entitled to maternity allowance (as to which see PARAS 76-79 ante); (4) any period throughout which he was engaged in training for which a training allowance is payable; (5) a period which includes 6 October 1996 during which the claimant attends court in response to a summons for jury service and which was immediately preceded by a period of entitlement to unemployment benefit: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 48(2), (3) (amended by SI 1996/2538; SI 1997/454). A period is a linked period for the purposes of the Jobseekers Act 1995 s 2(4)(b)(ii) (contribution-based conditions: see PARA 266 post) only where it ends within 12 weeks or less of the commencement of a jobseeking period or of some other linked period: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 48(2A) (added by SI 1996/2538).

6 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 48(1) (amended by SI 1996/1517).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus

within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the

arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **261 Waiting days, the jobseeking period and the linking rule**

TEXT AND NOTE 1--For 'three days' now read 'seven days': SI 1996/207 reg 46(2), as amended by SI 1998/71.

NOTE 1--In head (1) reference to invalid care allowance is now to carer's allowance and employment and support allowance is now included: SI 1996/207 reg 46(1) (amended by SI 2003/511, SI 2008/1554). Also, this does not apply where (3) a joint-claim couple (see PARA 260) are entitled to a joint-claim jobseeker's allowance in respect of themselves and the jobseekers Act 1995 Sch 1 para 4 has already applied to one member of that couple in respect of a jobseeking period which is linked to a jobseeking period relating to that member which has commenced by virtue of his having claimed a jobseeker's allowance as a member of that couple; (4) a joint-claim couple have claimed a jobseeker's allowance jointly within 12 weeks of either member of that couple being entitled to a jobseeker's allowance, income support, incapacity benefit, employment and support allowance or carer's allowance; (5) a member of a joint-claim couple is both in receipt of a training allowance and the nominated member for the purposes of the s 3B (see PARA 260B)': SI 1996/207 reg 46(1) (heads (3)-(5) added by SI 2000/1978; head (4) amended by SI 2003/511, SI 2008/1554). SI 1996/207 reg 47A further amended: SI 1998/563.

NOTE 4--SI 1996/207 reg 47(2) (amended by SI 2000/1978) applies also where the claimant is a member of a joint-claim couple to whom a jobseeker's allowance is payable in accordance with SI 1996/207 regs 146A-146H (added by SI 2000/1978; SI 1996/207 reg 146A amended by SI 2005/2877).

The definition of 'jobseeking period' in SI 1996/207 reg 47 now applies except where otherwise provided: reg 1(3); SI 1998/1274. An alternative definition applies in relation to SI 1996/207 reg 17A (see PARA 281A). Regulation 47(3) now provides that no period before the claim is made forms part of the jobseeking period: reg 47(3); SI 1999/714.

Also, head (5) subject to SI 1996/207 reg 2A (added by SI 1997/2676; and amended by SI 2009/471), any period in respect of which the claimant is not entitled to a jobseeker's allowance because the Administration Act 1992 s 1(1A) applies: SI 1996/207 reg 47(3) amended: SI 1999/2226. SI 1996/207 reg 49(1) amended: SI 2000/1978. SI 1996/207 reg 49(2) amended: SI 2008/1554. Any day which, for the purposes of the Welfare Reform Act Pt 1 (ss 1-29) (see PARA 75), is a day where the person has limited capability for work falling within a period of limited capability for work must not be a day on which the person is treated as satisfying the conditions referred to in SI 1996/207 reg 49(2): reg 49(4A) (added by SI 2008/1554). SI 1996/207 reg 49 does not apply in respect of any days in respect of which a joint-claim jobseeker's allowance has been claimed: reg 49(5) (added by SI 2000/1978).

NOTE 5--In head (1) reference to invalid care allowance is now to carer's allowance: reg 48(2) (amended by SI 2003/511). 'Linked periods' also include (6) any period throughout which the claimant has, or is treated as having, limited capability for work for the purposes of the Welfare Reform Act 2007 Pt 1 (ss 1-29) (see PARA 75A); (7) any period throughout which the claimant was participating (a) in the Employment Option

of the New Deal (see PARA 304); or (b) in the Voluntary Sector Option of the New Deal (see PARA 304), in the Environment Task Force Option of the New Deal (see PARA 304), in the Intensive Activity Period specified in SI 1996/207 reg 75(1)(a)(iv) and was not entitled to a jobseeker's allowance because, as a consequence of his participation, the claimant was engaged in remunerative work or failed to satisfy the condition specified in the Jobseekers Act 1995 s 2(1)(c) or 3(1)(a); (8) any period throughout which the claimant was participating in an employment zone programme and was not entitled to a jobseeker's allowance because, as a consequence of his participation in that programme, he was engaged in remunerative work or failed to satisfy the condition specified in the Jobseekers Act 1995 s 2(1)(c) or in s 3(1)(a): SI 1996/207 reg 48(2)(bb), (f), (g) (reg 42(2)(bb) added by SI 2008/1554; SI 1996/207 reg 48(2)(f) added by SI 1997/2863; and amended by SI 2001/1029, SI 2008/698; SI 1996/207 reg 48(2)(g) added by SI 2000/724).

'Employment zone programme' in head (7) has the same meaning as in the Income Support (General) Regulations 1987, SI 1987/1967 (see PARA 192): SI 1996/207 reg 1(3) (amended by SI 2000/724).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(1) IN GENERAL/(iii) Defining the Conditions of Entitlement/262. Remunerative work.

### (iii) Defining the Conditions of Entitlement

#### 262. Remunerative work.

For the purposes of jobseeker's allowance, 'remunerative work' has such meaning as may be prescribed<sup>1</sup> and regulations<sup>2</sup> may prescribe circumstances in which a person who is not engaged in remunerative work is to be treated as engaged in remunerative work or a person who is engaged in such work is to be treated as not so engaged<sup>3</sup>. For those purposes, 'remunerative work' means:

- 714 (1) in the case of the claimant<sup>4</sup>, work in which he is engaged or, where his hours fluctuate, is engaged on average, for not less than 16 hours per week<sup>5</sup>;
- 715 (2) in the case of any partner<sup>6</sup> of the claimant, work in which he is engaged or, where his hours of work fluctuate, is engaged on average, for not less than 24 hours per week<sup>7</sup>;
- 716 (3) in the case of a non-dependant<sup>8</sup>, or a child or young person (who, though not receiving full time education, is treated as receiving relevant education<sup>9</sup> and who is engaged in remunerative work), work in which he is engaged, or, where his hours of work fluctuate, is engaged on average, for not less than 16 hours per week<sup>10</sup>;

and 'work' is work for which payment is made or which is done in expectation of payment<sup>11</sup>.

Special provisions deem certain persons to be engaged in remunerative work<sup>12</sup>, and others not to be so engaged<sup>13</sup>.

1 Jobseekers Act 1995 s 21, Sch 1 para 1(1). For the meaning of 'prescribed' see PARA 21 note 12 ante.

2 For the meaning of 'regulations' see PARA 260 note 13 ante.

3 Ibid Sch 1 para 1(2). As to the exercise of this power see notes 12-13 infra.

4 For the meaning of 'claimant' see PARA 260 note 1 ante.

5 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 51(1)(a). For the purposes of reg 5(1), the number of hours in which the claimant or his partner is engaged in work is to be determined (1) where no recognisable cycle has been established in respect of a person's work, by reference to the number of hours or, where those hours are likely to fluctuate, the average of the hours, which he is expected to work in a week; (2) where the number of hours for which he is engaged fluctuate, by reference to the average of hours worked over (a) if there is a recognisable cycle of work, and head (3) infra does not apply, the period of one complete cycle (including, where the cycle involves periods in which the person does not work, those periods but disregarding any other absences); (b) in any other case, the period of five weeks immediately before the date of claim or the date of review, or such other length of time as may, in the particular case, enable the person's average hours of work to be determined more accurately; (3) where the person works at a school or other educational establishment or at some other place of employment and the cycle of work consists of one year but with school holidays or similar vacations during which he does no work, by disregarding those periods and any other periods in which he is not required to work: reg 51(2). A person who had transitional protection under the Income Support (General) Amendment No 4 Regulations 1991, SI 1991/1559, reg 22 (revoked) when that statutory instrument reduced the hours in the definition of remunerative work from 24 to 16 per week continues to have such protection under this scheme: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 51(4), (5).

6 'Partner' means, where the claimant (1) is a member of a married or unmarried couple, the other member of that couple; (2) is married polygamously to two or more members of his household, any such member; and

'polygamous marriage' means any marriage during the subsistence of which a party to it is married to more than one person and the ceremony of marriage took place under the law of a country which permits polygamy: *ibid* reg 1(3). 'Married couple' means a man and woman who are married to each other and are members of the same household; and 'unmarried couple' means a man and woman who are not married to each other but are living together as husband and wife otherwise than in prescribed circumstances: see the Jobseekers Act 1995 s 35(1).

7 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 51(1)(b) (amended by SI 1996/1516). As to averaging the hours of work for income support purposes see Decision R(IS)8/95.

8 'Non-dependant' means any person, except a person to whom heads (1), (2) or (3) *infra* applies, who normally resides with the claimant or with whom the claimant normally resides, ie any such person except:

- 136 (1) any member of the claimant's family, or (a) a child or young person who is living with the claimant but who is not a member of his household by virtue of the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 78 (as amended) (circumstances in which a person is to be treated as being or not being a member of the household); or (b) a person who lives with the claimant in order to care for him or for the claimant's partner and who is engaged for that purpose by a charitable or voluntary organisation (other than a public or local authority) which makes a charge to the claimant or the claimant's partner for the care provided by that person; or (c) the partner of a person to whom head (b) *supra* applies;
- 137 (2) a person, other than a close relative of the claimant or the claimant's partner, (a) who is liable to make payments on a commercial basis to the claimant or the claimant's partner in respect of his occupation of the claimant's dwelling; (b) to whom the claimant or the claimant's partner is liable to make payments on a commercial basis in respect of his occupation of that person's dwelling; (c) who is a member of the household of a person to whom head (a) or head (b) *supra* applies;
- 138 (3) subject as follows, (a) a person who jointly occupies the claimant's dwelling and who is either a co-owner of that dwelling with the claimant or the claimant's partner (whether or not there are other co-owners) or jointly liable with the claimant or the claimant's partner to make payments to a landlord in respect of his occupation of that dwelling; or (b) a partner of a person to whom head (a) *supra* applies,

but where a person is a close relative of the claimant or the claimant's partner, head (3) *supra* applies to him only if the claimant's, or the claimant's partner's, co-ownership, or joint liability to make payments to a landlord in respect of his occupation, of the dwelling arose either before 11 April 1988, or, if later, on or before the date upon which the claimant or the claimant's partner first occupied the dwelling in question: see reg 2(1)-(5). For these purposes, a person resides with another only if they share any accommodation except a bathroom, a lavatory or a communal area but not if each person is separately liable to make payments in respect of his occupation of the dwelling to the landlord; and 'communal area' means any area (other than rooms) of common access (including halls and passageways) and rooms of common use in sheltered accommodation: reg 2(6), (7). Cf the Income Support (General) Regulations 1987, SI 1987/1967, reg 3 (as amended); and PARA 185 note 10 *ante*.

9 As to relevant education see PARA 264 *post*.

10 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 51(1)(c) (added by SI 1996/1516).

11 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 51(1) (amended by SI 1997/454). As to the meaning of 'done in expectation of payment' see PARA 179 note 4 *ante*. In determining the number of hours, there is to be included time allowed by the employer for a meal or refreshments (where the person is, or expects to be, paid earnings in respect of that time), but no account is to be taken of hours spent in disregarded activities (as to which see note 13 *infra*), or of hours in which the person is engaged (otherwise than in an employment as an earner) in caring for another person (who is in receipt of or has applied for certain disability-based benefits): see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 51(3) (amended by SI 1996/1516).

Participation in a local exchange trading system is regarded as work for the purposes of jobseeker's allowance and income support and the credits received are taken into account as actual income: see 299 HC Official Report (6th series), 30 July 1997, written answers col 370.

12 These are: (1) a person absent from work where the absence is either without good cause or by reason of a recognised, customary or other holiday (persons on maternity leave or absent through illness not coming within this) (see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 52(1)); (2) the partner of a claimant, where that partner is or was involved in a trade dispute and would not have been eligible for an income-based allowance because of that (this provision applying for seven days from the commencement of the stoppage of work or withdrawal of labour) (see reg 52(2)); (3) a person who was engaged in remunerative work

and received a compensation payment or holiday pay (such person being deemed to be still in remunerative work for the period for which those payments are taken into account under the income rules) (see reg 52(3) (amended by SI 1996/1516)).

13 A person is to be treated as not engaged in remunerative work in so far as (1) he is engaged by a charity or voluntary organisation, or is a volunteer and has earnings which are disregarded; (2) he is engaged on a scheme for which a training allowance is being paid; (3) he is in employment and lives in a residential care home, nursing home or residential accommodation, and either he or his partner comes within the residential homes etc provisions relating to applicable amounts or allowances; (4) he is engaged in employment as a part-time member of the fire brigade, an auxiliary coastguard, a part-time lifeboat person or a member of any territorial or reserve forces; (5) he is performing duties as a councillor (within the meaning of the Social Security Contributions and Benefits Act 1992 s 171F(2) (as added) (see PARA 72 note 2 ante); (6) he is engaged in caring for a person who is accommodated with him, and is in receipt of certain payments; (7) he is the partner of the claimant, involved in a trade dispute, not covered by note 12 head (2) supra, and would have been subject to the trade dispute provisions had he claimed an allowance; (8) he is mentally or physically disabled, and by reason of that his earnings or hours of work are 75% or less of what a person without that disability would expect to earn for work in that employment or in comparable employment in that area: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 53 (amended by SI 1996/1516).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI

2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **262 Remunerative work**

TEXT AND NOTES 1-11--As to the interpretation of reg 51(1), see *Stafford v Chief Adjudication Officer* [2000] 1 All ER 686, CA.

TEXT AND NOTES 4, 5--For 'the claimant' substitute 'a claimant': SI 1996/207 reg 51(1)(a) (amended by SI 2000/1978).

NOTE 5--SI 1996/207 reg 5(1)(2) does not mean that the cycle should be reduced from one complete cycle to the relevant cycle less the holiday period: *Banks v Chief Adjudication Officer* [2001] UKHL 33, [2001] 1 WLR 1411.

NOTE 6--In definition of 'partner' in head (1) for 'a married or unmarried couple' read 'a couple': SI 1996/207 reg 1(3) (amended by SI 2005/2877).

In so far as the definition of 'partner' applies to a member of a joint-claim couple (see PARA 260), it only applies to such a member specified in SI 1996/207 reg 3E(2) (see PARA 260B): reg 1(3) (amended by SI 2000/1978).

Definitions of 'married couple' and 'unmarried couple' omitted: Civil Partnership Act 2004 Sch 24 para 124(4), Sch 30. For the meaning of 'couple' see PARA 260.

NOTE 8--SI 1996/207 reg 78 further amended: SI 2000/1978, SI 2005/2687, SI 2006/588, SI 2006/2378, SI 2008/1554.

NOTE 11--SI 1996/207 reg 51(3) further amended: SI 2003/511.

NOTE 12--In head (1) for 'maternity leave' read 'maternity leave, paternity leave, adoption leave': SI 1996/207 reg 52(1) (amended by SI 2002/2689).

Head (3). SI 1996/207 reg 52(3) (amended by SI 2007/2618, SI 2008/698) does not apply to earnings disregarded under SI 1996/207 Sch 6 para 1: reg 52(3A) (added by SI 2007/2618).

SI 1996/207 reg 52(2) applies for the purposes of an income-based jobseeker's allowance but not a joint-claim jobseeker's allowance: reg 52(2) (amended by SI 2000/1978). Also, head (4), 'for the purposes of a joint-claim jobseeker's allowance, a member of a joint-claim couple': SI 1996/207 reg 52(2A) (added by SI 2000/1978).

NOTE 13--Heads (3), (8) omitted: SI 1996/207 reg 53 (amended by SI 2009/3228).

Now head (4) also a part-time fire fighter employed by a fire and rescue authority: SI 1996/207 reg 53 (amended by SI 2004/3168 (England), SI 2005/2929 (Wales)).

Also, heads (9) he is (a) a member of a joint-claim couple; and (b) involved in a trade dispute; and (c) not a person to whom SI 1996/207 reg 52(2A) (see NOTE 12) applies, and had the joint-claim couple of which he is a member claimed a jobseeker's allowance jointly, the Jobseekers Act 1995 s 14 (see PARA 301) would have applied in the case of one or both members of that couple; (10) he is engaged in an activity in respect of which (a) a sports award had been made, or is to be made, to him; and (b) no other payment is made or is expected to be made to him; (11) he is participating in the programme known as the intensive activity period of the New Deal pilots for 25 plus as defined for the purposes of the Social Security (New Deal Pilot) Regulations 1999, SI 1999/3156, in reg 2(1); and (12) he is receiving assistance under the self-employment route in pursuing self-employed earner's employment whilst participating in an employment zone programme: SI 1996/207 reg 53 (amended by SI 1999/2165, SI 1999/3156, SI 2000/1978, SI 2000/2910, SI 2004/963).

SI 1996/207 reg 53 further amended: SI 2006/2378.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(1) IN GENERAL/(iii) Defining the Conditions of Entitlement/263. Capacity for work.

### **263. Capacity for work.**

One of the conditions for eligibility for jobseeker's allowance is that the claimant must not be incapable of work<sup>1</sup>. The question whether a person is capable or incapable of work is to be determined in accordance with the generally applicable rules contained in Part XIIA of the Social Security Contributions and Benefits Act 1992<sup>2</sup>.

Certain short periods of sickness can be overlooked; thus a person who would normally qualify for an allowance<sup>3</sup> and who proves to the satisfaction of the adjudication officer<sup>4</sup> that he is unable to work on account of specific disease or disablement is to be treated as still capable of work for a period of not more than two weeks, except where he states in writing that for the period of the disease or disablement he proposes to claim or has claimed incapacity benefit, severe disablement allowance or income support<sup>5</sup>.

1 See the Jobseekers Act 1995 s 1(2) (f); and PARA 260 ante.

2 See *ibid* s 21, Sch 1 para 2(1). References in the Social Security Contributions and Benefits Act 1992 PXIIA (ss 171A-171G) (as added) (see PARA 65 et seq ante) must be construed, where those provisions have effect for the purposes of the Jobseekers Act 1995 by virtue of Sch 1 para 2(1), as references to the purposes of the 1995 Act; and the Social Security Contributions and Benefits Act 1992 s 171B (as added) (incapacity for work: the own occupation test: see PARA 67 ante) has effect, as so applied, as if for the references in s 171B(3), (4)(a) (as added) to any purpose of the Social Security Contributions and Benefits Act 1992 there were substituted references to any purpose of the Jobseekers Act 1995: Sch 1 para 2(2), (3).

3 For this purpose, the person need not (of necessity) continue to satisfy *ibid* s 1(2)(a), (c) or (f) (available for and actively seeking employment, and capable of work: see PARA 260 ante) and can be under a disqualification under s 19(5) or (6) (see PARAS 304-305 post): see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 55(1) (amended by SI 1996/1517).

4 The evidence required for this purpose is a declaration made by the claimant in writing, in a form approved by the Secretary of State, that he has been unfit for work from a date or for a period specified in the declaration: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 55(2). 'Adjudication officer' means an adjudication officer appointed under the Social Security Administration Act 1992 s 38 (see PARA 359 post): Jobseekers Act 1995 s 35(1). As to the Secretary of State see PARA 1 ante.

5 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 55(1) (as amended: see note 3 supra). This may not apply to a claimant on more than two occasions in any one jobseeking period (see PARA 261 ante) or, where such a period exceeds 12 months, in each successive 12 months within that period; and for the purposes of calculating any period of 12 months, the first 12 months in the jobseeking period commences on the first day of the jobseeking period: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 55(3). It also does not apply to any person where the first day in respect of which he is unable to work falls within eight weeks of (1) an entitlement of his to incapacity benefit (see PARA 59 et seq ante), severe disablement benefit (see PARA 92 et seq ante) or statutory sick pay (see EMPLOYMENT vol 39 (2009) PARA 498 et seq); or (2) an entitlement to income support which included a disability premium: reg 55(4). Regulations may make provision for calculating periods for any purposes of the Jobseekers Act 1995: s 21, Sch 1 para 15.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-

time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made

under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **263 Capacity for work**

TEXT AND NOTES--A person who (1) has been awarded jobseeker's allowance or joint-claim jobseeker's allowance or who is a person to whom any of the circumstances mentioned in the Jobseekers Act 1995 ss 19(5), (6), 20A(2) apply; (2) is temporarily absent from Great Britain in the circumstances prescribed by SI 1996/207 reg 50(6AA) or, as the case may be, reg 50(6C) (see PARA 265); (3) proves to the satisfaction of the Secretary of State that he is unable to work on account of some specific disease or disablement; and (4) but for his disease or disablement, would satisfy the requirements for entitlement to jobseeker's allowance other than those specified in the 1995 Act s 1(2)(a), (c), (f), is to be treated during the period of temporary absence abroad specified in head (2) as capable of work or as not having limited capability for work, except where that person has stated in writing before that period of temporary absence abroad begins that immediately before the beginning of that period he has claimed incapacity benefit, employment and support allowance, severe disablement allowance or income support: SI 1996/207 reg 55A(1) (reg 55A added by SI 2004/1869; and amended by SI 2008/1554). For the purposes of head (3), the evidence required is a declaration made by the person in writing, in a form approved for the purposes by the Secretary of State, that he will be unfit for work from a date or for a period specified in the declaration: SI 1996/207 reg 55A(2).

TEXT AND NOTE 2--1995 Act Sch 1 para 2 substituted: Welfare Reform Act 2007 Sch 3 para 12(6).

NOTE 3--Refers also to a disqualification under the 1995 Act s 20A(2) (see PARA 304A)': SI 1996/207 reg 55(1) (amended by SI 2000/1978).

TEXT AND NOTE 5--Now refers to the person being still capable of work or not having limited capability for work: SI 1996/207 reg 55(1) (amended by SI 2008/1554).

NOTE 5--SI 1996/207 reg 55(1) also does not apply to a claimant who is temporarily absent from Great Britain in the circumstances prescribed by reg 50(6AA) or, as the case may be, reg 50(6C) (see PARA 265): reg 55(5) (added by SI 2004/1869). SI 1996/207 reg 55(4) amended: SI 2008/1554.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(1) IN GENERAL/(iii) Defining the Conditions of Entitlement/264. Relevant education.

## 264. Relevant education.

Regulations<sup>1</sup> may make provision for the purposes of the Jobseekers Act 1995 as to what is or is not to be treated as relevant education and as to the circumstances in which a person is or is not to be treated as receiving relevant education<sup>2</sup>. For the purposes of the conditions of eligibility for jobseeker's allowance<sup>3</sup>, only full-time education which is undertaken by a child or young person<sup>4</sup> and which is not a course of advanced education<sup>5</sup> is to be treated as 'relevant education'<sup>6</sup>. A child or young person who is treated as receiving full-time education for child benefit purposes<sup>7</sup> is treated as receiving full-time education for these purposes too<sup>8</sup>.

1 For the meaning of 'regulations' see PARA 260 note 13 ante.

2 Jobseekers Act 1995 s 21, Sch 1 para 14.

3 See PARA 260 ante.

4 'Young person' means a person aged 16 or over but under 19 who is treated as a child for child benefit purposes and is not on a course of advanced education, entitled to jobseeker's allowance or entitled to income support: Jobseeker's Allowance Regulations 1996, SI 1996/207, regs 1(3), 76.

5 'Course of advanced education' means (1) a course leading to a postgraduate degree or comparable qualification, a first degree or comparable qualification, a diploma of higher education or a higher national diploma; or (2) any other course which is of a standard above advanced GNVQ or equivalent, including a course which is of a standard above a general certificate of education (advanced level): *ibid* reg 1(3).

6 See *ibid* reg 54(1). A young person who (1) is a part-time student; (2) came within certain availability criteria for part-time students previously; and (3) is undertaking a course of study (other than advanced education or a course normally counting as full-time education) is not to be treated as receiving relevant education: see reg 54(3). When such a young person completes or terminates his course of part-time study, he is not to be treated as receiving relevant education: see reg 54(4).

7 *Ie* within the Social Security Benefits and Contributions Act 1992 s 142: see PARA 239 ante.

8 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 54(2).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is

participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of

State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **264 Relevant education**

TEXT AND NOTES--A young person who is participating in the Full-Time Education and Training Option of the New Deal (see PARA 304) is not treated as receiving relevant education: SI 1996/207 reg 54(5) (amended by SI 1997/2863).

NOTE 4--Definition of 'young person' amended: SI 1996/207 reg 76 (amended by SI 2001/3070, SI 2006/718, SI 2008/1554). A person of a prescribed description for the purposes of the definition of 'family' in the Jobseekers Act 1995 s 35(1) (see PARA 265 NOTE 6) includes a child or young person in respect of whom the Social Security Contributions and Benefits Act 1992 s 145A (see PARA 238A) applies for the purposes of entitlement to child benefit but only for the period prescribed under s 145A(1): SI 1996/207 reg 76(3) (added by SI 2002/2402).

NOTE 5--Head (2) after '(advanced level)' insert ', a Scottish national qualification (higher or advanced higher)': SI 1996/207 reg 1(3) (amended by SI 2004/1708).

TEXT AND NOTES 7, 8--SI 1996/207 reg 54(2) substituted: SI 2006/718.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(1) IN GENERAL/(iii) Defining the Conditions of Entitlement/265. Presence in Great Britain.

## **265. Presence in Great Britain.**

A person may be treated as still being in Great Britain during certain periods of temporary absence<sup>1</sup>. Thus, a temporary absence not exceeding 4 weeks is permitted where:

- 717 (1) the claimant is in Northern Ireland and satisfies the conditions of entitlement, immediately before the absence he was entitled to jobseeker's allowance, and the period of absence is unlikely to exceed 52 weeks<sup>2</sup>;
- 718 (2) immediately before the absence the claimant was entitled to an allowance, the period of absence is unlikely to exceed 52 weeks, the claimant continues to satisfy the conditions of entitlement and he is one of a couple (both of whom are absent from Great Britain) and the other member of the couple qualifies for a pension, disability or severe disability premium<sup>3</sup>; or
- 719 (3) the person is in receipt of a training allowance during the absence, the training allowance provision<sup>4</sup> applies to him, and immediately before the absence he was entitled to jobseeker's allowance<sup>5</sup>.

A temporary absence not exceeding eight weeks is permitted where:

- 720 (a) immediately preceding the absence the claimant was entitled to jobseeker's allowance; and
- 721 (b) the period of absence is unlikely to exceed 52 weeks; and
- 722 (c) the claimant continues to satisfy the other conditions of entitlement; and
- 723 (d) the claimant (and any other members of the family<sup>6</sup>) is accompanying a member of his family who is a child or young person solely in connection with arrangements made for the treatment of that child or young person for a disease or bodily or mental impairment; and
- 724 (e) those arrangements relate to treatment outside Great Britain, during the period of absence, and by or under the supervision of a person appropriately qualified<sup>7</sup> to carry out that treatment<sup>8</sup>.

A person is also to be treated as still in Great Britain during a period of temporary absence where:

- 725 (i) the absence is for the purpose of attending an interview for employment; and
- 726 (ii) the absence is for seven consecutive days or less; and
- 727 (iii) notice of the proposed absence is given to the employment officer<sup>9</sup> before departure (in writing if so required); and
- 728 (iv) on his return to Great Britain the person satisfies the employment officer that he attended for the interview in accordance with his notice<sup>10</sup>.

1 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 50(1). As to the power to make regulations regarding presence in and absence from Great Britain for these purposes see the Jobseekers Act 1995 s 21, Sch 1 para 11; and PARA 21 ante.

2 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 50(1)(a), (2).

3 See *ibid* reg 50(1)(a), (3). 'Couple' means a married or unmarried couple: reg 1(3). For the meaning of 'married couple' and 'unmarried couple' see PARA 262 note 6 *ante*.

4 *Ibid* reg 170: see PARA 326 *post*.

5 See *ibid* reg 50(1)(a), (4).

6 'Family' means (1) a married or unmarried couple; (2) a married or unmarried couple and a member of the same household for whom one of them is, or both are, responsible and who is a child or a person of a prescribed description; (3) except in prescribed circumstances, a person who is not a member of a married or unmarried couple and a member of the same household for whom that person is responsible and who is a child or a person of a prescribed description: see the Jobseekers Act 1995 s 35(1). Regulations may make provision for the purposes of the Jobseekers Act 1995 as to the circumstances in which (a) persons are to be treated as being or not being members of the same household; (b) one person is to be treated as responsible or not responsible for another: Sch 1 paras 12, 13. As to membership of a family for these purposes see the Jobseeker's Allowance Regulations 1996, SI 1996/207, regs 76-78 (as amended).

7 'Appropriately qualified' means qualified to provide medical treatment, physiotherapy, or a form of treatment which is similar to, or related to, either of those forms of treatment: *ibid* reg 50(7).

8 See *ibid* reg 50(1)(b), (5).

9 'Employment officer' means such an officer for the purposes of the Jobseekers Act 1995 ss 9 or 10 (jobseeker's agreement: see PARAS 295-299 *post*): Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 50(7).

10 *Ibid* reg 50(6).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such

payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining

work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **265 Presence in Great Britain**

TEXT AND NOTES--A claimant will be treated, for the purposes of the Jobseekers Act 1995, as being in Great Britain during any period of temporary absence from Great Britain if he was entitled to jobseeker's allowance immediately before the beginning of such a period and if the period of temporary absence is for the purpose of the claimant receiving treatment at a hospital or other institution outside Great Britain where that treatment is being provided (1) under the National Health Service Act 1977 s 3; (2) pursuant to arrangements made under s 23; or (3) pursuant to arrangements made under the National Health Service and Community Care Act 1990 Sch 2 para 13: SI 1996/207 reg 50(6AA) (added by SI 2004/1869). A member of a joint-claim couple will be treated, for the purposes of the Jobseekers Act 1995, as being in Great Britain where he is a member of a transitional case couple as defined for the purposes of Sch 1 para 8A(2) (see PARA 271) and, as at 19 March 2001, (a) he is temporarily absent from Great Britain; or (b) he has made definite arrangements to be temporarily absent from Great Britain from some future date, and that member will be so treated during any such period of temporary absence from Great Britain: SI 1996/207 reg 50(6A) (added by SI 2000/1978). A member of a joint-claim couple will be treated, for the purposes of the Jobseekers Act 1995, as being in Great Britain during any period of temporary absence from Great Britain (i) not exceeding four weeks where he is in Northern Ireland and the period of absence is unlikely to exceed 52 weeks; (ii) not exceeding four weeks where he is in receipt of a training allowance during the period of absence and SI 1996/207 reg 170 (see PARA 326) applies in his case; or (iii) not exceeding seven days where the absence is for the purpose of attending an interview for employment, where that member is so temporarily absent as at the date of claim by the other member of that couple: reg 50(6B) (added by SI 2000/1978). The first member of a joint-claim couple will be treated, for the purposes of the Jobseekers Act 1995, as being in Great Britain during any period of temporary absence if he and the other member of that couple were entitled to a joint-claim jobseeker's allowance immediately before the beginning of such a period and if the period of temporary absence is for the purpose of the first member receiving treatment at a hospital or other institution outside Great Britain where that treatment is being provided (A) under the National Health Service Act 1977 s 3; (B) pursuant to arrangements made under s 23; or (C) pursuant to arrangements made under the National Health Service and Community Care Act 1990 Sch 2 para 13: SI 1996/207 reg 50(6C) (added by SI 2004/1869). For the meaning of 'joint-claim couple' see PARA 260.

NOTE 6--Definition of 'family' amended: Civil Partnership Act 2004 Sch 24 para 124(3). SI 1996/207 regs 76, 77 amended: SI 2002/2402.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(2) CONTRIBUTION-BASED JOBSEEKER'S ALLOWANCE/266. The contribution-based conditions.

## **(2) CONTRIBUTION-BASED JOBSEEKER'S ALLOWANCE**

### **266. The contribution-based conditions.**

In order to qualify for a contribution-based jobseeker's allowance<sup>1</sup>, the claimant<sup>2</sup> must satisfy the general conditions of entitlement<sup>3</sup> and also the specific conditions that he:

- 729 (1) has actually paid Class 1 contributions<sup>4</sup> in respect of one ('the base year') of the last two complete years before the beginning of the relevant benefit year<sup>5</sup>, and satisfies certain additional conditions<sup>6</sup>;
- 730 (2) has, in respect of the last two complete years before the beginning of the relevant benefit year, either paid Class 1 contributions or been credited with earnings and satisfies an additional condition relating to certain earnings factor requirements<sup>7</sup>;
- 731 (3) does not have earnings in excess of the prescribed amount<sup>8</sup>; and
- 732 (4) is not entitled<sup>9</sup> to income support<sup>10</sup>.

1 'A contribution-based jobseeker's allowance' means a jobseeker's allowance entitlement to which is based on the claimant's satisfying conditions which include those set out in the Jobseekers Act 1995 s 2 (see heads (1)-(4) in the text): ss 1(4), 35(1).

2 For the meaning of 'claimant' see PARA 260 note 1 ante.

3 See PARA 260 ante.

4 As to Class 1 contributions see PARA 34 et seq ante.

5 For these purposes, 'the relevant benefit year' is the benefit year which includes (1) the beginning of the jobseeking period which includes the week for which a jobseeker's allowance is claimed; or (2) (if earlier), the beginning of any linked period: Jobseekers Act 1995 s 2(4)(b). A period is a linked period for this purpose only where it ends within 12 weeks or less of the commencement of a jobseeking period or of some other linked period: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 48(2A) (added by SI 1996/2538); and PARA 261 ante. For the meaning of 'jobseeking period' and 'linked period' generally see PARA 261 ante. 'Benefit year' means a period which is a benefit year for the purposes of the Social Security Contributions and Benefits Act 1992 Pt II (ss 20-62) (as amended) (see PARA 55 note 7 ante) or such other period as may be prescribed for these purposes: Jobseekers Act 1995 s 2(4)(a). 'Year', except in the expression benefit year, means a tax year (ie the 12 months beginning with 6 April in any year): s 35(1). For the meaning of 'prescribed' see PARA 21 note 12 ante.

6 Jobseekers Act 1995 s 2(1)(a). The additional conditions are that (1) the contributions have been paid before the week for which the jobseeker's allowance is claimed; and (2) the earnings factor derived from earnings upon which primary Class 1 contributions have been paid or treated as paid is not less than the base year's lower earnings limit multiplied by 25: s 2(2). As to primary Class 1 contributions see PARA 36 ante; for the meaning of 'earnings factor' see PARA 56 ante; for the meaning of 'earnings' see PARA 33 ante; and for the meaning of 'lower earnings limit' see PARA 34 ante (definitions applied by s 2(4)(c)).

7 See *ibid* s 2(1)(b). The additional condition is that the earnings factor derived from earnings upon which primary Class 1 contributions have been paid or treated as paid or from earnings credited is not less, in each of the two complete years, than the lower earnings limit for the year multiplied by 50: s 2(3).

8 *Ibid* s 2(1)(c). As to calculation of the prescribed amount see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 56(1). Only the claimant's earnings are to be taken into account in the calculation: see reg 56(2).

9 For the meaning of 'entitled' see PARA 21 note 9 ante.

10 Jobseekers Act 1995 reg 2(1)(d). As to entitlement to income support see PARA 176 et seq ante.

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements

for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **266 The contribution-based conditions**

NOTE 6--In head (2) for 'from earnings' read 'from so much of the claimant's earnings as did not exceed the upper earnings limit and': Jobseekers Act 1995 s 2(2) (amended by the National Insurance Contributions Act 2002 Sch 1 para 45, with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2)). Where primary Class 1 contributions have been paid or treated as paid on any part of a person's earnings, the 1995 Act s 2(1)(b) (see head (2)), (3) (see NOTE 7) has effect as if such contributions had been paid or treated as paid on so much of the earnings as did not exceed the upper earnings limit: s 2(3A) (added by the Social Security Act 1998 Sch 7 para 133).

NOTE 7--See the 1995 Act s 2(3A); and NOTE 6.

NOTE 10--Ibid s 2(1) amended: Welfare Reform and Pensions Act 1999 Sch 7 para 3.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(2) CONTRIBUTION-BASED JOBSEEKER'S ALLOWANCE/267. Duration of contribution-based jobseeker's allowance.

## **267. Duration of contribution-based jobseeker's allowance.**

The period for which a person is entitled<sup>1</sup> to a contribution-based jobseeker's allowance<sup>2</sup> may not exceed, in the aggregate, 182 days in any period for which his entitlement is established by reference<sup>3</sup> to the same two years<sup>4</sup>.

The fact that a person's entitlement to such an allowance ('his previous entitlement') has ceased through exhaustion of this maximum entitlement does not prevent his being entitled to a further such allowance if (1) he satisfies the contribution-based conditions<sup>5</sup>; and (2) the two years by reference to which he satisfies those conditions include at least one year which is later than the second of the two years by reference to which his previous entitlement was established<sup>6</sup>.

Regulations<sup>7</sup> may provide that a person who would be entitled to a contribution-based jobseeker's allowance but for the operation of prescribed provisions<sup>8</sup> is to be treated as if entitled to the allowance for these purposes<sup>9</sup>.

1 For the meaning of 'entitled' see PARA 21 note 9 ante.

2 For the meaning of 'contribution-based jobseeker's allowance' see PARA 266 note 1 ante.

3 I.e. under the Jobseekers Act 1995 s 2(1)(b): see PARA 266 ante.

4 Ibid s 5(1). In determining this maximum duration, any day (1) which falls within a jobseeking period (see PARA 261 ante); and either (2) on which the claimant satisfies the conditions of entitlement (other than those in s 2(1)(c), (d)) (see PARA 266 ante) and on which a contribution-based jobseeker's allowance is not payable to the claimant by virtue of s 19 (disqualification: see PARAS 304-306 post); or (3) which falls within a period which is treated as a period in which the claimant satisfies the conditions specified in s 1(2)(a)-(c) (see PARA 260 ante), in accordance with the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 47(2) (see PARA 261 note 4 ante), is to be treated as if it were a day in respect of which the claimant was entitled to a contribution-based allowance: reg 47(4) (amended by SI 1996/1517). The principal importance of this is that if a claimant suffers a disqualification for a certain number of weeks, his eventual entitlement is shortened by that number of weeks.

5 'Contribution-based conditions' means the conditions set out in the Jobseekers Act 1995 s 2 (see PARA 266 ante): s 35(1).

6 Ibid s 5(2).

7 For the meaning of 'regulations' see PARA 260 note 13 ante.

8 I.e. provisions of, or made under, the Jobseekers Act 1995: s 5(3). For the meaning of 'prescribed' see PARA 21 note 12 ante.

9 Ibid s 5(3). As to the exercise of this power see note 4 supra.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-

time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made

under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **267 Duration of contribution-based jobseeker's allowance**

NOTE 4--Head (2) refers also to a contribution-based jobseeker's allowance on which the claimant is a member of a joint-claim couple and a joint-claim jobseeker's allowance is not payable or is reduced because he is subject to sanctions by virtue of the Jobseekers Act 1995 s 20A (see PARA 304A) or by virtue of a restriction imposed pursuant to the Child Support, Pensions and Social Security Act 2000 s 62 or 63 (see PARA 176A): SI 1996/207 reg 47(4) (amended by SI 2001/518, SI 2001/1711). For the meaning of 'joint-claim couple' see PARA 260.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(2) CONTRIBUTION-BASED JOBSEEKER'S ALLOWANCE/268. The amount of a contribution-based jobseeker's allowance.

## **268. The amount of a contribution-based jobseeker's allowance.**

In the case of a contribution-based jobseeker's allowance<sup>1</sup>, the amount payable (referred to as the claimant's<sup>2</sup> 'personal rate') is calculated by:

- 733 (1) determining the age-related amount applicable to him<sup>3</sup>; and
- 734 (2) making prescribed deductions<sup>4</sup> in respect of earnings<sup>5</sup> and pension payments<sup>6</sup>.

1 For the meaning of 'contribution-based jobseeker's allowance' see PARA 266 note 1 ante.

2 For the meaning of 'claimant' see PARA 260 note 1 ante.

3 The age-related amount applicable to a claimant for these purposes must be determined in accordance with regulations: Jobseekers Act 1995 s 4(2). The age-related amounts are a (flat rate) lower amount in the case of a person under 18, a middle amount in the case of a person who has attained the age of 18 but not the age of 25, and a higher rate in the case of a person of 25 or over: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 79 (subject to frequent amendment).

4 As to the prescribed deductions see PARA 269 post. For the meaning of 'prescribed' see PARA 21 note 12 ante.

5 If the earnings exceed a prescribed amount, there is no entitlement to the allowance: see the Jobseekers Act 1995 s 2(1)(c); and PARA 266 ante. Subject to any regulations made for these purposes, in the Jobseekers Act 1995 generally, 'earnings' is to be construed in accordance with the Social Security Contributions and Benefits Act 1992 s 3 (see PARA 33 ante) and the Jobseekers Act 1995 s 21, Sch 1 para 6 (as amended): s 35(3). In relation to any contribution-based jobseeker's allowance, regulations may make provision (1) for any employment protection sum to be treated as earnings payable by such person, to such person and for such period as may be determined in accordance with the regulations; and (2) for any such period, so far as it is not a period of employment, to be treated as a period of employment; and 'employment protection sum' means (a) any sum, or a prescribed part of any sum, (i) payable, in respect of arrears of pay, under an order for reinstatement or re-engagement made under the Employment Rights Act 1996; (ii) payable, by way of pay, under an order made under that Act for the continuation of a contract of employment; (iii) payable, by way of remuneration, under a protective award made under the Trade Union and Labour Relations (Consolidation) Act 1992 s 189 (as amended) (see EMPLOYMENT vol 41 (2009) PARA 1155); and (b) any prescribed sum which the regulations provide is to be treated as related to any sum within head (a) supra: Jobseekers Act 1995 Sch 1 para 6(1), (2) (amended by the Employment Rights Act 1996 s 240, Sch 1 para 67(1), (3)).

6 Jobseekers Act 1995 s 4(1). Regulations may make provision, for the purposes of any provision of, or made under, the Jobseekers Act 1995, (1) for such sums by way of pension payments to be disregarded for prescribed purposes; (2) as to the week in which any pension payments are to be treated as having begun; (3) for treating, in a case where (a) a lump sum is paid to a person in connection with a former employment of his or arrangements are made for a lump sum to be so paid; or (b) benefits of any description are made available to a person in connection with a former employment of his or arrangements are made for them to be made so available; or (c) pension payments to a person are assigned, reduced or postponed or are made otherwise than weekly, such payments as being made to that person by way of weekly pension payments as are specified in or determined under the regulations; (4) for the method of determining whether pension payments are made to a person for any week and their amount: Sch 1 para 7. 'Pension payments' means (i) periodical payments made in relation to a person under a personal pension scheme or, in connection with the coming to an end of an employment of his, under an occupational pension scheme or public service pension scheme; and (ii) such other payments as may be prescribed: s 35(1). 'Personal pension scheme' means (A) a personal pension scheme as defined by the Pension Schemes Act 1993 s 1 (see PARA 710 post); (B) a contract or trust scheme approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch III (ss 618-629) (as amended) (see PARA 677 et seq post); and (C) a personal pension scheme approved under Pt XIV Ch IV (ss 630-655) (as amended) (see PARA 747 et seq post); and 'occupational pension scheme' and 'public service pension scheme' have the same meanings as they have in the Pension Schemes Act 1993 by virtue of s 1 (see PARAS 741, 874 post): Jobseekers Act 1995 s 35(1).

**UPDATE****258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any

payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **268 The amount of a contribution-based jobseeker's allowance**

TEXT AND NOTES 4-6--Prescribed deductions must also be made in respect of PPF payments and FAS payments: 1995 Act s 4(1) (amended by SI 2006/343). 'FAS payments' means payments made under the Financial Assistance Regulations 2005, SI 2005/1986 (see PARA 850A.1); and 'PPF payments' means payments made in relation to a person, payable under the pension compensation provisions specified in the Pensions Act 2004 s 162(2), or payable under s 166: 1995 Act s 35 (definitions added by SI 2006/343).

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JOBSEEKER'S ALLOWANCE/(2) CONTRIBUTION-BASED JOBSEEKER'S ALLOWANCE/269.  
Deductions for earnings and pension payments.

## 269. Deductions for earnings and pension payments.

The deduction to be made<sup>1</sup> in respect of earnings<sup>2</sup> is the amount equal to the weekly amount of the claimant's<sup>3</sup> earnings<sup>4</sup>.

The deduction to be made in respect of pension payments<sup>5</sup> in any benefit week<sup>6</sup> is a sum equal to the amount by which any such payment exceeds (or the aggregate of such payments exceed) a prescribed weekly amount<sup>7</sup>.

1    le under the Jobseekers Act 1995 s 4(1)(b): see PARA 268 ante.

2    For the meaning of 'earnings' see PARA 268 note 5 ante.

3    For the meaning of 'claimant' see PARA 260 note 1 ante.

4    See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 80(1) (amended by SI 1997/454). For these purposes, only the claimant's earnings are to be taken into account: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 80(2). The claimant's earnings are to be calculated under Pt VIII (regs 88-139) (as amended) (rules as to income and capital) (ie the same rules as to income that apply for the purposes of the income-based jobseeker's allowance: see PARA 273 post): reg 80(1) (as so amended).

5    For the meaning of 'pension payments' see PARA 268 note 6 ante.

6    Where pension payments first begin to be made to a person for a period starting other than on the first day of a benefit week, the deduction has effect from the beginning of that benefit week; and where pension payments are already in payment to a person and a change in the rate of payment takes effect in a week other than at the beginning of the benefit week, the deduction has effect from the first day of that benefit week: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 81(2A), (2B) (added by SI 1996/1517). If payments are made other than weekly, formulae are prescribed for converting them to weekly equivalents: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 81(3). 'Benefit week' means a period of seven days ending on the day which corresponds with the day of the week specified in a notice given or sent to the claimant in accordance with reg 23 (attendance) (see PARA 291 post) requiring him to provide a signed declaration as referred to in reg 24(6) or, in the case of a claimant who is not normally required to attend in person, on the day which corresponds with the day of the week specified by the Secretary of State in accordance with reg 24(10) for the provision of a signed declaration, except (1) where (a) the Secretary of State requires attendance otherwise than at regular two weekly intervals, or in the case of a claimant who is paid benefit in accordance with the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, Pt III (regs 20-32) (as amended), other than reg 20A (as added), at the time he provides a signed declaration as referred to in the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 24(6), the 'benefit week' ends on such day as the Secretary of State may specify in a notice in writing given or sent to the claimant; (b) in accordance with an award of income support that includes the relevant day, the 'benefit week' ends on a Saturday, the benefit week for these purposes also ends on a Saturday, or on such other day as the Secretary of State may specify in a notice in writing given or sent to the claimant; or (c) in accordance with an award of unemployment benefit that includes the relevant day, the claimant is paid benefit in respect of a period of seven days ending on the week-day specified in a written notice given to him by the Secretary of State for the purpose of his claiming unemployment benefit, and that day is a Saturday, the 'benefit week' ends on a Saturday or on such other day as the Secretary of State may specify in a notice in writing given or sent to the claimant; (2) where the Secretary of State has set a day for payment of a jobseeker's allowance in respect of a claim, but no notice has yet been given or sent to the claimant in accordance with reg 23, the 'benefit week' means a period of seven days ending on the day which has been set; (3) for the purpose of calculating any payment of income in accordance with Pt VIII (as amended), 'benefit week' also means the period of seven days ending on the day before the first day of the benefit week following the date of claim or, as the case may be, the last day on which a jobseeker's allowance is paid if it is in payment for less than a week; and in this definition 'relevant day' has the meaning it has in the Jobseeker's Allowance (Transitional Provisions) Regulations 1995, SI 1995/3276 (revoked): Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 1(2) (definition amended by SI 1996/1517; SI 1996/2538).

7 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 81(1) (amended by SI 1996/1517). At the date at which this volume states the law, the prescribed amount was £50. In determining the amount of any pension payments, any pension payment payable to him which arose in accordance with the terms of a personal pension scheme on the death of a person who was a member of that scheme is to be disregarded: see Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 81(2) (as so amended). For the meaning of 'personal pension scheme' see PARA 268 note 6 ante.

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or

falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **269 Deductions for earnings and pension payments**

TEXT AND NOTES--Provision is made for the making of prescribed deductions in respect of PPF payments and FAS payments: see PARA 268 TEXT AND NOTES 4-6.

TEXT AND NOTES 5-7--SI 1996/207 reg 81 further amended: SI 2006/1069.

NOTE 6--Definition of 'benefit week' substituted: SI 2009/604.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10.  
 JOBSEEKER'S ALLOWANCE/(2) CONTRIBUTION-BASED JOBSEEKER'S ALLOWANCE/270.  
 Concurrent entitlement to income-based jobseeker's allowance.

## **270. Concurrent entitlement to income-based jobseeker's allowance.**

A particular claimant<sup>1</sup> may satisfy the qualifications for both the flat rate contribution-based allowance<sup>2</sup> and the means-tested income-based allowance<sup>3</sup>, especially where that claimant has dependent children and housing costs<sup>4</sup>. In such a case, both may be payable, and the following rules are laid down:

- 735 (1) where a claimant satisfies both the contribution-based conditions<sup>5</sup> and the income-based conditions<sup>6</sup> but has no income, the amount payable is the applicable amount<sup>7</sup>, if that is greater than his personal rate<sup>8</sup>, and his personal rate, if it is not<sup>9</sup>; and where the amount payable to such a claimant is the applicable amount, the amount payable to him by way of a jobseeker's allowance must be taken to consist of two elements, one being an amount equal to his personal rate<sup>10</sup> and the other being an amount equal to the excess of the applicable amount over his personal rate<sup>11</sup>;
- 736 (2) where a claimant satisfies both the contribution-based conditions and the income-based conditions and has an income, the amount payable is the amount by which the applicable amount exceeds his income, if the amount of that excess is greater than his personal rate, and his personal rate, if it is not<sup>12</sup>; and where the amount payable to such a claimant is the amount by which the applicable amount exceeds his income, the amount payable to him by way of a jobseeker's allowance must be taken to consist of two elements, one being an amount equal to his personal rate<sup>13</sup> and the other being an amount equal to the amount by which the difference between the applicable amount and his income exceeds his personal rate<sup>14</sup>.

1 For the meaning of 'claimant' see PARA 260 note 1 ante.

2 For the meaning of 'contribution-based jobseeker's allowance' see PARA 266 note 1 ante.

3 As to income-based jobseeker's allowance see PARA 271 et seq post.

4 See PARA 259 ante.

5 As to the contribution-based conditions see PARA 266 ante.

6 As to the income-based conditions see PARA 271 post.

7 'Applicable amount' means the applicable amount determined in accordance with regulations under the Jobseekers Act 1995 s 4: s 35(1).

8 For the meaning of 'personal rate' see PARA 268 ante.

9 Jobseekers Act 1995 s 4(6).

10 This element is to be treated, for the purpose of identifying the source of the allowance, as attributable to the claimant's entitlement to a contribution-based jobseeker's allowance: *ibid* s 4(10).

11 *Ibid* s 4(7). This latter element is to be treated, for the purpose of identifying the source of the allowance, as attributable to the claimant's entitlement to an income-based jobseeker's allowance: *ibid* s 4(11).

12 *Ibid* s 4(8).

13 This element is to be treated, for the purpose of identifying the source of the allowance, as attributable to the claimant's entitlement to a contribution-based jobseeker's allowance: *ibid* s 4(10).

14 *ibid* s 4(9). This latter element is to be treated, for the purpose of identifying the source of the allowance, as attributable to the claimant's entitlement to an income-based jobseeker's allowance: *ibid* s 4(11).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity

Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **270 Concurrent entitlement to income-based jobseeker's allowance**

NOTE 1--In the Jobseekers Act 1995 s 4(6)-(11), 'claimant' does not include (1) a joint-claim couple; or (2) a member of such a couple (other than a person to whom regulations under s 1(2C) apply (see PARA 260)); but s 4A (see PARA 272A), which contains corresponding provisions relating to joint-claim couples, applies instead: s 4(11A) (added by the Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 5(1), (4)).

TEXT AND NOTES 5-9, 12--For 'satisfies ... income-based conditions' read 'is entitled to both a contribution-based jobseeker's allowance and an income-based jobseeker's allowance'; and after 'amount payable' insert 'by way of jobseeker's allowance': 1995 Act s 4(6), (8) (both amended by the 1999 Act Sch 8 para 29(1), (2)).



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(3) INCOME-BASED JOBSEEKER'S ALLOWANCE/271. The income-based conditions.

### (3) INCOME-BASED JOBSEEKER'S ALLOWANCE

#### 271. The income-based conditions.

In order to qualify for an income-based jobseeker's allowance<sup>1</sup>, the claimant must satisfy the general conditions of entitlement<sup>2</sup> and also the specific conditions that he:

- 737 (1) has an income that does not exceed the applicable amount<sup>3</sup> or has no income<sup>4</sup>;
- 738 (2) is not entitled to income support<sup>5</sup>;
- 739 (3) is not a member of a family<sup>6</sup> one of whose members is entitled to income support<sup>7</sup>;
- 740 (4) is not a member of a family one of whose members is entitled to an income-based jobseeker's allowance<sup>8</sup>;
- 741 (5) is not a member of a married or unmarried couple<sup>9</sup> the other member of which is engaged in remunerative work<sup>10</sup>; and
- 742 (6) is a person who has reached the age of 18, or in respect of whom a severe hardship direction is in force<sup>11</sup> or who has, in prescribed circumstances<sup>12</sup> to be taken into account for a prescribed period<sup>13</sup>, reached the age of 16 but not the age of 18<sup>14</sup>.

Regulations may prescribe circumstances in which a person may be entitled to an income-based jobseeker's allowance without being available for employment<sup>15</sup>, having entered into a jobseeker's agreement<sup>16</sup> or actively seeking employment<sup>17</sup> and may provide for an income-based jobseeker's allowance to which a person is entitled by virtue of such regulations to be payable at a prescribed rate and for a prescribed period<sup>18</sup>.

In such circumstances as may be prescribed, a claimant<sup>19</sup> may be treated as being entitled to an income-based jobseeker's allowance before his claim for a jobseeker's allowance has been determined<sup>20</sup> and an income-based jobseeker's allowance must be payable to a claimant even though payment to him of a jobseeker's allowance has been suspended<sup>21</sup>; but an allowance is to be so payable only if the claimant has complied with such requirements as to the provision of information as may be prescribed for these purposes<sup>22</sup>.

1 'An income-based jobseeker's allowance' means a jobseeker's allowance entitlement to which is based on the claimant's satisfying conditions which include those set out in the Jobseekers Act 1995 s 3 (see heads (1)-(6) in the text): ss 1(4), 35(1). For the meaning of 'claimant' see PARA 260 note 1 ante.

2 See PARA 260 ante.

3 For the meaning of 'the applicable amount' see PARA 270 note 7 ante; and as to that amount see PARA 272 post.

4 Jobseekers Act 1995 s 3(1)(a).

5 Ibid s 3(1)(b). As to entitlement to income support see PARA 176 et seq ante.

6 For the meaning of 'family' see PARA 265 note 6 ante.

7 Jobseekers Act 1995 s 3(1)(c).

8 Ibid s 3(1)(d).

9 For the meaning of 'married couple' and 'unmarried couple' see PARA 262 note 6 ante.

10 Jobseekers Act 1995 s 3(1)(e). As to remunerative work see PARA 262 ante.

11 Ie a direction under ibid s 16: see PARA 318 post.

12 The young persons prescribed for these purposes are (1) those living away from home in the child benefit extension period, for the duration of that period (see the Jobseeker's Allowance Regulations 1996, SI 1996/207, regs 58, 59); (2) those who have ceased to live in local authority accommodation or have been discharged from custody, for a period of eight weeks (see regs 58, 60); (3) those in a miscellaneous series of categories, for the appropriate prescribed periods (see regs 58, 61). As to the treatment of young persons see further PARA 323 post.

13 For these purposes 'period' includes a period of a determinate length, a period defined by reference to the happening of a future event, and a period of a determinate length but subject to earlier determination upon the happening of a future event: Jobseekers Act 1995 s 3(3).

14 Ibid s 3(1)(f). Regulations may provide for one or both of the following conditions to be included in the income-based conditions, in the case of a person to whom head (6) in the text applies in respect of whom a severe hardship direction is in force or who has not reached the age of 18, ie (1) a condition that the claimant must register for employment; (2) a condition that the claimant must register for training: s 3(2). 'Training' has the meaning prescribed for the purposes of the Jobseekers Act 1995 and, in relation to prescribed provisions, if regulations so provide, includes assistance to find training or employment, or to improve a person's prospects of being employed, of such a kind as may be prescribed: s 35(1). Thus such a young person must register with the Careers Service (or, in certain circumstances, with the Employment Service) for both employment and training: see the Jobseeker's Allowance Regulations 1996 SI 1996/207, reg 62. For the meaning of 'regulations' see PARA 260 note 13 ante.

15 See PARA 276 et seq post.

16 See PARA 295 et seq post.

17 See PARA 285 et seq post.

18 Jobseekers Act 1995 s 21, Sch 1 paras 8, 9.

19 For the meaning of 'claimant' see PARA 260 note 1 ante.

20 Jobseekers Act 1995 Sch 1 para 10(1).

21 See ibid Sch 1 para 10(2).

22 Ibid Sch 1 para 10(3). Regulations may make provision (1) for a jobseeker's allowance payable by virtue of Sch 1 para 10(1) or (2) to be (a) payable at a prescribed rate; (b) payable for a prescribed period; (c) treated as being a contribution-based jobseeker's allowance for the purposes of s 5 (see PARA 267 ante); (2) for the recovery, by prescribed means and in prescribed circumstances, of the whole or part of any amount paid by virtue of Sch 1 para 10(1) or (2); (3) for the whole or part of any amount paid by virtue of Sch 1 para 10(1) to be treated, if an award is made on the claim referred to there, as having been paid on account of the jobseeker's allowance awarded; (4) for the whole or part of any amount paid by virtue of Sch 1 para 10(2) to be treated, if the suspension referred to there is lifted, as having been paid on account of the suspended allowance: Sch 1 para 10(4), (5).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made

to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that

name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **271-274 Income-based Jobseeker's Allowance**

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to an income-based jobseeker's allowance to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

The child-related elements of income-based jobseeker's allowance are abolished and replaced: see the Tax Credits Act 2002 s 1; and PARA 227A.1.

## **271 The income-based conditions**

TEXT AND NOTES 1-14--Also, head (7) is not a member of a couple the other member of which is entitled to state pension credit: Jobseekers Act 1995 s 3(1)(dd) (added by State Pension Credit Act 2002 Sch 2 para 37; and amended by Civil Partnership Act 2004 Sch 24 para 119).

NOTE 1--'An income-based jobseeker's allowance' also means a joint-claim jobseeker's allowance: Jobseekers Act 1995 s 1(4) (amended by Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 2(1), (4)(a)). For the meaning of 'a joint-claim jobseeker's allowance' see PARA 260A.

TEXT AND NOTE 5--Now, head (2) is not entitled to income support or state pension credit: Jobseekers Act 1995 s 3(1)(b) (amended by State Pension Credit Act 2002 Sch 2 para 36).

TEXT AND NOTE 10--Jobseekers Act 1995 s 3(1)(e) amended: Civil Partnership Act 2004 Sch 24 para 119.

NOTE 12--SI 1996/207 reg 58 substituted: SI 2000/1978. SI 1996/207 reg 60 amended: SI 2009/2655. SI 1996/207 reg 61 amended: SI 2000/1978, SI 2001/652, SI 2008/1554.

NOTE 14--Jobseekers Act 1995 s 3(1) amended: Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 4(1). The requirement to register is now generally extended to young persons in joint-claim couples: see SI 1996/207 reg 62 (amended by SI 2000/1978). For the meaning of 'joint-claim couple' see PARA 260.

TEXT AND NOTES 15-18--Regulations may prescribe circumstances in which a joint-claim couple (see PARA 260) may be entitled to a joint-claim jobseeker's allowance without each member of the couple satisfying all the conditions referred to in the Jobseekers Act 1995 s 1(2B)(b) (see PARA 260): Sch 1 para 8A(1) (Sch 1 para 8A added by Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 16(1), (2)). Regulations may prescribe circumstances in which, and a period for which, a transitional case couple may be entitled to a joint-claim jobseeker's allowance without having jointly made a claim for it: Jobseekers Act 1995 Sch 1 para 8A(2). 'A transitional case couple' means a joint-claim couple a member of which is entitled to an income-based jobseeker's allowance on the coming into force of the Welfare Reform and Pensions Act 1999 Sch 7; and 'period' is to be construed in accordance with the Jobseekers Act 1995 s 3(3): Sch 1 para 8A(3). Jobseekers Act 1995 Sch 1 para 9 amended: Welfare Reform and Pensions Act 1999 Sch 7 para 16(3).

Regulations may make provision about the entitlement to a jobseeker's allowance of persons ('ex-members') who cease to be members of a joint-claim couple: Jobseekers Act 1995 Sch 1 para 9A(1) (Sch 1 paras 9A-9D added by Welfare Reform and Pensions Act 1999 Sch 7 para 16(4)). Regulations under the Jobseekers Act 1995 Sch 1 para 9A may, in particular, provide (1) for treating each or either of the ex-members as having made any claim made by the couple or, alternatively, for any such claim to lapse; (2) for any award made in respect of the couple to be replaced by an award (a 'replacement award') in respect of each or either of the ex-members of the couple or, alternatively, for any such award to lapse: Sch 1 para 9A(2). Regulations may make provision about the entitlement to a jobseeker's allowance of persons ('ex-members') who, having ceased to be members of a joint-claim couple, again become the members of a joint-claim couple: Sch 1 para 9B(1)). Regulations under Sch 1 para 9B may, in particular, provide (a) for any claim made by the ex-members when they were previously a joint-claim couple to be revived or otherwise given effect as a claim made by the couple; (b) for any award made in respect of the ex-members when they were previously a joint-claim couple to be restored; (c) for any such award, or any replacement award (within the meaning of Sch 1 para 9A) made in respect of either of them, to be replaced by an award (a 'new award') in respect of the couple: Sch 1 para 9B(2). Regulations may make provision about the entitlement to a jobseeker's allowance of persons who become members of a joint-claim couple as a result of the couple of which they are members becoming a joint-claim couple: Sch 1 para 9C(1) (amended by Civil Partnership Act 2004 Sch 24 para 125). Regulations under the Jobseekers Act 1995 Sch 1 para 9C may, in particular, provide (i) for any claim made by either member of the couple before the couple became a joint-claim couple to be given effect as a claim made by the couple; (ii) for any award, or any replacement award (within the meaning of Sch 1 para 9A), made in respect of either member of the couple before the couple became a joint-claim couple to be replaced by an award (a 'new award') in respect of the couple: Sch 1 para 9C(2). Regulations may provide, in relation to any replacement award (within the meaning of Sch 1 para 9A) or new award (within the meaning of Sch 1 para 9B or 9C) (A) for the award to be of an amount determined in a prescribed manner; (B) for entitlement to the award to be subject to compliance with prescribed requirements as to the provision of information and evidence: Sch 1 para 9D(1). In Sch 1 paras 9A-9D 'award' means an award of a jobseeker's allowance; and 'claim' means a claim for a jobseeker's allowance: Sch 1 para 9D(2).

TEXT AND NOTES 19, 20--In such circumstances as may be prescribed (1) a claimant for a jobseeker's allowance other than a joint-claim jobseeker's allowance; (2) a joint-claim couple claiming a joint-claim jobseeker's allowance; or (3) a member of such a couple, may be treated as being entitled to an income-based jobseeker's allowance before his or (as the case may be) the couple's claim for the allowance has been determined: Jobseekers Act 1995 Sch 1 para 10(1) (substituted by Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 16(1), (5)).

TEXT AND NOTE 21--Now, in such circumstances as may be prescribed, an income-based jobseeker's allowance is payable in respect of (1) a claimant for a jobseeker's allowance other than a joint-claim jobseeker's allowance; (2) a joint-claim couple claiming a joint-claim jobseeker's allowance; or (3) a member of such a couple, even though payment to him or (as the case may be) the couple of a jobseeker's allowance has been suspended by virtue of regulations under the Social Security Act 1998 s 21(2): Jobseekers Act 1995 Sch 1 para 10(2) (amended by Social Security Act 1998 Sch 7 para 146; and Welfare Reform and Pensions Act 1999 Sch 7 para 16(6), Sch 8 para 29 (7)).

TEXT AND NOTE 22--Now refers to the claimant or the couple or the member of the couple: Jobseekers Act 1995 Sch 1 para 10(3) (amended by Welfare Reform and Pensions Act 1999 Sch 7 para 16 (7)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(3) INCOME-BASED JOBSEEKER'S ALLOWANCE/272. The amount of an income-based jobseeker's allowance.

## **272. The amount of an income-based jobseeker's allowance.**

As with income support, the amount of an income-based jobseeker's allowance<sup>1</sup> is calculated by reference to the claimant's income<sup>2</sup> (if any) and the applicable amount<sup>3</sup> prescribed in his case<sup>4</sup>. The amount payable is (1) if the claimant<sup>5</sup> has no income, the applicable amount; (2) if the claimant has income, the amount by which the applicable amount exceeds his income<sup>6</sup>; and except in prescribed circumstances, a jobseeker's allowance is not payable where the amount otherwise payable would be less than a prescribed minimum<sup>7</sup>. The applicable amount in a particular claimant's case is the aggregate of whichever of the following apply to him:

- 743 (a) an amount in respect of himself or, if he is a member of a couple<sup>8</sup>, an amount in respect of both of them<sup>9</sup>;
- 744 (b) an amount in respect of any child<sup>10</sup> or young person<sup>11</sup> who is a member of the claimant's family<sup>12</sup>, except where the child or young person has capital exceeding the prescribed amount<sup>13</sup>;
- 745 (c) where the claimant or a member of his family aged 16 or over is in residential care accommodation, a further amount<sup>14</sup>;
- 746 (d) where the claimant is a member of a family with at least one child or young person, the family premium<sup>15</sup>;
- 747 (e) the amounts of any premiums which apply in his case<sup>16</sup>;
- 748 (f) any housing costs<sup>17</sup>.

These provisions replicate those applying to income support<sup>18</sup>.

1 For the meaning of 'income-based jobseeker's allowance' see PARA 271 note 1 ante.

2 In the case of an income-based allowance (unlike a contribution-based allowance, as to which see PARA 266 ante) the relevant income includes that of the claimant's partner and children (if any): see the Jobseekers Act 1995 s 13(2).

3 The applicable amount is such amount, or the aggregate of such amounts, as may be determined in accordance with regulations; and regulations may provide that in prescribed cases an applicable amount is to be nil: *ibid* s 4(5), (12). For the meaning of 'regulations' see PARA 260 note 13 ante; and for the meaning of 'prescribed' see PARA 21 note 12 ante.

4 For the equivalent provisions relating to income support see PARA 183 et seq ante.

5 For the meaning of 'claimant' see PARA 260 note 1 ante.

6 Jobseekers Act 1995 s 4(3).

7 *Ibid* s 4(4).

8 For the meaning of 'couple' and 'unmarried couple' see PARA 265 note 3 ante.

9 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 83(a), Sch 1 para 1 (subject to frequent amendment). As with income support, particular provision is made for (1) polygamous marriages (see reg 84 (amended by SI 1996/1516)); (2) special cases, including prisoners, persons from abroad and refugees (see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 85, Sch 5); and (3) persons in residential care and nursing homes (see reg 86, Sch 4). All these provisions prescribe amounts which are subject to frequent amendment.

10 'Child' means a person under the age of 16: see the Jobseekers Act 1995 s 35(1).

- 11 For the meaning of 'young person' see PARA 264 note 4 ante.
- 12 For the meaning of 'family', and as to the treatment of families for the purposes of jobseeker's allowance, see PARA 265 note 6 ante.
- 13 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 83(b), Sch 1 para 2 (subject to frequent amendment). The prescribed amount of capital at the date at which this volume states the law was £3,000.
- 14 See *ibid* reg 83(1), Sch 1 para 3 (subject to frequent amendment).
- 15 See *ibid* reg 83(d), Sch 1 Pt II (para 4) (subject to frequent amendment). With effect from 6 April 1998, new provisions prescribe the circumstances in which the applicable amount of income-based jobseeker's allowance will include the lone parent rate of family premium: see the Social Security (Lone Parents) (Amendment) Regulations 1997, SI 1997/1790, reg 13, amending the Jobseeker's Allowance Regulations 1996, SI 1996/207, Sch 1 para 4.
- 16 See *ibid* reg 83(e), Sch 1 Pts II, IV (subject to frequent amendment). The general rule is that only one premium (the highest in amount) is payable where the claimant qualifies for more than one (see Sch 1 para 6), but there are exceptions in relation to the severe disability premium, the disabled child premium and the carer premium, each of which may be applicable in addition to any other premium (see Sch 1 para 7).
- 17 See *ibid* reg 83(f), Sch 2 (amended by, *inter alia*, SI 1997/2305). With effect from 22 October 1997, the Social Security (Miscellaneous Amendments) (No 4) Regulations 1997, SI 1997/2305, amend the relevant regulations relating to income support and income-based jobseeker's allowance so that where an amount in respect of mortgage interest is included in a person's or his partner's applicable amount for either benefit and the person concerned ceases to receive one of those benefits but becomes entitled to the other within a prescribed period (generally 12 weeks), or less, that amount forms part of his applicable amount with respect to the other benefit: see further PARAS 185-186 ante.
- 18 There are certain drafting differences in relation to the pensioner premiums (see the Jobseeker's Allowance Regulations 1996, SI 1996/207, Sch 1 paras 10-12), reflecting the fact that any necessary topping up of pensions on a means-tested basis is likely to be done through income support, not jobseeker's allowance (since for the latter the claimant, if not any partner, has to be under pensionable age: see PARA 260 head (8) ante).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with

the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **271-274 Income-based Jobseeker's Allowance**

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to an income-based jobseeker's allowance to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

The child-related elements of income-based jobseeker's allowance are abolished and replaced: see the Tax Credits Act 2002 s 1; and PARA 227A.1.

## **272 The amount of an income-based jobseeker's allowance**

TEXT AND NOTES--SI 1996/207 regs 83-86 apply in the case of an income-based jobseeker's allowance but not a joint-claim jobseeker's allowance: reg 82 (substituted by SI 2000/1978). For the meaning of 'joint-claim jobseeker's allowance' see PARA 260A. Provision is made concerning the applicable amounts for joint-claim couples: see SI 1996/207 regs 86A-86C; and PARA 272A.

NOTE 2--See the Jobseekers Act 1995 s 13(2A), (2B) (see PARA 274).

TEXT AND NOTES 5, 6--The Jobseekers Act 1995 s 4(3) does not apply in relation to a joint-claim jobseeker's allowance: s 4(3) (amended by Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 5(1), (2)). In the case of a joint-claim jobseeker's allowance, the amount payable in respect of a joint-claim couple is (1) if the couple have no income, the applicable amount; (2) if the couple have an income, the amount by which the applicable amount exceeds the couple's income: Jobseekers Act 1995 s 4(3A) (added by Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 5(1), (3)). For the meaning of 'joint-claim couple' see PARA 260. For the meaning of 'joint-claim jobseeker's allowance' see PARA 260A.

NOTE 9--SI 1996/207 reg 84 further amended: SI 2001/3767, SI 2003/1121, SI 2005/522, SI 2009/3228. SI 1996/207 reg 85 amended: SI 1998/563, SI 2000/636, SI 2000/979, SI 2001/3767, SI 2003/1121, SI 2004/1232, SI 2005/522, SI 2005/2687, SI 2005/3360, SI 2006/1026, SI 2007/2618, SI 2009/583. SI 1996/207 reg 86 revoked: SI 2001/3767. SI 1996/207 Sch 1 para 1 further amended: SI 2000/1978, SI 2005/522, SI 2005/2877, SI 2007/719, SI 2008/698, SI 2009/1575. SI 1996/207 Sch 4 revoked: SI 2001/3767. SI 1996/207 Sch 5 amended: SI 2000/636, SI 2001/3767, SI 2003/1121, SI 2003/1195, SI 2005/522, SI 2005/2687, SI 2005/3360, SI 2007/719.

NOTE 12--It may be discriminatory to link jobseeker's allowance to child benefit: *Hockenjos v Secretary of State for Social Security* [2001] EWCA Civ 624, [2001] ICR 966; *Hockenjos v Secretary of State for Social Security* [2004] EWCA Civ 1749, [2005] 1 FCR 286.

NOTE 13--SI 1996/207 reg 83(b) amended: SI 2005/522. SI 1996/207 Sch 1 para 2 further amended: SI 1998/1541, SI 1999/2555, SI 2000/1993, SI 2001/207, SI 2001/2980, SI 2005/522. See also SI 2008/632 art 24(2)(a).

NOTE 14--SI 1996/207 reg 83 further amended: SI 2003/1121, SI 2009/3228. SI 1996/207 Sch 1 para 3 further amended: SI 2000/1978, SI 2001/3767, SI 2003/1121.

NOTE 15--SI 1996/207 Sch 1 para 4 further amended: SI 1998/766. SI 1997/1790 revoked: SI 1998/766.

NOTE 16--SI 1996/207 Sch 1 para 7 substituted: SI 2000/2629; and amended by SI 2003/455.

There are also exceptions in relation to enhanced disability premium (see SI 1996/207 Sch 1 para 15A (added by SI 2000/2629; amended by SI 2007/719): SI 1996/207 Sch 1 para 7 (substituted by SI 2000/2629).

NOTE 17--SI 1996/207 Sch 2 amended: SI 1997/2863, SI 1998/2231, SI 2000/1978, SI 2000/2629, SI 2002/3019, SI 2003/1195, SI 2004/2327, SI 2006/2378, SI 2006/3274, SI 2007/3183, SI 2008/1554, SI 2009/2655. A 'welfare to work beneficiary' is a person (1) to whom the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A(1) (see PARA 71) applies; and (2) who again becomes incapable of work for the purposes of the Social Security Contributions and Benefits Act 1992 Pt XIAA (ss 171A-171G: see PARA 65 et seq): SI 1996/207 reg 1 (amended by SI 1998/2231).

NOTE 18--SI 1996/207 Sch 1 para 12 amended: SI 1998/2231, SI 2000/724, SI 2006/2378, SI 2007/719.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(3) INCOME-BASED JOBSEEKER'S ALLOWANCE/272A. Amount payable in respect of joint-claim couple.

## **272A. Amount payable in respect of joint-claim couple.**

The following provision applies where (1) a joint-claim couple<sup>1</sup> are entitled to a joint-claim jobseeker's allowance<sup>2</sup>; and (2) one or each of the members of the couple is in addition entitled to a contribution-based jobseeker's allowance<sup>3</sup>. If a joint-claim couple falling within head (1) above have no income, the amount payable in respect of the couple by way of a jobseeker's allowance is (a) the applicable amount, if that is greater than the couple's personal rate<sup>4</sup>; and (b) the couple's personal rate, if it is not<sup>5</sup>. If a joint-claim couple falling within head (1) above have an income, the amount payable in respect of the couple by way of a jobseeker's allowance is (i) the amount by which the applicable amount exceeds the couple's income, if the amount of that excess is greater than the couple's personal rate; and (ii) the couple's personal rate, if it is not<sup>6</sup>.

The applicable amount of a joint-claim couple who are jointly claiming a jobseeker's allowance is the aggregate of such of the following amounts as may apply in their case (A) an amount in respect of the joint-claim couple<sup>7</sup>; (B) the amount of any premiums which may be applicable to either or both members of the joint-claim couple<sup>8</sup>; and (C) any housing costs<sup>9</sup>.

1 For the meaning of 'joint-claim couple' see PARA 260.

2 For the meaning of 'joint-claim jobseeker's allowance' see PARA 260A.

3 Jobseekers Act 1995 s 4A(1) (s 4A added by the Welfare Reform and Pensions Act 1999 Sch 7 para 6). In such a case the provisions of the 1995 Act s 4A have effect in relation to the couple in place of s 4(3A) (see PARA 272): s 4A(1). As to the contribution-based jobseeker's allowance see PARA 266 et seq.

4 'The couple's personal rate', in relation to a joint-claim couple, means (1) where only one member of the couple is entitled to a contribution-based jobseeker's allowance, that member's personal rate; (2) where each member of the couple is entitled to such an allowance, the aggregate of their personal rates: *ibid* s 4A(10).

5 *Ibid* s 4A(2). Where the amount payable in accordance with s 4A(2) is the applicable amount, the amount payable in respect of the couple by way of a jobseeker's allowance is to be taken to consist of two elements (1) one being an amount equal to the couple's personal rate; and (2) the other being an amount equal to the excess of the applicable amount over the couple's personal rate: s 4A(3). The element of a jobseeker's allowance mentioned in head (1) of the text, and that mentioned in NOTE 6 head (1), is treated, for the purpose of identifying the source of the allowance, as attributable (a) in a case where only one member of the joint-claim couple is entitled to a contribution-based jobseeker's allowance, to that member's entitlement to such an allowance; and (b) in a case where each member of the couple is entitled to a contribution-based jobseeker's allowance, rateably according to their individual entitlements to such an allowance: s 4A(8). The element of a jobseeker's allowance mentioned in head (2) of the text, and that mentioned in NOTE 6 head (2), is treated, for the purpose of identifying the source of the allowance, as attributable to the couple's entitlement to a joint-claim jobseeker's allowance: s 4A(9). Where the amount payable in accordance with s 4A(2) is the couple's personal rate, then (i) if each member of the couple is entitled to a contribution-based jobseeker's allowance, an amount equal to the member's own personal rate is payable in respect of the member by way of such an allowance; (ii) if only one of them is so entitled, an amount equal to that member's personal rate is payable in respect of the member by way of such an allowance; and in either case nothing is payable in respect of the couple by way of a joint-claim jobseeker's allowance: s 4A(4).

6 *Ibid* s 4A(5). Where the amount payable in accordance with s 4A(5) is the amount by which the applicable amount exceeds the couple's income, the amount payable in respect of the couple by way of a jobseeker's allowance is taken to consist of two elements (1) one being an amount equal to the couple's personal rate; and (2) the other being an amount equal to the amount by which the difference between the applicable amount and the couple's income exceeds the couple's personal rate: s 4A(6). See also s 4A(8), (9); and NOTE 5. Where the amount payable in accordance with s 4A(5) is the couple's personal rate, s 4A(4) (see NOTE 5) applies as it applies in a case where the amount payable in accordance with s 4A(2) is that rate: s 4A(7).

7 Jobseeker's Allowance Regulations 1996, SI 1996/207 reg 86A(a) (regs 86A-86C added by SI 2000/1978; and amended by SI 2001/3767, SI 2003/1121, SI 2009/3228; SI 1996/207 reg 86C amended by SI 2004/565, SI 2005/3360). The amount is determined in accordance with SI 1996/207, Sch 1 para 1(3) (amended by SI 2000/1978, SI 2007/719, SI 2008/1554, SI 2009/1575). Particular provision with regard to joint-claim couples, is made in respect of (1) polygamous marriages (see SI 1996/207 reg 86B, Sch 1 Pts IVA, IVB (added by SI 2000/1978; and amended by SI 2001/518, SI 2002/2020, SI 2002/2380, SI 2003/2279, SI 2009/3228)); and (2) special cases (see SI 1996/207 reg 86C, Sch 5A (added by SI 2000/1978; and amended by SI 2001/3767, SI 2003/1121, SI 2003/1195, SI 2004/565, SI 2005/522, SI 2005/2687, SI 2005/3360, SI 2007/719)).

8 SI 1996/207 reg 86A(c). The amount is determined in accordance with Sch 1 Pts IVA, IVB: see NOTE 7.

9 Ibid reg 86A(d). Any housing costs are determined in accordance with Sch 2 (see PARA 272) which may be applicable to the joint-claim couple in respect of mortgage interest payments or such other housing costs as are prescribed in Sch 2: reg 86A(d).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25

years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **271-274 Income-based Jobseeker's Allowance**

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to an income-based jobseeker's allowance to receive welfare foods,

see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

The child-related elements of income-based jobseeker's allowance are abolished and replaced: see the Tax Credits Act 2002 s 1; and PARA 227A.1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(3) INCOME-BASED JOBSEEKER'S ALLOWANCE/273. Calculation of income.

### 273. Calculation of income.

In relation to a claim for a jobseeker's allowance<sup>1</sup>, the income and capital of a person must be calculated or estimated in such manner as may be prescribed<sup>2</sup>. A person's income in respect of a week<sup>3</sup> must be calculated in accordance with prescribed rules<sup>4</sup>, which may provide for the calculation to be made by reference to an average over a period (which need not include the week concerned)<sup>5</sup>. Circumstances may be prescribed in which:

- 749 (1) a person is treated as possessing capital or income which he does not possess;
- 750 (2) capital or income which a person does possess is to be disregarded;
- 751 (3) income is to be treated as capital;
- 752 (4) capital is to be treated as income<sup>6</sup>.

It is essential to be able to calculate any income of the claimant<sup>7</sup> in order to establish entitlement to, and calculate the amount of, an income-based jobseeker's allowance<sup>8</sup>, and the same rules are applied wherever it is necessary to establish a claimant's income for the purposes of a contribution-based allowance<sup>9</sup>. Where a person claiming an income-based allowance is a member of a family<sup>10</sup>, the income of any member of that family is, except in prescribed circumstances, to be treated as the income of the claimant<sup>11</sup>.

The rules relating to the calculation of income replicate those applying to income support<sup>12</sup>.

1 As to making a claim see PARA 338 post.

2 Jobseekers Act 1995 s 12(1). For the meaning of 'prescribed' see PARA 21 note 12 ante.

3 'Week' means a period of seven days beginning with a Sunday or such other period of seven days as may be prescribed: *ibid* s 35(1).

4 *Ibid* s 12(2).

5 *Ibid* s 12(3).

6 *Ibid* s 12(4).

7 For the meaning of 'claimant' see PARA 260 note 1 ante.

8 See PARA 272 ante. As to income-based jobseeker's allowance see PARA 271 ante.

9 See PARA 269 note 2 ante. As to contribution-based jobseeker's allowance see PARA 266 ante.

10 See PARA 265 note 6 ante.

11 Jobseekers Act 1995 s 13(2).

12 Both the Income Support (General) Regulations 1987, SI 1987/1969 (as amended) and the Jobseeker's Allowance Regulations 1996, SI 1996/207 (as amended) make provision for the calculation of income; the calculation of earnings derived from employed earner's employment and income other than earnings; the calculation of earnings of self-employed earners; the date on which income is treated as paid; the calculation of weekly amounts of income; the earnings of employed earners; the calculation of net earnings of employed earners; the earnings of self-employed earners; the calculation of net profit of self-employed earners; the deduction of tax and contributions for self-employed earners; the calculation of income other than earnings;

capital treated as income; notional income; modification in respect of children and young persons; sums to be disregarded in the calculation of earnings; sums to be disregarded in the calculation of income other than earnings; liable relative payments; and child support payments: see in relation to jobseeker's allowance the Jobseeker's Allowance Regulations 1996, SI 1996/207, regs 88-106 (as amended). There are certain drafting differences in relation to the treatment of termination payments from an employer: see regs 94, 98 (as amended), which still reflect some of the superseded unemployment benefit rules, rather than simply adopting the income support rules.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or

falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **271-274 Income-based Jobseeker's Allowance**

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to an income-based jobseeker's allowance to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

The child-related elements of income-based jobseeker's allowance are abolished and replaced: see the Tax Credits Act 2002 s 1; and PARA 227A.1.

## **273 Calculation of income**

NOTES--As to the calculation of income and capital of a joint-claim couple see SI 1996/207 Sch 6 (amended by SI 1996/1516, SI 1996/1517, SI 1998/766, SI 2000/681, SI 2000/2545, SI 2001/3767, SI 2003/455, SI 2003/511, SI 2004/3168 (England), SI 2005/2687, SI 2005/2929 (Wales), SI 2006/2378, SI 2007/2618, SI 2008/1554). SI 1996/207 reg 88ZA, Sch 6A (added by SI 2000/1978, Sch 6A amended by SI 2000/2545, SI 2001/3767, SI 2003/511, SI 2005/2687, SI 2006/2378, SI 2008/1554). For the meaning of joint-claim couple see PARA 260.

NOTE 12--SI 1996/207 reg 88 amended: SI 2000/1978. SI 1996/207 reg 89 amended: SI 2008/2111, SI 2009/2655. SI 1996/207 reg 90 revoked: SI 2008/2111. SI 1997/207 reg 93 amended: SI 2000/1978. SI 1996/207 reg 94 amended: SI 1998/563, SI 2000/1978, SI 2007/2618, SI 2008/698. SI 1996/207 reg 95 amended: SI 2000/1978, SI 2008/698, SI 2009/583. SI 1996/207 reg 96 amended: SI 2000/636, SI 2000/681, SI 2002/2402, SI 2003/1731. SI 1996/207 reg 98 amended: SI 1999/1509, SI 2002/2689, SI 2006/2378, SI 2007/2618. SI 1996/207 reg 102 amended: SI 2007/1749, SI 2007/2618, SI 2009/583. SI 1996/207 reg 103 amended: SI 2001/2319, SI 2008/1554, SI 2008/1599, SI 2009/2655. SI 1996/207 reg 104 amended: SI 2000/2545, SI 2001/3070, SI 2002/2442, SI 2005/2465. SI 1996/207 reg 105 amended: SI 1998/563, SI 1998/2117, SI 2000/678, SI 2000/724, SI 2000/1978, SI 2002/841, SI 2005/2465, SI 2005/2687, SI 2007/719, SI 2007/1749, SI 2007/2618, SI 2008/698, SI 2008/3157, SI 2009/480, SI 2009/2655.

SI 1996/207 regs 88A (income of participants in the self-employment route), 102B-102D (participants in the self-employment route) (reg 88A added by SI 1998/1174; and amended by SI 2000/2910; SI 1996/207 regs 102A-102D added by SI 1998/1174; SI 1996/207 reg 102A amended by SI 1999/3156, SI 2000/2910; SI 1996/207 reg 102B amended by SI 2000/2910; SI 1996/207 reg 102C amended by SI 2000/1978, SI 2001/2910; SI 1996/207 reg 102D amended by SI 2000/2910, SI 2007/2618, SI 2009/283).

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## 274. The capital rule; the calculation of capital.

No person is entitled to an income-based jobseeker's allowance if his capital exceeds the prescribed amount<sup>1</sup>. At the date at which this volume states the law, the prescribed amount was £8,000, except in the case of a person living permanently in a residential care or nursing home (or other residential accommodation providing board and personal care by reason of the claimant's disablement, past or present dependence on alcohol or drugs or past or present mental disorder), in which case the limit was £16,000<sup>2</sup>.

Regulations<sup>3</sup> may provide that capital not exceeding the amount so prescribed, but exceeding a prescribed lower amount, is to be treated, to a prescribed extent, as if it were income of a prescribed amount<sup>4</sup>. As with the income support capital rule, provision has been made treating capital above a prescribed limit<sup>5</sup> as producing a 'tariff income' of £1 for each £250 or part thereof<sup>6</sup>.

The rules relating to the calculating of capital replicate those applying to income support<sup>7</sup>.

1 Jobseekers Act 1995 s 13(1). For the meaning of 'prescribed' see PARA 21 note 12 ante.

2 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 107 (substituted by SI 1996/1516). The capital of a child or young person who is a member of the claimant's family is not to be treated as capital of the claimant (Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 109); however, where a child or young person has capital exceeding £3,000, no applicable amount is to be included in respect of him (see reg 83(b)). The capital of a spouse or partner is to be treated as capital of the claimant: Jobseekers Act 1995 s 13(2).

3 For the meaning of 'regulations' see PARA 260 note 13 ante.

4 Jobseekers Act 1995 s 13(3).

5 At the date at which this volume states the law, the normal limit was £3,000, but £10,000 in the case of a claimant in residential care, etc: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 116 (amended by SI 1996/1516; SI 1997/65).

6 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 116 (as amended: see note 5 supra).

7 Both the Income Support (General) Regulations 1987, SI 1987/1969 (as amended) and the Jobseeker's Allowance Regulations 1996, SI 1996/207 (as amended) contain provisions relating to the capital limit; the calculation of capital; disregard of the capital of a child or young person; income treated as capital; the calculation of capital in the United Kingdom; the calculation of capital outside the United Kingdom; notional capital; the diminishing notional capital rule; capital jointly held; the calculation of tariff income from capital; and capital to be disregarded: see in relation to jobseeker's allowance the Jobseeker's Allowance Regulations 1996, SI 1996/207, regs 107-116 (as amended).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for

that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are

designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **271-274 Income-based Jobseeker's Allowance**

As to the entitlement of certain persons who are, or who are members of families of persons, entitled to an income-based jobseeker's allowance to receive welfare foods, see the Welfare Food Regulations 1996, SI 1996/1434; and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 680.

The child-related elements of income-based jobseeker's allowance are abolished and replaced: see the Tax Credits Act 2002 s 1; and PARA 227A.1.

## **274 The capital rule; the calculation of capital**

TEXT AND NOTES 1, 2--The Jobseekers Act 1995 s 13(1), (2) does not apply as regards a joint-claim jobseeker's allowance; but a joint-claim couple (see PARA 260) are not entitled to a joint-claim jobseeker's allowance if the couple's capital, or a prescribed part of it, exceeds the prescribed amount: s 13(2A) (s 13(2A), (2B) added by Welfare Reform and Pensions Act 1999 Sch 7 para 9(2)). Where a joint-claim couple claim a joint-claim jobseeker's allowance (1) the couple's income and capital includes the separate income and capital of each of them; and (2) the income and capital of any other person who is a member of any family of which the couple are members is, except in prescribed circumstances, treated as income and capital of the couple: s 13(2B). For the meaning of 'joint-claim couple' see PARA 260.

NOTES 2, 7--SI 1996/207 reg 107 amended: SI 2000/1978, SI 2000/2545, SI 2005/2465.

TEXT AND NOTES 3, 4--Reference to 'amount so prescribed' is now to amount prescribed under Jobseekers Act 1995 s 13(1) or s 13(1A): s 13(3) (amended by Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 9(1), (3)).

NOTE 5--SI 1996/207 reg 116 amended: SI 2000/2545, SI 2001/3767, SI 2005/2687.

NOTE 7--SI 1996/207 reg 110 amended: SI 1998/563, SI 2000/724, SI 2006/2378. SI 1996/207 reg 111 substituted: SI 2007/2618. SI 1996/207 reg 113 amended: SI 1997/2197, SI 1998/2117, SI 1999/2640, SI 1999/3156, SI 2000/1978, SI 2001/1029, SI 2001/3767, SI 2002/841, SI 2004/2308, SI 2005/3391, SI 2006/588, SI 2007/719, SI 2008/698, SI 2009/480. SI 1996/207 Sch 8 amended: SI 1997/2863, SI 1998/1174, SI 1998/2117, SI 1999/2640, SI 2000/1978, SI 2001/2333, SI 2001/3767, SI 2003/2279, SI 2003/2439, SI 2004/565, SI 2004/1141, SI 2004/1708, SI 2004/2308, SI 2005/2183, SI 2005/2877, SI 2006/2378, SI 2007/2128, SI 2008/1554, SI 2009/583. SI 1996/207 reg 115 amended: SI 1998/2250.

In relation to jobseeker's allowance, see *Miah v Secretary of State for Work and Pensions* [2003] EWCA Civ 1111, [2003] 4 All ER 702.

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## **(4) JOBSEEKING REQUIREMENTS**

### **(i) Introduction**

#### **275. Changes to the jobseeking requirements.**

Unemployment benefit, the predecessor to jobseeker's allowance, was always subject to a requirement that the claimant be available for employment, in order to ensure that it was only payable to the involuntarily unemployed. Originally such availability was left as a broad question of fact but, although that was held to include a positive element of looking for work (and not just being available if approached)<sup>1</sup>, it was considered that the test was not sufficiently rigorous and so changes were made in the legislation. In 1989 statutory criteria were added to the test for availability for employment<sup>2</sup> and there was added the further requirement that the claimant must be actively seeking employment. When the jobseeker's allowance replaced unemployment benefit in 1996 the two existing requirements (of availability for work<sup>3</sup> and actively seeking it<sup>4</sup>) were continued in amended form and there were added extended requirements on a claimant to attend when required and provide information and evidence to the Secretary of State<sup>5</sup>, and a new requirement of entering into a jobseeker's agreement<sup>6</sup>. Sanctions are prescribed for claimants who fail to comply with these requirements<sup>7</sup>.

1 See Decision R(U) 5/80.

2 In the light of this (and the further emphasis on statutory criteria in the jobseeker's allowance rules on both availability and actively seeking work) the emphasis below is on the criteria themselves, not on previous unemployment benefit case law which arose before their introduction, when the test for availability was essentially one of fact.

3 See PARA 276 et seq post.

4 See PARA 285 et seq post.

5 See PARA 291 et seq post.

6 See PARA 295 et seq post.

7 See PARA 303 et seq post.

### **UPDATE**

#### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be

treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only

persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(ii) Availability for Employment/276. The requirement of availability.

## **(ii) Availability for Employment**

### **276. The requirement of availability.**

It is a general requirement for eligibility for a jobseeker's allowance that the claimant<sup>1</sup> is available for employment<sup>2</sup>. A person is available for employment if he is willing and able to take up immediately any employed earner's employment<sup>3</sup>; but this is subject to such provisions as may be made by regulations<sup>4</sup>; and those regulations may, in particular, provide that a person:

- 753 (1) may restrict his availability for employment in any week<sup>5</sup> in such ways as may be prescribed<sup>6</sup>; or
- 754 (2) may restrict his availability for employment in any week in such circumstances as may be prescribed (for example, on grounds of conscience, religious conviction or physical or mental condition or because he is caring for another person) and in such ways as may be prescribed<sup>7</sup>.

The following are examples of restrictions for which provision may be made by the regulations:

- 755 (a) restrictions on the nature of the employment for which a person is available;
- 756 (b) restrictions on the periods for which he is available;
- 757 (c) restrictions on the terms or conditions of employment for which he is available;
- 758 (d) restrictions on the locality or localities within which he is available<sup>8</sup>.

Regulations may also prescribe circumstances in which a person is or is not to be treated as available for employment<sup>9</sup> and may, in particular, provide for a person who is available for employment only in his usual occupation, only at a level of remuneration not lower than that which he is accustomed to receive, or only in his usual occupation and at a level of remuneration not lower than that which he is accustomed to receive, to be treated, for a permitted period, as available for employment<sup>10</sup>.

In order to be regarded as available for employment, a person must be willing and able to take up employment of at least 40 hours per week<sup>11</sup>. Where it has been determined ('the first determination') that a person is to be treated as available for employment in any week, the question whether he is available for employment in that week may be subsequently determined on a review of the first determination<sup>12</sup>.

1 For the meaning of 'claimant' see PARA 260 note 1 ante.

2 See the Jobseekers Act 1995 s 1(2)(a); and PARA 260 ante.

3 Ibid s 6(1). For the meaning of 'employed earner's employment' see PARA 32 ante (definition applied by s 6(9)).

4 Ibid s 6(2). For the meaning of 'regulations' see PARA 260 note 13 ante.

5 For these purposes, 'week' means benefit week: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 4. For the meaning of 'benefit week' see PARA 269 note 6 ante.

6 Jobseekers Act 1995 s 6(2)(a). For the meaning of 'prescribed' see PARA 21 note 12 ante.

7 Ibid s 6(2)(b).

8 Ibid s 6(3). As to the restriction of availability see PARA 278 post.

9 Ibid s 6(4).

10 Ibid s 6(5). For these purposes, 'permitted period', in relation to any person, means such period as may be determined in accordance with the regulations made under s 6(4); and regulations so made may prescribe, in relation to permitted periods, (1) the day on which any such period is to be regarded as having begun in any case; (2) the shortest and longest periods which may be determined in any case; (3) factors which an adjudication officer may take into account in determining the period in any case: s 6(7), (8).

11 Jobseeker's Allowance Regulations, 1996 SI 1996/207, reg 6(1). This does not apply where the claimant has restricted his availability in accordance with reg 13(3), (4) or reg 17(2) (as added) (see PARAS 278, 284 post); and is also disapplied in relation to certain persons undertaking a workskill course (see the Jobseeker's Allowance (Workskill Courses) Pilot (No 2) Regulations 1997, SI 1997/1909, regs 6, 7). The person must also be willing and able to take up employment of less than 40 hours per week (but not for a greater number of hours than any number for which he is available in accordance with the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 13(3), (4) or reg 17(2) (as added)): reg 6(2).

12 Jobseekers Act 1995 s 6(6).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The

'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment

route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

**276 The requirement of availability**

NOTE 11--Reference to SI 1996/207 reg 13(3), (4) now to reg 13(3), (3A) (4): reg 6(1) (amended by SI 2008/3051).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(ii) Availability for Employment/277. Exceptions to the requirement to be available immediately.

## **277. Exceptions to the requirement to be available immediately.**

In order to be regarded as available for employment:

- 759 (1) a person who has caring responsibilities<sup>1</sup> or who is engaged on voluntary work<sup>2</sup> is not required to be able to take up employment immediately, provided he is willing and able to take up employment on being given 48 hours' notice<sup>3</sup>;
- 760 (2) a person who is engaged (whether by contract or otherwise) in providing a service with or without remuneration (other than as a carer or voluntary worker) is not required to be able to take up employment immediately, provided he is willing and able to take up employment on being given 24 hours' notice<sup>4</sup>;
- 761 (3) a person who is in employed earner's employment and is not engaged in remunerative work<sup>5</sup> and who is required by statute<sup>6</sup> to give notice to terminate his contract is not required to be able to take up employment immediately, provided he is willing and able to take up employment immediately he is able to do so in accordance with his statutory obligations<sup>7</sup>.

Where a person is validly only available for employment at certain times<sup>8</sup>, he is not required to be able to take up employment at a time at which he is not available, but must be willing and able to take up employment immediately he is available<sup>9</sup>.

1 'Caring responsibilities' means responsibility for caring for a child or for an elderly person or for a person whose physical or mental condition requires him to be cared for, who is either in the same household or a close relative: Jobseeker's Allowance Regulation 1996, SI 1996/207, reg 4. 'Close relative' (except in Pt IV (regs 57-68) (as amended)) (treatment of young persons: see PARA 323 post) means a spouse or other member of an unmarried couple, parent, step-parent, grandparent, parent-in-law, son, stepson, son-in-law, daughter, step-daughter, daughter-in-law, brother, sister, grandchild or the spouse of any of the preceding persons or, if that person is one of an unmarried couple, the other member of that couple: reg 4 (definition amended by SI 1996/2538).

2 'Voluntary work' means work for an organisation the activities of which are carried on otherwise than for profit, or work other than for a member of the claimant's family, where no payment is received by the claimant or the only payment due to be made to him by virtue of being so engaged is a payment in respect of any expenses reasonably incurred by him in the course of being so engaged: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 4. For the meaning of 'family' see PARA 265 note 6 ante.

3 Ibid reg 5(1).

4 Ibid reg 5(2). 'Providing a service' is a wide phrase, not confined to a public service and so may apply to a domestic context, though it means something more than normal domestic or parental responsibilities: Decision CU/96/1994.

5 For the meaning of 'remunerative work' see PARA 262 ante.

6 The statutory requirement was formerly in the Employment Protection (Consolidation) Act 1978 s 49 (repealed), but is now in the Employment Rights Act 1996 s 86: see EMPLOYMENT vol 40 (2009) PARAS 692-693.

7 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 5(3).

8 Ie by virtue of ibid reg 7, reg 13 or reg 17 (as amended): see PARAS 278, 284 post.

9 Ibid reg 5(4).

**UPDATE****258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with

his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **277 Exceptions to the requirement to be available immediately**

TEXT AND NOTES 1-3--Now head (1) subject to SI 1996/207 reg 5(1A), a person who is engaged in voluntary work or who has caring responsibilities is not required to be able to take up employment immediately, providing he is willing and able to take up employment on being given one week's notice and to attend for interview in connection with the opportunity of any such employment on being given 48 hours' notice: SI 1996/207 reg 5(1) (substituted by SI 2002/3072; and amended by SI 2006/1402, SI 2008/3051). In order to be regarded as available for employment, a person who has caring responsibilities in relation to a child is not required to take up employment or attend for interview within the periods referred to in SI 1996/207 reg 5(1) if those responsibilities make it unreasonable for him to do so, providing he is willing and able to take up employment on being given 28 days' notice; and to attend for interview in connection with the opportunity of any such employment on being given seven days notice; and, for this purpose, it is for the claimant to show that it is unreasonable for him to take up employment or attend for interview within the periods referred to in head (1): SI 1996/207 reg 5(1A), (1B) (added by SI 2008/3051).

NOTE 1--Definition of 'close relative' in SI 1996/207 reg 4 further amended: SI 2005/2877.

NOTE 7--SI 1996/207 reg 5(3) (amended by SI 2007/2618) now refers to legislation cited in NOTE 6.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(ii) Availability for Employment/278. Restrictions on availability.

## **278. Restrictions on availability.**

A person may not restrict the total number of hours for which he is available for employment to less than 40 hours in any week<sup>1</sup>. He may, however, restrict the total number of hours to 40 or more in any week, providing (1) the times at which he is available to take up employment (his 'pattern of availability') are such as to afford him reasonable prospects of securing employment<sup>2</sup>; (2) his pattern of availability is recorded in his jobseeker's agreement<sup>3</sup> and any variations in that pattern are recorded in a varied agreement; and (3) his prospects of securing employment are not reduced considerably by the restriction imposed by his pattern of availability<sup>4</sup>.

Subject to the hours requirements, any person may restrict his availability for employment by placing restrictions on the nature of the employment for which he is available, the terms or conditions or employment for which he is available (including the rate of remuneration) and the locality or localities within which he is available, providing he can show that he has reasonable prospects of securing employment<sup>5</sup> notwithstanding those restrictions<sup>6</sup>. However, after the expiry of the six month period beginning with the date of claim, a person may not restrict his availability for employment by placing restrictions on the level of remuneration in employment for which he is available<sup>7</sup>.

In addition to the above general rules, special provision as to availability is made in respect of certain persons; thus:

762 (a) a person may impose restrictions on the nature of employment for which he is available by reason of a sincerely held religious belief, or a sincerely held conscientious objection, providing he can show that he has reasonable prospects of securing employment notwithstanding those restrictions<sup>8</sup>;

763 (b) a person may restrict his availability in any way providing the restrictions are reasonable in the light of his physical or mental condition<sup>9</sup>;

764 (c) a person with caring responsibilities<sup>10</sup> may restrict the total number of hours for which he is available for employment to less than 40 hours in any week providing:

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120. (i) in that week he is available for as many hours as his caring responsibilities allow and for the specific hours that those responsibilities allow<sup>11</sup>;

121. (ii) he has reasonable prospects of securing employment notwithstanding that restriction<sup>12</sup>; and

122. (iii) he is available for employment for at least 16 hours in that week<sup>13</sup>.

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1 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 7(1).

2 For the meaning of 'reasonable prospects of securing employment' see PARA 279 post.

3 See PARA 295 post.

4 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 7(2). If a person makes such a restriction under reg 7(2) and is not available for employment (and cannot be treated as available) for one day or more in a week in accordance with his pattern of availability, he is not to be regarded as available for employment (even if he was so available for a total of 40 hours or more during that week): reg 7(3). Regulation 7 is disapplied in relation

to certain persons undertaking a workskill course: see the Jobseeker's Allowance (Workskill Courses) Pilot (No 2) Regulations 1997, SI 1997/1909, regs 6, 7.

5 See PARA 279 post.

6 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 8.

7 Ibid reg 9.

8 Ibid reg 13(1), (2).

9 Ibid reg 13(1), (3).

10 For the meaning of 'caring responsibilities' see PARA 277 note 1 ante.

11 Jobseeker's Allowance Regulations 1996, SI 1996/207 para 13(1), (4)(a). In deciding whether a person satisfies these conditions, regard is to be had, particularly, to (1) the particular hours and days spent caring; (2) whether the caring responsibilities are shared with another person; and (3) the age and physical and mental condition of the person being cared for: reg 13(5).

12 Ibid reg 13(4)(b).

13 Ibid reg 13(4)(c).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The

'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment

route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **278 Restrictions on availability**

NOTE 6--SI 1996/207 reg 8 amended: SI 2008/3051.

NOTE 9--A physical or mental condition is confined to personal disability, and the provision does not apply retrospectively: *Secretary of State for Social Security v David* [2000] All ER (D) 2306, CA (claimant not entitled to benefit for week when detained in police custody).

NOTE 11--SI 1996/207 reg 13(2) amended, reg 13(3A), (6), (7) added: SI 2008/3051.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(ii) Availability for Employment/279. Reasonable prospects of employment.

## **279. Reasonable prospects of employment.**

Under the former law relating to unemployment benefit there were general tests, largely established by case law, as to whether any restrictions on availability were reasonable, in which the question whether there were still reasonable prospects of employment in the light of these restrictions naturally played a part<sup>1</sup>. However, the legislative approach now<sup>2</sup> is to seek to establish more precise, express rules governing such questions and so it is submitted that the correct approach of the adjudicating authorities in seeking to determine the question should be to apply the current statutory wording to the particular facts, rather than seeking guidance from older case law on the previous, superseded legislation<sup>3</sup>.

Where it is necessary to decide whether a person has reasonable prospects of securing employment<sup>4</sup>, it is provided that regard is to be had, in particular, to the following matters:

- 765 (1) his skills, qualifications and experience;
- 766 (2) the type and number of vacancies within daily travelling distance from his home;
- 767 (3) the length of time for which he has been unemployed;
- 768 (4) the job applications which he has made and their outcome;
- 769 (5) if he wishes to place restrictions on the nature of the employment for which he is available, whether he is willing to move home to take up employment<sup>5</sup>.

If a claimant<sup>6</sup> wishes to restrict his availability in the relevant ways<sup>7</sup>, it is for him to show that he has reasonable prospects of securing employment<sup>8</sup>.

1 See eg Decisions R(U) 25/51; R(U) 2/52.

2 This started with amendments to the law on unemployment benefit in 1989 to make the availability tests more precise and more stringent (see PARA 275 ante) and has become particularly important within the overall, major change to jobseeker's allowance in 1996.

3 One longstanding problem concerns restrictions which a newly-unemployed person may naturally wish to impose that he will only accept similar work to that which he has lost; again, a more general approach under the previous law (based on when it would be reasonable for the person to accept lesser work, akin to the common law test for mitigation of damage in a wrongful dismissal case (see EMPLOYMENT vol 40 (2009) PARA 786) has been replaced by more precise rules applying a 'permitted period' for looking for equivalent employment: see further PARA 280 post.

4 Ie under the Jobseeker's Allowance Regulations 1996 SI 1996/207 reg 7 (hours restrictions); reg 8 (other restrictions as to nature, terms or location); or reg 13(2), (4) (religious or other objections; caring responsibilities): see PARA 278 ante.

5 Ibid reg 10(1).

6 For the meaning of 'claimant' see PARA 260 note 1 ante.

7 Ie under the Jobseeker's Allowance Regulations 1996, SI 1996/207, regs 7, 8 or reg 13(2) or (4): see PARA 278 ante.

8 Ibid reg 10(2).

## **UPDATE**

## 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training

allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(ii) Availability for Employment/280. Availability only for claimant's usual occupation; the permitted period.

## **280. Availability only for claimant's usual occupation; the permitted period.**

A person who is available for employment (1) only in his usual occupation; (2) only at a level of remuneration not lower than that which he is accustomed to receive; or (3) only in his usual occupation and at a level of remuneration not lower than that which he is accustomed to receive, may be treated for a permitted period<sup>1</sup> as available for employment<sup>2</sup>.

Whether a person should be treated as available for a permitted period and, if so, the length of that permitted period are to be determined having regard to the following factors:

- 770 (a) the person's usual occupation and any relevant skills or qualifications which he has;
- 771 (b) the length of any period during which he has undergone training relevant to that occupation;
- 772 (c) the length of the period during which he has been employed in that occupation and the period since he was so employed;
- 773 (d) the availability and location of employment in that occupation<sup>3</sup>.

<sup>1</sup> The permitted period is for a minimum of one week and a maximum of 13 weeks, starting on the date of claim; and 'week' for this purpose means any period of seven days: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 16(3).

<sup>2</sup> Ibid reg 16(1). Where reg 16 applies, the person may also be treated as actively seeking employment in that usual occupation: see reg 20; and PARA 288 post.

<sup>3</sup> Ibid reg 16(2).

## **UPDATE**

### **258-329 Jobseeker's Allowance**

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as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone

Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(ii) Availability for Employment/281. Circumstances in which a person is to be treated as available.

**281. Circumstances in which a person is to be treated as available.**

A person is to be treated as available for employment in the following circumstances and (where appropriate) for the following periods:

- 774 (1) if he is participating as a full-time student<sup>1</sup> in an employment-related course where participation by him has been approved before the course started by an employment officer<sup>2</sup>, for a maximum of two weeks<sup>3</sup> (and only in relation to one such course in any period of 12 months)<sup>4</sup>;
- 775 (2) if he is attending a residential work camp<sup>5</sup>, for a maximum of two weeks (and only in relation to one such occasion in any period of 12 months)<sup>6</sup>;
- 776 (3) if he is temporarily absent from Great Britain because he is taking a member of his family<sup>7</sup> who is a child or young person abroad for treatment<sup>8</sup>, for a maximum of eight weeks<sup>9</sup>;
- 777 (4) if he is engaged in the manning or launching of a lifeboat or in the performance of duty as a part-time member of a fire brigade or engaged during an emergency<sup>10</sup> in duties for the benefit of others<sup>11</sup>;
- 778 (5) if he is a member of a couple<sup>12</sup> and is looking after a member of his family who is a child while the other member is temporarily absent from the United Kingdom, for a maximum of eight weeks<sup>13</sup>;
- 779 (6) if he is following an Open University course and is attending, as a requirement of that course, a residential course, for a maximum of one week per course<sup>14</sup>;
- 780 (7) if he is temporarily looking after a child full-time because the person who normally looks after the child is ill or temporarily absent from home or the person is looking after a member of the family who is ill, for a maximum of eight weeks<sup>15</sup>;
- 781 (8) if he has been discharged from detention in a prison, remand centre or youth custody institution, for one week commencing with the date of his discharge<sup>16</sup>;
- 782 (9) if there is a period between the date of claim and the beginning of the first week after that date, for the period beginning on the date of claim and ending on the day before the beginning of the first week after the date of claim<sup>17</sup>;
- 783 (10) if the award is terminated other than on the last day of a week, for the period beginning with the beginning of the week in which the award is terminated and ending on the day on which the award is terminated<sup>18</sup>;
- 784 (11) if he is participating in a programme provided by the Venture Trust in pursuance of an arrangement made by the Home Secretary with the Trust, for a maximum of four weeks (and only in relation to one such programme in any period of 12 months)<sup>19</sup>;
- 785 (12) if he is treated as capable of work through a short period of sickness<sup>20</sup>, for that period<sup>21</sup>;
- 786 (13) if he is temporarily absent from Great Britain to attend an interview for employment and has given notice to an employment officer, in writing if so required by the officer, that he will be so absent, for a maximum of one week<sup>22</sup>;
- 787 (14) if he is a member of a couple and he and his partner are both absent from Great Britain and a pensioner or disability premium<sup>23</sup> is applicable in respect of his partner, for a maximum of four weeks<sup>24</sup>.

In addition, a person is to be treated as available for employment if:

- 788 (a) there is a death or serious illness of a close relative<sup>25</sup> or close friend of his;
- 789 (b) there is a domestic emergency affecting him or a close relative or close friend of his;
- 790 (c) there is a funeral of a close relative or close friend of his;
- 791 (d) he has caring responsibilities<sup>26</sup> and the person being cared for has died;

and this applies for the time required to deal with the emergency or other circumstance and for a maximum of one week on the occurrence of any of these circumstances (or combination thereof), and on not more than four such periods in any period of 12 months<sup>27</sup>.

If any of the circumstances set out above, except those in heads (9) and (10) above, apply to a person for part of a week, he is treated as available for eight hours on any day on which those circumstances applied subject to the specified maximum, unless he has restricted the total number of hours for which he is available in a week, in which case he is treated as available for the number of hours for which he would be available on that day in accordance with his pattern of availability recorded in his jobseeker's agreement, subject to the specified maximum<sup>28</sup>.

1 For the meaning of 'full-time student' see PARA 282 post.

2 'Employment officer' means a person who is such an officer for the purposes of the Jobseekers Act 1995 ss 9, 10 (jobseeker's agreement: see PARAS 295-299 post): Jobseeker's Allowance Regulations, 1996 SI 1996/207, reg 4.

3 For these purposes, except for the purposes of heads (9)-(10) in the text, 'week' means any period of seven consecutive days: *ibid* reg 14(6).

4 *Ibid* reg 14(1)(a).

5 'Work camp' means any place in Great Britain where people come together under the auspices of a charity, a local authority or a voluntary organisation to provide a service of benefit to the community or the environment: *ibid* reg 4.

6 *Ibid* reg 14(1)(b).

7 For the meaning of 'family' see PARA 265 note 6 ante.

8 'Treatment' means treatment for a disease or bodily or mental disablement by or under the supervision of a person qualified to provide medical treatment, physiotherapy or a form of treatment which is similar to, or related to, either of those forms of treatment: *ibid* reg 14(4).

9 *Ibid* reg 14(1)(c).

10 Events which may give rise to an emergency include (1) a fire, flood or explosion; (2) a natural catastrophe; (3) a railway or other transport accident; (4) a cave or mountain accident; (5) an accident at sea; (6) a person being reported missing and the organisation of a search for that person: *ibid* reg 14(5)(b). The predecessor of this provision (in identical terms) was held to be a non-exhaustive list which was not to be construed *eiusdem generis*: Decision CU/113/91.

11 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 14(1)(d). A person is engaged in duties for the benefit of others while (1) providing assistance to any person whose life may be endangered or who may be exposed to the risk of serious bodily injury or whose health may be seriously impaired; (2) protecting property of substantial value from imminent risk of serious damage or destruction; or (3) assisting in measures being taken to prevent a serious threat to the health of the people, as a member of a group of persons organised wholly or partly for the purpose of providing such assistance or, as the case may be, protection: reg 14(5)(a).

12 For the meaning of 'couple' see PARA 265 note 3 ante.

13 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 14(1)(e).

14 *Ibid* reg 14(1)(f).

15 Ibid reg 14(1)(g).

16 Ibid reg 14(1)(h).

17 Ibid reg 14(1)(i) (amended by SI 1996/1517). For these purposes and the purposes of head (10) in the text, 'week' means a benefit week: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, regs 4, 14(6). For the meaning of 'benefit week' see PARA 269 note 6 ante.

18 Ibid reg 14(1)(j) (substituted by SI 1996/1517).

19 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 14(1)(k).

20 Ie under ibid reg 55 (as amended): see PARA 263 ante.

21 Ibid reg 14(1)(l).

22 Ibid reg 14(1)(m).

23 Ie under ibid Sch 1 paras 10, 11, 12, 13 or 15 (subject to frequent amendment).

24 Ibid reg 14(1)(n).

25 For the meaning of 'close relative' see PARA 277 note 1 ante.

26 For the meaning of 'caring responsibilities' see PARA 277 note 1 ante.

27 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 14(2).

28 Ibid reg 14(3).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of

participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are

designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **281 Circumstances in which a person is to be treated as available**

TEXT AND NOTES--For further circumstances in which a person is to be treated as available for employment, see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 17A (full-time students participating in a qualifying course: see PARA 281A). SI 1996/207 reg 14 further amended: SI 2008/1826.

TEXT AND NOTES 1-24--Also, heads (15) if (a) he is available for employment, or is treated as such, on the day he makes his claim for a jobseeker's allowance, and (b) the Secretary of State has directed that the prescribed time for claiming a jobseeker's allowance be extended under the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 19(6), where the circumstances specified in reg 19(7)(d) (see PARA 341) applied in relation to an entitlement to incapacity benefit, employment and support allowance or an entitlement to income support by virtue of the Income Support (General) Regulations 1987, SI 1987/1967, Sch 1B para 7, for the period of that extension (SI 1996/207 reg 14(1)(o) (added by SI 1999/3087; and amended by SI 2008/1554)); (16) if he is a member of a joint-claim couple (see PARA 260) and he and his partner are both absent from Great Britain and a premium referred to in SI 1996/207 Sch 1 para 20E, 20F, 20G or 20I is applicable in respect of his partner, for a maximum of four weeks (reg 14(1)(nn) (added by SI 2000/3336)); (17) if he is temporarily absent from Great Britain in the circumstances prescribed in SI 1996/207 reg 50(6B)(a) or (c) (see PARA 265), for the period of any such temporary absence (reg 14(1)(p) (added by SI 2000/3336)); (18) if he is treated as capable of work or as not having limited capability for work in accordance with SI 1996/207 reg 55A, for the period determined in accordance with reg 55A (see PARA 263) (reg 14(1)(ll) (added by SI 2004/1869, amended by SI 2008/1554)); (19) if he is temporarily absent from Great Britain in the circumstances prescribed in SI 1996/207 reg 50(6AA) or, as the case may be, reg 50(6C) (see PARA 265) (reg 14(1)(q) (added by SI 2004/1869)); (20) if he is required to attend a court or tribunal as a justice of the peace, a party to any proceedings, a witness or a juror (SI 1996/207 reg 14(1)(r)); (21) if, for a maximum of 96 hours before being released, he is in police detention within the meaning in the Police and Criminal Evidence Act 1984 s 118(2), but is not a prisoner as defined by SI 1996/207 reg 85(4) (SI 1996/207 reg 14(1)(s)) (reg 14(1)(r), (s) added by SI 2006/1402)); (22) he is looking after a child for whom he has caring responsibilities during the child's school holidays or another similar vacation period and it would be unreasonable for him to make other arrangements for the care of that child (SI 1996/207 reg 14(1)(t)); (23) he is looking after a child for whom he has caring responsibilities at a time when the child is excluded from school or another educational establishment, and is not receiving education pursuant to arrangements made by a local education authority, and there are no other arrangements for the care of that child it would be reasonable for him to make (SI 1996/207 reg 14(1)(t)) (reg 14(1)(t), (u) added by SI 2008/3051)).

SI 1996/207 reg 14(2ZA), (2ZB) added: SI 2008/3051.

NOTE 19--SI 1996/207 reg 14(1)(k) amended: SI 2008/698.

NOTE 21--SI 1996/207 reg 14(1)(l) amended: SI 2008/1554.

TEXT AND NOTE 23--Head (14) now refers to a couple other than a joint-claim couple: SI 1996/207 reg 14(1)(n) (amended by SI 2000/3336).

NOTE 27--SI 1996/207 reg 14(2) amended: SI 2008/3051.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(ii) Availability for Employment/281A. Full-time students participating in a qualifying course.

## **281A. Full-time students participating in a qualifying course.**

Certain persons<sup>1</sup> are to be treated as available for employment in accordance with the following criteria<sup>2</sup>. Subject to a proviso<sup>3</sup>, where an employment officer has determined, having regard to certain factors, that such a person may undertake a qualifying course<sup>4</sup>, that person is to be treated as available for employment in any week in which he is undertaking the qualifying course as a full-time student and

- 792 (1) which falls wholly or partly in term-time<sup>5</sup>, providing he (a) provides evidence, as often as may be required by an employment officer, within five days of being so required, consisting of a document signed by him and on behalf of the establishment at which he is undertaking the qualifying course, confirming either that he is attending the establishment when required to attend or that he is making satisfactory progress on the course, as required, in such form as may be required;
- 793 (2) in which he is taking examinations relating to the qualifying course<sup>6</sup>; or
- 794 (3) which falls wholly in a vacation<sup>7</sup> from the qualifying course, if he is willing and able to take up immediately any casual employment<sup>8</sup>.

The factors which an employment officer must take into account when determining whether a person may undertake a qualifying course are

- 795 (a) the skills, qualifications and abilities of that person;
- 796 (b) whether the course would assist him to acquire new skills and qualifications;
- 797 (c) whether he would have to give up a course of study in order to undertake this course;
- 798 (d) any needs arising from his physical or mental condition;
- 799 (e) the time which has elapsed since he was last engaged in employment as an employed earner or as a self-employed earner;
- 800 (f) his work experience;
- 801 (g) the number of jobs in the labour market and, if relevant, the local labour market, which require the skills and qualifications which he would acquire on the course; and
- 802 (h) any evidence about whether this course or this type of course has facilitated the obtaining by persons of work<sup>9</sup>.

<sup>1</sup> ie any person (1) who is aged 25 years or over, and (2) who has made a claim for a jobseeker's allowance and has been receiving benefit within a jobseeking period for not less than two years as at the date he started, or is due to start, the qualifying course; for these purposes, the linking rule contained in the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 48 (see PARA 261) applies: reg 17A(2) (reg 17A added by SI 1998/1274; reg 17A(2) amended by SI 1998/2874). The phrase 'made a claim for a jobseeker's allowance' includes treated as having made a claim for the allowance and treated as having an award of the allowance in accordance with the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, regs 5-7: SI 1996/207 reg 4 (amended by SI 1998/1274). 'Benefit' means (a) income support, unemployment benefit, a jobseeker's allowance or any earnings credited to a person in accordance with the Social Security (Credits) Regulations 1975, SI 1975/556, reg 8A (as amended SI 2008/1554; SI 2010/424) or 9A (as amended by SI 2009/2206) or which would be credited to a person in accordance with SI 1975/556 reg 9A(1) but are not so credited by reason only of the fact that no further earnings are in his case required for the purpose mentioned in reg 9A(1), or (b) any earnings credited to a person for unemployment in accordance with SI 1975/556 reg 9 as it applied before 7 October 1996; 'jobseeking period' means the period described in reg 47 and any period treated as a jobseeking period pursuant to reg 47A (see PARA 261): reg 17A(7) (reg 17A as added; and reg

17A(7) amended by SI 1999/3083). A person who has been receiving benefit in accordance with head (a) must, for the purposes of head (2), be treated as having received benefit within a jobseeking period: reg 17A(2A) (reg 17A as added; and reg 17(2A) added by SI 1998/2874).

Subject to SI 1996/207 reg 17A(7B), reg 17A(7A) applies in the case of a person who (i) is a refugee within the definition of the Geneva Convention relating to the Status of Refugees art 1, as extended (see PARA 200 NOTE 17), or has been granted exceptional leave to enter the United Kingdom by an immigration officer appointed for the purposes of the Immigration Act 1971, or to remain in the United Kingdom by the Secretary of State; and (ii) who was in receipt of income support as an asylum seeker pursuant to SI 1987/1967 reg 70(3A) at any time during the period of 12 weeks immediately preceding the beginning of the jobseeking period which includes the date on which he started, or is due to start, the qualifying course: SI 1996/207 reg 17A(7A) (reg 17A as added; and reg 17A(7A) added by SI 1998/2874). SI 1996/207 reg 17A(7A) includes a person who has been recorded as a refugee by the Secretary of State within the definition in SI 1987/1967 reg 70(3A)(a) and whose claim for income support was determined in accordance with reg 21ZA(2) or (3) (treatment of refugees: see PARA 184 NOTE 15): SI 1996/207 reg 17A(7B) (reg 17A as added; and reg 17(7B) added by SI 1998/2874).

2 SI 1996/207 reg 17A(1) (reg 17A as added: see NOTE 1). The rule applies notwithstanding reg 15(1)(a) (see PARA 282): reg 17A(1) (amended by SI 2008/1826).

3 In a case where the combined duration of (1) any qualifying course, other than one falling within SI 1996/207 reg 17A(6), which a person to whom reg 17A(2) applies (see NOTE 1) has previously undertaken in respect of which he was, for any part of such qualifying course, treated as available for employment in accordance with reg 17A(3); and (2) the qualifying course which he is currently undertaking, is more than one year, the person is only to be treated as available for employment in accordance with reg 17A(3) if he has been receiving benefit within a jobseeking period for not less than 2 years since the last day of the most recent such qualifying course in respect of which he was, for any part, treated as available in accordance with reg 17A(3); for these purposes, the linking rule contained in reg 48 (see PARA 261) applies: reg 17A(4) (reg 17A as added: see NOTE 1). 'Duration' in relation to a qualifying course means the period beginning with the start of the course and ending with the last day of the course; 'last day' in relation to such a course means the date on which the last day of the course falls, or the date on which the final examination relating to that course is completed, whichever is the later: reg 17A(7) (reg 17A as added). A qualifying course falls within reg 17A(6) if the person had good cause for any act or omission for the purposes of the 1995 Act s 19(5)(b) (see PARA 304) in relation to that course: SI 1996/207 reg 17A(6) (reg 17A as added).

4 'Qualifying course' means a course which (1) is an employment-related course; (2) lasts no more than 12 consecutive months; and (3) except where it falls within *ibid* reg 17A(8), is a course of a description falling within the Further and Higher Education Act 1992 Sch 2: SI 1996/207 reg 17A(7) (reg 17A as added: see NOTE 1). A course or a programme of learning which is of a standard above that of a course or programme of learning falling within head (3) of the definition of 'qualifying course' falls within reg 17A(8) if an employment officer so determines in a particular case: reg 17A(8) (reg 17A as added).

5 'Term-time' in relation to a qualifying course means the period specified as term-time in relation to a person to whom *ibid* reg 17A(2) applies (see NOTE 1) in a document signed on behalf of the establishment at which the qualifying course is being undertaken: reg 4 (amended by SI 1998/1274).

6 'Examination' in relation to a qualifying course means an examination which is specified as an examination related to the qualifying course in a document signed on behalf of the establishment at which the qualifying course is being undertaken: SI 1996/207 reg 4 (amended by SI 1998/1274).

7 'Vacation' in relation to a qualifying course means any period falling within the period of study, which is not term-time: SI 1996/207 reg 4 (amended by SI 1998/1274).

8 SI 1996/207 reg 17A(3) (reg 17A as added: see NOTE 1). 'Casual employment' means employment from which the employee can be released without his giving any notice or, if he is required to give notice, employment from which he can be released before the end of the vacation: reg 17A(7) (reg 17A as added).

9 *Ibid* reg 17A(5) (reg 17A as added: see NOTE 1).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-

time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made

under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(ii) Availability for Employment/282. Circumstances in which a person is not to be regarded as available.

## **282. Circumstances in which a person is not to be regarded as available.**

A person is not to be regarded as available for employment in the following circumstances:

- 803 (1) if he is a full-time student<sup>1</sup>, during the period of study<sup>2</sup>, unless he has a partner who is also a full-time student, if either he or his partner is treated as responsible for a child or young person (but this exception only applies to the summer vacation and providing he is or is treated as being available for employment)<sup>3</sup>;
- 804 (2) if he is a prisoner on temporary release in accordance with the provisions of the Prison Act 1952<sup>4</sup>;
- 805 (3) if the period beginning on the date of claim and ending on the day before the beginning of the first week after the date of claim is less than seven days, for that period, unless he is treated<sup>5</sup> as available for employment for that period<sup>6</sup>;
- 806 (4) if she is in receipt of maternity allowance or maternity pay<sup>7</sup>.

<sup>1</sup> 'Full-time student' means a person, other than a person in receipt of a training allowance, who is (1) aged less than 19 and undertaking a full-time course of advanced education; or (2) aged 19 or over but under pensionable age (as to which see PARA 562 post) and (a) attending a full-time course of study which is not funded in whole or in part by the Further Education Funding Council for England or the Further Education Funding Council for Wales ('the FEFC') or a full-time course of study which is not funded in whole or in part by the Secretary of State for Scotland at a college of further education or a full-time course of study which is a course of higher education and is funded in whole or in part by the Secretary of State for Scotland; (b) undertaking a course of study which is funded in whole or in part by the FEFC if it involves more than 16 guided learning hours per week for the student in question, as set out in the case of a course funded by the FEFC for England, in his learning agreement signed on behalf of the establishment which is funded by the FEFC for the delivery of that course or, in the case of a course funded by the FEFC for Wales, in a document signed on behalf of the establishment which is funded by the FEFC for the delivery of that course; or (c) undertaking a course of study (not being higher education) which is funded in whole or in part by the Secretary of State for Scotland at a college of further education if it involves more than 16 hours per week of classroom-based or workshop-based programmed learning under the direct guidance of teaching staff according to the number of hours set out in a document signed on behalf of the college, or 16 hours or less per week of classroom or workshop based programmed learning under the direct guidance of teaching staff and it involves additional hours using structured learning packages supported by the teaching staff where the combined total of hours exceeds 21 per week, according to the number of hours set out in a document signed on behalf of the college: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 1(3) (definition amended by SI 1996/1516). For the meaning of 'course of study' see PARA 283 note 1 post. As to when a person is a full-time student see also *Chief Adjudication Officer v Webber* [1997] 4 All ER 274, CA.

<sup>2</sup> 'Period of study' means the period beginning with the start of the course of study and ending with the last day of the course or such earlier date as the student abandons it or is dismissed from it; any period of attendance by the student at his educational establishment, or any period of study undertaken by the student in connection with the course which occurs before or after the period of the course is to be treated as part of the period of study: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 4.

<sup>3</sup> Ibid reg 15(a).

<sup>4</sup> Ibid reg 15(b).

<sup>5</sup> Ie by virtue of ibid reg 14 (as amended): see PARA 281 ante.

<sup>6</sup> Ibid reg 15(bb) (added by SI 1997/563).

<sup>7</sup> Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 15(c). As to maternity allowance see PARAS 76-79 ante; as to maternity pay see EMPLOYMENT vol 39 (2009) PARA 365 et seq.

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For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any

payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **282 Circumstances in which a person is not to be regarded as available**

TEXT AND NOTES--Also, head (5) if he is on paternity leave or ordinary adoption leave by virtue of the Employment Rights Act 1996 s 75A (see EMPLOYMENT vol 39 (2009) PARA 344): SI 1996/207 reg 15(1)(bc) (added by SI 2002/3072; and amended by SI 2008/698). SI 1996/207 reg 15(a)-(c) now reg 15(1)(a)-(c): SI 2008/1826. SI 1996/207 reg 15(1)(a) substituted, reg 15(2)-(4) added: SI 2008/1826.

NOTE 1--'Full-time course of advanced education' means a course of advanced education which is (1) a full-time course of study which is not funded in whole or in part by the Learning and Skills Council for England or by the National Assembly for Wales; or (2) a course of study which is funded in whole or in part by the Learning and Skills Council for England or by the National Assembly for Wales if it involves more than 16 guided hours per week for the student in question, according to the number of guided learning hours per week for that student set out (a) in the case of a course funded by the Learning and Skills Council for England, in his learning agreement signed on behalf of the establishment which is funded by the Learning and Skills Council for

England for the delivery of that course; or (b) in the case of a course funded by the National Assembly for Wales, in a document signed on behalf of the establishment which is funded by the National Assembly for Wales for the delivery of that course: SI 1996/207 reg 1(3) (amended by SI 2000/1981, SI 2001/1434, SI 2005/3238).

In the definition of 'full-time student', in head (2)(a) for 'Further Education Funding Council for England ... ('the FEFC')' read 'Learning and Skills Council for England or by the National Assembly for Wales'; and now head (2)(b) undertaking a course of study which is funded in whole or in part by the Learning and Skills Council for England or by the National Assembly for Wales if it involves more than 16 guided hours per week for the student in question, according to the number of guided learning hours per week for that student set out (i) in the case of a course funded by the Learning and Skills Council for England, in his learning agreement signed on behalf of the establishment which is funded by the Learning and Skills Council for England for the delivery of that course; or (ii) in the case of a course funded by the National Assembly for Wales, in a document signed on behalf of the establishment which is funded by the National Assembly for Wales for the delivery of that course: SI 1996/207 reg 1(3) (amended by SI 2001/1434, SI 2005/3238).

For the purposes of the definition of 'full-time student', a person is to be regarded as attending or, as the case may be, undertaking a course of study or as being on a sandwich course (1) in the case of a person attending or undertaking a part of a modular course which would be a full-time course of study, for a period beginning on the day on which that part of the course starts and ending on the last day on which he is registered with the educational establishment as attending or undertaking that part as a full-time course of study, or on such earlier date (if any) as he finally abandons the course or is dismissed from it; (2) in any other case, throughout the period beginning on the date on which he starts attending or undertaking the course and ending on the last day of the course or on such earlier date (if any) as he finally abandons it or is dismissed from it: SI 1996/207 reg 1(3A) (reg 1(3A)-(3E) added by SI 2000/1981). The period referred to in head (1) includes (a) where a person has failed examinations or has failed to complete successfully a module relating to a period when he was attending or undertaking a part of the course as a full-time course of study, any period in respect of which he attends or undertakes the course for the purpose of retaking those examinations or that module; (b) any period of vacation within the period specified in head (1) or immediately following that period except where the person has registered with the educational establishment to attend or undertake the final module in the course and the vacation immediately follows the last day on which he is required to attend or undertake the course: SI 1996/207 reg 1(3B) (as added). 'Modular course' means a course of study which consists of two or more modules, the successful completion of a specified number of which is required before a person is considered by the educational establishment to have completed the course: reg 1(3C) (as added). A full-time student is not regarded as undertaking a full-time course of advanced education or a full-time course of study for the period specified in reg 1(3E) if (i) at any time during an academic year, with the consent of the relevant educational establishment, he ceases to attend or undertake a course because he is engaged in caring for another person, or ill; (ii) he has subsequently ceased to be engaged in caring for that person or, as the case may be, he has subsequently recovered from that illness; and (iii) he is not eligible for a grant or a student loan (see PARA 324) in respect of the period specified in reg 1(3E): reg 1(3D) (as added). The period specified for the purposes of reg 1(3D) is the period beginning on the day on which he ceased to be engaged in caring for that other person or, as the case may be, the day on which he recovered from that illness and ending on the day before the day on which he resumes attending or undertaking the course, or the first day of the following academic year, whichever occurs first: reg 1(3E) (as added).

NOTE 2--'Period of study' now means the period during which the student is regarded as attending or undertaking the course of study, and any period of attendance by the student at his educational establishment or any period of study undertaken by the student, in connection with the course, which occurs before or after the period during which he is to be regarded as undertaking the course of study: SI 1996/207 reg 4 (amended by SI 2000/1981).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(ii) Availability for Employment/283. Part-time students.

### **283. Part-time students.**

In relation to a person who is a part-time student<sup>1</sup> and fulfils certain conditions<sup>2</sup>, and who has restricted his hours of availability<sup>3</sup> (with the hours of his course of study falling in whole or in part within his pattern of availability), it is provided that in determining whether he is available for employment no matter relating to his course of study is to be relevant providing:

- 807 (1) he is willing and able to rearrange the hours of his course in order to take up employment at times falling within his pattern of availability, to take up such employment immediately<sup>4</sup>; and
- 808 (2) he continues to comply with the general requirement<sup>5</sup> to be available for at least 40 hours per week<sup>6</sup>.

1 A 'part-time student' means a person who is attending or undertaking a course of study and who is not a full-time student (for the meaning of which see PARA 282 ante): Jobseeker's Allowance Regulations 1996 SI 1996/207, reg 1(3). 'Course of study' means any course of study, including a course of advanced education and an employment-related course, whether or not it is a sandwich course and whether or not a grant is made for attending or undertaking it, and for this purpose a person who has started a course of study is to be treated as attending or undertaking it until the last day of the course or such earlier date as he abandoned or is dismissed from it: reg 1(3).

2 The conditions are that (1) for a continuous period of not less than three months falling immediately before the date on which he first attended the course of study, the person was in receipt of jobseeker's allowance or incapacity benefit or was on a course of training or was in receipt of income support and fell within the Income Support (General) Regulations 1987, SI 1987/1967, Sch 1B para 7 (as added) (persons incapable of work: see PARA 177 head (5) ante); or (2) during the period of six months falling immediately before the date on which he first attended the course he was (a) for a period, or for period in aggregate, of not less than three months in receipt of jobseeker's allowance or incapacity benefit or on a course of training or in receipt of income support and fell within Sch 1B para 7 (as added); and (b) after that period (or, in the case of periods in the aggregate, after the first such period) and throughout the remainder of the six months, engaged in remunerative work or other work the emoluments of which are such as to disentitle him from receipt of jobseeker's allowance, incapacity benefit or income support: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 11(2). The periods of three and six months in head (2) supra must have fallen wholly after the terminal date (ie the terminal date in the claimant's case for the purposes of the Child Benefit (General) Regulations 1976, SI 1976/965, reg 7: see PARA 239 note 11 ante): Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 11(2). 'Training' means training for which persons aged under 18 are eligible and for which persons aged 18 to 24 may be eligible provided directly or indirectly by a Training and Enterprise Council pursuant to its arrangement with the Secretary of State (whether that arrangement is known as an Operating Agreement or by any other name): reg 11(3).

3 Ie under ibid regs 7(2), 13(4) or 17(2) (as amended): see PARAS 278 ante, 284 post.

4 Or, if he falls within ibid reg 5(1), (2) or (3), at the time specified therein: see PARA 277 ante.

5 Ie in ibid reg 6: see PARA 276 note 11 ante.

6 Ibid reg 11(1) (amended by SI 1996/1517). As to the application of this regulation in relation to certain persons undertaking a workskill course see the Jobseeker's Allowance (Workskill Courses) Pilot (No 2) Regulations 1997, SI 1997/1909, regs 22, 23, 25.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's

employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **283 Part-time students**

NOTE 1--'Course of study' now means any course of study, whether or not it is a sandwich course and whether or not a grant is made for attending or undertaking it: SI 1996/207 reg 1(3); SI 2000/1981.

NOTE 2--In the definition of 'training' for 'provided directly ... any other name)' read 'secured in England and Wales by the Learning and Skills Council for England or by the National Assembly for Wales': SI 1996/207 reg 11(3) (amended by SI 2001/1434, SI 2005/3238, SI 2008/3157, SI 2009/583). SI 1996/207 reg 2 amended: SI 2008/1554.

NOTE 6--SI 1996/207 reg 11(1) amended: SI 2008/3051.

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## **284. Laid off and short time workers.**

A person who is laid off<sup>1</sup> is to be treated as available for employment providing he is willing and able to resume the employment from which he has been laid off and to take up immediately any casual employment<sup>2</sup> which is within daily travelling distance of his home<sup>3</sup>.

A person who is kept on short time<sup>4</sup> is to be treated as available for employment providing he is willing and able to resume immediately the employment in which he is being kept on short time and to take up immediately any casual employment<sup>5</sup> which is within daily travelling distance of his home in the hours in which he is not working short time; the total number of hours for which he works and is available for casual employment must be at least 40 in any week<sup>6</sup>.

Where either of these provisions applies, it may only do so for a maximum of 13 weeks, starting with the day after the day he was laid off or first kept on short time<sup>7</sup>.

1 'A person who is laid off' means a person whose employment has been suspended owing to temporary adverse industrial conditions: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 4.

2 'Casual employment' means employment from which the employee can be released without his giving any notice: *ibid* reg 4.

3 *Ibid* reg 17(1). If the person falls within reg 5(1) or (2) (see PARA 277 ante) it is sufficient that he can comply at the time specified therein: reg 17(1).

4 'A person who is kept on short time' means a person whose hours of employment have been reduced owing to temporary adverse industrial conditions: *ibid* reg 4.

5 The same exception applies in relation to a person falling within *ibid* reg 5(1) or (2): see note 3 supra.

6 *Ibid* reg 17(2)(a) (renumbered by SI 1996/1517). The hours can be less than 40 where there are reasonable restrictions due to physical or mental condition, or where the person has caring responsibilities: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 17(2)(b), (c) (added by SI 1996/1517). An employee on short time or laid off may be entitled to a statutory guarantee payment under the Employment Rights Act 1996 s 28 (see EMPLOYMENT vol 39 (2009) PARA 237); any such payment received counts towards the person's employed earner's earnings: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 98(1)(f) (substituted by SI 1996/1517).

7 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 17(3). For these purposes, 'week' means any period of seven consecutive days: reg 17(5). A person who is laid off or kept on short time may not be treated as available for employment for a permitted period under reg 16 (see PARA 280 ante), unless he ceases to be laid off or kept on short time within 13 days of the day on which he was laid off or first kept on short time, in which case he may be treated as available for employment for a permitted period ending a maximum of 13 weeks after the date of claim: reg 17(4).

Where reg 17 applies, the person may also be considered to be actively seeking work (within the above restrictions): see reg 21; and PARA 289 post.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations

1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in

pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **284 Laid off and short time workers**

NOTE 2--The definition of 'casual employment' now applies except where otherwise provided: SI 1996/207 reg 4; SI 1998/1274. An alternative definition applies in relation to SI 1996/207 reg 17A (see PARA 281A).

NOTE 3--SI 1996/207 reg 17(1) amended: SI 2008/3051.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(iii) Actively Seeking Employment/285. The requirement of actively seeking employment.

### (iii) Actively Seeking Employment

#### 285. The requirement of actively seeking employment.

It is a general requirement for eligibility for a jobseeker's allowance that the claimant is actively seeking employment<sup>1</sup>. A person is actively seeking employment in any week<sup>2</sup> if he takes in that week such steps as he can reasonably be expected to have to take in order to have the best prospects of securing employment<sup>3</sup>. Regulations<sup>4</sup> may make provision:

- 809 (1) with respect to steps which it is reasonable, for these purposes, for a person to be expected to have to take in any week<sup>5</sup>;
- 810 (2) as to circumstances (for example, his skills, qualifications, abilities and physical or mental limitations) which, in particular, are to be taken into account in determining whether, in relation to any steps taken by a person, the general requirements are satisfied in any week<sup>6</sup>;
- 811 (3) for acts of a person which would otherwise be relevant for these purposes to be disregarded in such circumstances (including circumstances constituted by, or connected with, his behaviour or appearance) as may be prescribed<sup>7</sup>.

Regulations also may prescribe circumstances in which a person is to be treated as actively seeking employment<sup>8</sup> and may, in particular, provide for a person who is actively seeking employment:

- 812 (a) only in his usual occupation;
- 813 (b) only at a level of remuneration not lower than that which he is accustomed to receive; or
- 814 (c) only in his usual occupation and at a level of remuneration not lower than that which he is accustomed to receive,

to be treated, for the permitted period determined in his case<sup>9</sup>, as actively seeking employment during that period<sup>10</sup>. In addition, regulations may provide for these provisions, and any regulations made under them, to have effect in relation to a person who has reached the age of 16 but not the age of 18 as if 'employment' included 'training'<sup>11</sup>.

Extensive guidance has been laid down as to the steps which it is reasonable to expect and the circumstances to be taken into account when applying the general test<sup>12</sup>. It is further provided that:

- 815 (i) a person is expected to take more than one of these steps on one occasion in any week unless taking one step on one occasion is all that is reasonable for that person to do in that week<sup>13</sup>; and
- 816 (ii) any act of a person which would otherwise be relevant to the general test is to be disregarded:

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- 123. (A) where, in taking the act, he acted in a violent or abusive manner;
- 124. (B) where the act comprised the completion of an application for employment and he spoiled the application; or

125. (C) where by his behaviour or appearance he otherwise undermined his prospects of securing the employment in question,  
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unless any of these circumstances were due to reasons beyond his control<sup>14</sup>.

Where it has been determined ('the first determination') that a person is to be treated as actively seeking employment in any week, the question whether he is actively seeking employment in that week may subsequently be determined on a review of the first determination<sup>15</sup>.

In any case where the period beginning on the date of claim and ending on the day before the beginning of the first week after the date of claim is less than seven days, a person is actively seeking employment in that period if he takes in that period such steps as he can reasonably be expected to have to take in order to have the best prospects of securing employment; and in determining whether a person has taken such steps, the steps which it is reasonable for him to be expected to have to take include those referred to in the detailed guidance<sup>16</sup>, and regard must be had to all the circumstances<sup>17</sup> of the case<sup>18</sup>.

1 See the Jobseekers Act 1996 s 1(2)(c); and PARA 260 ante. 'Employment' will normally mean employed earner's employment but may in prescribed circumstances mean self-employed earner's employment or both employed earner's employment and self-employed earner's employment: see s 7(8); and PARA 288 post. For the meaning of 'employed earner's employment' and 'self-employed earner's employment' see PARA 32 ante (definitions applied by s 7(8)).

2 For the meaning of 'week' see PARA 273 note 3 ante.

3 Jobseekers Act 1995 s 7(1).

4 For the meaning of 'regulations' see PARA 260 note 13 ante.

5 Jobseekers Act 1995 s 7(2)(a).

6 Ibid s 7(2)(b).

7 Ibid s 7(3).

8 Ibid s 7(4).

9 Ie for the purposes of ibid s 6(5): see PARA 276 ante.

10 Ibid s 7(5).

11 Ibid s 7(6).

12 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 18(2), (3); and PARA 286 post.

13 Ibid reg 18(1).

14 Ibid reg 18(4). As to the application of reg 18 in relation to certain persons undertaking a workskill course see the Jobseeker's Allowance (Workskill Courses) Pilot (No 2) Regulations 1997, SI 1997/1909, regs 22, 23, 25.

15 Jobseekers Act 1996 s 7(7).

16 Ie the steps referred to in the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 18(2): see PARA 286 post.

17 Ie including the matters referred to in ibid reg 18(3): see PARA 286 post.

18 See ibid reg 18A (added by SI 1997/563).

## UPDATE

## 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order

2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus; art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **285 The requirement of actively seeking employment**

TEXT AND NOTE 13--Now, head (1) a person is expected to have to take more than two steps in any week unless taking one or two steps is all that it is reasonable for that person to do in that week: SI 1996/207 reg 18(1) (substituted by SI 2004/1008).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(iii) Actively Seeking Employment/286. Steps to be taken by a person actively seeking employment.

**286. Steps to be taken by a person actively seeking employment.**

Steps which it is reasonable for a person to be expected to have to take in any week include:

- 817 (1) oral or written applications (or both) for employment<sup>1</sup> made to persons who have advertised the availability of employment or who appear to be in a position to offer employment;
- 818 (2) seeking information on the availability of employment from advertisements, persons who have placed advertisements which indicate the availability of employment, employment agencies and employment businesses<sup>2</sup> or employers;
- 819 (3) registration with an employment agency or employment business;
- 820 (4) appointment of a third party to assist the person in question in finding employment;
- 821 (5) seeking specialist advice, following referral by an employment officer<sup>3</sup>, on how to improve the prospects of securing employment having regard to that person's needs and in particular in relation to any mental or physical limitations of that person;
- 822 (6) drawing up a curriculum vitae;
- 823 (7) seeking a reference or testimonial from a previous employer;
- 824 (8) drawing up a list of employers who may be able to offer employment to him with a view to seeking information from them on the availability of employment;
- 825 (9) seeking information about employers who may be able to offer employment to him;
- 826 (10) seeking information on an occupation with a view to securing employment in that occupation<sup>4</sup>.

In determining whether, in relation to any steps taken by a person, the requirement of actively seeking employment is satisfied in any week, regard is to be had to all the circumstances of the case, including:

- 827 (a) his skills, qualifications and abilities;
  - 828 (b) his physical and mental limitations;
  - 829 (c) the time which has elapsed since he was last in employment and his work experience;
  - 830 (d) the steps which he has taken in previous weeks and the effectiveness of those steps in improving his prospects of securing employment;
  - 831 (e) the availability and location of vacancies in employment;
  - 832 (f) any time during which he was:
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- 126. (i) Engaged in the manning or launching of a lifeboat or in the performance of duty as a part-time member of a fire brigade or engaged during an emergency in duties for the benefit of others<sup>5</sup>;
  - 127. (ii) attending an Outward Bound course<sup>6</sup>;
  - 128. (iii) in the case of a blind person, participating in a course of training in the use of guide dogs;
  - 129. (iv) participating in training in the use of aids to overcome any physical or mental limitations of his in order to improve his prospects of securing employment;

- 130. (v) Engaged in duties as a member of any territorial or reserve forces;
  - 131. (vi) participating as a part-time student<sup>7</sup> in an employment-related course;
  - 132. (vii) participating for less than three days in an employment or training programme<sup>8</sup> for which a training allowance is not payable;
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- 833 (g) any time during which he was engaged in voluntary work<sup>9</sup> and the extent to which it may have improved his prospects of securing employment;
  - 834 (h) whether he is treated as available for employment;
  - 835 (i) whether he has applied for, or accepted, a place on, or participated in, a course or programme the cost of which is met in whole or in part out of central funds or by the European Community and the purpose of which is to assist people to select, train for, obtain or retain employed earner's employment or self-employed earner's employment; and
  - 836 (j) where he had no living accommodation in that week, the fact that he had no such accommodation and the steps that he needed to take and has in fact taken to seek such accommodation<sup>10</sup>.

1 'Employment' means employed earner's employment: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 4. For circumstances in which a claimant may seek self-employed earner's employment see PARA 288 post. For the meaning of 'employed earner's employment' and 'self-employed earner's employment' see PARA 32 ante.

2 'Employment agency' and 'employment business' mean such an agency or business within the meaning of the Employment Agencies Act 1973: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 18(5).

3 For the meaning of 'employment officer' see PARA 281 note 2 ante.

4 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 18(2).

5 For the purposes of *ibid* regs 18(3)(f)-(i), 19(1)(d), a person is engaged in duties for the benefit of others while (1) providing assistance to any person whose life may be endangered or who may be exposed to the risk of serious bodily injury or whose health may be seriously impaired; (2) protecting property of substantial value from imminent risk of serious damage or destruction; or (3) assisting in measures being taken to prevent a serious threat to the health of the people, in any of these cases as a member of a group of persons organised wholly or partly for the purpose of providing such assistance or protection: *ibid* reg 22(a). Events which may give rise to an emergency include (a) a fire, flood or explosion; (b) a natural catastrophe; (c) a railway or other transport accident; (d) a cave or mountain accident; (e) an accident at sea; (f) a person being reported missing and the organisation of a search for that person: reg 22(b); and see PARA 281 note 10 ante.

6 'Outward Bound course' means any course or programme for personal development which is made available to persons who are not in employment by the charitable trust known as the Outward Bound Trust Limited: *ibid* reg 4.

7 See PARA 283 note 1 ante.

8 'Employment or training programme' means a course or programme the person's participation in which is attributable to arrangements made by the Secretary of State under the Employment and Training Act 1973 s 2 (as substituted and amended) for the purpose of assisting persons to select, train for, obtain or retain employed earner's employment: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 18(5).

9 For the meaning of 'voluntary work' see PARA 277 note 2 ante.

10 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 18(3).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998,

during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus;

'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **286 Steps to be taken by a person actively seeking employment**

NOTE 10--SI 1996/207 reg 18(3) amended: SI 2006/2378.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(iii) Actively Seeking Employment/287. Circumstances in which people are to be treated as actively seeking employment.

**287. Circumstances in which people are to be treated as actively seeking employment.**

A person is to be treated as actively seeking employment in the following circumstances and (where appropriate) for the following periods:

- 837 (1) in any week during which he is participating for not less than three days as a full-time student<sup>1</sup> in an employment-related course where participation by him has been approved before the course started by an employment officer<sup>2</sup>, for a maximum of two weeks, and one such course in any period of 12 months;
- 838 (2) in any week during which he is attending for not less than 3 days a residential work camp<sup>3</sup>, for a maximum of two weeks and one such occasion in any period of 12 months;
- 839 (3) in any week during which he is temporarily absent from Great Britain<sup>4</sup> for not less than three days because he is taking a member of his family<sup>5</sup> who is a child or young person abroad for treatment<sup>6</sup>, for a maximum of eight weeks;
- 840 (4) in any week during which he is engaged for not less than three days in the manning or launching of a lifeboat or in the performance of duty as a part-time member of a fire brigade or engaged during an emergency in duties for the benefit of others<sup>7</sup>;
- 841 (5) if he is a member of a couple<sup>8</sup>, in any week during which he is for not less than three days looking after a member of his family who is a child while the other member is temporarily absent from the United Kingdom, for a maximum of eight weeks;
- 842 (6) if he is following an Open University course, in any week during which he is attending for not less than three days, as a requirement of that course, a residential course, for a maximum of one week per course;
- 843 (7) in any week during which he is for not less than three days temporarily looking after a child full-time because the person who normally looks after him is ill or temporarily absent from home, or the person is looking after a member of the family who is ill, for a maximum of eight weeks;
- 844 (8) in the first week after the date of claim if he is treated as available for employment to any extent in that week<sup>9</sup>;
- 845 (9) if the award is terminated other than on the last day of a week, for the period beginning with the beginning of the week in which the award is terminated and ending on the day on which the award is terminated;
- 846 (10) in any week during which he is participating for not less than three days in a programme provided by the Venture Trust in pursuance of an arrangement made by the Home Secretary with the trust, for a maximum of four weeks and one such programme in any period of 12 months;
- 847 (11) in any week during which he is for not less than three days treated as capable of work<sup>10</sup>;
- 848 (12) in any week during which he is temporarily absent from Great Britain for not less than three days in order to attend an interview for employment and has given notice to an employment officer, in writing if so required, that he will be so absent, for a maximum of one week;

- 849 (13) if he is a member of a couple, in any week in which he and his partner are both absent from Great Britain for not less than three days and a pensioner or disability premium<sup>11</sup> is applicable in respect of his partner, for a maximum of four weeks;
- 850 (14) in any week during which he is treated as available for employment on not less than three days in cases of domestic emergencies<sup>12</sup>;
- 851 (15) in any week in respect of which he has given notice to an employment officer, in writing if so required, that he does not intend to be actively seeking employment but he does intend to reside at a place other than his usual place of residence for at least one day<sup>13</sup>;
- 852 (16) in any week during which he is participating for not less than three days in an employment or training programme<sup>14</sup> for which a training allowance is not payable;
- 853 (17) in any week, being part of a single period not exceeding eight weeks falling within a period of continuous entitlement to a jobseeker's allowance, during which he is taking active steps to establish himself in self-employed earner's employment<sup>15</sup> under any scheme for assisting persons to become so employed where, in Wales, his participating in the scheme is attributable to arrangements made by the Secretary of State<sup>16</sup> under the Employment and Training Act 1973 and, in England, the scheme is directly or indirectly provided by (or with financial assistance from) the Secretary of State, the Urban Regeneration Agency<sup>17</sup>, an urban development corporation<sup>18</sup> or a housing action trust<sup>19</sup>; and the single period is to begin with the week in which he is accepted on a place under the scheme<sup>20</sup>.

1 For the meaning of 'full-time student' see PARA 282 note 1 ante.

2 For the meaning of 'employment officer' see PARA 281 note 2 ante.

3 For the meaning of 'work camp' see PARA 281 note 5 ante.

4 For the meaning of 'Great Britain' see PARA 15 note 4 ante.

5 For the meaning of 'family' see PARA 265 note 6 ante.

6 For the meaning of 'child' and 'young person' see PARAS 272 note 10, 264 note 4 respectively ante. The definition of 'treatment' in the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 19(3) for this purpose is the same as in reg 14(4): see PARA 281 note 8 ante.

7 As to when a person is engaged in duties for the benefit of others, and for the meaning of 'emergency' see PARA 286 note 5 ante.

8 For the meaning of 'couple' see PARA 265 note 3 ante.

9 Ie under the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 14(1)(h): see PARA 281 ante.

10 Ie under ibid reg 55: see PARA 263 ante.

11 Ie under ibid Sch 2 paras 10, 11, 12, 13 or 15 (as amended).

12 Ie under ibid reg 14(2): see PARA 281 ante.

13 This applies in any period of 12 months only for the following number of weeks: (1) a maximum of two weeks; or (2) a maximum of three weeks during which he is attending for at least three days in each such week an Outward Bound course; or (3) if he is a blind person, a maximum of six weeks during which, apart from a period of no more than two weeks, he participates for a maximum period of four weeks in a course of training in the use of guide dogs of which at least three days in each such week is spent in that training: ibid reg 19(2).

14 For the meaning of 'employment or training programme' see PARA 286 note 8 ante.

15 For the meaning of 'self-employed earner's employment' see PARA 32 ante (definition applied by virtue of the Jobseekers Act 1995 s 7(8)).

- 16 As to the Secretary of State see PARA 1 ante.
- 17 As to the Urban Regeneration Agency see TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 37.
- 18 As to urban development corporations see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1428 et seq.
- 19 As to housing action trusts see HOUSING vol 22 (2006 Reissue) PARA 319.
- 20 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 19(1) (amended by SI 1996/1517; SI 1997/563).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help

participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **287 Circumstances in which people are to be treated as actively seeking employment**

TEXT AND NOTES--Also, heads (18) for any period if he is treated as available for employment to any extent in that period under SI 1996/207 reg 14(1)(h) (see PARA 281); (19) if he is a member of a joint-claim couple, in any week during which he and

his partner are both absent from Great Britain for not less than three days and in which a premium referred to in Sch 1 para 20E, 20F, 20G or 20I is applicable in respect of his partner, for a maximum of four weeks; (20) for any period if he is treated as available for employment to any extent in that period under reg 14(1)(o) (see PARA 281); (21) if he is temporarily absent from Great Britain in the circumstances prescribed in reg 50(6B)(a) or (c) (see PARA 265), for the period of any such temporary absence; (22) in any week during which he is for not less than three days treated as capable of work or as not having limited capability for work in accordance with reg 55A; (23) if he is temporarily absent from Great Britain in the circumstances prescribed in reg 50(6AA) or, as the case may be, reg 50(6C) (see PARA 265): reg 19(1) (amended by SI 1999/3087, SI 2000/3336, SI 2004/1869, SI 2008/1554, SI 2008/3051). SI 1996/207 reg 19 further amended: SI 2006/1402.

TEXT AND NOTE 11--Head (13) refers to a couple other than a joint-claim couple (see PARA 260): SI 1996/207 reg 19(1) (amended by SI 2000/3336).

NOTE 11--SI 1996/207 Sch 2 para 10 further amended: SI 2005/522. SI 1996/207 Sch 2 para 11 further amended: SI 2005/522, SI 2007/3183. SI 1996/207 Sch 2 para 11 modified: SI 2008/3195. SI 1996/207 Sch 2 para 13 further amended: SI 1998/2231, SI 1999/714, SI 1999/1921, SI 2001/158, SI 2000/724, SI 2001/488, SI 2002/841, SI 2006/2378, SI 2008/1554, SI 2008/1826, SI 2009/480, SI 2009/2655.

TEXT AND NOTES 15-20--Head (17). SI 1996/207 reg 19(1) amended: SI 1998/1274, SI 2008/698, SI 2008/2831, SI 2009/583.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(iii) Actively Seeking Employment/288. Actively seeking work in the usual occupation or on a self-employed basis.

## **288. Actively seeking work in the usual occupation or on a self-employed basis.**

A person is to be treated as actively seeking employment in any week<sup>1</sup> during any permitted period<sup>2</sup> applicable to his case, if he is actively seeking employment only in his usual occupation, or only at a level of remuneration not lower than that which he is accustomed to receive, or both<sup>3</sup>.

Where a person has, at any time during the period of 12 months immediately preceding the date of claim, been engaged in his usual occupation in self-employed earner's employment<sup>4</sup>, he is to be treated as actively seeking employment in any week during any such permitted period if he is actively seeking employment or self-employed earner's employment (or both) only in his usual occupation, or only at a level of remuneration not lower than that which he is accustomed to receive, or both<sup>5</sup>.

1 For the meaning of 'week' see PARA 273 note 3 ante.

2 Ie the permitted period which may be allowed in relation to the requirement of availability for employment under the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 16: see PARA 280 ante.

3 Ibid reg 20(1).

4 For the meaning of 'self-employed earner's employment' see PARA 32 ante (definition applied by virtue of the Jobseekers Act 1995 s 7(8)).

5 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 20(2), (3).

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with

the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(iii) Actively Seeking Employment/289. Laid off and short time workers.

## **289. Laid off and short time workers.**

Where a person has restricted his availability by virtue of being laid off or kept on short time working<sup>1</sup>, he is to be treated (in any week<sup>2</sup> in which he has so restricted his availability for not less than three days) as actively seeking employment if he takes such steps as he can reasonably be expected to have to take in order to have the best prospects of securing employment for which he is available under those lay off and short time provisions<sup>3</sup>.

1    le under the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 17(1) or (2): see PARA 284 ante.

2    For the meaning of 'week' see PARA 284 note 7 ante.

3    Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 21. Note that reg 17, on which reg 21 relies, can only apply for a maximum of 13 weeks: see PARA 284 text and note 7 ante.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a training receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25

plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment

route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **289 Laid off and short time workers**

TEXT AND NOTES--SI 1996/207 reg 21A, inserted by SI 1998/1274, specifies further circumstances in which a person is to be treated as actively seeking employment.

A person who is treated as available for employment in accordance with SI 1996/207 reg 17A(3) (see PARA 281A) is to be treated as actively seeking employment in any week (1) which, in relation to the qualifying course, falls wholly or partly in term-time; (2) in which he is taking examinations relating to the qualifying course; or (3) which falls wholly in a vacation from the qualifying course, if in that week he takes such steps as he can reasonably be expected to have to take in order to have the best prospects of securing employment for which he is available under reg 17A(3)(c): reg 21A; SI 1998/1274. For the meaning of 'qualifying course', 'term-time', 'examination' (in relation to a qualifying course) and 'vacation', see PARA 281A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(iv) Attendance, Information and Evidence/290. Power to make regulations.

#### **(iv) Attendance, Information and Evidence**

##### **290. Power to make regulations.**

Regulations<sup>1</sup> may make provision for requiring a claimant<sup>2</sup>:

- 854 (1) to attend at such place and at such time as the Secretary of State<sup>3</sup> may specify; and
- 855 (2) to provide information and such evidence as may be prescribed<sup>4</sup> as to his circumstances, his availability for employment and the extent to which he is actively seeking employment<sup>5</sup>,

and may, in particular:

- 856 (a) prescribe circumstances in which entitlement to a jobseeker's allowance is to cease in the case of a claimant who fails to comply with any such regulations;
- 857 (b) provide for entitlement to cease at such time (after he last attended in compliance with requirements of the kind mentioned in head (1) above) as may be determined in accordance with any such regulations;
- 858 (c) provide for entitlement not to cease if the claimant shows, within a prescribed period of his failure to comply, that he had good cause for that failure; and
- 859 (d) prescribe matters which are, or are not, to be taken into account in determining whether a person has, or does not have, good cause for failing to comply with any such regulations, and circumstances in which a person is, or is not, to be regarded as having, or not having, good cause for failing to comply with any such regulations<sup>6</sup>.

1 For the meaning of 'regulations' see PARA 260 note 13 ante.

2 For the meaning of 'claimant' see PARA 260 note 1 ante.

3 As to the Secretary of State see PARA 1 ante.

4 For the meaning of 'prescribed' see PARA 21 note 12 ante.

5 Jobseekers Act 1995 s 8(1).

6 Ibid s 8(2). As to the exercise of this power see PARA 291 et seq post.

#### **UPDATE**

##### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment

Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged

25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **290 Power to make regulations**

TEXT AND NOTE 2--Now refers to a claimant other than a joint-claim couple claiming a joint-claim jobseeker's allowance: Jobseekers Act 1995 s 8(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 7(1), (2)). For the meaning of 'joint-claim couple' see PARA 260. For the meaning of 'joint-claim jobseeker's allowance' see PARA 260A. Regulations may make provision (1) for requiring each member of a joint-claim couple claiming a joint-claim jobseeker's allowance to attend at such place and such time as the Secretary of State may specify; (2) for requiring a member of such a couple to provide information and such evidence as may be prescribed as to his circumstances, his availability for employment and the extent to which he is actively seeking employment; (3) for requiring such a couple jointly to provide information and such evidence as may be prescribed as to the circumstances of each or either member of the couple, the availability for employment of each or either member of the couple and the extent to which each or either member of the couple is actively seeking employment; (4) where any requirement to provide information or evidence is imposed on such a couple by virtue of head (3), for the joint obligation of the couple to be capable of being discharged by the provision of the information or evidence by one member of the couple: 1995 Act s 8(1A) (added by the 1999 Act Sch 7 paras 1, 7(1), (3)).

TEXT AND NOTES 3-5--For 'Secretary of State' read 'an employment officer': 1995 Act s 8(1) (amended by the 1999 Act Sch 8 para 29(1), (3)(a)). 'Employment officer' means an officer of the Secretary of State or such other person as may be designated for the purposes of the 1995 Act s 8(1) by an order made by the Secretary of State: s 8(3) (added by the 1999 Act Sch 8 para 29(1), (3)(b)).

TEXT AND NOTE 6--1995 Act s 8(2) amended: 1999 Act Sch 7 paras 1, 7(1), (4)-(7); Welfare Reform Act 2009 s 33(2). 1995 Act s 8(2A) added: Welfare Reform Act 2009 s 33(3).

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## **291. Attendance.**

A claimant<sup>1</sup> must attend at such place and at such time as the Secretary of State<sup>2</sup> may specify by a notice in writing given or sent to the claimant<sup>3</sup>.

A jobseeker's allowance is to cease if:

- 860 (1) the claimant fails to attend on a day specified in such a notice (other than a notice requiring attendance under an employment programme or a training scheme)<sup>4</sup>; or
- 861 (2) following a failure to attend at the time specified in the notice, the Secretary of State has informed the claimant in writing that a failure to attend, on the next occasion on which he is required to attend, at the time specified, may result in his entitlement to a jobseeker's allowance ceasing, and the claimant fails to attend at the time specified in such a notice on the next occasion<sup>5</sup>.

Entitlement is to cease in such circumstances on whichever is the earlier of:

- 862 (a) the day after the last day in respect of which the claimant has provided information or evidence which shows that he continues to be entitled to a jobseeker's allowance; or
- 863 (b) the day on which he was required to attend,

provided that it is not to cease earlier than the day after he last attended in compliance with a notice<sup>6</sup>.

1 For the meaning of 'claimant' see PARA 260 note 1 ante.

2 As to the Secretary of State see PARA 1 ante.

3 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 23.

4 'Employment programme' and 'training scheme' have the meaning given in *ibid* reg 75 (see PARA 304 note 7 post): reg 25(2).

5 *Ibid* reg 25(1)(a), (b).

6 *Ibid* reg 26(a), (b) (respectively amended by SI 1996/1517; SI 1996/1516). This disentitlement to the allowance is subject to a 'good cause' defence: see PARA 292 post.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment

Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged

25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **291 Attendance**

TEXT AND NOTES 1-3--A claimant must attend at such place and at such time as an employment officer may specify by a notification which is given or sent to the claimant and which may be in writing, by telephone or by electronic means: SI 1996/207 reg 23 (substituted by SI 2000/2194).

Each member of a joint-claim couple must attend at such place and at such time as the employment officer may specify by a notification which is given or sent to that member and which may be in writing, by telephone or by electronic means: SI 1996/207 reg 23A (added by SI 2000/1978). For the meaning of 'joint-claim couple' see PARA 260.

TEXT AND NOTES 4-6--For 'notice' (in each place) read 'notification': SI 1996/207 regs 25, 26 (amended by SI 2000/2194). Such reference to notification now refers to a notification under SI 1996/207 regs 23, 23A (see TEXT AND NOTES 1-3): regs 25(1)(a), (b), 26 (amended by SI 2000/1978). In head (1) for 'the claimant' read 'a claimant'; in heads (2), (a), for 'the claimant' read 'that claimant': SI 1996/207 regs 25(1)(a), (b), 26(a) (amended by SI 2000/1978).

TEXT AND NOTE 5--In head (2) for 'following a failure ... the notice' read 'the claimant attends on the day specified in the notification but fails to attend at the time specified in that notification (other than a notification requiring attendance under an employment programme or a training scheme), and': SI 1996/207 reg 25(1)(b) (amended by SI 1999/530, SI 2000/1978, SI 2000/2194).

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## **292. Good cause for failure to attend.**

Entitlement to a jobseeker's allowance is not to cease due to failure to attend<sup>1</sup> if the claimant<sup>2</sup> shows, before the end of the fifth working day<sup>3</sup> after the day on which he failed to comply with the notice to attend, that he had good cause for the failure<sup>4</sup>. In determining this question, the matters which are to be taken into account include:

- 864 (1) whether the claimant misunderstood the requirement on him due to any learning, language or literacy difficulties of the claimant or any misleading information given to him by an employment officer<sup>5</sup>;
- 865 (2) whether the claimant was attending a medical or dental appointment, or accompanying a person for whom the claimant has caring responsibilities<sup>6</sup> to such an appointment, and whether it would have been unreasonable in the circumstances to rearrange the appointment;
- 866 (3) any difficulty with the claimant's normal mode of transport and whether there was any reasonable available alternative;
- 867 (4) the established customs and practices of the religion, if any, to which the claimant belongs;
- 868 (5) whether the claimant was attending an interview for employment<sup>7</sup>.

A claimant is to be regarded as having good cause for failure to attend:

- 869 (a) where, if he is not required to be immediately available because of caring responsibilities or voluntary work<sup>8</sup>, he was required to attend at a time less than 48 hours from receipt by him of the notice;
- 870 (b) where, if he is not required to be immediately available because of providing a service<sup>9</sup>, he was required to attend at a time less than 24 hours from receipt by him of the notice;
- 871 (c) where he was treated as available for employment under certain specific provisions<sup>10</sup> on the day on which he failed to attend;
- 872 (d) where the day on which he failed to attend falls in a week in which he was treated as actively seeking employment under the permitted holidays provisions<sup>11</sup>.

1    Ie under the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 23; see PARA 291 ante.

2    For the meaning of 'claimant' see PARA 260 note 1 ante.

3    'Working day' means any day on which the appropriate office is not closed (Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 27(2)); and 'appropriate office' means the office of the Department for Education and Employment which the claimant is required to attend in accordance with a notice under reg 23, or any other place which he is so required to attend (reg 4).

4    Ibid reg 27(1).

5    For the meaning of 'employment officer' see PARA 281 note 2 ante.

6    For the meaning of 'caring responsibilities' see PARA 277 note 1 ante.

7    Ibid reg 28(1). 'Employment' here means employed earner's employment, but may include self-employed earner's employment where the provision of regs 16 and 20(2) apply, for the relevant permitted period (see

PARAS 280, 288 ante): reg 28(2). For the meaning of 'employed earner's employment' and 'self-employed earner's employment' see PARA 32 ante.

8     Ie where ibid reg 5(1) applies: see PARA 277 head (1) ante.

9     Ie where ibid reg 5(2) applies: see PARA 277 head (2) ante.

10    Ie ibid reg 14(1)(a)-(g), (k)-(n) or reg 14(2): see PARA 281 ante.

11    Ibid reg 30. The permitted holiday provisions are those in reg 19(1)(p), (2); see PARA 287 head (15) ante.

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **292 Good cause for failure to attend**

TEXT AND NOTES--SI 1996/207 regs 27(1), 28(1), 30 also now refer to a notification under reg 23A (see PARA 291): SI 1996/207 regs 27(1), 28(1), 30 (amended by SI 2000/1978).

TEXT AND NOTES 1-7--For 'notice' read 'notification': SI 1996/207 reg 27(1) (amended by SI 2000/2194). For 'the claimant' read 'a claimant': SI 1996/207 reg 27(1) (amended by SI 2000/1978).

NOTE 7--SI 1996/207 reg 28(1) amended: SI 2000/2194.

TEXT AND NOTES 8-11--References to notice are now to notification: SI 1996/207 reg 30 (amended by SI 2000/2194, SI 2006/1402, SI 2008/3051).

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### **293. Provision of information and evidence.**

A claimant<sup>1</sup> must provide such information as to his circumstances, his availability for employment and the extent to which he is actively seeking employment as may be required by the Secretary of State<sup>2</sup> in order to determine the entitlement of the claimant to a jobseeker's allowance, whether that allowance is payable to him and, if so, in what amount<sup>3</sup>.

Where a jobseeker's allowance may be claimed by either member of a couple<sup>4</sup> (or the entitlement or amount of an allowance is or may be affected by the circumstances of either member of a couple or any member of a polygamous marriage<sup>5</sup>), the Secretary of State may require the member of the couple other than the claimant to certify in writing whether he agrees to the claimant's making the claim, or that he or any member of a polygamous marriage confirms the information given about his circumstances<sup>6</sup>.

A claimant must furnish such certificates, documents or other evidence as may be required by the Secretary of State for the determination of the claim<sup>7</sup>.

A claimant must notify the Secretary of State:

- 873 (1) of any change of circumstances which has occurred which he might reasonably be expected to know might affect his entitlement to a jobseeker's allowance or the payability or amount of such an allowance; and
- 874 (2) of any such change of circumstances which he is aware is likely so to occur,

and must do so as soon as reasonably practicable after its occurrence or, as the case may be, after he becomes so aware, by giving notice in writing (unless the Secretary of State determines in any particular case to accept notice given otherwise than in writing) to the appropriate office<sup>8</sup>.

Finally, a claimant must, if the Secretary of State requires him to do so, provide a signed declaration to the effect that:

- 875 (a) since making the claim for a jobseeker's allowance or since he last provided such a declaration, he has either been available for employment or satisfied the circumstances to be treated as available for employment<sup>9</sup>, save as he has otherwise notified the Secretary of State;
- 876 (b) since making a claim or since he last provided such a declaration, he has either been actively seeking employment to the extent necessary to give him his best prospects of securing employment<sup>10</sup> or he has satisfied the circumstances to be treated as actively seeking employment<sup>11</sup>, save as he has otherwise notified the Secretary of State; and
- 877 (c) since making the claim or since he last provided such a declaration, there has been no change to his circumstances which might affect his entitlement to an allowance or the amount thereof, save as he has notified the Secretary of State<sup>12</sup>.

Entitlement to a jobseeker's allowance ceases if the claimant was required to provide such a signed declaration and he fails to provide it on the day on which he ought to do so<sup>13</sup>.

1 For the meaning of 'claimant' see PARA 260 note 1 ante.

2 As to the Secretary of State see PARA 1 ante.

3 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 24(1). The claimant must also furnish such other information in connection with the claim or any question arising out of it as may be required by the Secretary of State: reg 24(2). In either case, the claimant must provide the information when he attends in accordance with a notice given under reg 23 (see PARA 291 ante) if so required by the Secretary of State, or within such period as the latter may require: reg 24(8).

4 For the meaning of 'couple' see PARA 265 note 3 ante.

5 For the meaning of 'polygamous marriage' see PARA 262 note 6 ante.

6 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 24(3).

7 Ibid reg 24(4). The claimant must also furnish such certificates, documents or other evidence affecting his continuing entitlement to the allowance, whether it is payable to him and, if so, in what amount as the Secretary of State may require: reg 24(5). In either case, the claimant must furnish the relevant material within seven days of being so required or such longer period as the Secretary of State may consider reasonable: reg 24(9).

8 Ibid reg 24(7). For the meaning of 'appropriate office' see PARA 292 note 3 ante. Failure to comply may lead to an overpayment of benefit; for the circumstances in which such an overpayment is repayable by the claimant see PARA 385 post.

9 See PARA 281 ante.

10 See PARA 285 ante.

11 See PARA 287 ante.

12 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 24(6) (amended by SI 1996/1517). Such a declaration must be provided on the day on which he is required to attend pursuant to a notice under reg 23 or on such other day as the Secretary of State may require: reg 24(10).

13 Ibid reg 25(1)(c). The entitlement ceases on the earlier of (1) the day after the last day in respect of which the claimant has provided information or evidence which shows that he continues to be entitled to a jobseeker's allowance; or (2) the day on which he ought to have provided the signed declaration, provided that it is not to cease earlier than the day on which he last attended in compliance with a notice under reg 23: reg 26(a), (c) (respectively amended by SI 1996/1517; SI 1996/1516).

This disentitlement is subject to a 'good cause' defence: see PARA 294 post.

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being

employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **293 Provision of information and evidence**

TEXT AND NOTES 1-12--References to the 'Secretary of State' include a reference to persons designated as employment officers by an order made by the Secretary of State under the Jobseekers Act 1995 s 8(3): SI 1996/207 reg 24(11) (added by SI 1999/3108).

A member of a joint-claim couple must provide such information as to the circumstances of each or either member of a couple, the availability for employment of each or either member of the couple and the extent to which each or either member of the couple is actively seeking employment as may be required by the Secretary of State in order to determine the entitlement of the couple to a jobseeker's allowance, whether that allowance is payable to the couple and, if so, in what amount: SI 1996/207 reg 24(1A) (reg 24(1A), (3A), (5A) added by SI 2000/1978). Where entitlement to a joint-claim jobseeker's allowance or whether that allowance is payable and, if so, in what amount, is or may be affected by the circumstances of any member of a polygamous marriage, the Secretary of State may require either member of the joint-claim couple to certify in writing that any member of the polygamous marriage confirms the information given about that member's circumstances: SI 1996/207 reg 24(3A) (as added). A member of a joint-claim couple must furnish such certificates, documents and other evidence affecting the continuing entitlement of the couple to a jobseeker's allowance, whether that allowance is payable to the couple and, if so, in what amount as the Secretary of State may require: reg 24(5A) (as added). For the meaning of 'joint-claim couple' see PARA 260.

NOTES 3, 12, 13--For 'notice' read 'notification': SI 1996/207 regs 24(8), (10), 26 (amended by SI 2000/2194).

NOTE 3--Now refers to reg 23 or 23A (see PARA 291)': SI 1996/207 reg 24(8) (amended by SI 2000/1978), which also now applies where the duty to provide information arises under reg 24(1A) (see TEXT AND NOTES 1-12).

NOTES 4-6--In SI 1996/207 reg 24(3), 'couple' does not include a joint-claim couple: reg 24(3) (amended by SI 2000/1978).

NOTE 7--SI 1996/207 reg 24(9) now also applies where the requirement to provide certificates, documents and other evidence arises under reg 24(5A) (see TEXT AND NOTES 1-12): reg 24(9) (amended by SI 2000/1978).

TEXT AND NOTE 8--After 'jobseeker's allowance' add 'or, in the case of a joint-claim couple, the entitlement of the couple to a joint-claim jobseeker's allowance': SI 1996/207 reg 24(7) (amended by SI 2000/1978). SI 1996/207 further amended: SI 2006/832.

NOTE 12--After 'reg 23' add 'or reg 23A (see PARA 291)': SI 1996/207 reg 24(10) (amended by SI 2000/1978).

NOTE 13--SI 1996/207 reg 25(1)(c) amended: SI 2000/1978. For 'the claimant' read 'that claimant'; the reference to reg 23 is now to reg 23 or 23A (see PARA 291): SI 1996/207 reg 26(a) (amended by SI 2000/1978).

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#### **294. Good cause for failure to provide a signed declaration.**

Entitlement to a jobseeker's allowance is not to cease due to failure to provide a signed declaration<sup>1</sup> if the claimant<sup>2</sup> shows, before the end of the fifth working day<sup>3</sup> after the day on which he failed to provide the signed declaration, that he had good cause for that failure<sup>4</sup>. In determining this question, the matters which are to be taken into account include:

- 878 (1) whether there were adverse postal conditions;
- 879 (2) whether the claimant misunderstood the requirement on him due to any learning, language or literacy difficulties of the claimant or any misleading information given to him by an employment officer<sup>5</sup>.

1   le under the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 24(6) (as amended): see PARA 293 ante.

2   For the meaning of 'claimant' see PARA 260 note 1 ante.

3   For the meaning of 'working day' see PARA 292 note 3 ante.

4   Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 27(1).

5   Ibid reg 29. For the meaning of 'employment officer' see PARA 281 note 2 ante.

#### **UPDATE**

#### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with

the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

#### **294 Good cause for failure to provide a signed declaration**

TEXT AND NOTES 2-4--For 'the claimant' substitute 'a claimant': SI 1996/207 reg 27(1) (amended by SI 2000/1978).

NOTE 4--SI 1996/207 reg 27(1) amended: SI 2000/2194.

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## **(v) The Jobseeker's Agreement**

### **295. Requirement for and nature of a jobseeker's agreement.**

It is a general requirement for eligibility for a jobseeker's allowance that the claimant has entered into a jobseeker's agreement which remains in force<sup>1</sup>. Such an agreement is one which is entered into by a claimant<sup>2</sup> and an employment officer<sup>3</sup> and which complies with the prescribed requirements<sup>4</sup> in force at the time of its making<sup>5</sup>. It must be in writing and signed by both parties<sup>6</sup> and a copy of it must be given to the claimant<sup>7</sup>.

An employment officer is not to enter into a jobseeker's agreement with a claimant unless, in the officer's opinion, the conditions relating to availability for employment and actively seeking employment<sup>8</sup> would be satisfied with respect to the claimant if he were to comply with, or be treated as complying with, the proposed agreement<sup>9</sup>.

1 See the Jobseekers Act 1995 s 1(2)(b); and PARA 260 ante. For the circumstances in which a person may be treated as having entered into such an agreement see PARA 296 post.

2 For the meaning of 'claimant' see PARA 260 note 1 ante.

3 'Employment officer' means an officer of the Secretary of State or such other person as may be designated for these purposes by an order made by the Secretary of State: Jobseekers Act 1995 s 9(13); and see PARA 281 note 2 ante. As to the Secretary of State see PARA 1 ante.

4 The prescribed requirements are set out in the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 31, and are that the agreement must contain the following information: (1) the claimant's name; (2) where the hours for which the claimant is available for employment are restricted under reg 7 (see PARA 278 ante), the total number of hours for which he is available and any pattern of availability; (3) any restrictions on the claimant's availability for employment, including restrictions on the location or type of employment, under regs 5, 8, 13 and 17 (as amended) (see PARAS 277, 278, 284 ante); (4) a description of the type of employment which the claimant is seeking; (5) the action which the claimant will take to seek employment and to improve his prospects of finding employment; (6) the dates of the start and finish of any permitted period in his case for the purposes of the Jobseekers Act 1995 ss 6(5) and 7(5) (ie the Jobseeker's Allowance Regulations 1996, SI 1996/207 regs 16, 20: see PARAS 280, 288 ante); (7) a statement of the claimant's right (a) to have a proposed agreement referred to an adjudication officer; (b) to seek a review of any determination of, or direction given by, an adjudication officer; and (c) to appeal to a social security appeal tribunal against any determination of, or direction given by, an adjudication officer on a review; (8) the date of the agreement: see reg 31. For the meaning of 'prescribed' see PARA 21 note 12 ante.

5 Jobseekers Act 1995 s 9(1). A jobseeker's agreement has effect only for the purposes of s 1 (see PARAS 259-260 ante): s 9(2).

6 Ibid s 9(3).

7 Ibid s 9(4).

8 Ie under ibid s 1(2)(a) and (c): see PARA 260 ante.

9 Ibid s 9(5).

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's

employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

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## **296. Jobseeker's agreement treated as having been made.**

Regulations<sup>1</sup> may provide that, in prescribed circumstances<sup>2</sup>, a claimant<sup>3</sup> is to be treated as having satisfied the condition<sup>4</sup> of entering into a jobseeker's agreement<sup>5</sup>. A claimant is to be so treated:

- 880 (1) where he is permitted to make a claim for a jobseeker's allowance without attending at an office of the Department for Education and Employment or the Department of Social Security, for the period beginning with the date of claim and ending on the date on which he has an interview with an employment officer<sup>6</sup> for the purpose of drawing up a jobseeker's agreement<sup>7</sup>;
- 881 (2) where, after the date of claim, the claim is terminated before he has an interview with an employment officer for the purpose of drawing up a jobseeker's agreement<sup>8</sup>;
- 882 (3) as long as he is treated as available for employment<sup>9</sup> where the relevant circumstances arise after the date of claim and before he has an interview with an employment officer for the purpose of drawing up a jobseeker's agreement<sup>10</sup>;
- 883 (4) as long as there are circumstances not peculiar to the claimant which make impracticable or unduly difficult the normal operation of the provisions governing, or the practice relating to, the claiming, awarding or payment of jobseeker's allowance<sup>11</sup>;
- 884 (5) where a claimant was in receipt of a training allowance and was, in accordance with the relevant provision<sup>12</sup>, entitled to an income-based jobseeker's allowance<sup>13</sup> without being available for employment, having entered into a jobseeker's agreement or actively seeking employment, for the period beginning with the date on which the relevant provision ceased to apply to him and ending on the date on which he has an interview with an employment officer for the purpose of drawing up a jobseeker's agreement<sup>14</sup>.

1 For the meaning of 'regulations' see PARA 260 note 13 ante.

2 For the prescribed circumstances see heads (1)-(5) in the text. For the meaning of 'prescribed' see PARA 21 note 12 ante.

3 For the meaning of 'claimant' see PARA 260 note 1 ante.

4 I.e. the condition mentioned in the Jobseekers Act 1995 s 1(2)(b): see PARA 260 ante.

5 Ibid s 9(10).

6 For the meaning of 'employment officer' see PARA 295 note 3 ante.

7 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 34(a).

8 Ibid reg 34(b).

9 I.e. under ibid reg 14: see PARA 281 ante.

10 Ibid reg 34(c).

11 Ibid reg 34(d).

12 le ibid reg 170: see PARA 326 post.

13 For the meaning of 'income-based jobseeker's allowance' see PARA 271 note 1 ante.

14 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 34(e) (added by SI 1996/1516).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity

Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **296 Jobseeker's agreement treated as having being made**

TEXT AND NOTES--Also, head (6) if he is temporarily absent from Great Britain in the circumstances prescribed in SI 1996/207 reg 50(6B)(a) or (c) (see PARA 265) for the period of any such temporary absence': reg 34(f) (added by SI 2000/1978).

TEXT AND NOTE 7--Reference to the Department for Education and Employment or the Department of Social Security is now to the Department for Work and Pensions: SI 1996/207 reg 34(a) (amended by SI 2002/1397).

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## **297. Reference to an adjudication officer.**

An employment officer<sup>1</sup> may, and if asked to do so by a claimant<sup>2</sup> must forthwith, refer a proposed jobseeker's agreement<sup>3</sup> to an adjudication officer<sup>4</sup> for him to determine:

- 885 (1) whether, if the claimant concerned were to comply with the proposed agreement, he would satisfy the conditions relating to availability for employment and actively seeking employment<sup>5</sup>; and
- 886 (2) whether it is reasonable to expect the claimant to have to comply with the proposed agreement<sup>6</sup>.

An adjudication officer to whom such a reference is made:

- 887 (a) must, so far as practicable, dispose of it before the end of the period of 14 days from the date of the reference;
- 888 (b) may give such directions, with respect to the terms on which the employment officer is to enter into a jobseeker's agreement with the claimant, as the adjudication officer considers appropriate;
- 889 (c) may direct that, if such conditions as he considers appropriate are satisfied, the proposed jobseeker's agreement is to be treated (if entered into) as having effect on such date, before it would otherwise have effect, as may be specified in the direction<sup>7</sup>.

Any such determination or direction must be notified to the claimant<sup>8</sup>; and any such determination is binding<sup>9</sup>.

1 For the meaning of 'employment officer' see PARA 295 note 3 ante.

2 For the meaning of 'claimant' see PARA 260 note 1 ante.

3 For the meaning of 'jobseeker's agreement' see PARA 295 ante.

4 For the meaning of 'adjudication officer' see PARA 263 note 4 ante.

5 I.e. the conditions in the Jobseekers Act 1995 s 1(2)(a), (c): see PARA 260 ante.

6 Ibid s 9(6).

7 Ibid s 9(7). Regulations may provide for such matters as may be prescribed to be taken into account by an adjudication officer in such giving a direction and for such persons as may be prescribed to be notified of any determination of an adjudication officer under these provisions and any direction given by an adjudication officer under them: s 9(8). For the meaning of 'regulations' see PARA 260 note 13 ante. In giving such a direction, the adjudication officer must take into account all relevant matters, including (1) where the claimant refused to accept the proposed agreement, whether he was reasonable in so refusing; (2) where the claimant has signified to the employment officer or to the adjudication officer that the claimant is prepared to accept an agreement which differs from the proposed agreement, whether the terms of the agreement which he is prepared to accept are reasonable; (3) where the claimant has signified to the employment officer or adjudication officer that the claimant is prepared to accept the proposed agreement, that fact; (4) the date on which, in all the circumstances, he considers that the claimant was first prepared to enter into an agreement which the adjudication officer considers reasonable; and (5) where the date on which the claimant first had an

opportunity to sign a jobseeker's agreement was later than the date on which he made a claim, that fact: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 32.

8 Ibid reg 33.

9 Jobseekers Act 1995 s 9(9). As to reviews and appeals see PARA 300 post.

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or

falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

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## **298. Commencement and duration of a jobseeker's agreement.**

Regulations<sup>1</sup> may provide that, in prescribed circumstances<sup>2</sup>, a jobseeker's agreement<sup>3</sup> is to be treated as having effect on a date, to be determined in accordance with the regulations, before it would otherwise have effect<sup>4</sup>. Where a jobseeker's agreement is signed on a date later than the date of claim and there is no reference of that agreement to an adjudication officer<sup>5</sup>, the agreement is to be treated as having effect on the date of claim<sup>6</sup>.

Except in such circumstances as may be prescribed, a jobseeker's agreement entered into by a claimant<sup>7</sup> ceases to have effect on the coming to an end of a jobseeker's allowance made to him<sup>8</sup>. It is provided, however, that that is not to be the case:

- 890 (1) where a further claim for a jobseeker's allowance is made within a period not exceeding 14 days; or
- 891 (2) in respect of any part of a period of suspension, where:
- 103 133. (a) payment under an award of the allowance has been suspended by direction of the Secretary of State<sup>9</sup> for a definite or indefinite period (on the ground that a question arises whether the conditions for entitlement to the allowance are or were fulfilled or the award ought to be revised); and
- 134. (b) subsequently that suspension expires or is cancelled in respect of a part only of the period for which it has been in force; and
- 135. (c) it is then determined that the award should be revised to the effect that there was no entitlement to the allowance in respect of all or any part of the period between the start of the period over which the award has been suspended and the date when the suspension expires or is cancelled; or
- 104 892 (3) for as long as the claimant satisfies the conditions of entitlement to national insurance credits<sup>10</sup>, other than any conditions relating to the existence of a jobseeker's agreement<sup>11</sup>.

1 For the meaning of 'regulations' see PARA 260 note 13 ante.

2 For the meaning of 'prescribed' see PARA 21 note 12 ante.

3 For the meaning of 'jobseeker's agreement' see PARA 295 ante.

4 Jobseekers Act 1995 s 9(11).

5 *Ie* under *ibid* s 9(6): see PARA 297 ante. For the meaning of 'adjudication officer' see PARA 263 note 4 ante.

6 Jobseeker's Allowance Regulations SI 1996/207, reg 35. For the position on commencement where there has been such a reference see PARA 297 ante.

7 For the meaning of 'claimant' see PARA 260 note 1 ante.

8 Jobseekers Act 1995 s 9(12).

9 *Ie* under the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968 reg 37(1A) (as added and substituted): see PARA 337 post. As to the Secretary of State see PARA 1 ante.

10 *Ie* in accordance with the Social Security (Credits) Regulations 1975, SI 1975/556 (as amended).

11 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 36 (amended by SI 1996/1517).

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements

for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

## **298 Commencement and duration of a jobseeker's agreement**

TEXT AND NOTE 8--For 'him' read 'him or to a joint-claim couple of which he is a member': Jobseekers Act 1995 s 9(12) (amended by the Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 8). As to joint-claim couples see PARA 260A.

NOTE 9--SI 1987/1968 reg 37 omitted in relation to tax credit: SI 1999/2572.

NOTE 10--SI 1975/556 further amended: see PARA 56 NOTE 17.

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## **299. Variation of a jobseeker's agreement.**

A jobseeker's agreement<sup>1</sup> may be varied in the prescribed manner<sup>2</sup> by agreement between the claimant<sup>3</sup> and any employment officer<sup>4</sup>. Any such agreement to vary must be in writing and signed by both parties, on the proposal of the claimant or the employment officer<sup>5</sup>. A copy of the agreement as varied must be given to the claimant<sup>6</sup>.

An employment officer must not agree to a variation of a jobseeker's agreement unless, in his opinion, the conditions as to availability for employment and actively seeking employment<sup>7</sup> would continue to be satisfied with respect to the claimant if he were to comply with, or be treated as complying with, the agreement as proposed to be varied<sup>8</sup>.

An employment officer may, and if asked to do so by the claimant must forthwith, refer a proposed variation to an adjudication officer<sup>9</sup> for him to determine:

- 893 (1) whether, if the claimant were to comply with the agreement as proposed to be varied, he would satisfy the conditions relating to availability and actively seeking employment; and
- 894 (2) whether it is reasonable to expect the claimant to have to comply with the agreement as proposed to be varied<sup>10</sup>.

An adjudication officer to whom such a reference is made:

- 895 (a) must, as far as practicable, dispose of it before the end of a period of 14 days from the date of the reference;
- 896 (b) must give such directions as he considers appropriate as to whether the agreement should be varied and, if so, the terms on which the claimant and the employment officer are to enter into an agreement to vary it;
- 897 (c) may bring the jobseeker's agreement to an end where the claimant fails within a prescribed period<sup>11</sup> to comply with a direction under head (b) above;
- 898 (d) may direct that, if the jobseeker's agreement is varied and such conditions as he considers appropriate are satisfied, the agreement as varied is to be treated as having effect on such date, before it would otherwise have effect, as may be specified in the direction<sup>12</sup>.

Any such determination or direction must be notified to the claimant<sup>13</sup>; and any such determination is binding<sup>14</sup>.

1 For the meaning of 'jobseeker's agreement' see PARA 295 ante.

2 For the meaning of 'prescribed' see PARA 21 note 12 ante. The prescribed manner is that described in the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 37: see the text and note 5 infra.

3 For the meaning of 'claimant' see PARA 260 note 1 ante.

4 Jobseekers Act 1995 s 10(1). For the meaning of 'employment officer' see PARA 295 note 3 ante.

5 Ibid s 10(2); Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 37.

6 Jobseekers Act 1995 s 10(3).

7 le the conditions mentioned in *ibid* s 1(2)(a) and (c): see PARA 260 ante.

8 *Ibid* s 10(4).

9 For the meaning of 'adjudication officer' see PARA 263 note 4 ante.

10 Jobseekers Act 1995 s 10(5).

11 This is the period of 21 days beginning with the date on which the direction was issued: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 38.

12 Jobseekers Act 1995 s 10(6). Regulations may provide (1) for such matters as may be prescribed to be taken into account by an adjudication officer in giving a direction under s 10(6)(b) or (d) (see heads (b), (d) in the text); and, (2) for such persons as may be prescribed to be notified of any determination of an adjudication officer under these provisions and any direction given by an adjudication officer under them: s 10(7). For the meaning of 'regulations' see PARA 260 note 13 ante. In giving a direction under s 10(6)(b) or (d), an adjudication officer is to take into account the preference of the claimant if he considers that both the claimant's proposals and those of the employment officer would satisfy the requirements of s 10(5): Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 39.

13 *Ibid* reg 40.

14 Jobseekers Act 1995 s 10(8).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The

'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment

route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(4) JOBSEEKING REQUIREMENTS/(v) The Jobseeker's Agreement/300. Jobseeker's agreement; reviews and appeals.

### **300. Jobseeker's agreement; reviews and appeals.**

Any determination of, or direction given by, an adjudication officer<sup>1</sup> in relation to a jobseeker's agreement<sup>2</sup> may be reviewed (by a different adjudication officer) on the application of the claimant<sup>3</sup> or an employment officer<sup>4</sup>. The claimant may appeal to a social security appeal tribunal<sup>5</sup> against any determination of, or direction given by, an adjudication officer on such a review<sup>6</sup>.

An appropriate person<sup>7</sup> may appeal to a social security commissioner<sup>8</sup> against the decision of a social security appeal tribunal on such an appeal, on the ground that it was erroneous in point of law<sup>9</sup>.

1 For the meaning of 'adjudication officer' see PARA 263 note 4 ante.

2 See under the Jobseekers Act 1995 ss 9 or 10: see PARA 295 et seq ante.

3 For the meaning of 'claimant' see PARA 260 note 1 ante.

4 Ibid s 11(1). Regulations may make provision with respect to the procedure to be followed on such a review: s 11(2). The procedure for such a review is set out in the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 41. The application for review must be in writing, setting out the grounds for the application, and be made to an appropriate office (see PARA 292 note 3 ante) within a period of three months beginning with the date on which the determination or direction was notified to the claimant: reg 41(2). For the meaning of 'employment officer' see PARA 295 note 3 ante.

5 As to social security appeal tribunals see PARA 360 post. The Social Security Administration Act 1992 s 23(7)-(10) applies in relation to such appeals: Jobseekers Act 1995 s 11(8). See PARA 363 post.

6 Ibid s 11(3). On such an appeal, a tribunal may give a direction of a kind which an adjudication officer may give under s 9(7)(b) or (e) or s 10(6)(b) or (d) (see PARAS 297, 299 ante): s 11(4). Where a tribunal gives a direction which may be given by an adjudication officer under s 10(6)(b)(ii) (terms on which the claimant and the employment officer are to enter into an agreement to vary), an adjudication officer may bring the jobseeker's agreement to an end if the claimant fails to comply with the direction within the period of 21 days beginning with the date on which the direction was issued: s 11(5); Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 43.

7 Any of the following is an 'appropriate person' for these purposes: (1) the claimant; (2) an adjudication officer; (3) (in prescribed circumstances) a trade union; (4) (in prescribed circumstances) any other association which exists to promote the interests and welfare of its members: ibid s 11(7). The prescribed circumstances for the purposes of heads (3)-(4) supra are the further conditions that (a) the claimant is a member of the union or association at the time of the appeal and was so immediately before the question at issue arose; or (b) the question at issue is a question as to or in connection with entitlement of a deceased person who was at the time of his death a member of the union or of the association: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 45.

8 For these purposes, 'commissioner' has the same meaning as in the Social Security Administration Act 1992 (see PARA 30 note 3 ante): Jobseekers Act 1995 s 11(9).

9 Ibid s 11(6).

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's

employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(5) DISQUALIFICATIONS AND SANCTIONS/(i) Trade Disputes/301. The trade dispute disqualification and the exceptions.

## **(5) DISQUALIFICATIONS AND SANCTIONS**

### **(i) Trade Disputes**

#### **301. The trade dispute disqualification and the exceptions.**

Where there is a stoppage of work<sup>1</sup> which causes a person not to be employed on any day and that stoppage is due to a trade dispute<sup>2</sup> at his place of work<sup>3</sup>, that person is not entitled<sup>4</sup> to a jobseeker's allowance for the week<sup>5</sup> which includes that day, unless he proves that he is not directly interested in the dispute<sup>6</sup>. The disqualification will normally last for as long as the stoppage lasts<sup>7</sup>; where the claimant is not taken back into employment at all (so that in his case there cannot be an ending of the dispute by a resumption of work in the normal way<sup>8</sup>), the disqualification can still end either if the employer ceases trading<sup>9</sup> or more generally when it becomes clear (if necessary with hindsight) that the employer's dismissal of the claimant (or possibly, the employee's resignation) was a final termination of that employment relationship and not just a tactic during the dispute<sup>10</sup>. In addition, the legislation establishes three circumstances in which the disqualification terminates during the currency of the dispute; if a person who is prevented under the trade dispute disqualification from being entitled to a jobseeker's allowance proves that during the stoppage:

- 899 (1) he became bona fide employed elsewhere<sup>11</sup>;
- 900 (2) his employment was terminated by reason of redundancy<sup>12</sup>; or
- 901 (3) he bona fide resumed employment with his employer but subsequently left for a reason other than the trade dispute<sup>13</sup>,

the trade dispute disqualification is taken to have ceased to apply to him on the occurrence of the event referred to in head (1) or head (2) above or, as the case may be, the first event referred to in head (3) above<sup>14</sup>.

1 Even if there is no actual stoppage of work resulting, a person may still be disqualified on the basis of having withdrawn his labour on any day in furtherance of a trade dispute: see the Jobseekers Act 1995 s 14(2) (a person who withdraws his labour on any day in furtherance of a trade dispute but to whom s 14(1) does not apply is not entitled to a jobseeker's allowance for the week which includes that day).

2 'Trade dispute' means any dispute between employers and employees, or between employees and employees, which is connected with the employment or non-employment or the terms of employment or the conditions of employment of any persons, whether employees in the employment of the employer with whom the dispute arises, or not: *ibid* s 35(1). This is broad wording (based on the original definition of 'trade dispute' in the Trade Disputes Act 1906 (repealed), not the modern definition for the purposes of civil liability for industrial action which has been deliberately narrowed: see EMPLOYMENT vol 41 (2009) PARA 1404 et seq); it can cover the manner of performance of work (much as a 'go-slow' or overtime ban) and is not dependent on there being a formal dispute between employer and union: Decision R(U)5/87. The definition covers strikes and lockouts: Decisions R(U)17/52; R(U)5/59. The trade dispute need not be at the claimant's place of work, provided that it causes a stoppage there, for example by secondary picketing (Decision R(U)1/74); in such a case however, if the claimant was prevented from attending work and not otherwise involved in the dispute itself, he may be able to come within the 'direct interest' proviso (Decision R(U)3/69). A dispute over health and safety concerns can qualify as being connected with the employment or the conditions of employment: *R v National Insurance Comr, ex p Thompson*, DC (reported as an appendix to Decision R(U) 5/77).

3 'Place of work', in relation to any person, means the premises or place at which he was employed: Jobseekers Act 1995 s 14(4). Where separate branches of work which are commonly carried on as separate

businesses in separate premises or at separate places are in any case carried on in separate departments on the same premises or at the same place, each of those departments is to be deemed to be separate premises or (as the case may be) a separate place: s 14(5). 'Department' may include an administrative as well as a physical or topographical division: Decision R(U)23/64. The onus is on the claimant to show that he works in a separate department (Decision R(U)1(70)) which may be more difficult in the case of an integrated plant (Decision R(U)4/62; see also Decisions R(U)24/57, R(U)4/58 and R(U)3/62).

4 As to entitlement to a jobseeker's allowance see PARA 259 et seq ante.

5 For the meaning of 'week' see PARA 273 note 3 ante.

6 Jobseekers Act 1995 s 14(1). The 'direct interest' proviso means that the disqualification can apply to employees not involved in the central dispute, but who are likely to be affected by the outcome of that dispute, not at a number of removes but virtually automatically: see Decision R(U)3/71, applied in *Watt v Lord Advocate* 1979 SC 120, 1979 SLT 137, Ct of Sess. There are two conditions for the disqualification to apply in such a case: (1) that the outcome of the dispute will be applied by the common employer not only to the group of workers belonging to the union participating in the dispute but also to the other groups of workers belonging to the other unions concerned; (2) this application of the outcome must come about automatically as a result of one of three things (a) a collective agreement which is legally binding; (b) a collective agreement which is not legally binding; or (c) established industrial custom and practice in the place of work concerned: see *Presho v Insurance Officer* [1984] AC 310 at 318, [1984] 1 All ER 97 at 101, HL, per Lord Brandon. A trade dispute does not have to be successful for there to be a direct interest; it is enough if there would have been a benefit to the claimant if the dispute had succeeded: Decision R(U)8/80.

7 See *Cartlidge v Chief Adjudication Officer* [1986] QB 360, [1986] 2 All ER 1, CA; this was applied to a casual worker in Decision R(U)12/80. A period of lay-off following a strike while a furnace had to be repaired due to the strike was held to be still a stoppage due to a trade dispute: see *R v Chief National Insurance Comr, ex p Dawber*, DC (reported as an appendix to Decision R(U)9/80).

8 Decision R(U)25/57.

9 In such a case the proximate cause of the claimant's loss of employment becomes the closure, not the dispute which may have caused it: Decision R(U)15/80.

10 This is because the 'direct interest' proviso is not restricted to only one application at the beginning of the dispute, but can also apply at its ending: Decision R(U)5/86, disapproving Decision R(U)4/79. The result is that once the claimant has been permanently dismissed he is no longer directly interested in the dispute and so can take advantage of the proviso: Decision R(U)1/87, where it was said with regard to resignation as opposed to dismissal that 'It seems to be immaterial whether the employment is terminated by the employee or the employer in so far as participation and direct interest are concerned'.

11 Jobseekers Act 1995 s 14(3)(a). 'Bona fide' here means genuine employment, not taken up just to evade the disqualification; it does not import a requirement that the replacement employment be permanent or long-term: Decision R(U)6/74 (work of a finite nature to dismantle certain equipment was held to qualify).

12 Jobseekers Act 1995 s 14(3)(b). 'Redundancy' here means redundancy within the meaning of the Employment Rights Act 1996 s 139(1): Jobseekers Act 1995 s 14(3)(b) (amended by the Employment Rights Act 1996 s 240, Sch 1 para 67(1), (2)). This provision was introduced to mitigate the harsh effects in a redundancy case of *Cartlidge v Chief Adjudication Officer* [1986] QB 360, [1986] 2 All ER 1, CA, cited in note 7 supra.

13 Jobseekers Act 1995 s 14(3)(c).

14 Ibid s 14(3).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training

under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining

work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(5) DISQUALIFICATIONS AND SANCTIONS/(i) Trade Disputes/302. Trade disputes; effect on other claimants.

### **302. Trade disputes; effect on other claimants.**

In relation to a claimant for an income-based jobseeker's allowance<sup>1</sup> where a member of his family<sup>2</sup> ('A') is or would be prevented by the trade dispute provisions<sup>3</sup> from being entitled<sup>4</sup> to a jobseeker's allowance, for the purposes of calculating the claimant's entitlement to an income-based jobseeker's allowance<sup>5</sup>:

- 902 (1) any portion of the applicable amount<sup>6</sup> which is included in respect of A is to be disregarded<sup>7</sup>;
- 903 (2) where the claimant and A are a married or unmarried couple<sup>8</sup>, any portion of the applicable amount included in respect of them is to be reduced by one half for the period for which these provisions apply to the claimant<sup>9</sup>;
- 904 (3) there is to be treated as part of the claimant's income any amount which becomes available, or would become available on application duly made, to A by way of an income tax refund<sup>10</sup>, and any other payment which the claimant and any member of his family receives or is entitled to obtain because A is without employment for that period<sup>11</sup>;
- 905 (4) any payment by way of a jobseeker's allowance for that period or any part of it which would otherwise be made to the claimant must not be made, if the weekly rate of payment ('the rate') would be equal to or less than the prescribed sum<sup>12</sup>, and must be at a weekly rate equal to the difference between the rate and the prescribed sum, if the rate would be more than the prescribed sum<sup>13</sup>.

These restrictions do not apply in certain prescribed circumstances<sup>14</sup>.

Where A returns to work with the same employer after a period during which these restrictions applied to the claimant (whether or not his return is before the end of any stoppage of work in relation to which he is, or would be, prevented from being entitled to an allowance), the restrictions cease to apply to the claimant at the commencement of the day on which A returns to work<sup>15</sup>.

1 For the meaning of 'income-based jobseeker's allowance' see PARA 266 note 1 ante; and for the meaning of 'claimant' see PARA 260 note 1 ante.

2 For the meaning of 'family' see PARA 265 note 6 ante.

3 I.e. the Jobseekers Act 1995 s 14 (as amended): see PARA 301 ante.

4 As to entitlement to a jobseeker's allowance see PARA 259 et seq ante.

5 For the meaning of 'income-based jobseeker's allowance' see PARA 271 note 1 ante.

6 As to the applicable amount of a jobseeker's allowance see PARA 272 ante.

7 Jobseekers Act 1995 s 15(1), (2)(a).

8 For the meaning of 'married couple' and 'unmarried couple' see PARA 262 note 6 ante.

9 Jobseekers Act 1995 s 15(1), (2)(b). Where a reduction under s 15(2)(b) would not produce a sum which is a multiple of 5 pence, the reduction must be to the nearest lower sum which is such a multiple: s 15(3).

10 le by way of repayment of income tax deducted from A's emoluments in pursuance of the Income and Corporation Taxes Act 1988 s 203 (as amended) (PAYE: see INCOME TAXATION vol 23(1) (Reissue) PARA 754 et seq); Jobseekers Act 1995 s 15(2)(c).

11 Ibid s 15(1), (2)(c).

12 Where an order made under the Social Security Administration Act 1992 s 150 (as amended) (annual up-rating of benefits: see PARA 17 ante) has the effect of increasing the sum prescribed in regulations made under the Jobseekers Act 1995 s 4(5) (see PARA 272 ante) as the personal allowance for a single person aged not less than 25 ('the personal allowance'), then for the sum prescribed in regulations made under s 15(2)(d) there must be substituted, from the time when the order comes into force, a sum arrived at by increasing the prescribed sum by the percentage by which the personal allowance has been increased by the order; and if the sum so arrived at is not a multiple of 50 pence, then any remainder of 25 pence or less must be disregarded and any remainder of more than 25 pence must be rounded up to the nearest 50 pence: s 15(6)-(8). The order must state the sum substituted for the sum prescribed in regulations made under s 15(2)(d); but nothing in s 15(7) prevents the making of further regulations under s 15(2)(d) varying the prescribed sum: s 16(9), (10). At the date at which this volume states the law, the prescribed sum was £26.50: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 172 (subject to frequent amendment). The origin of this 'prescribed sum' was to reflect notional strike pay, to put pressure on trade unions to make such payments, since it is deductible whether or not such payments are actually made (and even in a case where a union cannot make such payments, eg due to a sequestration of assets as in *R v Chief Adjudication Officer, ex p Bland* (1985) Times 6 February, DC). Any payments actually made by a trade union are disregarded when calculating income: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, Sch 7 para 36.

13 Jobseekers Act 1995 s 15(1), (2)(d). In relation to any period of less than a week, s 15(2) has effect subject to such modifications as may be prescribed: s 15(5). For the meaning of 'prescribed' see PARA 21 note 12 ante.

14 These are where the member of the family affected by the trade dispute provisions is a child or young person, or incapable of work or within the maternity period (ie the period commencing at the beginning of the sixth week before the expected week of confinement and ending at the end of the seventh week after the week in which confinement takes place): see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 171 (amended by SI 1996/1516).

15 Jobseekers Act 1995 s 15(4).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with

the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **302 Trade disputes; effect on other claimants**

TEXT AND NOTES 8, 9--Jobseekers Act 1995 s 15(2)(b) amended: Civil Partnership Act 2004 Sch 24 para 120.

NOTE 12--The prescribed sum is now £32.50: SI 1996/207 reg 172 (amended by SI 2008/632). SI 1996/207 Sch 7 amended: SI 2003/2279, SI 2004/98, SI 2004/565, SI 2004/1141, SI 2004/1708, SI 2004/2308, SI 2005/2687, SI 2005/2877, SI 2006/2378, SI 2007/719, SI 2007/2128, SI 2008/1554, SI 2008/2111, SI 2009/583.

NOTE 14--1996/207 reg 171 further amended: SI 2008/1554.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(5) DISQUALIFICATIONS AND SANCTIONS/(ii) Temporary Disqualifications/303. In general.

## **(ii) Temporary Disqualifications**

### **303. In general.**

The temporary disqualifications, like the trade disputes provisions<sup>1</sup> largely taken from the previous law on unemployment benefit, exist primarily to protect the principle that only the involuntarily unemployed should have call on the National Insurance Fund<sup>2</sup>, though under the modern jobseeker's allowance legislation they are also used to enforce the requirements of undertaking training<sup>3</sup> and complying with jobseeker's directions<sup>4</sup>. The disqualifications fall into two categories, those carrying fixed periods of disqualification<sup>5</sup> and those carrying discretionary periods, up to a maximum of 26 weeks<sup>6</sup>. The latter category contains the two most controversial areas in practice, leading to the most appeals, namely disqualification for misconduct or for voluntary leaving without just cause. The question of the appropriate length of a discretionary disqualification period (as with the question of 'good cause' under several of the disqualifications) is primarily a question of fact in each case, but the modern tendency has been to seek to lay down factors which may or may not be relevant (though seldom to do so exclusively)<sup>7</sup>. Exceptional cases are established, in particular the provisions allowing certain claimants to take employment on, in effect, a trial basis and allowing them to leave if necessary without incurring a disqualification<sup>8</sup>. To avoid destitution in a disqualification case, the claimant is permitted to claim an income-based jobseeker's allowance<sup>9</sup> (covering any family responsibilities too), though this operates through the 'hardship' provisions and so is subject to a reduction in amount<sup>10</sup>.

1 See PARAS 301-302 ante.

2 As to the National Insurance Fund see PARA 8 ante.

3 See PARAS 304 note 7 ante, 323 post.

4 See PARAS 297 ante, 304 note 5 post.

5 See PARA 304 post.

6 See PARA 305 post. These disqualifications are mostly longstanding in unemployment benefit law, but the significant change has been to the length of the maximum disqualification period. Traditionally it was for six weeks, but this was increased to 13 weeks in 1986 and then doubled again to 26 weeks in 1988; quare whether this radical increase has or should have an effect on the approach to be taken in deciding on a period in a particular case.

7 As to the period of disqualification see PARA 306 post; and as to the question of good cause see PARA 307 post.

8 See PARA 308 post.

9 For the meaning of 'income-based jobseeker's allowance' see PARA 271 note 1 ante.

10 See PARA 309 post. For a discussion of the benefit sanctions see 582 HL Official Report (5th series), 27 October 1997, cols 882-884; and as to the numbers of sanctions imposed during 1996-97 see 299 HC Official Report (6th series), 27 October 1997, written answers cols 683-684.

## **UPDATE**

## 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order

2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(5) DISQUALIFICATIONS AND SANCTIONS/(ii) Temporary Disqualifications/304. Disqualification for a fixed period.

### **304. Disqualification for a fixed period.**

Even though the conditions for entitlement to a jobseeker's allowance<sup>1</sup> are satisfied with respect to a person, the allowance is not payable for a prescribed period<sup>2</sup> where the claimant<sup>3</sup>:

- 906 (1) has, without good cause<sup>4</sup>, refused or failed to carry out any jobseeker's direction<sup>5</sup> which was reasonable, having regard to his circumstances<sup>6</sup>;
- 907 (2) has, without good cause:
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136. (a) neglected to avail himself of a reasonable opportunity of a place on a training scheme or employment programme<sup>7</sup>;
137. (b) after a place on such a scheme or programme has been notified to him by an employment officer as vacant or about to become vacant, refused or failed to apply for it or to accept it when offered to him;
138. (c) given up a place on such a scheme or programme; or
139. (d) failed to attend such a scheme or programme on which he has been given a place<sup>8</sup>; or
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- 908 (3) has lost his place on such a scheme or programme through misconduct<sup>9</sup>.

1 As to the conditions for entitlement to a jobseeker's allowance see PARA 259 et seq ante.

2 The period for which the allowance is not to be payable must be at least one week but not more than 26 weeks: see the Jobseekers Act 1995 s 19(2). The prescribed period is four weeks in any case in which (1) a jobseeker's allowance is determined not to be payable under these provisions; (2) on a previous occasion the jobseeker's allowance was similarly determined not to be payable; and (3) the first date on which the allowance was not payable to him on that previous occasion was within the period of 12 months preceding the date of the instant determination; in any other case it is two weeks: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 69. The period begins on the first day of the week following the date on which the allowance is determined not to be payable to the claimant: reg 69. 'Week' for this purpose means a benefit week (as to which see PARA 269 note 6 ante): reg 75(3). For the meaning of 'prescribed' see PARA 21 note 12 ante.

3 For the meaning of 'claimant' see PARA 260 note 1 ante.

4 As to 'good cause' in this context see PARA 307 post.

5 'Jobseeker's direction' means a direction in writing given by an employment officer with a view to assisting the claimant to find employment or improving the claimant's prospects of being employed, or both; and 'employment officer' means an officer of the Secretary of State or such other person as may be designated for these purposes by an order made by the Secretary of State: Jobseekers Act 1995 s 19(10)(a), (b). As to the Secretary of State see PARA 1 ante.

6 Ibid s 19(1), (2), (5)(a).

7 For these purposes, 'training scheme' and 'employment programme' have such meaning as may be prescribed: ibid s 19(10)(c). 'Employment programme' means a programme of advice, guidance or jobsearch assistance in pursuance of arrangements made by the Secretary of State under the Employment and Training Act 1973 s 2 (as substituted and amended) and known as 'Jobplan workshop', being a programme of up to one week to provide advice and guidance on jobs, training and employment opportunity; '1-2-1', being a programme of up to six interviews to give advice, support and encouragement and to identify matters that are preventing a return to work; 'Workwise' (in Scotland, 'Worklink'), being a programme of up to four weeks of guidance and practical assistance in jobsearch; 'Jobfinder', being a programme of up to seven interviews to give advice, support and guidance in jobsearch and with emphasis on obtaining employment as soon as possible; and 'Restart course', being a programme of up to two weeks with emphasis on jobsearch: Jobseeker's Allowance

Regulations 1996, SI 1996/207, SI 1996/207, reg 75(1)(a) (amended by SI 1997/367). In relation to persons to whom the Jobseeker's Allowance (Project Work Pilot Scheme) (No 2) Regulations 1997, SI 1997/984, reg 3 applies, 'employment programme' also includes Project Work: see reg 4. As to pilot schemes see further PARA 317 post. 'Training scheme' means a scheme for training for which persons aged under 18 are eligible and for which persons aged 18-24 may be eligible, provided in England and Wales directly or indirectly by a Training and Enterprise Council pursuant to its arrangement with the Secretary of State (whether that arrangement is known as an Operating Agreement or by some other name) and, in Scotland, directly or indirectly by a Local Enterprise Company pursuant to its arrangement with, as the case may be, Scottish Enterprise or Highlands and Islands Enterprise (whether that arrangement is known as an Operating Contract or by any other name): Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 75(1)(b).

8 Jobseekers Act 1995 s 19(1), (2), (5)(b).

9 Ibid s 19(1), (2), (5)(c). For the meaning of 'misconduct' in the analogous context of disqualification for losing employment through misconduct see PARA 305 post.

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25

years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **304-306 Disqualification for a fixed period ... The period of disqualification**

For regulations made under the Jobseekers Act 1995 s 19 see the Employment Zones Regulations 2003, SI 2003/2438; and PARA 310A.

Subject to the Jobseekers Act 1995 s 20A(9) (see PARA 304A), s 19 does not apply as regards a joint-claim jobseeker's allowance (but ss 20A, 20B (see PARA 304A) make, in relation to such an allowance, provision corresponding to that made by ss 19, 20): s 19(1A) (added by the Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 12).

### **304 Disqualification for a fixed period**

NOTE 2--The prescribed period, for the purposes of the Jobseekers Act 1995 ss 19(2), 20A(3) (see PARA 304A), is (1) two weeks, in any case which does not fall within head (2), (3), (4), (5) or (6); (2) four weeks, in any case (other than a case where a jobseeker's allowance is determined not to be payable in circumstances relating to the employment programme known as 'Gateway to Work' (see NOTE 7) or a case which falls within head (6) in which (a) a jobseeker's allowance is determined not to be payable to the claimant in circumstances falling within s 19(5) or 20A(2)(a)-(c); and (b) one of the following circumstances applies, that is to say (i) where the determination in head (2)(a) does not relate to one of the New Deal options or the Intensive Activity Period (see PARA 261), or the Flexible New Deal, on a previous occasion the jobseeker's allowance was determined not to be payable to him in circumstances falling within s 19(5) or 20A(2)(a)-(c), or (ii) where the determination in head (2)(a) relates to one of the New Deal options, on a previous occasion the jobseeker's allowance was determined not to be payable to him in circumstances falling within s 19(5) or 20A(2)(a)-(c) that relate to one of those options, or (iii) where the determination in head (2)(a) above relates to the Intensive Activity Period, on a previous occasion the jobseeker's allowance was determined not to be payable to him in circumstances falling within s 19(5) or 20A(2)(a)-(c) that relate to any Intensive Activity Period, or (iv) where the determination in head (2)(a) relates to the Flexible New Deal, on a previous occasion the jobseeker's allowance was determined not to be payable to him in circumstances falling within s 19(5) or 20A(2)(a)-(c) that relate to any element of that programme; and (c) the first date on which the jobseeker's allowance was not payable to him on that previous occasion falls within the period of 12 months preceding the date of the determination mentioned in head (2)(a); (3) 26 weeks in any case (other than a case where a jobseeker's allowance is determined not to be payable in circumstances relating to the employment programme known as 'Gateway to Work' in which (a) a jobseeker's allowance is determined not to be payable to the claimant in circumstances falling within s 19(5) or 20A(2)(a)-(c) and the determination relates to an act or omission in respect of one of the New Deal options; and (b) on two or more previous occasions a jobseeker's allowance has been determined not to be payable to the claimant in circumstances falling within s 19(5) or 20A(2)(a)-(c) and each such determination relates to one of the New Deal options; and (c) no more than 12 months have elapsed between the beginning of the day on which the determination mentioned in head (3)(a) is made and the beginning of the first day on which a jobseeker's allowance was not payable to the claimant as a result of the determination which most recently preceded it whether the preceding determination is either a determination falling within head (2)(a) to which the circumstances in head (2)(b)(ii) apply, or is itself an earlier determination falling within head (3)(a); (4) 26 weeks in any case (other than a case where a jobseeker's allowance is determined not to be payable in circumstances relating to the employment programme known as 'Gateway to Work') in which (a) a jobseeker's allowance is determined not to be payable to the claimant in circumstances falling within s 19(5) or 20A(2)(a)-(c) and the determination relates to an act or omission in respect of the Intensive Activity Period, and (b) on two or more previous occasions a jobseeker's allowance has been determined not to be payable to the claimant in circumstances falling within s 19(5) or 20A(2)(a)-(c) and each such determination relates to any Intensive Activity Period, and (c) no more than 12 months have elapsed between the beginning of the day on which the determination mentioned

in head (4)(a) is made and the beginning of the first day on which a jobseeker's allowance was not payable to the claimant as a result of the determination which most recently preceded it whether the preceding determination is either (i) a determination falling within head (2)(a) to which the circumstances in head (2)(b)(iii) apply, or (ii) itself an earlier determination falling within head (4)(a); (5) subject to SI 1996/206 reg 69(1A), 26 weeks in any case (other than a case where a jobseeker's allowance is determined not to be payable in circumstances relating to the employment programme known as 'Gateway to Work' in which (a) a jobseeker's allowance is determined not to be payable to the claimant in circumstances falling within the Jobseekers Act 1995 s 19(5) or 20A(2)(a)-(c) and the determination relates to an act or omission in respect of the Flexible New Deal; and (b) on two or more previous occasions a jobseeker's allowance has been determined not to be payable to the claimant in circumstances falling within s 19(5) or 20A(2)(a)-(c) and each such determination relates to the Flexible New Deal; and (c) no more than 12 months have elapsed between the beginning of the day on which the determination mentioned in head (5)(a) is made and the beginning of the first day on which a jobseeker's allowance was not payable to the claimant as a result of the determination which most recently preceded it whether the preceding determination is either a determination falling within head (2)(b)(i) to which the circumstances in head (2)(b)(iv) apply, or itself an earlier determination falling within head (5)(a); (6) one week in a case where a jobseeker's allowance is determined not to be payable in circumstances relating to a Back to Work Session; and falling within s 19(5)(a) or 20A(2)(a): SI 1996/207 reg 69(1) (reg 69 substituted by SI 2000/239; and amended by SI 2000/1370, SI 2000/1978, SI 2001/1029, SI 2009/480, SI 2009/2710). 'Back to Work Session' means a seminar or appointment referred to as 'a Back to Work Session' arranged by or on behalf of the Secretary of State, the purpose of which is to provide a person who attends with information, support and advice with a view to assisting him to find employment or to improve his chances of finding employment: SI 1996/207 reg 1(3) (definition added by SI 2009/480).

Where the Secretary of State is satisfied that the claimant has complied with the condition in SI 1996/207 reg 69(1B), head (5) applies as if the reference to 26 weeks were a reference to either 4 weeks, or the period beginning on the day specified in SI 1996/207 reg 69(2) and ending on the last day of the benefit week in which the claimant complies with the condition, whichever is the longer: reg 69(1A) (reg 69(1A), (1B) added by SI 2009/2710). The condition is that, after the date on which the determination mentioned in head (5)(a) is made, the claimant agrees in writing to undertake the activities specified in an action plan prepared in relation to the claimant: SI 1996/207 reg 69(1B).

The prescribed period begins where, in accordance with the Social Security (Claims and Payments Regulations) 1987, SI 1987/1968, reg 26A(1), a jobseeker's allowance is paid otherwise than fortnightly in arrears, on the day following the end of the last benefit week in respect of which that allowance was paid, and, in any other case, on the first day of the benefit week following the date on which a jobseeker's allowance is determined not to be payable: SI 1996/207 reg 69(2). In a case falling within head (3) or (4) in which (A) for the first time a determination is made that for a period of 26 weeks a jobseeker's allowance is not payable to the claimant; and (B) no further such determination is made; and (C) the Secretary of State gives notice in writing to the claimant that he is no longer required to participate in any of the New Deal options or the Intensive Activity Period, or the Flexible New Deal, an income-based jobseeker's allowance is payable to the claimant during the specified period even though the Jobseekers Act 1995 s 19 or 20A would otherwise prevent the payment of such an allowance: SI 1996/207 reg 69(3). The 'specified period' begins on either the day specified in a notice by the Secretary of State as being the day on which the claimant is or was no longer required to participate in any of the New Deal options, the Intensive

Activity Period, or the Flexible New Deal, or the day four weeks after the first day on which a jobseeker's allowance was not payable as a result of the first determination mentioned in reg 69(3), whichever is the later; ends on the last day when a jobseeker's allowance was not payable as a result of the first determination mentioned in reg 69(3); but does not include any period during which a jobseeker's allowance is again determined not to be payable to the claimant in circumstances falling within the Jobseekers Act 1995 s 19(5) or (6) or 20A(2): SI 1996/207 reg 69(4). Regulation 69 is modified in relation to persons participating in the Jobseeker Mandatory Activity Pilot: see the Jobseeker's Allowance (Jobseeker Mandatory Activity) Pilot Regulations 2007, SI 2007/1082.

SI 1996/207 reg 75(3) substituted: SI 1997/2863.

For the purposes of specified legislation, a person using facilities provided in pursuance of the employment programme known as the Flexible New Deal and receiving or entitled to receive a training allowance in connection with the use of those facilities (which include the provision of services) is to be treated for certain purposes as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and any payment made to such a person in connection with the use of those facilities, except a trading payment, is to be treated as a payment of training allowance made in respect of such training: Flexible New Deal (Miscellaneous Provisions) Order 2009, SI 2009/1562.

NOTE 7--The only programmes now included in the definition of 'employment programme' are (1) Gateway to Work, being a programme of up to two weeks' duration, consisting of advice and assistance on job search activity and the development of job search skills; (2) any one of the following programmes, available only to persons aged 18 or over and less than 26 immediately prior to entry, known as (a) the Self-Employed Employment Option of the New Deal, being a programme lasting for up to 26 weeks and including assistance in pursuing self-employed earner's employment; (b) the Voluntary Sector Option of the New Deal, being a programme lasting for up to six months and including employed earner's employment or a work placement combined in either case with training, support and job search; (c) the Environment Task Force Option of the New Deal, being a programme lasting for up to six months and including employed earner's employment or a work placement combined in either case with training, support and job search; (3) employment zone programme, being a programme established by the Secretary of State pursuant to Welfare Reform and Pensions Act 1999 s 60 (see PARA 310A) for an employment zone designed to assist claimants for a jobseeker's allowance to obtain sustainable employment and subject to the Employment Zones Regulations 2000, SI 2000/721 (revoked) or the Employment Zones Regulations 2003, SI 2003/2438; (4) the Intensive Activity Period, that is to say, the programme known by that name and provided in pursuance of arrangements made by or on behalf of the Secretary of State under the Employment and Training Act 1973 s 2, being a programme lasting for up to 52 weeks for any one individual aged 25 years or over and less than 60 years, and consisting of any one or more of the following elements, namely assistance in pursuing self-employed earner's employment, education and training, work experience, assistance with job search, motivation and skills training; (5) the Flexible New Deal, being the programme known by that name and provided pursuant to arrangements made by the Secretary of State or on his behalf under the Employment and Training Act 1973 s 2, which lasts for up to 78 weeks for any individual and consisting for that individual of one or more of the following elements, (a) assisting in the completion of an action plan to record the activity that he will undertake while attending the programme in order to improve his employment prospects or to obtain employment; (b) a work placement, training or other work-related activity lasting for a continuous period of at least four weeks; (c) other work experience or training, guidance, support, motivation, assistance

with job search or in pursuing self-employed earner's employment or other activity designed to assist him to select, train for, obtain and retain suitable employment: SI 1996/207 reg 75(1)(a) (amended by SI 1997/2863, SI 1998/1698, SI 1998/1174, SI 2000/721, SI 2000/1370, SI 2001/1029, SI 2002/2314, SI 2003/2438, SI 2004/959, SI 2006/909, SI 2007/1316, SI 2009/480).

In the definition of 'training scheme' for 'provided in England and Wales ... other name)' read 'secured by the Learning and Skills Council for England or by the Welsh Ministers'; and for 'directly or indirectly' read 'provided directly or indirectly'; and before 'Scottish Enterprise' add 'Skills Development Scotland': SI 1996/207 reg 75(1)(b) (amended by SI 1998/1698, SI 2001/652, SI 2005/3238, SI 2008/3157, SI 2009/583). 'Training scheme' also includes (A) the scheme, available only to persons aged 18 or over and less than 26 immediately prior to entry, known as the Full-Time Education and Training Option of the New Deal, being a scheme lasting for up to one year and including some or all of the following, namely education, training, work experience and support in job search skills; and (B) for the purposes of the Jobseekers Act 1995 ss 19(5)(b)(iii), (iv), (c), 20A(2)(b)(iii) in relation to a person who has been treated as available for employment to any extent under SI 1996/207 reg 17A(3) (see PARA 281A), the qualifying course in respect of which he has been so treated: reg 75(1)(b) (amended by SI 1997/2863, SI 1998/1274).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(5) DISQUALIFICATIONS AND SANCTIONS/(ii) Temporary Disqualifications/304A. Denial or reduction of joint-claim jobseeker's allowance.

### **304A. Denial or reduction of joint-claim jobseeker's allowance.**

Provision is made in relation to a member of a joint-claim couple<sup>1</sup> if that member of the couple (1) has, without good cause, refused or failed to carry out any jobseeker's direction which was reasonable, having regard to his circumstances; (2) has, without good cause (a) neglected to avail himself of a reasonable opportunity of a place on a training scheme<sup>2</sup> or employment programme<sup>3</sup>; (b) after a place on such a scheme or programme has been notified to him by an employment officer as vacant or about to become vacant, refused or failed to apply for it or to accept it when offered to him; (c) given up a place on such a scheme or programme; or (d) failed to attend such a scheme or programme on which he has been given a place; (3) has lost his place on such a scheme or programme through misconduct; (4) has lost his employment<sup>4</sup> as an employed earner through misconduct; (5) has voluntarily left such employment without just cause; (6) has, without good cause, after a situation in any employment has been notified to him by an employment officer as vacant or about to become vacant, refused or failed to apply for it or to accept it when offered to him; or (7) has, without good cause, neglected to avail himself of a reasonable opportunity of employment<sup>5</sup>. Such a member of a joint-claim couple is subject to sanctions<sup>6</sup>. Where this provision applies to a member of a joint-claim couple by virtue of any of heads (1) to (3) above, the period for which he is to be subject to sanctions is such period (of at least one week<sup>7</sup> but not more than 26 weeks) as may be prescribed<sup>8</sup>. Where this provision applies to a member of a joint-claim couple by virtue only of any of heads (4) to (7) above, the period for which he is to be subject to sanctions is such period (of at least one week but not more than 26 weeks) as may be determined by the Secretary of State<sup>9</sup>. Even though the conditions for entitlement to a joint-claim jobseeker's allowance<sup>10</sup> are satisfied in relation to a joint-claim couple (a) the allowance is not payable for any period during which both members of the couple are subject to sanctions; and (b) the amount of the allowance payable in respect of the couple for any period during which only one member of the couple is subject to sanctions is reduced to an amount calculated by the prescribed method ('the reduced amount')<sup>11</sup>. The method prescribed for calculating the reduced amount may, in particular, involve (i) deducting amounts from, or making percentage reductions of, the amount which would be the amount of the allowance if neither member of the couple were subject to sanctions; (ii) disregarding portions of the applicable amount; (iii) treating amounts as being income or capital of the couple<sup>12</sup>. During any period for which the amount of a joint-claim jobseeker's allowance payable in respect of a joint-claim couple is the reduced amount, the allowance is payable to the member of the couple who is not subject to sanctions<sup>13</sup>. Certain provisions of the general rules relating to the circumstances in which a jobseeker's allowance is not payable apply subject to modifications<sup>14</sup>.

The provision above<sup>15</sup> is not to be taken to apply to a member of a joint-claim couple merely because he has refused to seek or accept employment in a situation which is vacant in consequence of a stoppage of work due to a trade dispute<sup>16</sup> and nor does it apply to a member of a joint-claim couple by virtue of any of heads (1)-(3) above if (A) a severe hardship direction is in force<sup>17</sup> with respect to that member of the couple; and (B) he has acted in such a way as to risk either having that direction revoked<sup>18</sup>, or having the amount of the couple's entitlement to a joint-claim jobseeker's allowance reduced<sup>19</sup>. Regulations must make provision for the purpose of enabling any person of a prescribed description to accept any employed earner's employment without the provision above applying to him by virtue of head (5) or (7) above should he leave that employment voluntarily and without just cause at any time during a trial period<sup>20</sup>. In such circumstances as may be prescribed, a joint-claim jobseeker's allowance is

payable in respect of a joint-claim couple even though head (a) above prevents payment of such a jobseeker's allowance to the couple<sup>21</sup>. Regulations may make provision for determining, for these purposes, the day on which a person's employment is to be regarded as commencing<sup>22</sup>.

Where only one member of a joint-claim couple is subject to sanctions<sup>23</sup>, a reduced rate<sup>24</sup> of jobseeker's allowance is payable to the member of the couple who is not subject to sanctions<sup>25</sup>.

1 For the meaning of 'joint-claim couple' see PARA 260.

2 For the meaning of 'training scheme' see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 75(1)(b) (amended by SI 1998/1274, SI 2000/1978).

3 For the meaning of 'employment programme' see PARA 304.

4 For the meaning of 'employment' see SI 1996/207 reg 75(4) (amended by SI 2000/1978).

5 Jobseekers Act 1995 s 20A(2)(a)-(g) (ss 20A, 20B added by Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 13).

6 Jobseekers Act 1995 s 20A(1).

7 'Week', in ibid s 20A (except s 20A(3)), means any period of seven consecutive days, and in s 20A(3), means benefit week: SI 1996/207 reg 75(2), (3) (amended by SI 2000/1978).

8 Jobseekers Act 1995 s 20A(3).

9 Ibid s 20A(4). Regulations may prescribe (1) circumstances which the Secretary of State is to take into account; and (2) circumstances which he is not to take into account, in determining a period under s 20A(4): s 20A(8). In determining a period under s 20A(4) the Secretary of State must take into account all the circumstances of the case and, in particular, the following circumstances (1) where the employment would have lasted less than 26 weeks, the length of time which it was likely to have lasted; (2) in a case falling within s 20A(2)(d) (see TEXT head (4)) in which the employer has indicated an intention to re-engage the claimant, the date when he is to be re-engaged; (3) where the claimant has left his employment voluntarily and the hours of work in that employment were 16 hours or less a week, the rate of pay and hours of work in the employment which he left; and (4) where the claimant left his employment voluntarily or has neglected to avail himself of a reasonable opportunity of employment, any mitigating circumstances of physical or mental stress connected with his employment: SI 1996/207 reg 70 (amended by SI 1999/2860, SI 2000/1978).

10 For the meaning of 'joint-claim jobseeker's allowance' see PARA 260A.

11 Jobseekers Act 1995 s 20A(5).

12 Ibid s 20A(6).

13 Ibid s 20A(7). See also s 3B(4), (5) (see PARA 260A).

14 Ibid s 19(7)-(10) (see PARA 305) applies for the purposes of s 20A (see NOTE 5) as for those of s 19 but as if references in s 19(10)(b) to the claimant were to the member of the joint-claim couple to whom s 20A(2)(a) applies: s 20A(9).

15 Ie ibid s 20A.

16 Ibid s 20B(1).

17 Ie under ibid s 16: see PARA 318.

18 Ie under ibid s 16(3)(b).

19 Ie reduced by virtue of ibid s 17 because the condition in s 17(3)(b) or (c) is established: s 20B(2).

20 Ibid s 20B(3). A person is of a prescribed description for the purposes of s 20B(3) and does not fall within s 20A(2)(e) or (g) (see TEXT AND NOTE 5) if he has neither worked in employed earner's employment, nor has been a self-employed earner, nor been a full-time student nor been in relevant education, during the period of 13 weeks preceding the day of the commencement of the employment; for these purposes, a person will not be regarded as having (1) worked in employed earner's employment; or (2) been a self-employed earner; or (3)

been a full-time student or been in relevant education, by reason only of any engagement in the manning or launching of a lifeboat, the performance of duty as a part-time member of a fire brigade or by his attendance for a period of up to 14 days at a work camp: SI 1996/207 reg 74(1)-(3) (amended by SI 2000/1978). A trial period in the Jobseekers Act 1995 s 20B(3) means a period of eight weeks beginning with the commencement of the fifth week of the employment in question and ending at the end of the twelfth week of that employment and for the purposes of this definition in determining the time at which the fifth week of the employment in question commences or at which the twelfth week of that employment ends, any week in which a person has not worked in the employment for at least 16 hours must be disregarded: SI 2000/1978 reg 74(4) (amended by SI 2000/1978).

21 Jobseekers Act 1995 s 20B(4). A jobseeker's allowance is payable by virtue of s 20B(4) only if the couple have complied with such requirements as to the provision of information as may be prescribed: s 20B(5). Regulations under s 20B(4) may, in particular, provide for a jobseeker's allowance payable by virtue of s 20B(4) to be (1) payable at a prescribed rate; (2) payable for a prescribed period (which may differ from the period during which both members of the couple are subject to sanctions for the purposes of s 20A): s 20B(6).

22 Ibid s 20B(8).

23 Ie for the purposes of ibid s 20A.

24 The reduced rate is (1) in any case in which the member of the couple who is not subject to sanctions satisfies the conditions set out in ibid s 2 (see PARA 266), a rate equal to the amount calculated in accordance with s 4(1) (see PARA 268); (2) in any case where the couple are a couple in hardship for the purposes of SI 1996/207 regs 146A-146H (added by SI 2000/1978; SI 1996/207 reg 146A amended by SI 2005/2877, SI 2008/1554), a rate equal to the amount calculated in accordance with SI 1996/207 reg 146G; (3) in any other case, a rate calculated in accordance with the Jobseekers Act 1995 s 4(3A) (see PARA 272) save that the applicable amount is the amount determined by reference to SI 1996/207 Sch 1 para 1(1) which would have been the applicable amount had the member of the couple who is not subject to sanctions been a single claimant: reg 74B(3) (reg 74B added by SI 2000/1978).

25 SI 1996/207 reg 74B(1), (2).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus

within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the

arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **304-306 Disqualification for a fixed period ... The period of disqualification**

For regulations made under the Jobseekers Act 1995 s 19 see the Employment Zones Regulations 2003, SI 2003/2438; and PARA 310A.

Subject to the Jobseekers Act 1995 s 20A(9) (see PARA 304A), s 19 does not apply as regards a joint-claim jobseeker's allowance (but ss 20A, 20B (see PARA 304A) make, in relation to such an allowance, provision corresponding to that made by ss 19, 20): s 19(1A) (added by the Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 12).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(5) DISQUALIFICATIONS AND SANCTIONS/(ii) Temporary Disqualifications/305. Disqualification for a discretionary period.

### **305. Disqualification for a discretionary period.**

Even though the conditions for entitlement to a jobseeker's allowance<sup>1</sup> are satisfied with respect to a person, the allowance is not payable for such period (of at least one week and not more than 26 weeks<sup>2</sup>) as may be determined by an adjudication officer<sup>3</sup> where the claimant<sup>4</sup>:

- 909 (1) has lost his employment<sup>5</sup> as an employed earner<sup>6</sup> through misconduct<sup>7</sup>;
- 910 (2) has voluntarily left<sup>8</sup> such employment without just cause<sup>9</sup>;
- 911 (3) has, without good cause<sup>10</sup>, after a situation has been notified to him by an employment officer<sup>11</sup> as vacant or about to become vacant, refused or failed to apply for it or to accept it when offered to him<sup>12</sup>; or
- 912 (4) has, without good cause, neglected to avail himself of a reasonable opportunity of employment<sup>13</sup>.

1 As to the conditions for entitlement to a jobseeker's allowance see PARA 259 et seq ante.

2 For these purposes, 'week' means any period of seven consecutive days: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 75(2).

3 As to the factors to be taken into consideration in determining the length of the disqualification see PARA 306 post. For the meaning of 'adjudication officer' see PARA 263 note 4 ante.

4 For the meaning of 'claimant' see PARA 260 note 1 ante.

5 The use of the broad phrase 'lost his employment' means that this head can cover not just dismissal but also certain cases of voluntary leaving, in particular a resignation as an alternative to impending dismissal: Decision R(U)17/64; R(U)2/76. To this extent there may be some overlap with the disqualification in head (2) in the text (voluntary leaving without just cause), placing the emphasis on whether a causal link with misconduct has been shown: see Decision R(U)14/57. This means that on appeal against a disqualification on one ground, the other may also be considered; if, however, this is done the tribunal must make the change particularly clear to the appellant: Decision R(U)2/71.

6 For the meaning of 'employed earner' see PARA 32 ante.

7 Jobseekers Act 1995 s 19(1), (3), (6)(a). Misconduct is not statutorily defined. The leading commissioner's decision states that it means conduct which is causally but not necessarily directly connected with employment, and having regard to the relationship of employer and employee and the rights and duties of both, can fairly be said to be blameworthy, reprehensible and wrong: Decision R(U)2/77. Normally it will refer to misconduct at work (where it may cover neglect as well as deliberate conduct: Decision R(U)8/57) but it can also apply to misconduct outside working hours if that misconduct impinges on the claimant's continued suitability for the job (Decision R(U)1/71 (gardener disqualified after dismissal for sexual offence outside his employment)); this may be particularly the case with an offence of dishonesty outside employment (Decisions R(U)10/53; R(U)20/59). A similar rule operates in the law of unfair dismissal: see EMPLOYMENT vol 40 (2009) PARA 735. A finding of an industrial tribunal in an unfair dismissal action concerning the same alleged misconduct may be relevant, but not binding (Decisions R(U)2/74; R(U)4/78); different issues may arise in each context, and so in this social security context it is better to avoid terms such as 'proper dismissal' or 'unfair dismissal' (Decision R(U)3/79). As the Civil Evidence Act 1968 s 11(2) does not apply to tribunals, a criminal conviction for the same misconduct is not binding by statute, but it has been held that a similar principle should apply by analogy, so that such a conviction (once proved by the adjudication officer) should have a strong bearing on the claim and shifts the burden of proof to the claimant to show, on a balance of probabilities, that he is entitled to the benefit: Decision R(S)2/80.

As a matter of timing, the misconduct must occur during the employment; in Decision R(U)26/56 an accountant committed fraud and was convicted of it before taking up the employment and when this was discovered and he was dismissed he was not subject to disqualification. This would also apply where the misconduct took place

before the employment began but the conviction (on which he was dismissed) occurred during the employment: Decision R(U)1/58.

There are many reported decisions on specific types of misconduct, but ultimately these are a question of fact for the adjudicating authorities; moreover, where misconduct is established there is still much scope for argument and discretion as to the length of disqualification which that particular misconduct merits: see PARA 306 post.

8 The burden of proof is on the adjudication officer to prove the voluntary leaving, then on the claimant to show just cause: Decision R(U) 20/64. Voluntary leaving will usually take the form of resignation, but may in certain circumstances be more widely construed to cover cases where the employee brought termination on himself (Decision R(U)16/52), but it was later held that such cases must be treated restrictively since they involve an extension of the statutory language (see Decision R(U)2/77, particularly the review of the previous case law in PARAS 24-27). Resignation in the face of imminent dismissal may not be voluntary leaving: see note 5 supra. On the other hand, where the employee gives notice and the employer terminates the employment before expiry of that notice, that will probably still constitute voluntary leaving: Decision R(U)2/54, applied in Decision CU/151/1993.

The previous voluntary leaving provisions caused problems in the context of early leaving or retirement schemes, where the volunteer would normally be disqualified even though the leaving was in practice at the behest of the employer: *Crewe v Social Security Comr* [1982] 2 All ER 745, [1982] 1 WLR 1209, CA (though cf Decision R(U)1/83 where there was ad hoc pressure on one individual to leave, not as part of a scheme). In such circumstances as may be prescribed, however, including in particular where he has been dismissed by his employer by reason of redundancy within the meaning of the Employment Rights Act 1996 s 139(1) after volunteering or agreeing to be so dismissed, a person who might otherwise be regarded as having left his employment voluntarily is to be treated as not having left voluntarily: Jobseekers Act 1995 s 19(7) (amended by the Employment Rights Act 1996 s 240, Sch 1 para 67(1), (2)). A claimant is not to be treated as having left his employment voluntarily (1) where he has been dismissed by his employer by reason of redundancy within the Employment Rights Act 1996 s 139(1) after volunteering or agreeing to be so dismissed; (2) where he has left his employment on a date agreed with his employer without being dismissed in pursuance of an agreement relating to voluntary redundancy; or (3) where he has been laid off or kept on short time (to the extent specified in s 148) and has complied with the requirements of s 148: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 71 (amended by SI 1996/1516). For the definition of redundancy and the rules on lay off and short time see EMPLOYMENT vol 40 (2009) PARAS 825, 830. The Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 71 (as amended) applies where employer and employee mutually agree severance, as well as where the employee is formally dismissed for redundancy: see Decision R(U)3/91.

9 Jobseekers Act 1995 s 19(6)(b). Regulations may (1) prescribe matters which are, or are not, to be taken into account in determining whether a person has, or does not have, good cause for any act or omission, or has, or does not have, just cause for any act or omission; or (2) prescribe circumstances in which a person is, or is not, to be regarded as having, or not having, good cause for any act or omission, or is, or is not, to be regarded as having, or not having, just cause for any act or omission; and subject to any such regulations, in determining whether a person has, or does not have, good cause or (as the case may be) just cause for any act or omission, any matter relating to the level of remuneration in the employment in question must be disregarded: s 19(8), (9). Apart from that statutory provision, the matter is principally one of fact for the statutory authorities; it is not practicable to lay down any hard and fast rules and each case must depend on its own circumstances: Decision R(U)14/52. The general principles are set out *in extenso* in Decision R(U)20/64, in which it was held that the disqualification requires a balance to be struck between the needs of the claimant and the interest of the National Insurance Fund and other contributors; thus, acting reasonably in his own interests (or even those of the employer) is not sufficient: see *Crewe v Social Security Comr* [1982] 2 All ER 745, [1982] 1 WLR 1209, CA. The test is a stringent one, and it has also been explained on the basis that just cause means having virtually no alternative but to leave (on the insurance analogy of a person who throws his baggage overboard to make room in a lifeboat being able to claim on his baggage insurance): Decision R(U)4/87. Normally a person leaving without other employment organised will have difficulty showing just cause, though (as with everything else) this is not a rule and there may be just cause if the new employment seemed certain but then fell through (though it is otherwise if the claimant merely thought he had good prospects of another job when he left): Decision R(U)20/64. Some feature of the existing employment may justify leaving immediately (Decisions R(U)15/53; R(U)38/53; R(U)18/57), but it must be pressing (such as where the employer threatens to break his contract, eg by imposing a change of terms or requiring work which is not under the contract: Decisions R(U)15/53; R(U)18/57). A similar approach applies in relation to pressing personal circumstances (Decisions R(U)14/52; R(U)19/52; R(U)31/59); the health of the claimant or someone living with him may be a factor in such cases (Decision R(U)20/64). To encourage a person to take up and try employment which may be suitable without running the risk of being disqualified under this heading if it proves to be unsuitable and the claimant leaves, a statutory trial period has been introduced: see PARA 308 post.

10 See PARA 307 post.

11 For the meaning of 'employment officer' for these purposes see PARA 304 note 5 ante.

12 Jobseekers Act 1995 s 19(1), (3), (6)(c).

13 Ibid s 19(1), (3), (6)(d).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in

respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **304-306 Disqualification for a fixed period ... The period of disqualification**

For regulations made under the Jobseekers Act 1995 s 19 see the Employment Zones Regulations 2003, SI 2003/2438; and PARA 310A.

Subject to the Jobseekers Act 1995 s 20A(9) (see PARA 304A), s 19 does not apply as regards a joint-claim jobseeker's allowance (but ss 20A, 20B (see PARA 304A) make, in relation to such an allowance, provision corresponding to that made by ss 19, 20): s 19(1A) (added by the Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 12).

### **305 Disqualification for a discretionary period**

NOTE 2--SI 1996/207 reg 75(3) substituted: SI 1997/2863.

TEXT AND NOTE 7--Industrial tribunals now called employment tribunals: Employment Rights (Dispute Resolution) Act 1998 s 1.

NOTE 8--SI 1996/207 reg 71 further amended: SI 2007/2618.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(5) DISQUALIFICATIONS AND SANCTIONS/(ii) Temporary Disqualifications/306. The period of disqualification.

### **306. The period of disqualification.**

Regulations<sup>1</sup> may prescribe circumstances which an adjudication officer<sup>2</sup> is to take into account, and circumstances which he is not to take into account, in determining the length of a period of discretionary disqualification<sup>3</sup>. For those purposes, an adjudication officer is to take into account all the circumstances of the case and, in particular, the following circumstances:

- 913 (1) where the employment would have lasted less than 26 weeks, the length of time which it was likely to have lasted;
- 914 (2) in a misconduct case in which the employer has indicated an intention to re-engage the claimant, the date when he is to be re-engaged;
- 915 (3) where the claimant<sup>4</sup> has left employment voluntarily and the hours of work in that employment were 16 hours or less a week, the rate of pay and hours of work in the employment which he left; and
- 916 (4) where the claimant left his employment voluntarily or has neglected to avail himself of a reasonable opportunity of employment, any mitigating circumstances of physical or mental stress connected with his employment<sup>5</sup>.

Other than in relation to these specific provisions, the matter is a broad one of discretion for the statutory authorities, with scope for the consideration of mitigating factors which, although not sufficient to avoid a disqualification at all, may have an effect on the period that is considered appropriate<sup>6</sup>. On an appeal from a disqualification by an adjudication officer, a social security appeal tribunal may reconsider the question of the length of the disqualification, and is to give reasons for its decision<sup>7</sup>. Once a disqualification of a particular length is imposed, it continues to run for that length; if within that period the claimant gains new employment but then loses it again, he will still be disqualified until the terminal date of the original disqualification<sup>8</sup>.

1 For the meaning of 'regulations' see PARA 260 note 13 ante.

2 For the meaning of 'adjudication officer' see PARA 263 note 4 ante.

3 Jobseekers Act 1995 s 19(4). The period referred to is a period of disqualification under s 19(3), (6): see PARA 305 ante.

4 For the meaning of 'claimant' see PARA 260 note 1 ante.

5 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 70.

6 See eg Decision R(U) 4/87 where a civil servant gave up his job to seek work as a social worker helping the mentally handicapped; the leaving could not be considered with just cause because of the decision in *Crewe v Social Security Comr* [1982] 2 All ER 745, [1982] 1 WLR 1209, CA (see PARA 305 note 8 ante) but in the light of the desirability of what he was doing the disqualification was cut to one week.

7 Decision R(U)4/87.

8 Decision R(U)13/64; affd in Decision CU/64/94.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading

payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **304-306 Disqualification for a fixed period ... The period of disqualification**

For regulations made under the Jobseekers Act 1995 s 19 see the Employment Zones Regulations 2003, SI 2003/2438; and PARA 310A.

Subject to the Jobseekers Act 1995 s 20A(9) (see PARA 304A), s 19 does not apply as regards a joint-claim jobseeker's allowance (but ss 20A, 20B (see PARA 304A) make, in relation to such an allowance, provision corresponding to that made by ss 19, 20): s 19(1A) (added by the Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 12).

### **306 The period of disqualification**

TEXT AND NOTES 2, 3--Reference to an adjudication officer is now to the Secretary of State: Jobseekers Act 1995 s 19(4) (amended by the Social Security Act 1998 Sch 7 para 141(2)).

TEXT AND NOTES 4, 5--Reference to an adjudication officer is now to the Secretary of State: SI 1996/207 reg 70 (amended by SI 1999/2860). SI 1996/207 reg 70 further amended: SI 2000/1978.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(5) DISQUALIFICATIONS AND SANCTIONS/(ii) Temporary Disqualifications/307. Good cause.

### **307. Good cause.**

For the purposes of deciding whether a person had good cause for refusing or failing to carry out a jobseeker's direction<sup>1</sup>, refusing or failing to apply for a job or refusing to accept it<sup>2</sup> or neglecting to avail himself of an opportunity of employment<sup>3</sup>, the matters which are to be taken into account include:

- 917 (1) any restrictions on availability which apply in the claimant's case, having regard to the extent of any disparity between those restrictions and the requirements of the vacancy in question<sup>4</sup>;
- 918 (2) any condition or personal circumstance of that person which indicates that a particular employment or carrying out a jobseeker's direction would be likely to, or did, cause significant harm to his health or subject him to excessive physical or mental stress;
- 919 (3) the fact that the failure to undertake a particular employment or to carry out the jobseeker's direction resulted from a religious or conscientious objection sincerely held;
- 920 (4) any caring responsibilities<sup>5</sup> making it unreasonable for the person to undertake a particular employment or carry out the jobseeker's direction;
- 921 (5) the time it took, or would normally take, for the person to travel from his home to the place of employment and back to his home by a route and means appropriate to his circumstances and to the employment or to the carrying out of the jobseeker's direction;
- 922 (6) the expenses which were or would be necessarily and exclusively incurred for the purposes of the employment or carrying out the jobseeker's direction (together with any travelling expenses) if those expenses did or would represent an unreasonably high proportion<sup>6</sup> of, in the case of employment, the remuneration which it is reasonable to expect that he would derive from it, or in any other case the income that he would receive while carrying out the jobseeker's direction<sup>7</sup>.

A person is not to be regarded as having good cause for those purposes if and to the extent that the reason for the act or omission in question relates to:

- 923 (a) his income or outgoings<sup>8</sup> (or those of any other member of the household<sup>9</sup>) or the income or outgoings which he or any other member of his household would have if he were to become employed or carry out the jobseeker's direction<sup>10</sup>;
- 924 (b) the time it took or would normally take for the person to travel from his home to the place of employment or a place mentioned in the jobseeker's agreement, and back to his home, where that time was or is normally less than one hour either way by a route and means appropriate to his circumstances and to the employment or direction, unless, in view of the health of the person or any caring responsibilities of his, that time was or is unreasonable<sup>11</sup>.

For the purposes of deciding whether a person had good cause in relation to refusal of, giving up or failure to attend a training scheme or employment programme<sup>12</sup>, a person is to be regarded as having good cause for any act or omission attributable to any of the following circumstances:

- 925 (i) the claimant was suffering from some disease or bodily or mental disablement on account of which he was not able to attend the relevant training scheme or employment programme in question or his attendance would have put at risk his health or the health of other persons;
- 926 (ii) the claimant's failure to participate resulted from a religious or conscientious objection sincerely held;
- 927 (iii) travelling time would have exceeded one hour in each direction (or, where no scheme or programme was available within one hour of his home, such greater time as was necessary in the particular circumstances of the nearest appropriate scheme or programme);
- 928 (iv) the claimant had caring responsibilities and no close relative<sup>13</sup> of the person he cared for and no other member of that person's household was available to care for him, and in the circumstances it was not practicable for the claimant to make other arrangements for the care of that person;
- 929 (v) the claimant was attending court as a party, witness or juror;
- 930 (vi) the claimant was arranging or attending the funeral of a close relative or close friend;
- 931 (vii) the claimant was engaged in the manning or launching of a lifeboat or the performance of duty as a part-time member of a fire brigade;
- 932 (viii) the claimant was required to deal with some domestic emergency;
- 933 (ix) the claimant was engaged during an emergency in duties for the benefit of others<sup>14</sup>;
- 934 (x) the claimant gave up a place on a training scheme or an employment programme and if he had continued to participate in it he would have, or would have been likely to have, put his health and safety at risk<sup>15</sup>.

As a general principle, and subject to any regulations to the contrary, in determining whether a person has, or does not have, good cause for any act or omission, any matter relating to the level of remuneration in the employment in question is to be disregarded<sup>16</sup>.

1 le for the purposes of the Jobseekers Act 1995 s 19(5)(a): see PARA 304 ante.

2 le for the purposes of *ibid* s 19(6)(c): see PARA 305 ante.

3 le for the purposes of *ibid* s 19(6)(d): see PARA 305 ante.

4 le within the Jobseeker's Allowance Regulations 1996, SI 1996/207, regs 6, 7, 8, 13: see PARA 278 ante. For the meaning of 'claimant' see PARA 260 note 1 ante. Head (1) in the text is modified, in relation to certain persons undertaking a workskill course, by the Jobseeker's Allowance (Workskill Courses) Pilot (No 2) Regulations 1997, SI 1997/1909, reg 21(1).

5 For the meaning of 'caring responsibilities' see PARA 277 note 1 ante.

6 For the purpose of applying this test, the principle is to apply that the greater the level of remuneration or income the higher the proportion thereof which it is reasonable should be represented by expenses: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 72(3).

7 See *ibid* reg 72(1), (2). A person who has undergone training for a particular kind of employment for at least two months has good cause for rejecting any other kind of employment for a period of four weeks beginning with the day on which the training ends: see reg 72(4). A person has good cause for any act or omission resulting from restriction on his availability under regs 16, 17 (as amended) (see PARAS 280, 284 ante) or from the fact that he is exempted from the availability requirement: see reg 72(5) (amended by SI 1997/454). A person is to be regarded as having good cause for any act or omission for the purposes of the Jobseekers Act 1995 s 19(6)(c), (d) if in a case where it has been agreed that the claimant may restrict his hours of availability to less than 24 hours a week, the employment in question is for less than 16 hours a week, or in any other case, the employment is for less than 24 hours a week: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 72(5A) (added by SI 1997/454; disappplied, in relation to certain persons undertaking a workskill

course, by the Jobseeker's Allowance (Workskill Courses) Pilot (No 2) Regulations 1997, SI 1997/1909, reg 21(2)).

8 This does not include any expenses taken into account under head (6) in the text: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 72(6)(a).

9 As to the members of a household see *ibid* reg 78 (as amended).

10 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 72(6)(a). This does not apply where the claimant has agreed a restriction on the level of remuneration he was prepared to accept under regs 13(3), 16 (see *PARAS* 278, 280 *ante*), or where the employment is remunerated only by commission: reg 72(7).

11 *Ibid* reg 72(6)(b). With regard to good cause under the Jobseekers Act 1995 s 19(6)(d) alone (neglect to avail) it is provided that there is to be no good cause if the situation is a 'qualifying former employment' of that person; this means where (1) it is an employment with an employer for whom he has previously worked (or with an employer who has succeeded that employer); (2) not more than 12 months have elapsed between the date when he last worked for that employer and the date of the conduct in question; and (3) the terms and conditions of employment in that situation are not less favourable than those in the situation which he held when he last worked for that employer: see reg 72(8), (9).

12 *Ie* for the purposes of the Jobseekers Act 1995 s 19(5)(b): see *PARA* 304 *ante*.

13 The prescribed meaning of 'close relative' (see *PARA* 277 note 1 *ante*) does not apply for these purposes: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 1(3).

14 For these purposes, a person is engaged in duties for the benefit of others while (1) providing assistance to any person whose life may be endangered or who may be exposed to the risk of serious bodily injury or whose health may be seriously impaired; (2) protecting property of substantial value from imminent risk of serious damage or destruction; or (3) assisting in measures being taken to prevent a serious threat to the health of the people, in each case as a member of a group of persons organised wholly or partly for the purpose of providing such assistance or, as the case may be, protection; and events which may give rise to an emergency include (a) a fire, flood or an explosion; (b) a natural catastrophe; (c) a railway or other transport accident; (d) a cave or mountain accident; (e) an accident at sea; (f) a person being reported missing and the organisation of a search for that person: *ibid* reg 73(3).

15 *Ibid* reg 73(1), (2) (amended by SI 1996/1516). Heads (i)-(x) in the text are without prejudice to any other circumstances in which a person may be considered to have good cause: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 73(2) (as so amended). Additionally, a person to whom the Jobseeker's Allowance (Project Work Pilot Scheme) (No 2) Regulations 1997, SI 1997/984, regs 3, 4(2) apply is to be regarded as having good cause for any act or omission in relation to Project Work where there is no place available for him on Project Work or where he has already participated in Project Work for one continuous period of 13 weeks or two or more periods amounting in total to 13 weeks (reg 5); and a person to whom the Jobseeker's Allowance (Contract for Work) Regulations 1997, SI 1997/982, apply is to be regarded as having good cause for any act or omission in relation to Contract for Work where there is no place available for him on Contract for Work or he has already participated in Contract for Work for one continuous period of 26 weeks or for two or more periods amounting in total to 26 weeks (reg 6). As to pilot schemes see further *PARA* 317 *post*.

16 See the Jobseekers Act 1995 s 19(9); and *PARA* 305 note 9 *ante*.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1),

(2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining

work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **307 Good cause**

TEXT AND NOTES 1-7--Also head (7) any child care expenses which were, or would be, necessarily incurred by the person as a result of his being in the employment or of carrying out the jobseeker's direction if those expenses did, or would, represent an unreasonably high proportion of (a) in the case of employment, the remuneration which it is reasonable to expect that he would derive from that employment; or (b) in any other case, the income which he received, or would receive, while carrying out the jobseeker's direction: SI 1996/207 reg 72(2)(g) (added by SI 2008/3051). As to head (4) see SI 1996/207 reg 72(2A) (added by SI 2008/3051).

These provisions also apply in determining whether a person has good cause for any act or omission for the purposes of the Jobseekers Act 1996 s 20A(2)(a), (f), (g) (see PARA 304A): SI 1996/207 reg 72(1), (2) (amended by SI 2000/1978).

As to just cause for the purposes of the Jobseekers Act 1995 s 19(6)(b) (see PARA 305) see SI 1996/207 reg 73A (added by SI 2008/3051).

NOTE 4--Also now within SI 1996/207 reg 17A (see PARA 281A): reg 72(2)(a) (amended by SI 1998/1274).

TEXT AND NOTE 7--Without prejudice to any other circumstances in which a person may be regarded as having good cause for any act or omission for the purposes of the Jobseekers Act 1995 s 19(6)(c), (d), a person to whom SI 1996/207 reg 17A(2) applies (see PARA 281A NOTE 1), in respect of whom an employment officer has determined that he may undertake a qualifying course, and who is undertaking such a course as a full-time student, is to be regarded as having good cause for any act or omission for those purposes where (1) the act or omission took place within a period of 4 weeks before the end of his qualifying course or of his examinations; or (2) the employment consists of employment for which he is not required to be available in accordance with reg 17A(3)(c) (see PARA 281A TEXT head (3)) unless it is permanent full-time employment: reg 72(3A) (added by SI 1998/1274). For these purposes, 'full-time employment' means remunerative work within the meaning of SI 1996/207 reg 51(1)(a) (see PARA 262): reg 72(3B) (added by SI 1998/1274).

NOTE 7--SI 1996/207 reg 72(5) amended: SI 2000/1978. SI 1996/207 reg 72(5A) now also applies for the purposes of the Jobseekers Act 1995 s 20A(2)(a), (f), (g): SI 1996/207 reg 72(5A) (amended by SI 2000/1978).

TEXT AND NOTES 8-11--SI 1996/207 reg 72(6) now also applies for the purposes of the Jobseekers Act 1995 s 20A(2)(a), (f), (g): SI 1996/207 reg 72(6) (amended by SI 2000/1978, SI 2008/3051).

NOTE 9--SI 1996/207 reg 78 further amended: SI 2000/1978, SI 2005/2687, SI 2006/2378.

TEXT AND NOTE 11--After 'one hour either way' read 'during the first 13 weeks of entitlement to a jobseeker's allowance, and one hour and thirty minutes either way in all other cases': Jobseeker's Allowance Regulations 1996, SI 1996/207 reg 72(6)(b) (amended by SI 2004/1008).

NOTE 11--SI 1996/207 reg 72(8), (9) now also applies with regard to good cause under the Jobseekers Act 1995 s 20A(2)(g): SI 1996/207 reg 72(8), (9) (amended by SI 2000/1978).

TEXT AND NOTES 12-15--SI 1996/207 reg 73(1), (2) now also applies for the purposes of the Jobseekers Act 1995 s 20A(2)(b): SI 1996/207 reg 73(1), (2) (amended by SI 2000/1978).

TEXT AND NOTE 15--Without prejudice to any other circumstances in which a person may be regarded as having good cause for any act or omission for the purposes of the Jobseekers Act 1995 ss 19(5)(b), 20A(2)(b), a person is regarded as having good cause if the act or omission in question relates to an employment programme specified in SI 1996/207 reg 75(1)(a)(ii) (see PARA 304) or the training scheme specified in reg 75(1)(b)(ii) or (iv) or (v) (see PARAS 261, 304), and he had not, prior to that act or omission, been given or sent a notice in writing by an employment officer referring to the employment programme or training scheme in question and advising him that if any of the circumstances mentioned in the Jobseekers Act 1995 s 19(5)(b) or 20A(2)(b) arise in his case in relation to the specified programme his jobseeker's allowance could cease to be payable or could be payable at a lower rate: SI 1996/207 reg 73(2A) (added by SI 1997/2863; and amended by SI 2000/1978, SI 2001/2029, SI 2009/480).

Also, without prejudice to any other such circumstances, a person to whom SI 1996/207 reg 17A(2) applies, in respect of whom an employment officer has determined that he may undertake a qualifying course, and who is undertaking such a course as a full-time student, is to be regarded as having good cause for any act or omission (1) for the purposes of the Jobseekers Act 1995 s 19(5)(b) where the act or omission was in relation to an employment programme and he was, or would have been, required to attend the employment programme at a time which would have prevented him from attending the qualifying course; (2) for the purposes of ss 19(5)(b)(iii), (iv), 20A(2)(b)(iii), (iv), where (a) the act or omission was in relation to a qualifying course undertaken by him and occurred less than 4 weeks after the first day of the period of study; (b) the act or omission was in relation to a qualifying course undertaken by him and was due to his lack of ability; or (c) the act or omission was in relation to a qualifying course undertaken by him which was not suitable for him: SI 1996/207 reg 73(2B) (added by SI 1998/1274, amended by SI 2000/1978). For the purposes of head (c), a qualifying course is suitable for a person if it is suitable for him in vocationally relevant respects, namely his personal capacity, aptitude, his preference, the level of qualification aimed at, duration of the course and proportion of time, if any, which the person has spent on the training in relation to the length of the course: SI 1996/207 reg 73(4) (added by SI 1998/1274).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(5) DISQUALIFICATIONS AND SANCTIONS/(ii) Temporary Disqualifications/308. Exceptions.

### **308. Exceptions.**

A person is not to be disqualified for jobseeker's allowance<sup>1</sup> merely because he refuses to seek or accept employment<sup>2</sup> in a situation which is vacant in consequence of a stoppage of work due to a trade dispute<sup>3</sup>.

The disqualification provisions relating to failure to carry out a jobseeker's direction or to apply for or to accept or retain a place on a training scheme or employment programme<sup>4</sup> do not apply if there is in force a severe hardship direction<sup>5</sup> with respect to the claimant<sup>6</sup> and he has acted in such a way as to risk having it revoked<sup>7</sup> or having the amount of his allowance reduced<sup>8</sup> for failure to complete a course of training<sup>9</sup>.

Regulations<sup>10</sup> must make provision for the purpose of enabling any person of a prescribed description<sup>11</sup> to accept any employed earner's employment without falling within the statutory disqualifications for voluntary leaving or neglect to avail himself of an employment opportunity<sup>12</sup> should he leave that employment voluntarily and without just cause at any time during a trial period<sup>13</sup>. 'Trial period' has such meaning as may be prescribed<sup>14</sup> and means a period of eight weeks beginning with the commencement of the fifth week of the employment in question and ending at the end of the twelfth week of it<sup>15</sup>.

1    Ie under the Jobseekers Act 1995 s 19, or by virtue of regulations made thereunder: see PARAS 304-305 ante.

2    For the meaning of 'employment' see PARA 32 note 2 ante.

3    See the Jobseekers Act 1995 s 20(1). For the meaning of 'trade dispute' see PARA 301 note 2 ante.

4    Ie *ibid* s 19(5): see PARA 304 ante.

5    Ie under *ibid* s 16: see PARA 318 post.

6    For the meaning of 'claimant' see PARA 260 note 1 ante.

7    Ie under *ibid* s 16(3)(b): see PARA 318 post.

8    Ie under *ibid* s 17: see PARA 319 post.

9    *Ibid* s 20(2).

10   For the meaning of 'regulations' see PARA 260 note 13 ante.

11   A person is a prescribed person for these purposes if he has neither worked in employed earner's employment, nor been a self-employed earner, nor been a full-time student, nor been in relevant education, during the period of 13 weeks preceding the day of the commencement of the employment: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 74(1). A person is not to be regarded as having been in any of those categories by reason only of manning or launching of a lifeboat, acting as a part-time member of a fire brigade or attending for a period of up to 14 days at a work camp: see reg 74(2), (3). For the meaning of 'employed earner's employment' and 'self-employed earner's employment' see PARA 32 ante; for the meaning of 'full-time student' see PARA 282 note 1 ante; and for the meaning of 'relevant education' see PARA 264 ante. For the meaning of 'work camp' see PARA 281 note 5 ante.

12   Ie without falling within the Jobseekers Act 1995 s 19(6)(b) or (d): see PARA 305 ante.

13   *Ibid* s 20(3).

14 Ibid s 20(7). Regulations may make provision for determining for these purposes the day on which a person's employment is to be regarded as commencing: s 20(8).

15 Jobseeker's Allowance Regulations 1996 SI 1996/207, reg 74(4). In determining the time at which the fifth week commences or at which the twelfth week ends, any week in which a person has not worked in the employment for at least 16 hours is to be disregarded: see reg 74(4). 'Week' means any period of seven consecutive days: reg 75(2); the wording that the person must leave in the period 'beginning with the fifth week' means that it would not be enough just to complete the first four weeks: Decision R(U)1/92 (made under the previous unemployment benefit provision for a trial period, which had different weeks and the wording 'after the end of the sixth week', but the principle remains valid).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a training receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **308 Exceptions**

NOTES 11, 15--SI 1996/207 reg 74(1), (4) amended: SI 2000/1978.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(5) DISQUALIFICATIONS AND SANCTIONS/(ii) Temporary Disqualifications/309. Benefit for those disqualified for jobseeker's allowance.

### **309. Benefit for those disqualified for jobseeker's allowance.**

In such circumstances as may be prescribed<sup>1</sup>, an income-based jobseeker's allowance<sup>2</sup> is payable to a claimant<sup>3</sup> even though the disqualification provisions<sup>4</sup> prevent payment of a jobseeker's allowance to him<sup>5</sup>. A jobseeker's allowance is so payable only if the claimant has complied with such requirements as to the provision of information as may be prescribed for these purposes<sup>6</sup>. Regulations<sup>7</sup> under these provisions may, in particular, provide for a jobseeker's allowance so payable to be payable at a prescribed rate and for a prescribed period<sup>8</sup>.

Even though a person is disqualified for a jobseeker's allowance, there is provision for the payment of a reduced income-based jobseeker's allowance to him under the hardship provisions, provided that he continues to satisfy the conditions of entitlement to an income-based allowance<sup>9</sup>. If a person qualifies under one of the special categories as a 'person in hardship'<sup>10</sup> the reduced allowance may be paid immediately from the date of disqualification<sup>11</sup>; if he only qualifies under the general, residual category (where the adjudication officer is satisfied that the person will, unless an allowance is paid, suffer hardship)<sup>12</sup>, the reduced allowance is not payable in respect of the first 14 days of the period of disqualification<sup>13</sup>. The amount of the reduction is 40 per cent of the person's own appropriate personal allowance in the applicable amount, or 20 per cent where the claimant or any member of his family is either pregnant or seriously ill<sup>14</sup>.

1 For the meaning of 'prescribed' see PARA 21 note 12 ante.

2 For the meaning of 'income-based jobseeker's allowance' see PARA 271 note 1 ante.

3 For the meaning of 'claimant' see PARA 19 note 5 ante.

4 Ie the Jobseekers Act 1995 s 19: see PARAS 304-305 ante.

5 Ibid s 20(4).

6 Ibid s 20(5); and see note 9 infra.

7 For the meaning of 'regulations' see PARA 260 note 13 ante.

8 Jobseekers Act 1995 s 20(6). The prescribed period may differ from the period fixed under s 19(2) or (3) (see PARAS 304-305 ante): s 20(6).

9 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 141(6). See generally regs 140-145 (as amended); and PARAS 320-321 post. As these payments come under the hardship provisions, the requirements there as to the provision of a signed statement and the necessary information apply: see PARA 320 text and notes 6-8 post.

10 Ie under ibid reg 140(1)(a)-(j) (as amended): see PARA 321 post.

11 See ibid reg 141 (amended by SI 1996/1517; SI 1996/2538).

12 Ie under the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 140(2): see PARA 321 note 18 post. Note the factors to be taken into account in assessing hardship, which are set out in reg 140(5): see PARA 321 heads (a)-(c) post. For the meaning of 'adjudication officer' see PARA 263 note 4 ante.

13 See ibid reg 142(5).

14 See *ibid* reg 145 (amended by SI 1996/1516, SI 1996/1517). The applicable amount for the rest of a family is unaffected. One exceptional category is where the person affected by a disqualification under the Jobseekers Act 1995 s 19 is in receipt of a training allowance and is not receiving training under the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 170(2) (see PARA 326 post); in such a case, the person is entitled to an income-based jobseeker's allowance at the full rate, provided that he satisfies the income-based conditions of entitlement other than those which he is not required to meet by virtue of reg 170 (see PARA 326 post): see reg 74A (added by SI 1996/1516).

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or

falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **309 Benefit for those disqualified for jobseeker's allowance**

TEXT AND NOTES 3-5--For 'payable to' read 'payable in respect of': Jobseekers Act 1995 s 20(4) (amended by Welfare Reform and Pensions Act 1999 Sch 8 para 29(1), (5)).

TEXT AND NOTES 9-14--Provision has been made concerning the making of hardship payments to couples in hardship which corresponds to that applicable to individual persons in hardship: see SI 1996/207 regs 146A-146H (added by SI 2000/1978; SI 1996/207 reg 146A amended by SI 2005/2687, SI 2005/2877).

NOTE 14--SI 1996/207 reg 74A does not apply to a person who is a member of a joint-claim couple (see PARA 260): reg 74A (amended by SI 2000/1978).



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(6) BACK TO WORK SCHEMES/(i) Introduction/310. Back to work schemes.

## **(6) BACK TO WORK SCHEMES**

### **(i) Introduction**

#### **310. Back to work schemes.**

In addition to introducing the new jobseeker's allowance, the Jobseekers Act 1995 contains provisions in Part II enacting the following measures which seek to facilitate the return to work of persons who have been in receipt of benefit:

- 935 (1) the back to work bonus, which gives credit for half of any part-time earnings of a claimant while unemployed (which are deductible from benefit while claiming it) and provides a lump sum on taking up employment again and thereby ceasing to claim benefit, up to a maximum of £1,000<sup>1</sup>;
- 936 (2) the reimbursement of certain employer's contributions for an employer who takes on a person who has been unemployed for two years or more, as an incentive to employ the long-term unemployed<sup>2</sup>;
- 937 (3) a regulatory power to provide for priority to be given to certain persons claiming housing benefit and council tax benefit where they have ceased to qualify for jobseeker's allowance or income support because they are taking up employment<sup>3</sup>;
- 938 (4) the introduction of pilot schemes to test whether possible future measures will in fact encourage people to obtain or remain in work<sup>4</sup>.

1 See the Jobseekers Act 1995 s 26; the Social Security (Back to Work Bonus) (No 2) Regulations 1996, SI 1996/2570 (as amended); and PARAS 311-313 post.

2 See the Jobseekers Act 1995 s 27; the Employer's Contributions Reimbursement Regulations 1996, SI 1996/195; and PARA 315 post.

3 See the Jobseekers Act 1995 s 28 (amended by the Social Security Administration (Fraud) Act 1997 s 22, Sch 2); and HOUSING vol 22 (2006 Reissue) PARA 140 et seq; RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq. In addition, there is a separate power to make grants to persons for the provision or maintenance of resettlement places, ie, places at which persons without a settled way of life are afforded temporary accommodation with a view to assisting them to lead a more settled life: see the Jobseekers Act 1995 s 30; and SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1081.

4 See the Jobseekers Act 1995 s 29; and PARA 317 post.

### **UPDATE**

#### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for

that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are

designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(6) BACK TO WORK SCHEMES/(i) Introduction/310A. Special schemes for claimants for jobseeker's allowance.

### **310A. Special schemes for claimants for jobseeker's allowance.**

The Secretary of State may by regulations make provision for or in connection with the participation of claimants for a jobseeker's allowance in schemes of any prescribed<sup>1</sup> description, being schemes established for designated<sup>2</sup> areas in Great Britain (or for the whole of Great Britain) and designed to assist such persons to obtain sustainable employment<sup>3</sup>. Such regulations may, in particular, make provision (1) for the imposition during any prescribed period, as additional conditions for entitlement to a jobseeker's allowance applying in the case of persons participating in schemes, of requirements to take steps determined in accordance with the regulations with a view to improving those persons' prospects of securing employment; (2) for the suspension, during any prescribed period, of any prescribed conditions that would otherwise apply to such persons<sup>4</sup>. Such regulations may also make provision for any provisions relating to jobseeker's allowance<sup>5</sup> to apply for the purposes of the regulations subject to prescribed modifications<sup>6</sup>. The Secretary of State may for the purposes of, or in connection with, any scheme (a) make such arrangements (whether or not with other persons) for the provision of any facilities<sup>7</sup>, (b) provide such support (by whatever means) for arrangements made by other persons for the provision of any facilities, (c) make such payments (i) by way of fees, grants, loans or otherwise, to persons undertaking the provision of facilities under arrangements within heads (a) or (b) above, (ii) by way of grants, loans or otherwise, to persons participating in the scheme, or (iii) in respect of any incidental expenses, as he considers appropriate<sup>8</sup>. The power of the Secretary of State to make an order relating to the status of trainees is extended in relation to persons participating in any scheme under the above provisions<sup>9</sup>.

1 'Prescribed' means specified in or determined in accordance with regulations under the Welfare Reform and Pensions Act 1999 s 60: s 60(9).

2 'Designated' means designated by the Secretary of State: *ibid* s 60(9).

3 *Ibid* s 60(1). 'Employment' has the meaning given by regulations under s 60: s 60(9).

4 *Ibid* s 60(2).

5 *Ie* any provisions of the Jobseekers Act 1995.

6 Welfare Reform and Pensions Act 1999 s 60(3). The provisions of the Jobseekers Act 1995 which may be so applied include in particular any provisions of (1) s 19 or 20A (circumstances in which jobseeker's allowance is not payable); or (2) ss 20 or 20B (exemptions from s 19 or 20A) (see PARA 304A): Welfare Reform and Pensions Act 1999 s 60(4).

7 'Facilities' includes services, and any reference to the provision of facilities includes the making of payments to persons participating in the scheme: Welfare Reform and Pensions Act 1999 s 60(7).

8 *Ibid* s 60(5). Supplementary provision is made concerning similar payments by the Welsh Assembly in relation to a scheme established for, or for an area which includes, Wales or a part of Wales: see further s 60(6).

9 The power of the Secretary of State to make an order under the Employment Act 1988 s 26 (see EMPLOYMENT vol 40 (2009) PARA 565) includes the power to make, in relation to persons participating in any scheme, and payments received by them by virtue of the Welfare Reform and Pensions Act 1999 s 60(5) (see TEXT AND NOTES 7, 8), provision corresponding to any provision which (by virtue of the Employment Act 1988 s 26(1) or (2)) may be made in relation to persons using such facilities, and to such payments received by them, as are mentioned in s 26(1): Welfare Reform and Pensions Act 1999 s 60(8).

See the Employment Zones Regulations 2003, SI 2003/2438 (amended by SI 2004/1043, SI 2005/1744, SI 2006/1000, SI 2007/924); and the Employment Zones (Allocations to Contractors) Pilot Regulations 2006, SI 2006/962, which make provision for a claimant of jobseeker's allowance to participate in an employment zone programme.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to

receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(6) BACK TO WORK SCHEMES/(ii) The Back to Work Bonus/311. Power to make regulations.

## **(ii) The Back to Work Bonus**

### **311. Power to make regulations.**

Regulations<sup>1</sup> may make provision for the payment, in prescribed circumstances<sup>2</sup>, of sums to or in respect of persons who are or have been entitled<sup>3</sup> to a jobseeker's allowance or to income support<sup>4</sup> and a sum payable under the regulations is to be known as 'a back to work bonus'<sup>5</sup>. A back to work bonus is treated<sup>6</sup> for all purposes as payable by way of a jobseeker's allowance or (as the case may be) income support<sup>7</sup>.

The regulations may, in particular, provide for:

- 939 (1) a back to work bonus to be payable only on the occurrence of a prescribed event;
- 940 (2) a bonus not to be payable unless a claim is made before the end of the prescribed period;
- 941 (3) the amount of a bonus (subject to any maximum prescribed by virtue of head (7) below) to be determined in accordance with the regulations;
- 942 (4) Enabling amounts to be calculated by reference to periods of entitlement to a jobseeker's allowance and periods of entitlement to income support;
- 943 (5) treating a bonus as payable wholly by way of income support or wholly by way of a jobseeker's allowance, in a case where amounts have been calculated in accordance with provision made by virtue of head (4) above;
- 944 (6) keeping persons who may be entitled to a bonus informed of the amounts calculated in accordance with any provision of the regulations made by virtue of head (3) above;
- 945 (7) the amount of a bonus not to exceed a prescribed maximum;
- 946 (8) a bonus not to be payable if the amount of the bonus which would otherwise be payable is less than the prescribed minimum;
- 947 (9) prescribed periods to be disregarded for prescribed purposes;
- 948 (10) a bonus which has been paid to a person to be treated, in prescribed circumstances and for prescribed purposes, as income or capital of his or of any other member of his family<sup>8</sup>;
- 949 (11) treating the whole or a prescribed part of an amount which has accrued towards a person's bonus as not having accrued towards his bonus, but as having accrued towards the bonus of another person;
- 950 (12) the whole or a prescribed part of a back to work bonus to be payable, in such circumstances as may be prescribed, to such person, other than the person who is or had been entitled to a jobseeker's allowance or to income support, as may be determined in accordance with the regulations<sup>9</sup>.

1 For the meaning of 'regulations' see PARA 260 note 13 ante.

2 See PARA 312 post. For the meaning of 'prescribed' see PARA 21 note 12 ante.

3 As to entitlement to a jobseeker's allowance see PARA 259 et seq ante.

4 As to entitlement to income support see PARA 176 et seq ante.

5 Jobseekers Act 1995 s 26(1), (2). As to the exercise of this power see PARAS 312-313 post.

6 le subject to the Income and Corporation Taxes Act 1988 s 617 (as amended) (back to work bonus not taxable). As to the taxation of benefits generally see PARA 7 ante.

7 Jobseekers Act 1995 s 26(3).

8 For the meaning of 'family' see PARA 265 note 6 ante.

9 Jobseekers Act 1995 s 26(4).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(6) BACK TO WORK SCHEMES/(ii) The Back to Work Bonus/312. Qualification for the bonus.

### **312. Qualification for the bonus.**

An applicant<sup>1</sup> who has served or is treating as having served a waiting period<sup>2</sup> is entitled to a bonus where he satisfies any one of four conditions<sup>3</sup>.

The first condition is that:

- 951 (1) he or his partner<sup>4</sup> has or had earnings of which a part only has been disregarded in determining the amount of those earnings for the purposes of a qualifying benefit<sup>5</sup>;
- 952 (2) he or his partner takes up or returns to or increases the number of hours in which he or his partner is engaged in employment, or the earnings from an employment in which he or his partner is engaged are increased ('the work condition'), as a result of which there is a cessation of an entitlement to a qualifying benefit (other than a partner's entitlement to a contribution-based jobseeker's allowance) in respect of himself, and where he has a partner, his family;
- 953 (3) he claims the bonus before the end of a period of 12 weeks immediately following that cessation; and
- 954 (4) in the case where the qualifying benefit was income support, he has not attained the day before the age of 60, or in a case where the qualifying benefit was a jobseeker's allowance, he has not attained the day before pensionable age, in either case as at the time the work condition was satisfied<sup>6</sup>.

The second condition is that:

- 955 (a) within 14 days of his ceasing to be entitled to a qualifying benefit he or his partner satisfies the work condition;
- 956 (b) had the work condition been satisfied on the day he was last so entitled, that entitlement would as a consequence have ceased;
- 957 (c) he satisfies heads (1) and (2) above in relation to the first condition; and
- 958 (d) he claims the bonus within 12 weeks of his ceasing to be entitled to a qualifying benefit<sup>7</sup>.

The third condition is that:

- 959 (i) within 12 weeks of ceasing to be entitled to a qualifying benefit or within 12 weeks of a connecting period ceasing, the applicant commences training;
- 960 (ii) within 14 days of the day he last attended training, he takes up or returns to or increases the number of hours in which he is engaged in employment, or where his hours fluctuate, is engaged on average, for not less than 16 hours per week, or he takes up employment or increases his earnings from his existing employment, as a result of which weekly earnings equal or exceed the amount of the training allowance payable to him in the last week of training;
- 961 (iii) he claims the bonus before the end of a period of 12 weeks immediately following the date on which the training ceased;
- 962 (iv) he satisfies head (1) above in relation to the first condition; and

- 963 (v) in a case where the qualifying benefit to which a person was entitled was income support, he satisfied the requirements in head (ii) above before he attained the age of 60, or in a case where the qualifying benefit was a jobseeker's allowance, he satisfied those requirements before he attained pensionable age<sup>8</sup>.

The fourth condition is that:

- 964 (A) the applicant was formerly one of a couple or of a polygamous marriage who have separated and the separation took place before the person attained the age of 60;
- 965 (B) at the date of separation, either the applicant or his partner was entitled to a qualifying benefit;
- 966 (C) within 14 days of the separation he takes up or returns to or increases the number of hours in which he is engaged in employment, or where his hours fluctuate, is engaged on average, for not less than 16 hours per week, or he takes up employment or increases his earnings from his existing employment, as a result of which his weekly earnings, had he been entitled to a qualifying benefit on the day of separation, equalled or exceeded the amount that would have been the applicable amount or the age-related amount in his case;
- 967 (D) he satisfies head (1) above in relation to the first condition; and
- 968 (E) he claims the bonus within 12 weeks of the day on which the separation occurred<sup>9</sup>.

1 'Applicant' means the person claiming the back to work bonus: Social Security (Back to Work Bonus) (No 2) Regulations 1996, SI 1996/2570, reg 1(2). A claim for a bonus must be made in writing on a form approved for the purpose by the Secretary of State and must be made (1) subject to reg 22(7), not earlier than the beginning of the benefit week which precedes the benefit week in which an award of a qualifying benefit comes to an end; and (2) subject to reg 23(5), not later than the end of the period of 12 weeks immediately following (a) in the case of a person who satisfies the third condition in reg 7 (see heads (i)-(v) in the text), the last day on which he was engaged in training; (b) in the case of a person to whom the fourth condition specified in reg 7 applies (couples who separate: see heads (A)-(E) in the text), the date of separation; (c) in the case of a person to whom reg 12 applies (couples who separate where the separated partner has attained the age of 60), the date of separation; (d) in the case of a person who has attained pensionable age (see PARA 562 post) or, where the qualifying benefit is income support the age of 60, the date he attained that age; (e) in any other case, the date on which entitlement to a qualifying benefit ceased on satisfaction of the work condition: reg 22(1). In the case of a person who ceases to be entitled to a qualifying benefit and again becomes entitled to a qualifying benefit in the same period of entitlement to a qualifying benefit, for the reference to 12 weeks in head (2) supra there must be substituted a reference to a period equal to the period falling between the last day of entitlement to the first qualifying benefit and the first day of entitlement to the second qualifying benefit: see reg 23(5).

A claim for a bonus must be delivered or sent to an office of the Department of Social Security or of the Department for Education and Employment: reg 22(2). If a claim is defective at the date when it is received, the Secretary of State may refer the claim to the person making it and if the form is received properly completed within one month, or such longer period as the Secretary of State may consider reasonable, from the date on which it is so referred, the Secretary of State may treat the claim as if it had been duly made in the first instance; and a claim which is made on the form approved for the time being is, for these purposes, properly completed if it is completed by the applicant in accordance with instructions on the form and defective if it is not: reg 22(3), (4). An applicant must furnish such certificates, documents, information and evidence in connection with the claim, or any question arising out of it, as may be required by the Secretary of State and must do so within one month of being required to do so or such longer period as the Secretary of State may consider reasonable: reg 22(5). In the case of a person who has served or is treated as having served a waiting period in accordance with reg 6(1) (waiting period) and is a member of a couple in respect of whom income support or an income-based jobseeker's allowance is payable, the claim for the bonus must be made by the member of the couple entitled to the benefit: reg 22(6). A person who has an employment to take up, or whose earnings from, or the hours of, employment will increase, within 14 days of completing his training or the date of separation, and where that employment satisfies the requirements of reg 7(4)(b) or (5)(c), may make a claim for a bonus (i) in the case of a person who satisfies all the other requirements of the third condition specified in reg 7, up to 14 days before the day following the last day of attendance on the course; (ii) in the case of a person who satisfies all the other conditions of the fourth condition specified in reg 7, up to 13 days before the day on which he complies with the condition, but not before the day after the separation: reg 22(7).

A person who has made a claim may amend it at any time by notice in writing received at an appropriate office before a determination has been made on a claim, and any claim so amended may be treated as if it had been so amended in the first instance; and may withdraw it at any time before a determination has been made on it, by notice to the appropriate office, and any such notice of withdrawal must have effect when it is received: reg 23(1), (2).

The date on which the claim is made is, in the case of a claim which meets the requirements of reg 22(1), the date on which it is received at the appropriate office, or in the case of a claim treated under reg 22(3) as having been duly made, the date on which the claim was received in an appropriate office in the first place: reg 23(3). For these purposes, the 'appropriate office' means an office of the Department of Social Security or the Department for Education and Employment: reg 23(4).

Where the applicant proves there was good cause throughout the period from the expiry of the 12 weeks specified in reg 22(1) for failure to claim the bonus within the specified time, the time for claiming the bonus must be extended to the date on which the claim is made or to a period of 12 months, whichever is the shorter period: reg 23(6).

2 The waiting period is the period comprising the first 91 days in a period of entitlement to a qualifying benefit in which the claim for the bonus is made, or which precedes a claim made on resumption of work (see note 1 head (2) *supra*): *ibid* reg 6(2).

3 *Ibid* regs 6(1), 7(1). Where the adjudication officer is satisfied that a person satisfies, or will satisfy, the work condition or either of the requirements specified in reg 7(4)(b) or the requirements specified in reg 7(5)(c) he may award a bonus in advance of the condition or requirement being met; and if, having been awarded a bonus in advance in accordance with this provision, the person fails to satisfy the conditions, he is not entitled to any further bonus until he has served a further waiting period in accordance with reg 6: reg 25(1), (2).

4 'Partner' means where the person (1) is a member of a married or unmarried couple, the other member of that couple; (2) is married polygamously to two or more members of his household, any such member: see *ibid* reg 1(2).

5 'Qualifying benefit' means a jobseeker's allowance or income support: see *ibid* reg 1(3).

6 *Ibid* reg 7(2).

7 *Ibid* reg 7(3).

8 *Ibid* reg 7(4).

9 *Ibid* reg 7(5). There are special provisions relating to couples who separate (see reg 10); couples who separate where the partner has earnings (see reg 11); couples who separate where the separated partner has attained the age of 60 (see reg 12); single persons who become couples (see regs 13, 14); single claimants who are couples (see reg 15); couples both of whom are entitled to a qualifying benefit (see reg 16); persons attaining pensionable age (see reg 17); share fishermen (see reg 20); and death (see reg 18 (amended by SI 1997/454)). Entitlement to the bonus is subject to restrictions where the claimant's partner is involved in a trade dispute: see the Social Security (Back to Work Bonus) (No 2) Regulations 1996, SI 1996/2570, reg 19 (as so amended).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with

or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of

State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **312-313 Qualification for the bonus, Amount payable by way of bonus**

These provisions are revoked subject to transitional provision: SI 2003/1589 (amended by SI 2004/1655).

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### **313. Amount payable by way of bonus.**

The amount of the back to work bonus payable to an applicant<sup>1</sup> is the aggregate of:

- 969 (1) half the amount of that part of the applicant's earnings in any benefit week<sup>2</sup> falling either wholly or partly within the bonus period<sup>3</sup>, if the earnings are not disregarded under the relevant income support or jobseeker's allowance provisions<sup>4</sup>; and
- 970 (2) where the person is one of a couple or a member of a polygamous marriage, half the amount of the partner's earnings which are not disregarded in accordance with the provisions mentioned in head (1) above<sup>5</sup>; and
- 971 (3) a pro-rata amount in respect of any earnings of the applicant or his partner in any part-week which counts<sup>6</sup>.

At the date at which this volumes states the law, the maximum sum payable by way of bonus to an applicant in respect of a bonus period was £1,000<sup>7</sup>.

1 For the meaning of 'the applicant' see PARA 312 note 1 ante.

2 If the qualifying benefit is income support, 'benefit week' has the meaning it has in the Income Support (General) Regulations 1987, SI 1987/1967 (as amended) (see PARA 182 note 3 ante); and if the qualifying benefit is jobseeker's allowance, 'benefit week' has the meaning it has in the Jobseeker's Allowance Regulations 1996, SI 1996/207 (as amended) (see PARA 269 note 6 ante): Social Security (Back to Work Bonus) (No 2) Regulations 1996, SI 1996/2570, reg 1(2).

3 The 'bonus period' means a period beginning on the first day of entitlement to a qualifying benefit in a period of entitlement to a qualifying benefit which falls after the waiting period and ends on the last day of that period of entitlement: Social Security (Back to Work Bonus) (No 2) Regulations 1996, SI 1996/2570, reg 1(2). For the meaning of 'qualifying benefit' see PARA 312 note 5 ante; for the meaning of 'waiting period' see PARA 312 note 2 ante. 'Period of entitlement' is defined in regs 2-5 (amended by SI 1997/454) which contain linking rules to permit two or more periods to count as one (in general, when not separated by more than 12 weeks), and also permit certain 'connecting periods' where the person is undertaking training, receiving maternity allowance or receiving incapacity benefit, severe disablement allowance or invalid care allowance; periods in receipt of interim payments, urgent cases payments and certain special jobseeker's allowance payments are stated not to count.

4 These are the Income Support (General) Regulations 1987, SI 1987/1967, regs 36(2), 38(2), Sch 8 paras 4-9 (as amended) and the corresponding provisions of the Jobseeker's Allowance Regulations 1996, SI 1996/207 (as amended).

5 This does not apply where the qualifying benefit to which the person is entitled is a contribution-based jobseeker's allowance: Social Security (Back to Work Bonus) (No 2) Regulations 1996, SI 1996/2570, reg 8(3). As to contribution-based jobseeker's allowance see PARA 266 et seq ante.

6 See *ibid* reg 8(1). Earnings which were not declared by the applicant or were otherwise not taken into account in determining the amount of the qualifying benefit are to be disregarded in determining the amount of the bonus: see reg 8(4), (5). Earnings for any week in respect of which the person is entitled to a qualifying benefit but has an applicable amount of nil are also to be disregarded: see reg 8(2).

7 See *ibid* reg 8(6).

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading

payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **312-313 Qualification for the bonus, Amount payable by way of bonus**

These provisions are revoked subject to transitional provision: SI 2003/1589 (amended by SI 2004/1655).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(6) BACK TO WORK SCHEMES/(iii) Deductions by Employers for Employment of the Long-term Unemployed/314. Power to make regulations.

### **(iii) Deductions by Employers for Employment of the Long-term Unemployed**

#### **314. Power to make regulations.**

Regulations<sup>1</sup> may make provision for any employer<sup>2</sup> who employs a person who is a qualifying employee<sup>3</sup> in relation to him, to make deductions from the employer's contributions payments<sup>4</sup> in accordance with the regulations and in prescribed circumstances<sup>5</sup>. Those regulations may, in particular, make provision as to the period for which deductions may be made by an employer<sup>6</sup>.

Regulations may provide, in relation to cases where an employee is a qualifying employee in relation to more than one employer at the same time, for the right to make deductions to be confined to one employer determined in accordance with the regulations and certified by the Secretary of State<sup>7</sup>, in accordance with the regulations, to be the employer entitled to make those deductions<sup>8</sup>. Regulations may also:

- 972 (1) provide that, in prescribed circumstances, a person who would not otherwise be a qualifying employee is treated as satisfying the relevant conditions<sup>9</sup>;
- 973 (2) prescribe circumstances in which, for prescribed purposes, two or more employers are to be treated as one<sup>10</sup>;
- 974 (3) make provision for the payment, in prescribed circumstances, by the Secretary of State or by the Commissioners of Inland Revenue on behalf of the Secretary of State, of sums to employers who are unable to make the whole or part of any deductions which they are entitled to make<sup>11</sup>;
- 975 (4) require persons to maintain such records in connection with deductions made by them as may be prescribed;
- 976 (5) require persons who have made deductions to furnish to the Secretary of State such documents and information, at such time, as may be prescribed<sup>12</sup>.

1 For the meaning of 'regulations' see PARA 260 note 13 ante.

2 For these purposes, 'employer' has such meaning as may be prescribed (Jobseekers Act 1995 s 27(8)) and means a person who in relation to an employee is a secondary contributor within the meaning of the Social Security Contributions and Benefits Act 1992 s 7(1) (see PARA 35 note 9 ante) or who is treated as such under s 116 (as amended) (see PARA 22 ante) or by regulations made under s 7(2); s 117 (see PARA 23 ante); s 119 (see PARA 21 ante); or s 120 (see PARA 24 ante) (Employer's Contributions Reimbursement Regulations 1996, SI 1996/195, reg 1(2)).

3 For the meaning of 'qualifying employee' see PARA 316 post.

4 'Contributions payments', in relation to an employer, means the aggregate of the payments which he is required to make by way of primary or secondary Class 1 contributions: Jobseekers Act 1995 s 27(8). As to primary and secondary Class 1 contributions see PARAS 36-37 ante.

5 Ibid s 27(3). 'Deductions' means deductions made in accordance with such regulations: s 27(8). As to the permitted deduction see PARA 315 post.

6 Ibid s 27(4).

7 As to the Secretary of State see PARA 1 ante.

8 Jobseekers Act 1995 s 27(5). The right to make deductions is confined to the employer with whom the qualifying employee's employment began first and certified on the deductions certificate as the employer entitled to make the deductions: see the Employer's Contributions Reimbursement Regulations 1996, SI 1996/195, reg 10.

9 le the condition in the Jobseekers Act 1995 s 27(1) or the condition in s 27(2)(a): see PARA 316 post.

10 For the prescribed circumstances see the Employer's Contributions Reimbursement Regulations 1996, SI 1996/195, reg 11.

11 See *ibid* reg 9; and PARA 315 post.

12 Jobseekers Act 1995 s 27(6); and see the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 30, reg 30A (as added) (both amended, for these purposes, by SI 1996/195).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help

participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **314 Power to make regulations**

NOTE 5--'Prescribed' means specified in or determined in accordance with regulations; and 'regulations' means regulations made by the Treasury: 1995 Act s 27(8), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 3 para 61.

TEXT AND NOTE 7--For 'Secretary of State' read 'Commissioners of Inland Revenue': 1995 Act s 27(5), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 65.

TEXT AND NOTE 11--Head (3) now refers only to the commissioners of Inland Revenue: 1995 Act s 27(6)(d), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 65.

TEXT AND NOTE 12--In head (5) for 'Secretary of State' read 'Commissioners of Inland Revenue': 1995 Act s 27(6)(f), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 65.

NOTE 12--1979 Regulations reg 30 revoked: SI 2001/769. 1979 Regulations reg 30A revoked: SI 2001/1004.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(6) BACK TO WORK SCHEMES/(iii) Deductions by Employers for Employment of the Long-term Unemployed/315. The permitted deduction.

### **315. The permitted deduction.**

An employer<sup>1</sup> who employs a person who is a qualifying employee<sup>2</sup> in relation to him for a continuous period of at least 13 weeks, who has obtained a deductions certificate<sup>3</sup> and who is liable to pay Class 1 contributions<sup>4</sup> in respect of that employee is entitled to deduct an amount from his contributions payments<sup>5</sup>. The maximum period for the making of these deductions is one year, though the period ends before that if the employment ends or the qualifying employee reaches pensionable age<sup>6</sup>. Where such an amount has been deducted, that amount is to be treated as if it had been paid by the employer, and received by the Secretary of State, towards discharging the employer's liability in respect of his contributions<sup>7</sup>.

1 For the meaning of 'employer' see PARA 314 note 2 ante. Two employers may be treated as one if earnings are aggregated for contributions purposes: see the Employer's Contributions Reimbursement Regulations 1996, SI 1996/195, reg 11. If the qualifying employee works for more than one employer, only one (the first in point of time) may claim the deduction: see reg 10.

2 For the meaning of 'qualifying employee' see PARA 316 post.

3 An application for a deductions certificate must be in writing and must contain the following particulars: (1) the name and address of the person employing the qualifying employee; (2) the name and national insurance number of the qualifying employee; (3) the date the qualifying employee's employment with that person commenced: Employer's Contributions Reimbursement Regulations 1996, SI 1996/195, reg 7(1), (2). An application for a deductions certificate must be made to the Secretary of State before the end of the period commencing with the first day of the qualifying employee's employment with the employer and ending on the expiry of 52 weeks after that date; and 'week' means a period of seven consecutive days: regs 1(2), 7(3). On receipt of an application from a person employing a qualifying employee the Secretary of State must issue a deductions certificate and must certify on the deductions certificate that the person to whom it is issued is the employer entitled to make deductions in accordance with the Employer's Contributions Reimbursement Regulations 1996, SI 1996/195; and where an application is made after the specified period it may be accepted by the Secretary of State if the person applying for it proves that there was good cause for his failure to make the application within that period: reg 7(4), (5). A deductions certificate remains at all times the property of the Secretary of State; and the person who has been issued with it (a) is responsible for its custody; (b) must, within 28 days of receiving a request from the Secretary of State to do so, return the certificate to the Secretary of State unless he has reasonable cause for not so doing: reg 7(6)-(8). Where a deductions certificate has been lost or destroyed the Secretary of State may, at his discretion, issue a duplicate: reg 7(9). A person who contravenes or fails to comply with the requirements of reg 7(8) (see head (b) supra) is guilty of an offence: reg 12(1). The Jobseekers Act 1995 s 34(7) (see PARA 404 note 2 post) applies in relation to the original offence; and 'the original offence' has the meaning given to it in s 34(7): Employer's Contributions Reimbursement Regulations 1996, SI 1996/195, reg 11(2). As to the Secretary of State see PARA 1 ante.

4 As to Class 1 contributions see PARA 34 et seq ante.

5 See the Employer's Contributions Reimbursement Regulations 1996, SI 1996/195, regs 5(1), 8. For the meaning of 'contributions payments' see PARA 314 note 4 ante. The amount which may be deducted is: (1) where the Class 1 contributions are payable at the contracted-out rate (see PARAS 36 ante, 911 post), an amount equal to the amount of secondary Class 1 contributions which would be payable by that employer in respect of the earnings paid in the relevant period were those contributions payable at the non-contracted-out rate; (2) where they are payable at any other rate, an amount equal to the amount of secondary Class 1 contributions which would be payable by that employer in respect of the earnings paid in the relevant period: reg 5(2). No account is to be taken of any earnings paid to or for the benefit of the qualifying employee after the relevant period: reg 5(3). As to the relevant period see the text and note 6 infra.

The usual method is by direct deduction of the amount from the employer's contributions payments, but if in any particular income tax period the amount the employer is entitled to deduct exceeds the contributions payments due (or if no such payments are due at all) the employer may require the Secretary of State to pay him the balance: see reg 9. Special provisions apply in relation to a mariner's earnings paid for a voyage period: see reg 6.

6 See *ibid* reg 5(4). This period, which begins with the first day of the qualifying employee's employment with that employer, is referred to as 'the relevant period'. For the meaning of 'pensionable age' see PARA 562 post.

7 See the Jobseekers Act 1995 s 27(7).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or

falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **315 The permitted deduction**

NOTES 3, 5--Functions of Secretary of State under SI 1996/195 regs 7-9 transferred to Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

TEXT AND NOTE 5--After '13 weeks' read 'commencing on or before 31 March 1999': SI 1996/195 reg 5(1); SI 1999/286. SI 1996/195 reg 6 amended: SI 1999/286.

TEXT AND NOTE 7--For 'Secretary of State' read 'Commissioners of Inland Revenue': 1995 Act s 27(7)(b), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 65.



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(6) BACK TO WORK SCHEMES/(iii) Deductions by Employers for Employment of the Long-term Unemployed/316. Meaning of 'qualifying employee'.

### **316. Meaning of 'qualifying employee'.**

An employee<sup>1</sup> is a 'qualifying employee' in relation to his employer<sup>2</sup> if, immediately before beginning his employment with that employer, he had been entitled<sup>3</sup> to a jobseeker's allowance for a continuous period of not less than two years<sup>4</sup>. The employee is also a qualifying employee if immediately before beginning his employment with that employer he had been unemployed for a continuous period of not less than two years<sup>5</sup>, he is under pensionable age<sup>6</sup> and he falls within a prescribed description of person<sup>7</sup>.

1 For these purposes, 'employee' has such meaning as may be prescribed (Jobseekers Act 1995 s 27(8)); and means a person who is, or is treated as, an employed earner for the purposes of the Social Security Contributions and Benefits Act 1992 (see PARA 32 ante) and is over the age of 16: Employer's Contributions Reimbursement Regulations 1996, SI 1996/195, reg 1(2).

2 For the meaning of 'employer' see PARA 314 note 2 ante.

3 As to entitlement to a jobseeker's allowance see PARA 259 et seq ante.

4 Jobseekers Act 1995 s 27(1). Certain categories of person are treated as satisfying this qualification; in particular, a person is permitted to aggregate separate periods of entitlement to the allowance where they are separated by 'breaking periods' of not more than 12 successive weeks (or of jury service), and may count certain periods while undergoing training, while treated as available for work for income support purposes, while a carer or while a lone parent: see the Employer's Contributions Reimbursement Regulations 1996, SI 1996/195, reg 2.

5 Certain categories of person are treated as satisfying this qualification; in particular, a person is again permitted to aggregate separate periods of unemployment which are separated only by breaking periods (see note 4 supra); also, the period of unemployment is not to be broken by certain forms of work which are disregarded for certain benefit purposes: see *ibid* reg 3.

6 For the meaning of 'pensionable age' see PARA 562 post (definition applied by *ibid* reg 1(2)).

7 Jobseekers Act 1995 s 27(2). A person falls within a prescribed description if (1) he is in receipt of a qualifying benefit for a continuous period of not less than two years; and (2) continuously for the whole of that period he satisfied any one or more of the following conditions: (a) he is undergoing a course of training for which a training allowance is payable; (b) he was available or treated as available for employment under the Income Support (General) Regulations 1987, SI 1987/1967, reg 9 (revoked) or under regulations made under the Social Security Contributions and Benefits Act 1992 s 25A(1)(a) (repealed); (c) he is a carer; (d) he is a lone parent: Employer's Contributions Reimbursement Regulations 1996, SI 1996/195, reg 4(1). For the purposes of head (1) supra in determining whether a person has been entitled to a qualifying benefit for any period, any benefit week on any day of which that person was entitled to unemployment benefit is to be treated as a period throughout which he was entitled to a qualifying benefit: reg 4(2). 'Qualifying benefit' here means the former unemployment benefit or income support: reg 1(2). In calculating the two years' continuous period, once again there can be aggregation of separate periods, separated only by breaking periods: see reg 4(3).

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment

Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged

25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(6) BACK TO WORK SCHEMES/(iv) Pilot Schemes/317. Pilot scheme regulations.

## **(iv) Pilot Schemes**

### **317. Pilot scheme regulations.**

Regulations<sup>1</sup> may be made, in the nature of pilot schemes, with a view to ascertaining whether their provisions will, or will be likely to, encourage persons to obtain or remain in work or will, or will be likely to, facilitate the obtaining by persons of work or their remaining in work<sup>2</sup>. Such regulations may be made so as to have effect for a specified period not exceeding 12 months<sup>3</sup> and the scheme enacted may provide that its provisions are only to apply in relation to (1) one or more specified areas or localities; (2) one or more specified classes of person; (3) persons selected either by reference to prescribed criteria or on a sampling basis<sup>4</sup>.

A pilot scheme may make consequential or transitional provision with respect to the cessation of the scheme on the expiry of the specified period<sup>5</sup> and may be replaced by a further pilot scheme making the same, or similar, provision (apart from the specified period) to that made by the previous scheme<sup>6</sup>.

1 For the meaning of 'regulations' see PARA 260 note 13 ante.

2 See the Jobseekers Act 1995 s 29(1), (2), (8).

3 Ibid s 29(1), (2).

4 Ibid s 29(3). These provisions apply to regulations made under the Jobseekers Act 1995, other than regulations made under s 4(2) or (5) (see PARAS 268, 272 ante) which have the effect of reducing any age-related amount or applicable amount, or regulations made under s 27 (see PARAS 314-316 ante); and also to (1) regulations made under the Social Security Administration Act 1992, so far as they relate to a jobseeker's allowance; (2) regulations made under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-127) (as amended) (income-related benefits: see PARA 173 et seq ante), other than regulations made under (a) s 128(5) which have the effect of reducing the appropriate maximum family credit (see PARA 204 ante); (b) s 129(8) which have the effect of reducing the appropriate maximum disability working allowance (see PARA 220 ante); (c) s 130(4) which have the effect of reducing the appropriate maximum housing benefit (see HOUSING vol 22 (2006 Reissue) PARA 140 et seq); (d) s 131(10)(a) which have the effect of reducing the appropriate maximum council tax benefit (see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq) and other than regulations reducing any of the sums prescribed under s 135(1) (see PARA 174 ante); and (3) regulations made under the Social Security Administration Act 1992 so far as they relate to income-related benefits payable under the Social Security Contributions and Benefits Act 1992 Pt VII (as amended): Jobseekers Act 1995 s 29(6), (7).

5 Ibid s 29(4).

6 Ibid s 29(5). The first such schemes were made by the Income Support (Pilot Scheme) Regulations 1996, SI 1996/1252 (revoked); and the Jobseeker's Allowance (Pilot Scheme) Regulations 1996, SI 1996/1307 (revoked). See now (1) the Jobseeker's Allowance (Project Work Pilot Scheme) (No 2) Regulations 1997, SI 1997/984, for the period from 26 May 1997 to 25 May 1998, imposing sanctions on relevant persons who without good cause refuse or fail to participate in the employment programme known as Project Work, or who lose their places on that programme due to misconduct; (2) the Jobseeker's Allowance (Workskill Courses) Pilot (No 2) Regulations 1997, SI 1997/1909, for the period from 1 September 1997 to 31 August 1998, which modify the provisions of the Jobseeker's Allowance Regulations 1996, SI 1996/207 (as amended) in relation to certain qualifying persons. See also the Jobseeker's Allowance (Contract for Work) Regulations 1997, SI 1997/982, which establish a pilot scheme for persons who claim jobseeker's allowance and have been receiving benefit for at least two years and attending a specified office of the Department for Education and Employment.

## **UPDATE**

## 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order

2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus; art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **317 Pilot scheme regulations**

TEXT AND NOTES--See the Jobseeker's Allowance (Jobseeker Mandatory Activity) Pilot Regulations 2007, SI 2007/1082.

TEXT AND NOTES 2, 3--Jobseekers Act 1995 s 29(1), (8) amended: Welfare Reform Act 2009 s 28(1).

NOTE 4--Subject to savings (SI 2003/962), heads (a) and (b) repealed: Tax Credits Act 2002 Sch 6.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(7) SPECIAL PROVISIONS AND SPECIAL CATEGORIES/(i) Hardship Payments/318. Severe hardship payments to young persons.

## **(7) SPECIAL PROVISIONS AND SPECIAL CATEGORIES**

### **(i) Hardship Payments**

#### **318. Severe hardship payments to young persons.**

If it appears to the Secretary of State<sup>1</sup> that a person has reached the age<sup>2</sup> of 16 but not the age of 18, is not entitled to a jobseeker's allowance<sup>3</sup> or to income support<sup>4</sup> and is registered for training<sup>5</sup> but is not being provided with it, then if it further appears that severe hardship will result to him unless a jobseeker's allowance is paid to him, the Secretary of State may make a direction in his case<sup>6</sup>, which may be limited to a specified period<sup>7</sup>. Where such a direction is in force, that person is eligible for an income-based jobseeker's allowance if he satisfies certain of the income-based conditions<sup>8</sup>.

The Secretary of State may revoke such a direction if:

- 977 (1) it appears to him that there has been a change of circumstances as a result of which failure to receive an allowance need no longer result in severe hardship to the person concerned;
- 978 (2) it appears to him that the person concerned has either failed to pursue an opportunity of obtaining training or has rejected an offer of training, in either case not showing good cause<sup>9</sup> for doing so; or
- 979 (3) he is satisfied that it was given in ignorance of some material fact or was based on a mistake as to some material fact and considers that, but for that ignorance or mistake, he would not have given the direction<sup>10</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 A person attains a particular age expressed in years at the commencement of the relevant anniversary of his birth: see the Family Law Reform Act 1969 s 9; and see also PARA 19 note 11 ante.

3 As to entitlement to a jobseeker's allowance see PARA 259 et seq ante.

4 As to entitlement to income support see PARA 176 et seq ante.

5 For the meaning of 'training' see PARA 271 note 14 ante.

6 Jobseekers Act 1995 s 16(1).

7 Ibid s 16(2). 'Period' includes (1) a period of a determinate length; (2) a period defined by reference to the happening of a future event; and (3) a period of a determinate length but subject to earlier determination upon the happening of a future event: s 16(4).

8 Ibid s 3(1)(f)(ii); and see PARA 271 ante. As to the income-based conditions see PARA 271 ante; there are certain modifications in the case of young persons, in particular to permit them to hold themselves available for, and to seek actively, training as well as employment: see PARA 323 post.

9 As to good cause see PARA 307 ante.

10 Jobseekers Act 1995 s 16(3).

### **UPDATE**

## 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training

allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **318-326 Special Provisions and Special Categories**

The Jobseekers Act 1995 ss 17A, 17B (added by Welfare Reform Act 2009 s 1(2)) make provision for 'work for your benefit' schemes; see PARA 326A.

The Jobseekers Act 1995 s 17C, Sch A1 (added by Welfare Reform Act 2009 Sch 3 paras 1, 2) make provision for persons dependent on drugs; see PARA 326B.

### **318 Severe hardship payments to young persons**

TEXT AND NOTES--In relation to a person who has reached the age of 16 but not the age of 18, no appeal lies against a decision whether the Jobseekers Act 1995 s 16 is to apply to him: Social Security Act 1998 s 12(1), Sch 2 para 1(a).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(7) SPECIAL PROVISIONS AND SPECIAL CATEGORIES/(i) Hardship Payments/319. Reduced payments for severe hardship.

### **319. Reduced payments for severe hardship.**

Where a Secretary of State's direction<sup>1</sup> is in force in respect of a young person<sup>2</sup> and either:

- 980 (1) that young person was previously entitled<sup>3</sup> to an income-based jobseeker's allowance<sup>4</sup> and that entitlement ceased by virtue of the revocation of the direction<sup>5</sup>; or
- 981 (2) that young person has failed to complete a course of training<sup>6</sup> and no certificate of good cause<sup>7</sup> has been issued to him,

then regulations<sup>8</sup> may provide for the amount of an income-based jobseeker's allowance payable to him to be reduced in such circumstances, by such a percentage and for such a period as may be prescribed<sup>9</sup>. The prescribed reduction is in general 40 per cent of his personal allowance for a period of two weeks, but only 20 per cent where the young person is pregnant or seriously ill<sup>10</sup>.

1 le a direction under the Jobseekers Act 1995 s 16: see PARA 318 ante.

2 'Young person' means a person who has reached the age of 16, but not the age of 18: *ibid* s 17(5). As to when a person attains a particular age see PARA 318 note 2 ante.

3 As to entitlement to a jobseeker's allowance see PARA 259 et seq ante.

4 For the meaning of 'income-based jobseeker's allowance' see PARA 271 note 1 ante.

5 As to the power to revoke a direction see PARA 318 ante.

6 For the meaning of 'training' see PARA 271 note 14 ante.

7 Where a young person who has failed to complete a course of training claims that there was good cause for that failure and applies to the Secretary of State for a certificate, the Secretary of State, if he is satisfied that there was good cause, is to issue a certificate to that effect and give a copy of it to the young person: Jobseekers Act 1995 s 17(4). As to good cause see PARA 307 ante.

8 For the meaning of 'regulations' see PARA 260 note 13 ante.

9 Jobseekers Act 1995 s 17(1)-(3).

10 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 63 (amended by SI 1997/827).

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training

under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining

work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **318-326 Special Provisions and Special Categories**

The Jobseekers Act 1995 ss 17A, 17B (added by Welfare Reform Act 2009 s 1(2)) make provision for 'work for your benefit' schemes; see PARA 326A.

The Jobseekers Act 1995 s 17C, Sch A1 (added by Welfare Reform Act 2009 Sch 3 paras 1, 2) make provision for persons dependent on drugs; see PARA 326B.

### **319 Reduced payments for severe hardship**

TEXT AND NOTES 1-9--Regulations may provide for the amount of a joint-claim jobseeker's allowance payable in respect of any joint-claim couple where a member of the couple is a young person to whom the Jobseeker's Act 1995 s 17 applies (see s 17(2)-(4)) to be reduced (1) in such circumstances; (2) by such a percentage; and (3) for such a period, as may be prescribed: s 17(1A) (added by Welfare Reform and Pensions Act 1999 Sch 7 paras 1, 11).

NOTE 7--In relation to a person who has reached the age of 16 but not the age of 18, no appeal lies against a decision whether to issue a certificate under the Jobseekers Act 1995 s 17(4): Social Security Act 1998 s 12(1), Sch 2 para 1(b).

TEXT AND NOTE 9--For 'payable to' read 'payable in respect of': Jobseekers Act 1995 s 17(1) (amended by Welfare Reform and Pensions Act 1999 Sch 8 para 29(1), (4)).

NOTE 10--SI 1996/207 reg 63 amended: SI 2000/1978.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(7) SPECIAL PROVISIONS AND SPECIAL CATEGORIES/(i) Hardship Payments/320. Hardship payments.

### **320. Hardship payments.**

Provision is made<sup>1</sup> for an income-based jobseeker's allowance<sup>2</sup> to be paid to a person who is deemed to be a person in hardship<sup>3</sup> where there is a delay in determining that person's claim (or his claim has been suspended) because a doubt has arisen as to whether he satisfies the general requirements for a jobseeker's allowance as to availability for employment, the jobseeker's agreement and actively seeking employment<sup>4</sup>, or where the person is subject to a disqualification<sup>5</sup>. In these circumstances a claimant must furnish a signed statement to the Secretary of State<sup>6</sup> in approved form as to the circumstances he relies on to show hardship<sup>7</sup>, and must provide information as to the circumstances of the person alleged to be in hardship<sup>8</sup>.

Where these provisions apply, the weekly applicable amount<sup>9</sup> of the claimant<sup>10</sup> is reduced by a sum equal to 40 per cent of his personal amount, or 20 per cent where the claimant or any other member of his family<sup>11</sup> is either pregnant or is seriously ill<sup>12</sup>.

1 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, regs 141, 142 (amended by SI 1996/1517; SI 1996/2538).

2 For the meaning of income-based jobseeker's allowance' see PARA 271 note 1 ante.

3 For the meaning of 'person in hardship' see PARA 321 post.

4 Ie the requirements of the Jobseekers Act 1995 s 1(2)(a)-(c): see PARA 260 ante.

5 As to disqualification see PARA 301 et seq ante.

6 As to the Secretary of State see PARA 1 ante.

7 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 143.

8 See ibid reg 144 (amended by SI 1996/1516).

9 For the meaning of 'applicable amount' see PARA 272 ante.

10 For the meaning of 'claimant' see PARA 260 note 1 ante.

11 For the meaning of 'family' see PARA 265 note 6 ante.

12 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 145(1) (amended by SI 1996/1516; SI 1996/1517). As to the specific case of an allowance for a person subject to disqualification see PARA 309 ante.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training

under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining

work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **318-326 Special Provisions and Special Categories**

The Jobseekers Act 1995 ss 17A, 17B (added by Welfare Reform Act 2009 s 1(2)) make provision for 'work for your benefit' schemes; see PARA 326A.

The Jobseekers Act 1995 s 17C, Sch A1 (added by Welfare Reform Act 2009 Sch 3 paras 1, 2) make provision for persons dependent on drugs; see PARA 326B.

### **320-321 Hardship payments, Meaning of 'person in hardship'**

Corresponding provision is made for an income-based jobseeker's allowance to be paid to a couple in hardship: see SI 1996/207 regs 146A-146H (added by SI 2000/1978; SI 1996/207 reg 146A amended by SI 2001/1029, SI 2005/2687, SI 2005/2877, SI 2008/1554, SI 2009/480; SI 1996/207 reg 146B amended by SI 2001/1029, SI 2009/480).

### **320 Hardship payments**

NOTE 1--SI 1996/207 reg 141 amended: SI 1998/71.

NOTE 12--SI 1996/207 reg 145 further amended: SI 2005/522.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/10. JOBSEEKER'S ALLOWANCE/(7) SPECIAL PROVISIONS AND SPECIAL CATEGORIES/(i) Hardship Payments/321. Meaning of 'person in hardship'.

### **321. Meaning of 'person in hardship'.**

A 'person in hardship' means a claimant<sup>1</sup> who comes within one of the following categories and in respect of whom the adjudication officer<sup>2</sup> is satisfied that hardship will be suffered if a jobseeker's allowance is not paid:

- 982 (1) a single woman who is pregnant and who will suffer hardship<sup>3</sup>;
- 983 (2) a single person who is responsible for a young person and the young person will suffer hardship<sup>4</sup>;
- 984 (3) a member of a married or unmarried couple<sup>5</sup> where the woman is pregnant and will suffer hardship<sup>6</sup>;
- 985 (4) a member of a polygamous marriage<sup>7</sup> and one member of the marriage is pregnant and will suffer hardship<sup>8</sup>;
- 986 (5) a member of a married or unmarried couple or of a polygamous marriage where one or both members of the couple, or one or more members of the polygamous marriage, is or are responsible for a child or young person and the child or young person will suffer hardship<sup>9</sup>;
- 987 (6) a person with an award of jobseeker's allowance including in his applicable amount<sup>10</sup> a disability premium, where that award is not payable either because it is suspended or because a disqualification is in operation and the person who would satisfy the conditions of entitlement to that premium would suffer hardship<sup>11</sup>;
- 988 (7) a person who suffers, or whose partner suffers, from a chronic medical condition which results in functional capacity being limited or restricted by physical impairment where the adjudication officer is satisfied that the suffering has already lasted or is likely to last for not less than 26 weeks and the health of the person suffering would, within two weeks of the adjudication officer making his decision, decline further than that of a normally healthy adult and that person would suffer hardship<sup>12</sup>;
- 989 (8) a person who devotes, or whose partner<sup>13</sup> devotes, a considerable portion of each week to caring for another person who receives or has claimed certain disability-based benefits and who does not reside in a residential care home or nursing home and the person providing the care will not be able to continue doing so<sup>14</sup>;
- 990 (9) a person, or the partner of a person, in respect of whom the Secretary of State<sup>15</sup> has made a severe hardship direction<sup>16</sup>;
- 991 (10) a person under the age of 18 to whom prescribed circumstances apply, or the partner of such a person, and the person will suffer hardship<sup>17</sup>.

More generally, a 'person in hardship' can simply mean a claimant, where the adjudication officer is satisfied that he or his partner will suffer hardship unless a jobseeker's allowance is paid to him<sup>18</sup>, but in such a case there are further restrictions on eligibility for a hardship payment<sup>19</sup>.

Under either definition, when an adjudication officer is determining whether a person will suffer hardship, the factors he is to take into account are:

- 992 (a) the presence in the claimant's family<sup>20</sup> of a person who satisfies the requirements for a disability premium or disabled child premium<sup>21</sup>;

- 993 (b) the resources which, without a jobseeker's allowance, are likely to be available to the claimant's family, the amount by which those resources fall short of the applicable amount in hardship cases, the amount of any resources which may be available to members of the claimant's family from any person in the claimant's household who is not a member of his family, and the length of time for which those factors are likely to persist;
- 994 (c) whether there is a substantial risk that essential items, including food, clothing, heating and accommodation, will cease to be available to the claimant or to a member of the claimant's family, or will be available at considerably reduced levels and the length of time that those factors are likely to persist<sup>22</sup>.

1 le other than a claimant who is entitled to income support or within the category of persons so entitled under the Social Security Contributions and Benefits Act 1992 s 124(1)(e) (as added) (see PARA 176 ante): Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 140(3) (amended by SI 1996/1517).

2 For the meaning of 'adjudication officer' see PARA 263 note 4 ante.

3 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 140(1)(a).

4 Ibid reg 140(1)(b). 'Young person' means a person aged 16 but under 19 who is treated as a child for child benefit purposes (see PARA 239 ante): reg 1(3), applying reg 76.

5 For the meaning of 'married or unmarried couple' see PARA 262 note 6 ante.

6 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 140(1)(c).

7 For the meaning of 'polygamous marriage' see PARA 262 note 6 ante.

8 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 140(1)(d).

9 Ibid reg 140(1)(e). For the meaning of 'child' see PARA 272 note 10 ante.

10 For the meaning of 'applicable amount' see PARAS 270 note 7, 272 ante.

11 Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 140(1)(f).

12 Ibid reg 140(1)(g).

13 For the meaning of 'partner' see PARA 262 note 6 ante.

14 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 140(1)(h), (4) (reg 140(1)(h)) amended by SI 1996/1516).

15 As to the Secretary of State see PARA 1 ante.

16 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 140(1)(i); this does not apply where the person to whom the direction applies does not satisfy the requirements as to availability, the jobseeker's agreement or actively seeking work: reg 140(1)(i). As to the making of a direction see PARA 318 ante.

17 Ibid reg 140(1)(j). The circumstances are those prescribed under the Jobseekers Act 1995 s 3(1)(f)(iii): see PARA 271 ante.

18 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 140(2) (amended by SI 1996/1516); again, this cannot apply to a person entitled to income support or within the categories of persons so entitled: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 140(3).

19 This is because such a person's entitlement is governed by ibid reg 142 (as amended) rather than reg 141 (as amended), and reg 142 (as amended) (although covering the same reasons for lack of normal entitlement: see PARA 320 ante) is subject to restrictions in each case that nothing is payable under it for the first 14 days of the relevant period.

20 For the meaning of 'family' see PARA 265 note 6 ante.

21 See PARA 272 ante.

22 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 140(5) (amended by SI 1996/1516).

## UPDATE

### 258-329 Jobseeker's Allowance

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements

for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **318-326 Special Provisions and Special Categories**

The Jobseekers Act 1995 ss 17A, 17B (added by Welfare Reform Act 2009 s 1(2)) make provision for 'work for your benefit' schemes; see PARA 326A.

The Jobseekers Act 1995 s 17C, Sch A1 (added by Welfare Reform Act 2009 Sch 3 paras 1, 2) make provision for persons dependent on drugs; see PARA 326B.

### **320-321 Hardship payments, Meaning of 'person in hardship'**

Corresponding provision is made for an income-based jobseeker's allowance to be paid to a couple in hardship: see SI 1996/207 regs 146A-146H (added by SI 2000/1978; SI 1996/207 reg 146A amended by SI 2001/1029, SI 2005/2687, SI 2005/2877, SI 2008/1554, SI 2009/480; SI 1996/207 reg 146B amended by SI 2001/1029, SI 2009/480).

### 321 Meaning of 'person in hardship'

TEXT AND NOTES--A claimant who is not a person in hardship by virtue of SI 1996/207 reg 140(4A) (see NOTE 18) is not a person in hardship throughout the period beginning on the day on which a New Deal decision has effect by virtue of reg 69 (see PARA 304) or, as the case may be, by virtue of the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991, reg 7(8) and ending on the last day on which he is required to participate in a New Deal option, or on the day which is 14 days after the day on which the New Deal decision had effect, whichever is the later, or in the Intensive Activity Period (see PARA 304) or in the Flexible New Deal (see PARA 304): SI 1996/207 reg 140A(1) (amended by SI 2000/239, SI 2001/1029, SI 2009/480). 'New Deal decision' means a decision that the Jobseekers Act 1995 s 19(5)(b) or (c) applies by virtue of an act or omission relating to one of the New Deal options or to the Intensive Activity Period (see PARA 304) or to the Flexible New Deal (see PARA 304): SI 1996/207 reg 140A(4) (amended by SI 2000/239, SI 2001/1029, SI 2009/480). Where a claimant who is not a person in hardship by virtue of SI 1996/207 reg 140(4A) was a person in hardship for the purposes of reg 142 immediately before the commencement of the period referred to above, that claimant again becomes a person in hardship for the purposes of reg 142 on the day following the expiration of that period: reg 140A(2). However, a claimant to whom reg 140A(2) applies does not again become a person in hardship if a subsequent New Deal decision applies to the day after the expiry of that period, or he is no longer a person in hardship for the purposes of reg 142: reg 140A(3).

TEXT AND NOTES 1-18--SI 1996/207 reg 140(1), (2) does not now apply to a member of a joint-claim couple in circumstances where reg 3E (see PARA 260B) does not apply: reg 140(1), (2) (further amended by SI 2000/1978). For the meaning of 'joint-claim couple' see PARA 260.

TEXT AND NOTES 3-17--Also, head (11) a person (a) who, pursuant to the Children Act 1989, was being looked after by a local authority; (b) with whom the local authority had a duty, pursuant to that Act, to take reasonable steps to keep in touch; or (c) who, pursuant to that Act, qualified for advice and assistance from a local authority, but in respect of whom (a), (b) or, as the case may be, (c) had not applied for a period of three years or less as at the date on which he complies with the requirements of SI 1996/207 reg 143; and (d) as at the date on which he complies with the requirements of reg 143, is under the age of 21: reg 140(1)(k), inserted by SI 2000/239.

TEXT AND NOTE 4--Reference to child now to child or young person: SI 1996/207 reg 140(1)(b) (amended by SI 2008/3051).

TEXT AND NOTES 6, 9--SI 1996/207 reg 140(1)(c), (e) amended: SI 2005/2877.

TEXT AND NOTE 14--Reference to residential care home or nursing home is now to care home, Abbeyfield Home or independent hospital: SI 1996/207 reg 140(4) (amended by SI 2005/2687). For the meanings of 'care home', 'Abbeyfield Home' and 'independent hospital' see PARA 262.

NOTE 18--SI 1996/207 reg 140(2) further amended: SI 1997/2863, SI 2009/480. SI 1996/207 reg 140(3) amended: SI 2008/1554. Further, 'person in hardship' does not include a claimant to whom the Jobseekers Act 1995 s 19(5)(b) or (c) applies by virtue of any act or omission relating to one of the New Deal options or to the Intensive Activity Period specified in SI 1996/207 reg 75(1)(a)(iv) (see PARA 304) or to the Flexible New Deal (see PARA 304): reg 140(4A) (amended by SI 1997/2863, SI 2001/1029, SI 2009/480).

NOTE 19--SI 1996/207 reg 141 amended: SI 1998/71.

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## **(ii) Urgent Cases and other Special Cases**

### **322. Urgent cases.**

Jobseeker's allowance on an income basis<sup>1</sup> may be awarded, at a reduced rate, in urgent cases, though these are restricted to cases of certain persons from abroad<sup>2</sup> and certain persons whose income is not readily available to them<sup>3</sup>. These provisions are similar to those applying to income support<sup>4</sup>.

1 As to income-based jobseeker's allowance see PARA 271 et seq ante.

2 These provisions apply to a person from abroad within the meaning of the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 85(4) (special cases) who is an asylum seeker and holds a work permit or has written authorisation from the Secretary of State permitting him to work in the United Kingdom: reg 147(3) (substituted by SI 1996/1516). For these purposes, a person: (1) is an asylum seeker when he submits on his arrival (other than on his re-entry) in the United Kingdom from a country outside the Common Travel Area (ie United Kingdom, the Channel Islands, the Isle of Man and the Republic of Ireland collectively), a claim for asylum to the Secretary of State that it would be contrary to the United Kingdom's obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol to that Convention for him to be removed from, or required to leave, the United Kingdom and that claim is recorded by the Secretary of State as having been made; or (2) becomes, while present in Great Britain, an asylum seeker when the Secretary of State makes a declaration to the effect that the country of which he is a national is subject to such a fundamental change in circumstances that he would not normally order the return of a person to that country, and he submits, within a period of three months from the day that declaration was made, a claim for asylum to the Secretary of State under the Convention and his claim for asylum under that Convention is recorded by the Secretary of State as having been made; and (3) ceases to be an asylum seeker (a) in the case of a claim for asylum which, on or after 5 February 1996, is recorded by the Secretary of State as having been determined (other than on appeal) or abandoned, on the date on which it is so recorded; or (b) in the case of a claim for asylum which is recorded as determined before 5 February 1996 and in respect of which there is either an appeal pending on 5 February 1996 or an appeal is made within the applicable time limits, on the date on which that appeal is determined: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 147(4), (5) (as so substituted). As to accommodation etc for asylum seekers see SOCIAL SERVICES AND COMMUNITY CARE vol 44(2) (Reissue) PARA 1029.

3 The urgent cases provisions only apply to a person who is treated as possessing income by virtue of ibid reg 105(6), (7) (notional income) where the income he is treated as possessing is not readily available to him and (1) the amount of jobseeker's allowance payable to him otherwise than under Pt X (regs 147-149) (as amended) is less than the amount of a jobseeker's allowance payable to him thereunder; and (2) the adjudication officer is satisfied that, unless the provisions of Pt X (as amended) are applied to the claimant, the claimant or his family will suffer hardship: reg 147(6).

4 Where ibid Pt X (as amended) applies, the claimant's weekly applicable amount is calculated in accordance with reg 148 and his income and capital in accordance reg 149 (amended by SI 1996/1516). As to urgent cases in relation to income support see PARAS 200-201 ante.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment

Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged

25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **318-326 Special Provisions and Special Categories**

The Jobseekers Act 1995 ss 17A, 17B (added by Welfare Reform Act 2009 s 1(2)) make provision for 'work for your benefit' schemes; see PARA 326A.

The Jobseekers Act 1995 s 17C, Sch A1 (added by Welfare Reform Act 2009 Sch 3 paras 1, 2) make provision for persons dependent on drugs; see PARA 326B.

### **322 Urgent cases**

TEXT AND NOTES--SI 1996/207 Pt X revoked: SI 2009/3228.

NOTE 2--SI 1996/207 reg 85(4) amended: SI 2005/2877. For further provision in relation to persons from abroad see SI 1996/207 reg 85A (added by SI 2006/1026; and amended by SI 2006/1981, SI 2006/2528, SI 2006/3341, SI 2009/362).

NOTE 3--SI 1996/207 reg 105(7) amended: SI 1999/3324. See also Social Security Benefits Up-rating Order 2008, SI 2008/632, art 24(2)(a), (11), Sch 19.

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### **323. Young persons.**

The normal age requirement for an income-based jobseeker's allowance<sup>1</sup> is that the person has reached the age of 18<sup>2</sup> and a person under that age will usually be debarred from claiming a contribution-based jobseeker's allowance<sup>3</sup> by the contribution-based conditions<sup>4</sup>, but a young person<sup>5</sup> may be eligible for an income-based jobseeker's allowance:

- 995 (1) where a severe hardship direction has been made in respect of the young person by the Secretary of State<sup>6</sup>;
- 996 (2) where the young person comes within certain prescribed circumstances<sup>7</sup>.

Where a young person falls within one of these exceptional categories, in order to claim an income-based jobseeker's allowance he will normally have to satisfy the general<sup>8</sup> and specific<sup>9</sup> requirements for such an allowance, but with the qualification that he may be able to restrict his availability to employment where suitable training<sup>10</sup> is provided by the employer<sup>11</sup>, and may discharge the requirement of actively seeking work by also actively seeking training<sup>12</sup>.

1 For the meaning of 'income-based jobseeker's allowance' see PARA 271 note 1 ante.

2 See the Jobseekers Act 1995 s 3(1)(f)(i); and PARA 271 ante.

3 For the meaning of 'contribution-based jobseeker's allowance' see PARA 266 note 1 ante.

4 As to the contribution-based conditions see PARA 266 ante.

5 'Young person' means a person who has reached the age of 16 but not the age of 18 and who does not satisfy the contribution-based conditions or whose entitlement to a contribution-based jobseeker's allowance has ceased as a result of the Jobseekers Act 1995 s 5(1) (end of the maximum period of entitlement: see PARA 267 ante): Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 57(1) (definition substituted by SI 1996/1516).

6 See PARA 318 ante.

7 See the Jobseekers Act 1995 s 3(1)(f)(iii); and PARA 271 ante.

8 See PARA 260 ante.

9 See PARA 271 ante.

10 For the meaning of 'training' see PARA 271 note 14 ante.

11 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 64.

12 See *ibid* reg 65. The young person may be required to provide a declaration as to his attempts to seek training: see reg 65A (added by SI 1996/1517). There are also modifications to the sanctions applicable to a young person where one of the general disqualifications applies to him: see the Jobseeker's Allowance Regulations 1996, SI 1996/207, regs 66-68 (amended by SI 1996/1516; SI 1996/1517; and SI 1997/827).

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's

employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **318-326 Special Provisions and Special Categories**

The Jobseekers Act 1995 ss 17A, 17B (added by Welfare Reform Act 2009 s 1(2)) make provision for 'work for your benefit' schemes; see PARA 326A.

The Jobseekers Act 1995 s 17C, Sch A1 (added by Welfare Reform Act 2009 Sch 3 paras 1, 2) make provision for persons dependent on drugs; see PARA 326B.

### **323 Young persons**

NOTE 5--'Young person' also means a person who is not a person to whom the Children (Leaving Care) Act 2000 s 6 (see PARA 176) applies: SI 1996/207 reg 57(1) (definition substituted by SI 2001/3070).

NOTE 10--For the meaning of training see now SI 1996/207 reg 57(1) (amended by SI 2001/652, SI 2008/3157, SI 2009/583).

NOTES 11, 12--SI 1996/207 regs 64, 65 amended: SI 2000/3336.

NOTE 12--SI 1996/207 regs 66-68 further amended: SI 2000/1978.

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### **324. Students.**

Rules are laid down for calculating the income and capital of a full-time student<sup>1</sup> for cases where such a student is, untypically, eligible for a jobseeker's allowance<sup>2</sup>. These are in pari materia with the equivalent provisions applying to income support<sup>3</sup>.

<sup>1</sup> For the position of part-time students see PARA 283 ante.

<sup>2</sup> See the Jobseeker's Allowance Regulations 1996, SI 1996/207, regs 130-139 (amended by SI 1996/1516; SI 1996/1517; and SI 1997/1671).

<sup>3</sup> See PARAS 198-199 ante.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's

employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **318-326 Special Provisions and Special Categories**

The Jobseekers Act 1995 ss 17A, 17B (added by Welfare Reform Act 2009 s 1(2)) make provision for 'work for your benefit' schemes; see PARA 326A.

The Jobseekers Act 1995 s 17C, Sch A1 (added by Welfare Reform Act 2009 Sch 3 paras 1, 2) make provision for persons dependent on drugs; see PARA 326B.

### **324 Students**

NOTE 2--SI 1996/207 reg 130 amended: SI 1998/563, SI 2000/1981, SI 2000/1922, SI 2001/2319, SI 2002/1589, SI 2004/1708, SI 2005/2877, SI 2008/3157, SI 2009/583, SI 2009/2655. SI 1996/207 reg 131 amended: SI 2000/1922, SI 2001/2319, SI 2000/1444, SI 2002/1589, SI 2002/2207, SI 2003/1701, SI 2003/1914, SI 2004/1708, SI 2005/1807, SI 2006/1752, SI 2007/1632, SI 2008/1599, SI 2009/583, SI 2009/1575. SI 1996/207 reg 136 amended: SI 2000/1922, SI 2001/2319, SI 2002/1589, SI 2003/1701, SI 2003/1914, SI 2004/1708, SI 2005/1807, SI 2006/1752, SI 2007/1632, SI 2008/1599, SI 2009/1575. SI 1996/207 reg 138 amended: SI 2001/3767, SI 2007/719. As to treatment of payments from access funds (see PARA 199) see SI 1996/207 reg 136A (added by SI 2000/1922; and amended by SI 2001/3767). A loan for fees, known as a fee loan or a fee contribution loan, made pursuant to the Teaching and Higher Education Act 1998 s 22, is disregarded as income: SI 1996/207 reg 136B (added by SI 2006/1752). As to further disregard of student's income see SI 1996/207 reg 137A (added by SI 1998/563).

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### **325. Share fishermen.**

Special provisions and modifications apply to share fishermen<sup>1</sup> in relation to the contribution-based conditions<sup>2</sup>, disqualification<sup>3</sup>, trade disputes<sup>4</sup>, availability for work<sup>5</sup>, remunerative work<sup>6</sup>, calculation of earnings<sup>7</sup> and the amount payable<sup>8</sup>.

1 'Share fisherman' means any person who (1) is ordinarily employed in the fishing industry otherwise than under a contract of service, as a master or member of the crew of any fishing boat manned by more than one person, and is remunerated in respect of that employment in whole or in part by a share of the profits or gross earnings of the fishing boat; or (2) has ordinarily been so employed, but who by reason of age or infirmity permanently ceases to be so employed and becomes ordinarily engaged in employment ashore in Great Britain, otherwise than under a contract of service, making or mending any gear appurtenant to a fishing boat or performing other services ancillary to or in connection with that boat and is remunerated in respect of that employment in whole or in part by a share in the profits or gross earnings of that boat and has not ceased to be ordinarily engaged in such employment: Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 156.

2 See *ibid* reg 158. As to the contribution-based conditions see PARA 266 ante.

3 See *ibid* reg 159. As to disqualification see PARA 303 et seq ante.

4 See *ibid* reg 160. As to trade disputes see PARA 301 et seq ante.

5 See *ibid* reg 161 (amended by SI 1996/1516). As to availability for work see PARA 276 et seq ante.

6 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 162. As to remunerative work see PARA 262 ante.

7 See *ibid* reg 163 (amended by SI 1996/1516).

8 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 164.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during

that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or

falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **318-326 Special Provisions and Special Categories**

The Jobseekers Act 1995 ss 17A, 17B (added by Welfare Reform Act 2009 s 1(2)) make provision for 'work for your benefit' schemes; see PARA 326A.

The Jobseekers Act 1995 s 17C, Sch A1 (added by Welfare Reform Act 2009 Sch 3 paras 1, 2) make provision for persons dependent on drugs; see PARA 326B.

### **325 Share fishermen**

NOTE 7--SI 1996/207 reg 163 further amended: SI 2007/2618, SI 2009/583.

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### **326. Persons in receipt of a training allowance.**

A person who is in receipt of a training allowance and who is not receiving the relevant training<sup>1</sup> may be entitled to an income-based jobseeker's allowance<sup>2</sup> without being available for employment, having entered a jobseeker's agreement or actively seeking employment<sup>3</sup>.

1 Training falls within this provision if it is training for which persons under 18 are eligible and for which persons aged 18 to 24 may be eligible, provided in England and Wales directly or indirectly by a Training and Enterprise Council pursuant to its arrangement with the Secretary of State (whether that arrangement is known as an Operating Agreement or by any other name): Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 170(2).

2 For the meaning of 'income-based jobseeker's allowance' see PARA 271 note 1 ante.

3 See the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 170(1).

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of

facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and

a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **318-326 Special Provisions and Special Categories**

The Jobseekers Act 1995 ss 17A, 17B (added by Welfare Reform Act 2009 s 1(2)) make provision for 'work for your benefit' schemes; see PARA 326A.

The Jobseekers Act 1995 s 17C, Sch A1 (added by Welfare Reform Act 2009 Sch 3 paras 1, 2) make provision for persons dependent on drugs; see PARA 326B.

### **326 Persons in receipt of a training allowance**

TEXT AND NOTES--These provisions also apply to a person who is not a qualifying young person or child within the meaning of the Social Security Contributions and Benefits Act 1992 s 142: SI 1996/207 reg 170(1) (substituted by SI 2001/1711; and amended by SI 2006/718, SI 2010/424).

NOTE 1--For 'provided in England and Wales ... other name)' read 'secured by the Learning and Skills Council for England or by the Welsh Ministers': SI 1996/207 reg 170(2) (amended by SI 1998/1698, SI 2001/652, SI 2005/3238, SI 2008/3157).

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**326A. Schemes for assisting persons to obtain employment: 'work for your benefit' schemes etc.**

Regulations may make provision for or in connection with imposing on claimants in prescribed circumstances a requirement to participate in schemes of any prescribed description that are designed to assist them to obtain employment: Jobseekers Act 1995 s 17A(1) (ss 17A, 17B added by Welfare Reform Act 2009 s 1(2)). 'Claimant', in relation to a joint-claim couple claiming a joint-claim jobseeker's allowance, means either or both of the members of the couple: Jobseekers Act 1995 s 17A(10). Regulations under the Jobseekers Act 1995 s 17A may, in particular, require participants to undertake work, or work-related activity, during any prescribed period with a view to improving their prospects of obtaining employment: s 17A(2). 'Participant', in relation to any time, means any person who is required at that time to participate in a scheme within s 17A(1): s 17A(10). In s 17A(2) 'work-related activity', in relation to any person, means activity which makes it more likely that the person will obtain or remain in work or be able to do so: s 17A(3). Regulations under s 17A may not require a person to participate in a scheme unless the person would (apart from the regulations) be required to meet the jobseeking conditions: s 17A(4). 'The jobseeking conditions' means the conditions set out in the Jobseekers Act 1995 s 1(2)(a)-(c) (see PARA 260): s 17A(10). Regulations under s 17A may, in particular, make provision (1) for notifying participants of the requirement to participate in a scheme within s 17A(1); (2) for securing that participants are not required to meet the jobseeking conditions or are not required to meet such of those conditions as are specified in the regulations; (3) for suspending any jobseeker's agreement to which a person is a party for any period during which the person is a participant; (4) for securing that the appropriate consequence follows if a participant has failed to comply with the regulations and it is not shown, within a prescribed period, that the participant had good cause for the failure; (5) prescribing matters which are, or are not, to be taken into account in determining whether a participant has good cause for any failure to comply with the regulations; (6) prescribing circumstances in which a participant is, or is not, to be regarded as having good cause for any failure to comply with the regulations: s 17A(5). In the case of a jobseeker's allowance other than a joint-claim jobseeker's allowance, the appropriate consequence for the purposes of head (4) is that the allowance is not payable for such period (of at least one week but not more than 26 weeks) as may be prescribed: s 17A(6). In the case of a joint-claim jobseeker's allowance, the appropriate consequence for the purposes of head (4) is that the participant is to be treated as subject to sanctions for the purposes of the Jobseekers Act 1995 s 20A (see PARA 304A) for such period (of at least one week but not more than 26 weeks) as may be prescribed: s 17A(7). Regulations under s 17A may make provision for an income-based jobseeker's allowance to be payable in prescribed circumstances even though other provision made by the regulations would prevent payment of it: s 17A(8). Section 17A(8) does not apply in the case of a joint-claim jobseeker's allowance (corresponding provision for which is made by the Jobseekers Act 1995 s 20B(4)) (see PARA 304A): s 17A(8). The provision that may be made by the regulations by virtue of s 17A(8) includes, in particular, provision for the allowance to be (a) payable only if prescribed requirements as to the provision of information are complied with; (b) payable at a prescribed rate; (c) payable for a prescribed period (which may differ from any period mentioned in s 17A(6)): s 17A(9).

Supplemental provision is made: see Jobseekers Act 1995 s 17B.

**UPDATE****258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with

his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **318-326 Special Provisions and Special Categories**

The Jobseekers Act 1995 ss 17A, 17B (added by Welfare Reform Act 2009 s 1(2)) make provision for 'work for your benefit' schemes; see PARA 326A.

The Jobseekers Act 1995 s 17C, Sch A1 (added by Welfare Reform Act 2009 Sch 3 paras 1, 2) make provision for persons dependent on drugs; see PARA 326B.

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### **326B. Persons dependent on drugs etc.**

The Jobseekers Act 1995 Sch A1 (added by Welfare Reform Act 2009 Sch 3 para 2) makes provision for or in connection with imposing requirements on persons in cases where (1) they are dependent on, or have a propensity to misuse, any drug, and (2) any such dependency or propensity is a factor affecting their prospects of obtaining or remaining in work: Jobseekers Act 1995 s 17C(1) (s 17C added by Welfare Reform Act 2009 Sch 3 para 1). The Jobseekers Act 1995 Sch A1 also contains a power for its provisions to apply in relation to alcohol: s 17C(2).

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI

2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **318-326 Special Provisions and Special Categories**

The Jobseekers Act 1995 ss 17A, 17B (added by Welfare Reform Act 2009 s 1(2)) make provision for 'work for your benefit' schemes; see PARA 326A.

The Jobseekers Act 1995 s 17C, Sch A1 (added by Welfare Reform Act 2009 Sch 3 paras 1, 2) make provision for persons dependent on drugs; see PARA 326B.

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## **(8) MISCELLANEOUS ADMINISTRATIVE PROVISIONS**

### **327. Effect of alteration of rates of a jobseeker's allowance.**

The following provisions apply where an award of a jobseeker's allowance is in force in favour of any person ('the recipient') and an alteration<sup>1</sup> in any component<sup>2</sup> of the allowance, or in the recipient's benefit income<sup>3</sup>, affects the amount of the jobseeker's allowance to which he is entitled<sup>4</sup>. Where, as a result of the alteration, the amount of the jobseeker's allowance to which the recipient is entitled is increased or reduced, then as from the commencing date<sup>5</sup>, the amount of the jobseeker's allowance payable to or for the recipient under the award is the increased or reduced amount, without any further decision of an adjudication officer<sup>6</sup>, and the award has effect accordingly<sup>7</sup>. In any case where there is any such alteration, and before the commencing date (but after that date is fixed) an award of a jobseeker's allowance is made in favour of a person, the award may provide for the jobseeker's allowance to be paid as from the commencing date, in which case the amount of the jobseeker's allowance must be determined by reference to the components applicable on that date, or may provide for an amount determined by reference to the components applicable at the date of the award<sup>8</sup>.

1 For these purposes, 'alteration' means (1) in relation to any component of a jobseeker's allowance, its alteration by or under any enactment; and (2) in relation to a person's benefit income, the alteration of any of the sums referred to in the Social Security Administration Act 1992 s 150 (as amended) (see PARA 17 ante) by any enactment or by an order under s 150 (as amended), to the extent that any such alteration affects the amount of the recipient's benefit income: s 159A(5) (s 159A added by the Jobseekers Act 1995 s 24). For the meaning of 'component' and 'benefit income' see notes 2-3 infra.

2 'Component', in relation to a jobseeker's allowance, means any of the sums specified in regulations under the Jobseekers Act 1995 which are relevant in calculating the amount payable by way of a jobseeker's allowance: Social Security Administration Act 1992 s 159A(5) (as added: see note 1 supra).

3 For these purposes, 'benefit income', in relation to a recipient, means so much of his income as consists of (1) benefit under the Social Security Contributions and Benefits Act 1992 (see PARA 54 et seq ante, 561 et seq post); or (2) a war disablement pension or war widow's pension (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 595 et seq): Social Security Administration Act 1992 s 159A(5) (as added: see note 1 supra).

4 Ibid s 159A(1) (as added: see note 1 supra).

5 'The commencing date' in relation to an alteration, means the date on which the alteration comes into force in relation to the recipient: ibid s 159A(1) (as added: see note 1 supra).

6 As to adjudication officers see PARA 359 post.

7 Social Security Administration Act 1992 s 159A(2), (3) (as added: see note 1 supra).

8 Ibid s 159A(4) (as added: see note 1 supra).

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998,

during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus;

'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **327 Effect of alteration of rates of a jobseeker's allowance**

TEXT AND NOTES--As to the effect of alterations affecting state pension credit see Social Security Administration Act 1992 s 159B (added by State Pension Credit Act 2002 Sch 2 para 17; and amended by Pensions Act 2007 Sch 1 para 27 (partly in force: see ss 5(3)-(7), 30(1)(a)); Welfare Reform Act 2007 Sch 3 para 10(22); and SI 2005/2053).

TEXT AND NOTES 1-3--No appeal lies against a decision as to the amount of benefit to which a person is entitled, where it appears to the Secretary of State that the amount is determined by an alteration of a kind referred to in the Social Security Administration Act 1992 s 159A(1)(b): Social Security Act 1998 s 12(1), Sch 2 para 6(b) (ii).

NOTE 1--Definition of 'alteration' in 1992 Act s 159A(5) amended: Pensions Act 2007 Sch 1 para 26 (partly in force: see ss 5(3)-(7), 30(1)(a)).

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### **328. Implementation of increases in income-based jobseeker's allowance due to attainment of particular ages.**

Where an award of an income-based jobseeker's allowance<sup>1</sup> is in force in favour of a person ('the recipient') and a component<sup>2</sup> has become applicable, or applicable at a particular rate, because he or some other person has reached a particular age ('the qualifying age')<sup>3</sup>, then if, as a result of the recipient or other person reaching the qualifying age, the recipient becomes entitled to an income-based jobseeker's allowance of an increased amount, the amount payable to or for him under the award must, as from the day on which he becomes so entitled, be that increased amount, without any further decision of an adjudication officer<sup>4</sup> and the award has effect accordingly<sup>5</sup>. This does not, however, apply where, in consequence of the recipient or other person reaching the qualifying age, a question arises in relation to the recipient's entitlement to a benefit under the Social Security Contributions and Benefits Act 1992 or a jobseeker's allowance, unless the question is whether, in relation to a jobseeker's allowance, the component concerned, or any other component, becomes or ceases to be applicable, or applicable at a particular rate, in the recipient's case and whether, in consequence, the amount of his income-based jobseeker's allowance falls to be varied<sup>6</sup>.

1 For the meaning of 'income-based jobseeker's allowance' see PARA 277 note 1 ante.

2 For these purposes, 'component', in relation to a recipient and his jobseeker's allowance, means any of the amounts determined in accordance with regulations made under the Jobseekers Act 1995 s 4(5) (see PARA 272 ante): Social Security Administration Act 1992 s 160A(5) (s 160A added by the Jobseekers Act 1995 s 25).

3 As to when a person attains a particular age see PARA 19 note 11 ante.

4 As to adjudication officers see PARA 359 post.

5 Social Security Administration Act 1992 s 160A(1), (2) (as added: see note 2 supra).

6 Ibid s 160A(3), (4) (as added: see note 2 supra).

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is

participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of

State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **328 Implementation of increases in income-based jobseeker's allowance due to attainment of particular ages**

TEXT AND NOTES 1-5--No appeal lies against a decision as to the amount of benefit to which a person is entitled, where it appears to the Secretary of State that the amount is determined by the recipient's entitlement to an increased amount of income-based jobseeker's allowance in the circumstances referred to in the Social Security Administration Act 1992 s 160A(2): Social Security Act 1998 s 12(1), Sch 2 para 7.

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### **329. Termination of awards where alternative benefit payable.**

Regulations<sup>1</sup> may make provision allowing, in prescribed circumstances<sup>2</sup>:

- 997 (1) an award of income support<sup>3</sup> to be brought to an end by an adjudication officer<sup>4</sup> where the person to whom it was made, or where he is a member of a married or unmarried couple<sup>5</sup> his partner<sup>6</sup>, will be entitled<sup>7</sup> to a jobseeker's allowance if the award is brought to an end<sup>8</sup>;
- 998 (2) an award of a jobseeker's allowance to be brought to an end by an adjudication officer where the person to whom it was made, or where he is a member of a married or unmarried couple his partner, will be entitled to income support if the award is brought to an end<sup>9</sup>.

Where an adjudication officer brings an award of the existing benefit to an end in pursuance of these provisions he must do so with effect from the day immediately preceding the first day on which the award of the alternative benefit has effect; and where an award of jobseeker's allowance is made in accordance with these provisions, there are no waiting days<sup>10</sup>.

1 For the meaning of 'regulations' see PARA 260 note 13 ante.

2 For the prescribed circumstances see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 56B(1), (2) (added by SI 1996/1518).

3 As to income support see PARA 176 et seq ante.

4 For the meaning of 'adjudication officer' see PARA 263 note 4 ante.

5 For the meaning of 'married couple' and 'unmarried couple' see PARA 262 note 6 ante.

6 For these purposes, 'partner' means the other member of the couple concerned: Jobseekers Act 1995 s 31(3).

7 As to entitlement to a jobseeker's allowance see PARA 259 et seq ante.

8 Jobseekers Act 1995 s 31(1).

9 Ibid s 31(2).

10 See the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 56B(3), (4) (added by SI 1996/1518). As to waiting days see PARA 261 ante. As to overlapping benefits see generally para 393 post.

## **UPDATE**

### **258-329 Jobseeker's Allowance**

For the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for

that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2) (art 2 substituted by SI 1998/1425), Schedule. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3) (art 2 substituted by SI 1998/1425), Schedule. See further PARA 31-46.

Also for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self-employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. The 'self-employment route' means assistance in pursuing self-employed earner's employment while participating in (1) an employment zone programme; or (2) a programme provided or other arrangements made pursuant to the Employment and Training Act 1973 s 2: SI 1996/207 reg 1(3) (amended by SI 2000/2910, SI 2001/652, SI 2001/1029, SI 2002/1411, SI 2004/963). The 'intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are

designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of the Jobseekers Act 1995, the Jobseeker's Allowance Regulations 1996, SI 1996/207, and the Jobseeker's Allowance (Transitional Provisions) Regulations 1996, SI 1996/2567, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **329 Termination of awards where alternative benefit payable**

TEXT AND NOTES 1-9--In head (1) for 'an adjudication officer' read 'the Secretary of State'; and after 'his partner' add 'or the couple': Jobseekers Act 1995 s 31(1) (amended by the Social Security Act 1998 Sch 7 para 143, Welfare Reform and Pensions Act 1999 Sch 7 paras , 14(1), (2)). In head (2) for 'an adjudication officer' read 'the Secretary of State'; and after 'his partner' insert 'or where the award was made to a couple a member of the couple': Jobseekers Act 1995 s 31(2) (amended by the Social Security Act 1998 Sch 7 para 143, Welfare Reform and Pensions Act 1999 Sch 7 paras , 14(1), (3)).

TEXT AND NOTES 8, 9--In Jobseekers Act 1995 s 31(1), (2) for 'married or unmarried couple' read 'couple': Civil Partnership Act 2004 Sch 24 para 123.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(1) GENERAL ADMINISTRATIVE PROVISIONS/330. Regulations about claims for and payments of benefit.

## **11. ADMINISTRATION**

### **(1) GENERAL ADMINISTRATIVE PROVISIONS**

#### **330. Regulations about claims for and payments of benefit.**

Regulations<sup>1</sup> may provide:

- 999 (1) for requiring a claim for certain benefits<sup>2</sup> to be made by such person, in such manner and within such time as may be prescribed<sup>3</sup>;
- 1000 (2) for treating such a claim made in such circumstances as may be prescribed as having been made at such date earlier or later than that at which it is made as may be prescribed<sup>4</sup>;
- 1001 (3) for permitting such a claim to be made, or treated as if made, for a period wholly or partly after the date on which it is made<sup>5</sup>;
- 1002 (4) for permitting an award on such a claim to be made for such a period subject to the condition that the claimant satisfies the requirements for entitlement when benefit becomes payable under the award<sup>6</sup>;
- 1003 (5) for a review of any such award if those requirements are found not to have been satisfied<sup>7</sup>;
- 1004 (6) for the disallowance on any ground of a person's claim for such a benefit to be treated as a disallowance of any further claim by that person for that benefit until the grounds of the original disallowance have ceased to exist<sup>8</sup>;
- 1005 (7) for enabling one person to act for another in relation to a claim for such a benefit and for enabling such a claim to be made and proceeded with in the name of a person who has died<sup>9</sup>;
- 1006 (8) for requiring any information or evidence needed for the determination of such a claim or of any question arising in connection with such a claim to be furnished by such person as may be prescribed in accordance with the regulations<sup>10</sup>;
- 1007 (9) for the person to whom, time when and manner in which such a benefit is to be paid and for the information and evidence to be furnished in connection with the payment of such a benefit<sup>11</sup>;
- 1008 (10) for notice to be given of any change of circumstances affecting the continuance of entitlement to such a benefit or payment of such a benefit<sup>12</sup>;
- 1009 (11) for the day on which entitlement to such a benefit is to begin or end<sup>13</sup>;
- 1010 (12) for calculating the amounts of such a benefit according to a prescribed scale or otherwise adjusting them so as to avoid fractional amounts or facilitate computation<sup>14</sup>;
- 1011 (13) for extinguishing the right to payment of such a benefit if payment is not obtained within such period, not being less than 12 months, as may be prescribed from the date on which the right is treated under the regulations as having arisen<sup>15</sup>;
- 1012 (14) for suspending payment, in whole or in part, where it appears to the Secretary of State<sup>16</sup> that a question arises whether:
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140. (a) the conditions for entitlement are or were fulfilled;
141. (b) an award ought to be revised;
142. (c) an appeal ought to be brought against an award<sup>17</sup>;
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- 1013 (15) for withholding payments of such a benefit in prescribed circumstances and for subsequently making withheld payments in prescribed circumstances<sup>18</sup>;
- 1014 (16) for the circumstances and manner in which payments of such a benefit may be made to another person on behalf of the beneficiary for any purpose, which may be to discharge, in whole or in part, an obligation of the beneficiary or any other person<sup>19</sup>;
- 1015 (17) for the payment or distribution of such a benefit to or among persons claiming to be entitled on the death of any person and for dispensing with strict proof of their title<sup>20</sup>;
- 1016 (18) for the making of a payment on account of such a benefit:
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143. (a) where no claim has been made and it is impracticable for one to be made immediately;

144. (b) where a claim has been made and it is impracticable for the claim or an appeal, reference, review or application relating to it to be immediately determined;  
 145. (c) where an award has been made but it is impracticable to pay the whole immediately<sup>21</sup>.

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1 As to the power to make regulations generally see PARA 30 ante.

2 These provisions apply to the following benefits: (1) benefits as defined in the Social Security Contributions and Benefits Act 1992 s 122 (as amended) (see PARA 13 note 8 ante); (2) a jobseeker's allowance (see PARA 258 et seq ante); (3) income support (see PARA 176 et seq ante) (4) family credit (see PARA 202 et seq ante); (4) disability working allowance (see PARA 218 et seq ante); (5) housing benefit (see generally HOUSING vol 22 (2006 Reissue) PARA 140 et seq); (6) any social fund payments such as are mentioned in s 138(1)(a) or (2) (see PARA 228 ante); (7) child benefit (see PARA 237 et seq ante); and (8) Christmas bonus (see PARA 29 ante): Social Security Administration Act 1992 s 5(2) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 39). For the meaning of 'claim' see PARA 19 note 5 ante.

3 Social Security Administration Act 1992 s 5(1)(a). For the meaning of 'prescribed' see PARA 19 note 3 ante.

4 Ibid s 5(1)(b).

5 Ibid s 5(1)(c).

6 Ibid s 5(1)(d).

7 Ibid s 5(1)(e).

8 Ibid s 5(1)(f).

9 Ibid s 5(1)(g), which also has effect in relation to statutory sick pay and statutory maternity pay: see s 5(5). As to statutory sick pay and statutory maternity pay see EMPLOYMENT vol 39 (2009) PARAS 498 et seq, 365 et seq respectively.

10 Ibid s 5(1)(h). The reference in head (8) in the text to information or evidence needed for the determination of a claim includes a reference to information or evidence required by a rent officer under the Housing Act 1996 s 122: Social Security Administration Act 1992 s 5(3) (amended by the Housing Act 1996 s 123, Sch 13 para 391), (2)).

11 Social Security Administration Act 1992 s 5(1)(i), which also has effect in relation to statutory sick pay and statutory maternity pay: see s 5(5).

12 Ibid s 5(1)(j).

13 Ibid s 5(1)(k).

14 Ibid s 5(1)(l), which also has effect in relation to statutory sick pay and statutory maternity pay: see s 5(5).

15 Ibid s 5(1)(m).

16 As to the Secretary of State see PARA 1 ante.

17 Social Security Administration Act 1992 s 5(1)(n), which has effect in relation to housing benefit as if the reference to the Secretary of State were a reference to the authority paying the benefit: see s 5(4).

18 Ibid s 5(1)(o).

19 Ibid s 5(1)(p), which also has effect in relation to statutory sick pay and statutory maternity pay: see s 5(5). As it has effect in relation to housing benefit, head (16) in the text authorises provision requiring the making of payments of benefit to another person, on behalf of the beneficiary, in such circumstances as may be prescribed: s 5(6) (added by the Housing Act 1996 s 120).

20 Social Security Administration Act 1992 s 5(1)(q), which also has effect in relation to statutory sick pay and statutory maternity pay: see s 5(5).

21 Ibid s 5(1)(r). As to the exercise of the powers conferred by s 5(1) see 40 Halsbury's Statutes (1997 Reissue) 543 and Supp. The relevant provisions of the Jobseeker's Allowance Regulations 1996, SI 1996/207 (as amended), and also of the Income Support (General) Regulations 1987, SI 1987/1967 (as amended); the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968 (as amended); the Family Credit (General) Regulations 1987, SI 1987/1973 (as amended); the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664 (as amended); and the Social Security (Introduction of Disability Living Allowance) Regulations 1991, SI 1991/2891 (as amended), are discussed in their appropriate contexts in this title.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see *RATING AND COUNCIL TAX* vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **330 Regulations about claims for and payments of benefit**

TEXT AND NOTES--Now, head (5) for any such award to be revised under the Social Security Act 1998 s 9 (see PARA 356A.2), or superseded under s 10 (see PARA 356A.3), if any of those requirements are found not to have been satisfied: Social Security Administration Act 1992 s 5(1)(e) (substituted by the Social Security Act 1998 Sch 7 para 79(1)).

Now, head (14) for suspending payment, in whole or in part, where an appeal is pending against the decision given in a different case by a social security appeal tribunal, a Commissioner or a court, and it appears to the Secretary of State that if the appeal were to be determined in a particular way an issue would arise whether the award in the case itself ought to be revised: Social Security Administration Act 1992 s 5(1)(nn) (added by the Social Security Act 1998 Sch 6 para 5(1)).

Head (15) omitted: see TEXT AND NOTE 18.

Now, head (19) for requiring such person as may be prescribed in accordance with the regulations to furnish any information or evidence needed for a determination whether a decision on an award of benefit to which the Social Security Administration Act 1992 s 5 applies (a) should be revised under the Social Security Act 1998 s 9 or, as the case may be, under the Child Support, Pensions and Social Security Act 2000 Sch 7 para 3; or (b) should be superseded under the Social Security Act 1998 s 10 or, as the case may be, under the Child Support, Pensions and Social Security Act 2000 Sch 7 para 4: Social Security Administration Act 1992 s 5(1)(hh) (added by Social Security Act 1998 s 74; and amended by Child Support, Pensions and Social Security Act 2000 Sch 7 para 21(1)). For provision made under the Social Security Administration Act 1992 s 5(1)(hh) see the Housing Benefit and Council Tax Benefit (Decisions and Appeals) Regulations 2001, SI 2001/1002; and *HOUSING* vol 22 (2006 Reissue) PARA 156.

The references in the 1992 Act s 5(1)(h), (hh) to information or evidence needed for the determination of a claim or of any question arising in connection with a claim or, as the case may be, for a determination whether a decision on an award should be revised or should be superseded, includes, in the case of state pension credit, a reference to information or evidence as to the likelihood of future changes in a person's circumstances which is needed for determining (a) whether a period should be specified as an assessed income period under the State Pension Credit Act 2002 s 6

in relation to any decision; and (b) if so, the length of the period to be so specified: 1992 Act s 5(3A) (added by the State Pension Credit Act 2002 Sch 1 para 3).

The regulations may also require such persons as are prescribed to provide a rent officer with information or evidence of such description as is prescribed: 1992 Act s 5(2A) (s 5(2A)-(2C) added by Welfare Reform Act 2007 s 35(2)). For the purposes of the 1992 Act s 5(2A), the Secretary of State may prescribe any description of information or evidence which he thinks is necessary or expedient to enable rent officers to carry out their functions under the Housing Act 1996 s 122: 1992 Act s 5(2B). Information or evidence required to be provided by virtue of s 5(2A) may relate to an individual claim or award or to any description of claims or awards: s 35(2C).

NOTE 2--Provisions now also apply to state pension credit: 1992 Act s 5(2) (amended by the Tax Credits Act 2002 Sch 1 para 3). References to family credit (working families' tax credit) and disability working allowance (disabled person's tax credit) in Social Security Administration Act 1992 s 5(2) repealed: Tax Credits Act 2002 Sch 6.

Provisions also apply to an employment and support allowance: 1992 Act s 5(2) (further amended by Welfare Reform Act 2007 Sch 3 para 10(4)).

Provisions also apply to a health in pregnancy grant (see PARA 236A): 1992 Act s 5(2) (further amended by Health and Social Care Act 2008 s 132(1)).

NOTE 10--1992 Act s 5(3) repealed: Welfare Reform Act 2007 s 35(3), Sch 8.

NOTE 11--The 1992 Act s 5(1)(i) now covers ordinary statutory paternity pay, additional statutory paternity pay and statutory adoption pay: s 5(5) (amended by Employment Act 2002 Sch 7 para 11; and the Work and Families Act 2006 Sch 1 para 24 (Sch 1 para 24 in force 3 March 2010: SI 2010/495)).

TEXT AND NOTES 16, 17--Head (14) replaced: see TEXT AND NOTES. Social Security Administration Act 1992 s 5(1)(n), (4) repealed: Social Security Act 1998 Sch 7 para 79(1)(b), (2), Sch 8.

TEXT AND NOTE 18--Head (15) omitted. Social Security Administration Act 1992 s 5(1)(o) repealed: Social Security Act 1998 Sch 7 para 79(1)(b), Sch 8.

NOTE 21--SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance: Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(1) GENERAL ADMINISTRATIVE PROVISIONS/330A. Supply of social security information for certain purposes.

### **330A. Supply of social security information for certain purposes.**

#### **1. General**

The Secretary of State may by regulations make such provision for or in connection with any of the following matters, namely (1) the use by any of a number of specified persons<sup>1</sup> of social security information<sup>2</sup>, or information relating to employment or training, held by that person; (2) the supply, whether to any such person or otherwise, of social security information held by any such person; (3) the relevant purposes<sup>3</sup> for which a person to whom such information is supplied under the regulations may use it; and (4) the circumstances and extent, if any, in and to which a person to whom such information is supplied under the regulations may supply it to any other person, whether a person referred to in head (1) or not, as the Secretary of State considers appropriate in connection with any of a number of specified provisions<sup>4</sup> or in connection with certain schemes or arrangements<sup>5</sup>. The regulations may, in particular, authorise information supplied to a person under the regulations (a) to be used for the purpose of amending or supplementing other information held by that person; and (b) if it is so used, to be supplied to any other person, and used for any purpose, to whom or for which that other information could be supplied or used<sup>6</sup>.

1     le (1) a minister of the Crown; (2) a person providing services to, or designated for the purposes of this provision by an order of, a minister of the Crown; (3) a local authority (within the meaning of the Social Security Administration Act 1992, namely, in relation to England, the council of a district or London borough, the Common Council of the City of London or the Council of the Isles of Scilly and, in relation to Wales, the council of a county or county borough); (4) a county council in England; and (5) a person providing services to, or authorised to exercise any function of, any authority mentioned in head (3) or (4): Welfare Reform and Pensions Act 1999 s 72(2) (amended by Education and Skills Act 2008 Sch 1 para 74(2), Sch 2).

2     'Social security information' means (subject to the Welfare Reform and Pensions Act 1999 s 72(6A)) information relating to social security, child support or war pensions; for these purposes 'war pensions' means war pensions within the meaning of the Social Security Act 1989 s 25 (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 618): Welfare Reform and Pensions Act 1999 s 72(6) (amended by Education and Skills Act 2008 Sch 1 para 74(3)). See further Welfare Reform and Pensions Act 1999 s 72(6A) (added by Education and Skills Act 2008 Sch 1 para 74(4)). Information supplied in pursuance of any provision made by or under the Jobseekers Act 1995 is to be taken for all purposes to be information relating to social security: Jobseekers Act 1995 Sch 1 para 19 (added by the Welfare Reform Act 2009 s 34(3)).

3     'Relevant purposes' means purposes connected with (1) social security, child support or war pensions; or (2) employment or training: Welfare Reform and Pensions Act 1999 s 72(6). The reference in s 72 to information relating to, or purposes connected with, employment or training includes information relating to, or purposes connected with, the existing or future employment or training prospects or needs of persons and, in particular, assisting or encouraging persons to enhance their employment prospects: s 72(7) (amended by the Welfare Reform Act 2009 s 34(4)).

4     le any provision made by or under (1) any of the provisions of the Social Security Administration Act 1992 ss 2A-2F; (2) the Welfare Reform and Pensions Act 1999 s 60 (see PARA 310A); (3) the Jobseekers Act 1995 (see PARA 258 et seq); or (4) the Welfare Reform Act 2007 Pt 1 (ss 1-29): Welfare Reform and Pensions Act 1999 s 72(3) (amended by the Employment Act 2002 Sch 7 para 55; the Welfare Reform Act 2007 Sch 3 para 18, Sch 8; and the Welfare Reform Act 2009 s 2(5)).

5     1999 Act s 72(1) (amended by the Welfare Reform Act 2009 s 34(4)). See the Social Security (Claims and Information) Regulations 1999, SI 1999/3108, regs 6 (information in relation to war pensions and child support), 7 (holding information), 8 (provision of information), 13, (use and supply of information), and 14 (purposes for which information may be used). The schemes or arrangements referred to are (1) any scheme designated by regulations under the 1999 Act s 72(1), being a scheme operated by the Secretary of State, whether under

arrangements with any other person or not, for any purposes connected with employment or training in the case of persons of a particular category or description; (2) any arrangements of a description specified in such regulations, being arrangements made by the Secretary of State for any such purposes: s 72(4).

6 Ibid s 72(5). See the Social Security (Claims and Information) Regulations 1999, SI 1999/3108, regs 15 (information supplied), 16 (partners of claimants on jobseeker's allowance), and 17 (amended by SI 2001/1189, SI 2005/2877) (partners of claimants).

## **2. Supply of social security information for purposes connected with television licences**

The Secretary of State and the Northern Ireland department<sup>1</sup> may, at the request of the British Broadcasting Corporation ('BBC')<sup>2</sup>, supply the BBC with social security information<sup>3</sup>. Such information may be used only in connection with television licences<sup>4</sup> for which no fee is payable or reduced-fee licences<sup>5</sup>.

A person to whom information is supplied ('a recipient') is guilty of an offence if, without lawful authority, he discloses that information<sup>6</sup>. A person who is or has been employed by a recipient, or engaged in the provision of services to a recipient, is guilty of an offence if, without lawful authority, he discloses<sup>7</sup> information supplied to the recipient<sup>8</sup>. It is not an offence (1) to disclose information in the form of a summary or collection of information so framed as not to enable information supplied relating to any particular person to be ascertained from it; or (2) to disclose information which has previously been disclosed to the public with lawful authority<sup>9</sup>. It is a defence for a person charged with such an offence to prove that at the time of the alleged offence he believed that he was making the disclosure in question with lawful authority, or that the information in question had previously been disclosed to the public with lawful authority, and he had no reasonable cause to believe otherwise<sup>10</sup>. A person guilty of any such offence is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum<sup>11</sup> or both, or on conviction on indictment to imprisonment for a term not exceeding two years or a fine or both<sup>12</sup>. If an offence committed by a body corporate is shown to have been committed with the consent or connivance of an officer<sup>13</sup>, or to be attributable to any neglect on his part, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly<sup>14</sup>.

1 'Northern Ireland department' means the Department for Social Development: Television Licences (Disclosure of Information) Act 2000 s 5.

2 The BBC includes any person providing the BBC with services in connection with television licences: *ibid* s 1(2). As to the BBC see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 306 et seq. For the meaning of 'television licence' see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 303.

3 *Ibid* s 1(1). 'Social security information', in relation to the Secretary of State, means information of a prescribed description held by him (or on his behalf) and obtained as a result, or for the purpose, of the exercise of functions of his in relation to social security or war pensions: s 1(3). 'Social security information', in relation to the Northern Ireland department, means information of a prescribed description held by the department (or on its behalf) and obtained as a result, or for the purpose, of the exercise of functions of the department in relation to social security: s 1(4). The Television Licences (Disclosure of Information) Act 2000 (Prescription of Information) Order 2000, SI 2000/1955, prescribes information consisting of the name, date of birth, address and national insurance number of an individual aged 74 years or over, and in a case where such an individual has died, that fact and the date on which he died as 'social security information': art 2(2). For the meaning of 'war pensions' see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 618.

4 For the meaning of 'television licence' see TELECOMMUNICATIONS AND BROADCASTING vol 45(1) (2005 Reissue) PARA 303.

5 Television Licences (Disclosure of Information) Act 2000 s 2(1). 'Reduced-fee licences' means television licences for which a reduced fee is payable, and which fall within a prescribed category: s 2(2).

6 *Ibid* s 3(1).

7 A disclosure is to be regarded as made with lawful authority if, but only if, it is made (1) by a person exercising functions in relation to television licences and using the information in a permitted way (see TEXT to NOTE 5); (2) in accordance with any enactment or order of a court; (3) for the purpose of instituting, or otherwise for the purposes of, proceedings before a court; or (4) with the consent of the person to whom the information relates or of any person authorised to act on that person's behalf: *ibid* s 3(5).

8 *Ibid* s 3(2).

9 *Ibid* s 3(3).

10 *Ibid* s 3(4).

11 As to the statutory maximum, see PARA 403.

12 *Ibid* s 3(6).

13 'Officer', in relation to a body corporate, means a director, member of the committee of management, chief executive, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity: *ibid* s 4(3).

14 *Ibid* s 4(1). If the affairs of a body corporate are managed by its members, s 4(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body: s 4(2).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(1) GENERAL ADMINISTRATIVE PROVISIONS/331. Regulations as to determination of questions and matters arising out of, or pending, reviews and appeals.

**331. Regulations as to determination of questions and matters arising out of, or pending, reviews and appeals.**

Subject to the provisions of the Social Security Administration Act 1992, provision may be made by regulations<sup>1</sup> for the determination by the Secretary of State<sup>2</sup>, or by a person or tribunal appointed or constituted in accordance with the regulations, of any question arising under or in connection with the Social Security Contributions and Benefits Act 1992, the Jobseekers Act 1995 or the former legislation<sup>3</sup>, including a claim<sup>4</sup> for benefit<sup>5</sup>. Such regulations may modify, add to or exclude any provisions of Part II of the Social Security Administration Act 1992<sup>6</sup>, so far as relating to any questions to which the regulations relate<sup>7</sup>, and may provide:

- 1017 (1) for the review by the Secretary of State of decisions on questions determined by him<sup>8</sup>;
- 1018 (2) for the reference to the High Court for decision of any question of law arising in connection with the determination of a question by the Secretary of State and for appeals to the High Court from the decision of the Secretary of State on any such question of law<sup>9</sup>.

The Lord Chancellor may by regulations provide:

- 1019 (a) for officers authorised by him to determine any question which is determinable by a commissioner<sup>10</sup> and which does not involve the determination of any appeal, application for leave to appeal or reference;
- 1020 (b) for the procedure to be followed by any such officer in determining any such question;
- 1021 (c) for the manner in which determinations of such questions by such officers may be called in question<sup>11</sup>,

but a determination which would have the effect of preventing an appeal, application for leave to appeal or reference being determined by a commissioner is not a determination of the appeal, application or reference for these purposes<sup>12</sup>.

1 As to the power to make regulations generally see PARA 30 ante.

2 As to the Secretary of State see PARA 1 ante.

3 'The former legislation' means (1) the National Insurance Acts 1965 to 1974 (repealed); (2) the National Insurance (Industrial Injuries) Acts 1965 to 1974 (repealed); (3) the Social Security Act 1975 (repealed); and (4) the Social Security Act 1986 Pt II (ss 20-31) (largely repealed): Social Security Administration Act 1992 s 58(2). As to the Acts which were cited together with the collective titles given in heads (1)-(2) supra see 40 Halsbury's Statutes (1997 Reissue) 597.

4 For the meaning of 'claim' see PARA 19 note 5 ante.

5 Social Security Administration Act 1992 s 58(1) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 44).

6 I.e. the Social Security Administration Act 1992 Pt II (ss 17-70) (as amended): see PARA 356 et seq post.

7 Ibid s 58(3). It is declared for the avoidance of doubt that the power to make regulations under s 58(1) (as amended) includes power to make regulations for the determination of any question arising as to the total or partial recoupment of unemployment benefit or a jobseeker's allowance in pursuance of regulations under the Industrial Tribunals Act 1996 s 16, including any decision as to the amount of benefit: Social Security Administration Act 1992 s 58(4) (amended by the Industrial Tribunals Act 1996 s 43, Sch 1 para 7).

8 Social Security Administration Act 1992 s 58(5).

9 Ibid s 58(8). Section 18(5)-(7) (see PARA 358 post) applies to a reference or appeal under s 58 (as amended) as it applies to a reference or appeal under s 58(1)-(3): s 58(8).

10 For the meaning of 'commissioner' see PARA 30 note 3 ante.

11 Social Security Administration Act 1992 s 58(6).

12 Ibid s 58(7). As to the exercise of the powers conferred by s 58 (as amended) see 40 Halsbury's Statutes (1997 Reissue) 597. The relevant provisions of the Social Security (Adjudication) Regulations 1995, SI 1995/1801 (as amended); and also of the Social Security Benefit (Persons Abroad) Regulations 1975, SI 1975/563 (as amended); the Social Security Commissioners Procedure Regulations 1987, SI 1987/214 (as amended); the Income Support (General) Regulations 1987, SI 1987/1967 (as amended); the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968 (as amended); and the Social Security (Disability Living Allowance) Regulations 1991, SI 1991/2890 (as amended) are discussed in their appropriate contexts in this title.

The Social Security Administration Act 1992 s 58 (as amended) is applied in relation to certain provisions of the Pension Schemes Act 1993: see s 167(1), (3).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **331 Regulations as to determination of questions and matters arising out of, or pending, reviews and appeals**

NOTE 7--Industrial Tribunals Act 1996 now called the Employment Tribunals Act 1996: Employment Rights (Dispute Resolution) Act 1998 s 1.

TEXT AND NOTES 10-12--The Lord Chancellor's function under the 1992 Act s 58 is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

NOTE 12--SI 1987/214 replaced: Social Security Commissioners (Procedure) Regulations 1999, SI 1999/1495 (see PARA 81 NOTE 8).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(1) GENERAL ADMINISTRATIVE PROVISIONS/332. Procedure regulations.

### **332. Procedure regulations.**

Regulations<sup>1</sup> (referred to as 'procedure regulations') may make any such provision as is specified below<sup>2</sup>, that is, provision:

- 1022 (1) prescribing<sup>3</sup> the procedure to be followed in connection with the consideration and determination of claims<sup>4</sup> and questions by the Secretary of State<sup>5</sup>, an adjudication officer<sup>6</sup> and a competent tribunal<sup>7</sup>, or in connection with the withdrawal of a claim<sup>8</sup>;
- 1023 (2) as to the striking out of proceedings for want of prosecution<sup>9</sup>;
- 1024 (3) as to the form which is to be used for any document, the evidence which is to be required and the circumstances in which any official record or certificate is to be sufficient or conclusive evidence<sup>10</sup>;
- 1025 (4) as to the time to be allowed for producing any evidence or for making an appeal<sup>11</sup>;
- 1026 (5) as to the manner in which, and the time within which, a question may be raised with a view to its decision by the Secretary of State under Part II of the Social Security Administration Act 1992<sup>12</sup> or with a view to the review of a decision under that Part<sup>13</sup>;
- 1027 (6) for summoning persons to attend and give evidence or produce documents and for authorising the administration of oaths to witnesses<sup>14</sup>;
- 1028 (7) for authorising a competent tribunal consisting of two or more members to proceed with any case, with the consent of the claimant<sup>15</sup>, in the absence of any member<sup>16</sup>;
- 1029 (8) for giving the chairman or acting chairman of a competent tribunal consisting of two or more members a second or casting vote where the number of members present is an even number<sup>17</sup>;
- 1030 (9) for empowering the chairman of a social security appeal tribunal, a disability appeal tribunal or a medical appeal tribunal to give directions for the disposal of any purported appeal which he is satisfied that the tribunal does not have jurisdiction to entertain<sup>18</sup>;
- 1031 (10) for the non-disclosure to a person of the particulars of any medical advice or medical evidence given or submitted for the purposes of a determination<sup>19</sup>;
- 1032 (11) for requiring or authorising the Secretary of State to hold, or to appoint a person to hold, an inquiry in connection with the consideration of any question by the Secretary of State<sup>20</sup>.

Procedure regulations may deal differently with claims and questions relating to different benefits<sup>21</sup>.

Procedure regulations prescribing the procedure to be followed in cases before a commissioner must provide that any hearing is to be in public except in so far as the commissioner for special reasons otherwise directs<sup>22</sup>. The power to prescribe procedure includes power to make provision as to the representation of one person, at any hearing of a case, by another person whether having professional qualifications or not; and the power to provide for the manner in which questions arising for determination by the Secretary of State are to be raised includes power to make provision with respect to the formulation of any such questions, whether arising on a reference<sup>23</sup> or otherwise<sup>24</sup>.

Except so far as they may be applied in relation to England and Wales by procedure regulations, the statutory provisions relating to arbitration<sup>25</sup> do not apply to any proceedings under Part II of the Social Security Administration Act 1992<sup>26</sup>.

- 1 As to the power to make regulations generally see PARA 30 ante.
- 2 Social Security Administration Act 1992 s 59(1).
- 3 For the meaning of 'prescribe' see PARA 19 note 3 ante.
- 4 For the meaning of 'claim' see PARA 19 note 5 ante.
- 5 As to the Secretary of State see PARA 1 ante.
- 6 As to adjudication officers see PARA 359 post.
- 7 'Competent tribunal' means (1) a commissioner; (2) a social security appeal tribunal (see PARA 360 post); (3) a disability appeal tribunal (see PARA 378 post); (4) a medical appeal tribunal (see PARA 381 post); (5) an adjudicating medical practitioner (see PARA 380 note 1 post): Social Security Administration Act 1992 s 59(1), Sch 3 para 1. For the meaning of 'commissioner' see PARA 30 note 3 ante.
- 8 Ibid Sch 3 para 2.
- 9 Ibid Sch 3 para 3.
- 10 Ibid Sch 3 para 4.
- 11 Ibid Sch 3 para 5.
- 12 Ie under ibid Pt II (ss 17-70) (as amended): see PARAS 331 ante, 333 et seq post.
- 13 Ibid Sch 3 para 6.
- 14 Ibid Sch 3 para 7.
- 15 For the meaning of 'claimant' see PARA 19 note 5 ante.
- 16 Social Security Administration Act 1992 Sch 3 para 8.
- 17 Ibid Sch 3 para 9.
- 18 Ibid Sch 3 para 10.
- 19 Ibid Sch 3 para 11.
- 20 Ibid Sch 3 para 12. At any inquiry held by virtue of procedure regulations the witnesses must, if the person holding the inquiry thinks fit, be examined on oath; and the person holding the inquiry has power to administer oaths for that purpose: s 59(3).
- 21 See ibid s 59(2), applied in relation to the Pension Schemes Act 1993 s 46 (as amended) (see PARA 916 post) by s 167(4).
- 22 Social Security Administration Act 1992 s 59(5).
- 23 Ie under ibid s 117 (as amended): see PARA 405 post.
- 24 Ibid s 59(6). As to the exercise of the powers conferred by s 59 (as amended) see 40 Halsbury's Statutes (1997 Reissue) 599. The relevant provisions of the Social Security (Adjudication) Regulations 1995, SI 1995/1801 (as amended); the Jobseeker's Allowance Regulations 1996, SI 1996/207 (as amended); and of the Social Security (Medical Evidence) Regulations 1976, SI 1976/1615 (as amended); the Social Security (Earnings Factor) Regulations 1979, SI 1979/676 (as amended); and the Social Security Commissioners Procedure Regulations 1987, SI 1987/214 (as amended) are discussed in their appropriate contexts in this title.
- 25 Ie the Arbitration Act 1996 Pt I (ss 1-84): see generally ARBITRATION vol 2 (2008) PARA 1201 et seq.

26 Social Security Administration Act 1992 s 59(7) (amended by the Arbitration Act 1996 s 107(1), Sch 3 para 54).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **332 Procedure regulations**

NOTE 24--SI 1976/615 further amended: SI 1998/646, SI 2001/2931, SI 2002/881, SI 2004/1771, SI 2008/1554. SI 1979/676 further amended: SI 2003/608. SI 1987/214 replaced: Social Security Commissioners (Procedure) Regulations 1999, SI 1999/1495 (see PARA 81 NOTE 8).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(1) GENERAL ADMINISTRATIVE PROVISIONS/333. Finality of decisions.

### **333. Finality of decisions.**

Subject to the relevant statutory provisions<sup>1</sup>, the decision of any claim<sup>2</sup> or question in accordance with those provisions is final, as is the decision of any claim or question in accordance with the relevant regulations<sup>3</sup>; but this does not make any finding of fact or other determination embodied in or necessary to a decision, or on which it is based, conclusive for the purpose of any further decision<sup>4</sup>.

Special provision is made in relation to decisions concerning industrial accidents<sup>5</sup>.

1    le subject to the provisions of the Social Security Administration Act 1992 Pt II (ss 17-70) (as amended): see PARAS 331-332 ante, 356 et seq post.

2    For the meaning of 'claim' see PARA 19 note 5 ante.

3    Social Security Administration Act 1992 s 60(1). The regulations referred to are regulations under s 58 (as amended): see PARA 331 ante. Section 60(1) does not take away the ability to challenge a decision by way of judicial review: see eg *R v Medical Appeal Tribunal, ex p Gilmore* [1957] 1 QB 574, sub nom *Re Gilmore's Application* [1957] 1 All ER 796, CA. A provisional assessment is final only in respect of the specified period for which it is made and is not binding for any subsequent period: see *R v National Insurance Comr, ex p Viscusi* [1974] 2 All ER 724, [1974] 1 WLR 646 CA.

An action for negligence at common law against an adjudication officer amounts to challenging the finality of his decision and cannot therefore lie in view of the prohibition in the Social Security Administration Act 1992 s 60(1) on challenging the correctness of a decision other than by way of the appellate procedures set out in Pt II (as amended): see *Jones v Department of Employment* [1989] QB 1, [1988] 1 All ER 725, CA.

4    Social Security Administration Act 1992 s 60(2), reversing the decisions in *Re Dowling, Minister of Social Security v Amalgamated Engineering Union* [1967] 1 AC 725, [1967] 1 All ER 210, HL; and *Jones v Secretary of State for Social Services, Hudson v Secretary of State for Social Services* [1972] AC 944, [1972] 1 All ER 145, HL. The Social Security Administration Act 1992 s 60(2) applies as regards the effect to be given in any proceedings to any decision, or to a reference under s 45 (see PARA 379 post), whether the decision was given or reference made or the proceedings were commenced before or after the passing of the National Insurance Act 1972 (repealed), (s 5 (repealed) originally containing the provisions contained in the Social Security Administration Act 1992 s 60), except that it does not affect the determination of any appeal under s 48 (see PARAS 363, 381 post) from a decision of a medical appeal tribunal given before the passing of that Act, nor affect any proceedings consequent on such an appeal from a decision so given; and accordingly the references to provisions of the Social Security Administration Act 1992 include, so far as possible, the corresponding provisions of previous Acts: see the Social Security Administration Act 1992 s 60(5).

5    See *ibid* s 60(3), (4); and PARA 379 post.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(1) GENERAL ADMINISTRATIVE PROVISIONS/334. Regulations about supplementary matters relating to determinations.

### **334. Regulations about supplementary matters relating to determinations.**

Regulations<sup>1</sup> may make provision as respects matters arising:

- 1033 (1) pending the determination<sup>2</sup>, whether in the first instance or on an appeal or reference, and whether originally or on review, of any claim for a specified benefit<sup>3</sup>, of any question affecting any person's right to such benefit or its receipt or of any person's liability for contributions<sup>4</sup>; or
- 1034 (2) out of the revision on appeal or review of any decision<sup>5</sup> on any such claim or question<sup>6</sup>.

Without prejudice to the generality of heads (1) and (2) above, regulations so made may include provision as to the date from which any decision on a review is to have effect or to be deemed to have had effect<sup>7</sup>. They may include, in relation to child benefit, provision as to the date from which child benefit is to be payable to a person in respect of a child in a case where, before the benefit was awarded to that person, child benefit in respect of the child was awarded to another person<sup>8</sup>.

1 As to the power to make regulations generally see PARA 30 ante.

2 Ie under the Social Security Administration Act 1992: see PARA 337 et seq post.

3 These provisions apply to (1) benefit as defined in the Social Security Contributions and Benefits Act 1992 s 122 (as amended) (see PARA 13 note 8 ante); (2) a jobseeker's allowance (see PARA 258 et seq ante); (3) child benefit (see PARA 237 et seq ante); (4) statutory sick pay (see EMPLOYMENT vol 39 (2009) PARA 498 et seq); (5) statutory maternity pay (see EMPLOYMENT vol 39 (2009) PARA 365 et seq); (6) income support (see PARA 176 et seq ante); (7) family credit (see PARA 202 et seq ante); (8) disability working allowance (see PARA 218 et seq ante); and (9) any social fund payments such as are mentioned in the Social Security Contributions and Benefits Act 1992 s 138(1)(a) or (2) (see PARA 228 ante); Social Security Administration Act 1992 s 61(4) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 45).

4 As to liability for contributions see PARA 31 et seq ante.

5 See note 2 supra.

6 Social Security Administration Act 1992 s 61(1) (amended by the Social Security Administration (Fraud) Act 1997 s 22, Sch 2).

7 Social Security Administration Act 1992 s 61(2).

8 Ibid s 61(3). As to the exercise of the powers conferred by s 61 (as amended) see 40 Halsbury's Statutes (1997 Reissue) 602. The relevant provisions of the Social Security (Adjudication) Regulations 1995, SI 1995/1801 (as amended); and of the Child Benefit (Residence and Persons Abroad) Regulations 1976, SI 1976/963 (as amended); the Social Security (General Benefit) Regulations 1982, SI 1982/1408 (as amended); the Child Benefit (Interim Payments) Regulations 1983, SI 1983/104 (as amended); the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1310 (as amended); and the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968 (as amended) are discussed in their appropriate contexts in this title.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **334 Regulations about supplementary matters relating to determinations**

NOTE 3--Subject to savings (see SI 2003/962) family credit (working families' tax credit) and disability working allowance (disabled person's tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(1) GENERAL ADMINISTRATIVE PROVISIONS/335. Regulations in relation to industrial injuries and diseases.

### **335. Regulations in relation to industrial injuries and diseases.**

Regulations<sup>1</sup> may provide:

- 1035 (1) for requiring the prescribed notice<sup>2</sup> of an accident in respect of which industrial injuries benefit<sup>3</sup> may be payable to be given within the prescribed time by the employed earner<sup>4</sup> to the earner's employer or other prescribed person<sup>5</sup>;
- 1036 (2) for requiring employers:
- 111
146. (a) to make reports, to such person and in such form and within such time as may be prescribed, of accidents in respect of which industrial injuries benefit may be payable;
147. (b) to furnish to the prescribed person any information required for the determination of claims<sup>6</sup>, or of questions arising in connection with claims or awards;
148. (c) to take such other steps as may be prescribed to facilitate the giving notice of accidents, the making of claims and the determination of claims and of questions so arising<sup>7</sup>;
- 112
- 1037 (3) for requiring claimants for disablement benefit:
- 113
149. (a) to submit themselves from time to time to medical examination<sup>8</sup> for the purpose of determining the effect of the relevant accident<sup>9</sup>, or the treatment appropriate to the relevant injury or loss of faculty<sup>10</sup>;
150. (b) to submit themselves from time to time to appropriate medical treatment<sup>11</sup> for the injury or loss of faculty<sup>12</sup>;
- 114
- 1038 (4) for disqualifying a claimant for the receipt of industrial injuries benefit:
- 115
151. (a) for failure without good cause to comply with any requirement of regulations to which these provisions apply, including in the case of a claim for industrial death benefit, a failure on the part of some other person to give the prescribed notice of the relevant accident;
152. (b) for wilful obstruction of, or other misconduct in connection with, any examination or treatment to which he is required under such regulations to submit himself, or in proceedings<sup>13</sup> for the determination of his right to benefit or to its receipt,
- 116
- 1039 or for suspending proceedings on the claim or payment of benefit as the case may be, in the case of any such failure, obstruction or misconduct<sup>14</sup>.

Special provision must be made by regulations in relation to adjudication as to industrial diseases<sup>15</sup>.

1 As to the power to make regulations generally see PARA 30 ante.

2 For the meaning of 'prescribed' see PARA 19 note 3 ante.

3 As to industrial injuries benefit see PARA 126 et seq ante.

- 4 For the meaning of 'employed earner' see PARA 32 ante.
- 5 Social Security Administration Act 1992 s 8(a).
- 6 For the meaning of 'claim' see PARA 19 note 5 ante.
- 7 Social Security Administration Act 1992 s 8(b). At the date at which this volume states the law, no such regulations had been made but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Industrial Injuries) (Mariners' Benefits) Regulations 1975, SI 1975/470 (as amended); and the Social Security (Claims and Payments) Regulations 1979, SI 1979/628, regs 24, 25 (as amended) have effect as if so made.
- 8 For the meaning of 'medical examination' see PARA 65 note 7 ante.
- 9 For the meaning of 'relevant accident' see PARA 129 note 12 ante (definition applied by virtue of the Social Security Administration Act 1992 s 192(2)).
- 10 For the meaning of 'relevant injury' and 'relevant loss of faculty' see PARA 142 note 7 ante (definitions as applied: see note 9 supra).
- 11 For the meaning of 'medical treatment' see PARA 149 note 1 ante.
- 12 Social Security Administration Act 1992 s 9(1). Such regulations requiring persons to submit themselves to medical examination or treatment may require those persons to attend at such places and at such times as may be required and may, with the consent of the Treasury, provide for the payment by the Secretary of State to those persons of travelling and other allowances including compensation for loss of remunerative time: s 9(2). As to the Secretary of State see PARA 1 ante. At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Claims and Payments) Regulations 1979, SI 1979/628, reg 26 (as amended) has effect as if so made.
- 13 Ie under the Social Security Administration Act 1992: see PARA 337 et seq post.
- 14 Ibid s 10(1). The regulations to which head (4) in the text applies are (1) any regulations made by virtue of s 5(1)(h), (i) or (l) (see PARA 330 ante), so far as relating to industrial injuries benefit; and (2) regulations made by virtue of s 8 or s 9 (see heads (1)-(3) in the text): s 10(2). Regulations so made providing for disqualification for the receipt of benefit for any of the following matters, ie (a) for failure to comply with the requirements of regulations under s 9(1) or (2); (b) for obstruction of, or misconduct in connection with, medical examination or treatment, must not be made so as to disentitle a claimant to benefit for a period exceeding six weeks on any disqualification: s 10(3). At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (General Benefit) Regulations 1982, SI 1982/1408 (as amended), partly have effect as if so made.
- 15 Regulations must provide for applying, in relation (1) to claims for benefit under the Social Security Contributions and Benefits Act 1992 ss 108-110 (see PARA 153 et seq ante); and (2) to questions arising in connection with such claims or with awards of such benefit, the provisions of the Social Security Administration Act 1992 Pt II (ss 17-70) (as amended) (see PARA 356 et seq post) subject to any prescribed additions or modifications; and regulations for those purposes may in particular provide: (a) for the appointment of specially qualified adjudicating medical practitioners and the appointment of medical officers for the purposes of the regulations (which must be taken to include, in the case of specially qualified adjudicating medical practitioners, the purposes for which adjudicating medical practitioners are appointed and medical appeal tribunals are established); and (b) for the payment by the prescribed persons of fees of the prescribed amount in connection with any medical examination by specially qualified adjudicating medical practitioners or any such officer and their return in any prescribed cases, and (so far as not required to be returned) their payment into the National Insurance Fund and recovery as sums due to that Fund: s 62(1), (2). As to the National Insurance Fund see PARA 8 ante.

## UPDATE

### 330-450 Administration

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(1) GENERAL ADMINISTRATIVE PROVISIONS/336. Payment of travelling expenses.

### **336. Payment of travelling expenses.**

The Secretary of State<sup>1</sup> may pay such travelling expenses as, with the consent of the Treasury, he may determine:

1040 (1) to persons required by him to attend any interview in connection with the operation of the Social Security Contributions and Benefits Act 1992, the Jobseekers Act 1995, the Social Security (Recovery of Benefits) Act 1997 or the Social Security Administration Act 1992;

1041 (2) to persons attending local offices in connection with the operation of any of those Acts or of any prescribed<sup>2</sup> enactment<sup>3</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 For the meaning of 'prescribed' see PARA 19 note 3 ante.

3 Social Security Administration Act 1992 s 180 (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 71; and by the Social Security (Recovery of Benefits) Act 1997 s 33(1), Sch 3 para 9). References in the Social Security Administration Act 1992 s 180 (as amended) to that 1992 Act include references to specified provisions of the Pension Schemes Act 1993: see s 167(1), (2).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **336 Payment of travelling expenses**

TEXT AND NOTES--The Inland Revenue may pay such travelling expenses as it may determine (1) to persons required by it to attend any interview in connection with the operation of the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992, or the Social Security Contributions (Transfer of Functions, etc) Act 1999 Pt II (ss 8-19); and (2) to persons attending local offices in connection with the operation of the provisions mentioned in head (1): Social Security Administration Act 1992 s 180A (added by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 16).

NOTE 3--Social Security Administration Act 1992 s 180 further amended: Social Security Act 1998 Sch 7 para 108; State Pension Credit Act 2002 Sch 2 para 22; and Welfare Reform Act 2007 Sch 3 para 10(30).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(2) CLAIMS FOR BENEFIT/(i) General Requirements/337. The necessity of a claim.

## **(2) CLAIMS FOR BENEFIT**

### **(i) General Requirements**

#### **337. The necessity of a claim.**

Except in such cases as may be prescribed, and subject to statutory provision<sup>1</sup>, no person is entitled to any benefit<sup>2</sup> unless, in addition to any other conditions relating to that benefit being satisfied, he makes a claim for it in the manner<sup>3</sup>, and within the time<sup>4</sup>, prescribed in relation to that benefit by regulations<sup>5</sup> or he is treated by virtue of such regulations as making a claim for it<sup>6</sup>.

Regulations prescribe certain cases where it is not a condition of entitlement to benefit that a claim be made for it<sup>7</sup>.

No person whose entitlement to any benefit depends on his making a claim is to be entitled to the benefit unless the statutory requirement<sup>8</sup> is satisfied in relation both to the person making the claim and to any other person in respect of whom he is claiming benefit<sup>9</sup>; and that requirement is satisfied in relation to a person if:

- 1042 (1) the claim is accompanied by: (a) a statement of the person's national insurance number<sup>10</sup> and information or evidence establishing that that number has been allocated to the person; or (b) information or evidence enabling the national insurance number that has been allocated to the person to be ascertained; or
- 1043 (2) the person makes an application for a national insurance number to be allocated to him which is accompanied by information or evidence enabling such a number to be so allocated<sup>11</sup>.

Where this provision<sup>12</sup> applies, any question arising as to: (i) whether the claimant is or was at any time (whether before, on or after 2 September 1985) entitled to the benefit in question, or to any other benefit on which his entitlement to that benefit depends; or (ii) in a case where the claimant's entitlement to the benefit depends on the entitlement of another person to a benefit, whether that other person is or was so entitled, must be determined as if the relevant claim enactment<sup>13</sup> and any regulations made under or referred to in that enactment had also been in force, with any necessary modifications, at all times relevant for the purpose of determining the entitlement of the claimant, and, where applicable, of the other person, to the benefit or benefits in question (including the entitlement of any person to any benefit on which that entitlement depends, and so on)<sup>14</sup>.

In any case where:

- 1044 (A) a claim for benefit was made or treated as made<sup>15</sup>, and benefit was awarded on that claim, in respect of a period falling wholly or partly before that date; but
- 1045 (B) that award would not have been made had the current requirements<sup>16</sup> applied in relation to claims for benefit, whenever made, in respect of periods before that date; and

1046 (C) Entitlement to the benefit claimed<sup>17</sup> depends on whether the claimant or some other person was previously entitled or treated as entitled to that or some other benefit,

then, in determining whether the conditions of entitlement to the benefit so claimed are satisfied, the person to whom benefit was awarded as mentioned in heads (A) and (B) above must be taken to have been entitled to the benefit so awarded<sup>18</sup>.

1 The subject to the provisions of the Social Security Administration Act 1992 ss 1, 3 (both as amended): see the text and notes 2-11 infra; and PARA 347 post.

2 In *ibid* s 1 (as amended), s 2 'benefit' means (1) benefit as defined in the Social Security Contributions and Benefits Act 1992 s 122 (as amended) (see PARA 13 note 8 ante); (2) a jobseeker's allowance (see PARA 258 et seq ante); (3) any income-related benefit (see PARA 173 et seq ante): see the Social Security Administration Act 1992 s 1(4) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 38).

3 As to the prescribed manner see PARA 338 post. For the meaning of 'prescribed' see PARA 19 note 3 ante.

4 As to the prescribed time see PARA 340 post.

5 The by regulations under the Social Security Administration Act 1992 Pt I (ss 1-16) (as amended): see PARA 338 et seq post.

6 See *ibid* s 1(1). Section 1 (as amended) (which corresponds to the Social Security Act 1975 s 165A (repealed), as it had effect immediately before the Social Security Administration Act 1992 came into force) applies to claims made on or after 1 October 1990 or treated by virtue of regulations under the Social Security Act 1975 s 165A (repealed) or the Social Security Administration Act 1992 s 1 (as amended) as having been made on or after that date: see s 1(5). Where a person purports to make a claim on behalf of another: (1) for an attendance allowance by virtue of the Social Security Contributions and Benefits Act 1992 s 66(1) (see PARA 115 ante); or (2) for a disability living allowance by virtue of s 72(5) or s 73(12) (see PARA 110 ante), that other must be regarded for the purposes of the Social Security Administration Act 1992 s 1 (as amended) as making the claim, notwithstanding that it is made without his knowledge or authority: see s 1(3). Schedule 1 (claims for benefit made or treated as made before 1 October 1990) has effect in relation to other claims: see s 1(6).

7 See the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 3 (as amended). It is not a condition of entitlement to benefit that a claim be made for it in the following cases (see reg 3 (amended by SI 1989/136; SI 1990/2208; SI 1994/2943; and SI 1996/1460));

139 (1) in the case of a Category C retirement pension (see PARA 579 post) where the beneficiary is in receipt of another retirement pension, widow's benefit or benefit corresponding to a widow's pension or a widowed mother's allowance;

140 (2) in the case of a Category D retirement pension (see PARA 580 post) where the beneficiary was ordinarily resident in Great Britain (see PARA 15 note 4 ante) on the day on which he attained 80 years of age and is in receipt of another retirement pension;

141 (3) age addition (see PARA 588 post) in any case;

142 (4) in the case of a Category A or B retirement pension (see PARA 568 et seq post) where the beneficiary is a woman over the age of 65 and entitled to a widowed mother's allowance (see PARA 85 ante), on her ceasing to be so entitled, or where the beneficiary is a woman under the age of 65 and in receipt of widow's pension (see PARA 86 ante), on her attaining that age;

143 (5) in the case of retirement allowance;

144 (6) in the case of a jobseeker's allowance (see PARA 258 et seq ante) where:

10. (a) that allowance has previously been claimed and an award made;

10

11. (b) the Secretary of State (as to whom see PARA 1 ante) has directed under the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 37(1A) (as substituted and added) that payment under that award be suspended for a definite or indefinite period on the ground that a question arises whether the conditions for entitlement to that allowance are or were fulfilled or the award ought to be revised;

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12. (c) subsequently that suspension expires or is cancelled in respect of a part only of the period for which it has been in force;

12

13. (d) it is then determined that the award should be revised to the effect that there was no entitlement to the allowance in respect of all or any part of the period between the start of the period over which the award has been suspended and the date when the suspension expires or is cancelled; and

13

14. (e) there are no other circumstances which cast doubt on the claimant's entitlement.

14

8 le unless the Social Security Administration Act 1992 s 1(1B) (as added) is satisfied: see the text to note 11 infra.

9 See *ibid* s 1(1A) (s 1(1A)-(1C) added by the Social Security Administration (Fraud) Act 1997 s 19). Regulations may make provision disapplying the Social Security Administration Act 1992 s 1(1A) (as added) in the case of (1) prescribed benefits; (2) prescribed descriptions of persons making claims; or (3) prescribed descriptions of persons in respect of whom benefit is claimed, or in other prescribed circumstances: see s 1(1C) (as so added). As to the exercise of this power see the Social Security (National Insurance Number Information: Exemption) Regulations 1997, SI 1997/2676, disapplying the requirement to state a national insurance number in relation to (a) any claim for attendance allowance made or treated as made before 9 February 1998; (b) council tax benefit; (c) a person under the age of 16 on a claim for disability living allowance, and any claim for that allowance made or treated as made before that date; (d) a child or young person in respect of whom disability working allowance is claimed, any claim for disability working allowance made or treated as made before that date, or a partner in respect of whom a claim for disability working allowance is made or treated as made before 5 October 1998; (e) a child or young person in respect of whom family credit is claimed, any claim for family credit made or treated as made before 9 February 1998 or a partner in respect of whom a claim for family credit is made or treated as made before 5 October 1998; (f) guardian's allowance; (g) housing benefit; (h) a child in respect of whom an increase of incapacity benefit is claimed or an adult dependant in respect of whom a claim for such an increase is made or treated as made before 5 October 1998; (i) a child or young person in respect of whom income support is claimed or a partner in respect of whom a claim for income support is made or treated as made before that date; (j) a child in respect of whom an increase of invalid care allowance is claimed, any claim for invalid care allowance made or treated as made before 9 February 1998 or an adult dependant in respect of whom a claim for an increase of invalid care allowance is made or treated as made before 5 October 1998; (k) a child or young person in respect of whom jobseeker's allowance is claimed or any claim for jobseeker's allowance made or treated as made before that date; (l) an adult dependant in respect of whom a claim for an increase of maternity allowance is made or treated as made before that date; (m) a child in respect of whom an increase of severe disablement allowance is claimed or an adult dependant in respect of whom a claim for such an increase is made or treated as made before 5 October 1998; (n) a child in respect of whom an increase of retirement pension is claimed or an adult dependant in respect of whom a claim for an increase of such retirement pension is made before that date; (o) a child in respect of whom an increase of widowed mother's allowance is claimed: see regs 2-15, which come into force on 1 December 1997 (reg 1(1)) and amend the relevant regulations covering the various benefits mentioned.

10 But as to the disapplication of this requirement see note 9 *supra*.

11 See the Social Security Administration Act 1992 s 1(1B) (as added: see note 9 *supra*).

12 le where *ibid* s 2 applies. Section 2 applies where a claim for benefit is made or treated as made at any time on or after 2 September 1985 in respect of a period the whole or any part of which falls on or after that date: see the Social Security Administration Act 1992 s 2(1).

13 In *ibid* s 2 'the relevant claim enactment' means s 1 (as amended) as it has effect in relation to the claim referred to in s 2(1): see s 2(3).

14 See *ibid* s 2(2).

15 le whether before, on or after 2 September 1985, and whether by the same claimant as the claim referred to in *ibid* s 2(1) (see note 12 *supra*) or not.

16 In *ibid* s 2(4) 'the current requirements' means: (1) the relevant claim enactment, and any regulations made or treated as made under that enactment, or referred to in it, as in force at the time of the claim referred to in s 2(1), with any necessary modifications; and (2) s 2(1) (with the omission of the words following 'at any time') and s 2(2), (3): see s 2(5).

17 le as mentioned in *ibid* s 2(1): see note 12 *supra*.

18 le notwithstanding anything in ibid s 2(2): see s 2(4).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to

entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **337 The necessity of a claim**

NOTES--As to claims for, or entitlement to, certain benefits being made conditional on participation in work-focused interviews see PARAS 337A, 337B.

As to work-related activity see PARA 337C.

NOTE 2--'Benefit' now includes state pension credit: 1992 Act s 1(4) (amended by the State Pension Credit Act 2002 Sch 1 para 2).

'Benefit' also includes an employment and support allowance: 1992 Act s 1(4) (amended by Welfare Reform Act 2007 Sch 3 para 10(2)).

NOTE 7--Head (1) refers also to the beneficiary being in receipt of a bereavement benefit (see PARA 54) under the Social Security Contributions and Benefits Act 1992 Pt II (ss 20-62): SI 1987/1968 reg 3 (amended by SI 2000/1483, SI 2008/441).

Head (4) refers also to a woman over the age of 65 and entitled to a widowed parent's allowance (see PARA 87A) and to a woman under the age of 65 and in receipt of bereavement allowance (see PARA 87B): reg 3 (amended by SI 2000/1483, SI 2008/441).

In head (6)(b) SI 1987/1968 reg 37 omitted in relation to tax credit: SI 1999/2572.

Also, head (7) in the case of income support, there is no requirement to make a claim where the beneficiary (a) is a person to whom the Income Support (General) Regulations 1987, SI 1987/1967, reg 6(5) (see PARA 180) applies; (b) was in receipt of an income-based jobseeker's allowance or an income-related employment and support allowance on the day before the day on which he was first engaged in the work referred to in reg 6(2)(a), (5)(a); and (c) would satisfy the conditions of entitlement to income support (apart from the condition of making a claim which would apply in the absence of SI 1987/1968 reg 3(h) only by virtue of SI 1987/1967 reg 6(5): SI 1987/1968 reg 3(h) (added by SI 1999/2556; and amended by SI 2001/488, SI 2003/1589, SI 2008/1554).

Also, head (8) in the case of a shared additional pension where the beneficiary is in receipt of a retirement pension of any category: SI 1987/1968 reg 3(i) (added by SI 2005/1551). 'Shared additional pension' means a shared additional pension under the 1992 Act s 55A (see PARA 582A): SI 1987/1968 reg 2(1) (amended by SI 2005/1551).

Also, heads (9) in the case of a Category A retirement pension where the beneficiary (a) is entitled to any category of retirement pension other than a Category A retirement pension; and (b) becomes divorced or the beneficiary's civil partnership is dissolved; (10) in the case of a Category B retirement pension where (a) the beneficiary is entitled to either a Category A retirement pension or to a graduated retirement benefit or to both; and (b) the spouse or civil partner of the beneficiary becomes entitled to a Category A retirement pension or the beneficiary marries or enters into a civil partnership with a person who is entitled to a Category A retirement pension or the spouse or civil partner of the beneficiary dies having been entitled to a Category A retirement pension at the date of death; and (11) in the case of a bereavement payment where the beneficiary is in receipt of a retirement pension at the date of death of the beneficiary's spouse or civil partner and satisfies the conditions of entitlement under the Social Security Contributions and Benefits Act 1992 s 36(1): SI 1987/1968 reg 3(ca), (cb), (da) (added by SI 2007/2470; reg 3(cb) substituted by SI 2008/441 and amended by SI 2009/1490; reg 3(da) substituted by SI 2008/2667). Also, head (12) in the case of an employment and support allowance where the beneficiary has made and is pursuing an appeal against the decision of the Secretary of State that he does not have limited capability for work: SI 1987/1968 reg 3(j) (added by SI 2008/1554).

NOTE 9--Subject to savings (see SI 2003/962), family credit (working families' tax credit) and disability working allowance (disabled person's tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A. The 1992 Act s 1(1A) is disapplied in respect of hostel dwellers and children or young persons: Housing Benefit Regulations 2006, SI 2006/213, reg 4 (amended by SI 2009/471); Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006, SI 2006/214, reg 4 (amended by SI 2009/471).

See Social Security (National Insurance Number Information: Exemption) Regulations 2009, SI 2009/471, which provide that where a person is the partner of a claimant, has no right to enter or remain in the United Kingdom, is not entitled to social security benefits, and does not already have a national insurance number, the claimant is not required to state a national insurance number in relation to that person on a claim form.

NOTE 10--The claimant must provide both his own and his partner's national insurance numbers: *Secretary of State for Work and Pensions v Wilson* [2006] EWCA Civ 882, (2006) Times, 4 July. As to the circumstances in which a claimant is not required to provide his partner's national insurance number see NOTE 9.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(2) CLAIMS FOR BENEFIT/(i) General Requirements/337A. Claim or full entitlement to certain benefits conditional on work-focused interview.

**337A. Claim or full entitlement to certain benefits conditional on work-focused interview.**

Regulations may make provision for or in connection with (1) imposing, as a condition falling to be satisfied by a person who (a) makes a claim for a benefit to which this provision applies, and (b) has not attained pensionable age at the time of making the claim<sup>1</sup>, a requirement to take part in one or more work-focused interviews<sup>2</sup>; (2) imposing, at a time when a person has not attained pensionable age and is entitled to such a benefit, and any prescribed circumstances exist, a requirement to take part in one or more work-focused interviews as a condition of that person continuing to be entitled to the full amount which is payable to him in respect of the benefit apart from the regulations<sup>3</sup>.

The benefits to which this provision applies are income support, housing benefit, council tax benefit, widow's and bereavement benefits<sup>4</sup>, incapacity benefit, severe disablement allowance and invalid care allowance<sup>5</sup>.

Supplementary provision is made in relation to work-focused interviews<sup>6</sup>.

Regulations may also make provision for or in connection with imposing, at a time when (a) a person has not attained pensionable age<sup>7</sup>, and who has a partner who has also not attained pensionable age, is entitled to a benefit to which this provision applies at a higher rate referable to his partner; and (b) prescribed circumstances exist, a requirement for the partner to take part in a one or more work-focused interviews as a condition of the benefit continuing to be payable to the claimant at that rate<sup>8</sup>.

1 But see the Social Security Administration Act 1992 s 2A(1A) (see NOTE 3).

2 'Work-focused interview', in relation to a person, means an interview conducted for such purposes connected with employment or training in the case of that person as may be specified in accordance with regulations, and the purposes which may be so specified include purposes connected with a person's existing or future employment or training prospects or needs and, in particular, assisting or encouraging a person to enhance his employment prospects: Social Security Administration Act 1992 s 2A(8) (s 2A added by Welfare Reform and Pensions Act 1999 s 57).

3 Social Security Administration Act 1992 s 2A(1) (amended by the Welfare Reform Act 2009 s 35(2), (4)). For the purposes of the Social Security Administration Act 1992 s 2A(1) a man born before 6 April 1955 is treated as attaining pensionable age when a woman born on the same day as the man would attain pensionable age: s 2A(1A) (added by the Welfare Reform Act 2009 s 35(2)). See also Social Security Administration Act 1992 s 2A(7); and NOTE 4.

4 Ie falling within the Social Security Contributions and Benefits Act 1992 s 20(1)(e), (ea), other than a bereavement payment.

5 Social Security Administration Act 1992 s 2A(2) (prospectively amended by Welfare Reform Act 2007 Sch 8 so as to omit references to incapacity benefit and severe disablement allowance).

Regulations under the 1992 Act s 2A may, in particular, make provision (1) for securing, where a person would otherwise be required to take part in interviews relating to two or more benefits (a) that he is only required to take part in one interview, and (b) that any such interview is capable of counting for the purposes of all those benefits; (2) for determining the persons by whom interviews are to be conducted; (3) conferring power on such persons or the designated authority to determine when and where interviews are to take place (including power in prescribed circumstances to determine that they are to take place in the homes of those being interviewed); (4) prescribing the circumstances in which persons attending interviews are to be regarded as having or not having taken part in them; (5) for securing that the appropriate consequences mentioned in s 2A(4)(a) or (b) ensue if a person who has been notified that he is required to take part in an interview (a) fails to take part in

the interview, and (b) does not show, within the prescribed period, that he had good cause for that failure; (6) prescribing (a) matters which are or are not to be taken into account in determining whether a person does or does not have good cause for any failure to comply with the regulations, or (b) circumstances in which a person is or is not to be regarded as having or not having good cause for any such failure: s 2A(3). 'The designated authority' means such of the following as may be specified, namely the Secretary of State, a person providing services to the Secretary of State, a local authority, subject to s 2A(9), a county council in England, or subject to s 2A(9) a person providing services to, or authorised to exercise any function of, any authority mentioned above: s 2A(8) (amended by Education and Skills Act 2008 Sch 1 para 45(2)). As to the appropriate consequences of a failure falling within head (5) see Social Security Administration Act 1992 s 2A(4), (5). A county council in England or a person providing services to, or authorised to exercise any function of, such a council may be specified as the designated authority only in relation to interviews with persons to whom the council is required to make support services available under the Education and Skills Act 2008 s 68(1) (support services: provision by local education authorities): Social Security Administration Act 1992 s 2A(9) (added by Education and Skills Act 2008 Sch 1 para 45(3)).

Regulations under the Social Security Administration Act 1992 s 2A may also provide that any requirement to take part in an interview that would otherwise apply to a person by virtue of such regulations (i) is, in any prescribed circumstances, either not to apply or not to apply until such time as is specified; (ii) is not to apply if the designated authority determines that an interview would not be of assistance to that person or would not be appropriate in the circumstances; (iii) is not to apply until such time as the designated authority determines, if that authority determines that an interview would not be of assistance to that person or would not be appropriate in the circumstances, until that time; and the regulations may make provision for treating a person in relation to whom any such requirement does not apply, or does not apply until a particular time, as having complied with that requirement to such extent and for such purposes as are specified: s 2A(6). Where a person is required to take part in an interview by virtue of s 2A(1)(a) (see TEXT head (1)), and the interview is postponed by or under regulations made in pursuance of s 2A(6)(a) or (c) (see heads (i) and (iii)), the time to which it is so postponed may be a time falling after an award of the relevant benefit to that person: s 2A(7). 'Relevant benefit', in relation to any person required to take part in a work-focused interview, means any benefit in relation to which that requirement applied by virtue of s 2A(1)(a) or (b): s 2A(8).

Information supplied in pursuance of regulations under s 2A is to be taken for all purposes to be information relating to social security: s 2A(7A) (added by the Welfare Reform Act 2009 s 34(1)).

Without prejudice to the generality of the 1992 Act s 189(1)-(7) (see PARA 30), regulations under ss 2A-2F, may provide for all or any of the provisions of the regulations to apply only in relation to any area or areas specified in the regulations: s 189(7A) (added by 1999 Act Sch 12 para 82; amended by Welfare Reform Act 2009 s 2(4)).

6 The Social Security Act 1998 Pt I Ch II (ss 8-39) (social security decisions and appeals: see PARA 356A) applies to 'relevant decisions' subject to modifications, a 'relevant decision' being a decision (1) made under the Social Security Administration Act 1992 s 2A that a person (a) has failed to comply with a requirement to take part in an interview which applied to him by virtue of the regulations, or (b) has not shown, within the prescribed period mentioned in s 2A(3)(e)(ii) (see NOTE 4 head (5)(b)), that he had good cause for such a failure; or (2) made under s 2AA that (a) the partner of a person entitled to a benefit has failed to comply with a requirement to take part in an interview which applied to the partner by virtue of the regulations, or (b) it has not been shown, within the prescribed period mentioned in s 2AA(4)(f)(ii), that the partner had good cause for such a failure: see s 2B (added by the 1999 Act s 57; amended by the Employment Act 2002 Sch 7 para 9, and SI 2008/2833). As to the geographical scope of regulations under the Social Security Administration Act 1992 s 2B, see also s 189(7A); and NOTE 4. For regulations made under ss 2A, 2AA, 2B see Social Security (Work-focused Interviews) Regulations 2000, SI 2000/897 (amended by SI 2000/1982, SI 2001/652, SI 2001/3210, SI 2005/2727); Social Security (Jobcentre Plus Interviews) Regulations 2001, SI 2001/3210 (amended by SI 2005/2727, SI 2008/3051); Social Security (Jobcentre Plus Interviews) Regulations 2002, SI 2002/1703 (amended by SI 2003/2439, SI 2004/959, SI 2005/2727, SI 2006/909, SI 2008/2683, SI 2009/1541); Social Security (Jobcentre Plus Interviews for Partners) Regulations 2003, SI 2003/1886 (amended by SI 2004/959, SI 2005/2877, SI 2006/909, SI 2008/759, SI 2008/1554, SI 2008/2683); Social Security (Incapacity Benefit Work-focused Interviews) Regulations 2008, SI 2008/2928 (see PARA 177); Social Security (Working Neighbourhoods) Regulations 2004, SI 2004/959 (largely revoked by SI 2006/909); Social Security (Quarterly Work-focused Interviews for Certain Lone Parents) Regulations 2004, SI 2004/2244 (amended by SI 2005/2727). No appeal lies against a decision terminating or reducing the amount of a person's benefit made in consequence of any decision made under regulations under the Social Security Administration Act 1992 s 2A or 2AA: Social Security Act 1998 s 12(1), Sch 2 para 5A (added by 1999 Act Sch 12 para 87; and amended by 2002 Act Sch 7 para 51).

7 But see the Social Security Administration Act 1992 s 2AA(1A) (see NOTE 8).

8 See the Social Security Administration Act 1992 s 2AA (added by 2002 Act s 49; and amended by Civil Partnership Act 2004 Sch 24 para 55; Welfare Reform Act 2007 Sch 3 para 10(3), Sch 7 para 3(2), Sch 8; Education and Skills Act 2008 Sch 1 para 46; and Welfare Reform Act 2009 ss 34(2), 35(3), (4)). For the purposes of the Social Security Administration Act 1992 s 2AA a man born before 6 April 1955 is treated as attaining pensionable age when a woman born on the same day as the man would attain pensionable age: s 2AA(1A) (added by the Welfare Reform Act 2009 s 35(3)).

**UPDATE****330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

**337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(2) CLAIMS FOR BENEFIT/(i) General Requirements/337B. Optional work-focused interviews.

### **337B. Optional work-focused interviews.**

Regulations may make provision for conferring on local authorities or<sup>1</sup> county councils in England functions in connection with conducting work-focused interviews<sup>2</sup> in cases where such interviews are requested or consented to by persons to whom the following provision applies<sup>3</sup>. This provision applies to persons making claims for or entitled to any one of a number of specified benefits<sup>4</sup> or any prescribed benefit; and it so applies regardless of whether such persons have, in accordance with certain regulations<sup>5</sup>, already taken part in interviews conducted under such regulations<sup>6</sup>. The functions which may be conferred on a local authority or on a county council in England by regulations under this provision include functions relating to (1) the obtaining and receiving of information for the purposes of work-focused interviews conducted under the regulations; (2) the recording and forwarding of information supplied at, or for the purposes of, such interviews; (3) the taking of steps to identify potential employment or training opportunities for persons taking part in such interviews<sup>7</sup>. Regulations under this provision may make different provision for different areas or different authorities<sup>8</sup>.

1 Subject to the Social Security Administration Act 1992 s 2C(3A).

2 'Work-focused interview', in relation to a person to whom this provision applies, means an interview conducted for any or all of the following purposes (1) assessing a person's prospects for existing or future employment (whether paid or voluntary); (2) assisting or encouraging a person to enhance his prospects of such employment; (3) identifying activities which the person may undertake to strengthen his existing or future prospects of such employment; (4) identifying current or future employment or training opportunities suitable to the person's needs; and (5) identifying educational opportunities connected with the existing or future employment prospects or needs of the person: Social Security Administration Act 1992 s 2C(5) (s 2C added by the Welfare Reform and Pensions Act 1999 s 58); Social Security (Claims and Information) Regulations 1999, SI 1999/3108, reg 3.

3 1992 Act s 2C(1) (amended by Education and Skills Act 2008 Sch 1 para 47(2)) (1992 Act s 2C as added: see note 2). See SI 1999/3108 (note 2) reg 4(1)-(3).

Regulations under the 1992 Act may confer functions on a county council in England only in relation to interviews with persons to whom the council is required to make support services available under the Education and Skills Act 2008 s 68(1) (support services: provision by local education authorities): 1992 Act s 2C(3A) (added by Education and Skills Act 2008 Sch 1 para 47(4)).

4 See 1992 Act ss 2A(2), 2AA(2); and PARA 337A. See SI 1999/3108 reg 4(4).

5 I.e regulations made under 1992 Act s 2A: see PARA 337A.

6 Ibid s 2C(2) (amended by Employment Act 2002 Sch 7 para 10).

7 Ibid s 2C(3) (amended by Education and Skills Act 2008 Sch 1 para 47(3)). See SI 1999/3108 reg 4(6).

8 1992 Act s 2C(4) (s 2C as inserted: see note 2). See SI 1999/3108 Schs 1, 2. See also Social Security Administration Act 1992 s 189(7A); and PARA 337A note 4.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training

Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(2) CLAIMS FOR BENEFIT/(i) General Requirements/337C. Work-related activity: income support claimants and partners of claimants.

### **337C. Work-related activity: income support claimants and partners of claimants.**

#### **1. Work-related activity**

Regulations may make provision for or in connection with imposing on a person who (1) is entitled to income support, and (2) is not a lone parent of a child under the age of three, a requirement to undertake work-related activity in accordance with regulations as a condition of continuing to be entitled to the full amount of income support payable apart from the regulations: Social Security Administration Act 1992 s 2D(1) (s 2D added by Welfare Reform Act 2009 s 2(2)). 'Lone parent' means a person who is not a member of a couple, and is responsible for, and a member of the same household as, a child: Social Security Administration Act 1992 s 2D(9)(b). 'Couple' has the meaning given by the Social Security Contributions and Benefits Act 1992 s 137(1) (see PARA 175): Social Security Administration Act 1992 s 2D(9)(a). 'Work-related activity', in relation to a person, means activity which makes it more likely that the person will obtain or remain in work or be able to do so: s 2D(9)(d). Regulations may make provision for or in connection with imposing on a person ('P') who (a) is under pensionable age, and (b) is a member of a couple the other member of which ('C') is entitled to a benefit to which the Social Security Administration Act 1992 s 2D(3) applies at a higher rate referable to P, a requirement to undertake work-related activity in accordance with regulations as a condition of the benefit continuing to be payable to C at that rate: s 2D(2). Any reference to a person attaining pensionable age is, in the case of a man born before 6 April 1955, a reference to the time when a woman born on the same day as the man would attain pensionable age: s 2D(9)(e). Any reference to a benefit payable to C at a higher rate referable to P is a reference to any case where the amount payable is more than it would be if C and P were not members of the same couple: s 2D(9)(f). The benefits to which s 2D(3) applies are (i) income support; (ii) an income-based jobseeker's allowance other than a joint-claim jobseeker's allowance; and (iii) an income-related employment and support allowance. s 2D(3). Further provision with respect to work-related activity is made: see s 2D(4)-(11).

See also Welfare Reform Act 2009 s 8 (parliamentary procedure: regulations imposing work-related activity requirements on lone parents of children under seven).

#### **2. Action plans in connection with work-focused interviews**

The Secretary of State must in prescribed circumstances provide a document (referred to in the Social Security Administration Act 1992 s 2E as an 'action plan') prepared for such purposes as may be prescribed to a person who is subject to a requirement imposed under s 2A or 2AA (see PARA 337A) in relation to any of the following benefits: s 2E(1) (s 2E added by Welfare Reform Act 2009 s 2(2)). 'Prescribed' means specified in, or determined in accordance with, regulations: Social Security Administration Act 1992 s 2D(9)(c). The benefits are (1) income support; (2) an income-based jobseeker's allowance other than a joint-claim jobseeker's allowance; and (3) an income-related employment and support allowance: s 2E(2). Regulations may make provision about (a) the form of action plans; (b) the content of action plans; (c) the review and updating of action plans: s 2E(3). Regulations under s 2E may, in particular, make provision for action plans which are provided to a person who is subject under s 2D (see PARA 337C.1) to a requirement to undertake work-related activity to contain particulars of activity which, if undertaken, would enable the requirement to be met: s 2E(4). Regulations may make provision for reconsideration of an action plan at the request of the person to whom it is

provided and may, in particular, make provision about (i) the circumstances in which reconsideration may be requested; (ii) the period within which any reconsideration must take place; (iii) the matters to which regard must be had when deciding on reconsideration whether the plan should be changed; (iv) notification of the decision on reconsideration; (v) the giving of directions for the purpose of giving effect to the decision on reconsideration: s 2E(5). In preparing any action plan, the Secretary of State must have regard (so far as practicable) to its impact on the well-being of any person under the age of 16 who may be affected by it: s 2E(6).

### **3. Directions about work-related activity**

In prescribed circumstances, the Secretary of State may by direction given to a person subject to a requirement imposed under the Social Security Administration Act 1992 s 2D (see PARA 337C.1) provide that the activity specified in the direction is (1) to be the only activity which, in the person's case, is to be regarded as being work-related activity; or (2) to be regarded, in the person's case, as not being work-related activity: s 2F(1) (s 2F added by Welfare Reform Act 2009 s 2(2)). For the meaning of 'prescribed' see PARA 337C.2. For the meaning of 'work-related activity' see PARA 337C.1. But a direction under the Social Security Administration Act 1992 s 2F(1) may not specify medical or surgical treatment as the only activity which, in any person's case, is to be regarded as being work-related activity: s 2F(2). A direction under s 2F(1) given to any person (a) must be reasonable, having regard to the person's circumstances; (b) must be given to the person by being included in an action plan provided to the person under s 2E (see PARA 337C.2); and (c) may be varied or revoked by a subsequent direction under s 2F(1): s 2F(3). Where a direction under s 2F(1) varies or revokes a previous direction, it may provide for the variation or revocation to have effect from a time before the giving of the direction: s 2F(4).

### **4. Contracting-out**

The following functions of the Secretary of State may be exercised by, or by employees of, such person (if any) as the Secretary of State may authorise for the purpose, namely (1) conducting interviews under the Social Security Administration Act 1992 s 2A or 2AA (see PARA 337A); (2) providing documents under s 2E (see PARA 337C.2); (3) giving, varying or revoking directions under s 2F (see PARA 337C.3): s 2G(1) (s 2G added by Welfare Reform Act 2009 s 2(2)). Regulations may provide for specified functions of the Secretary of State to be exercised by, or by employees of, such person (if any) as the Secretary of State may authorise for the purpose: see Social Security Administration Act 1992 s 2G(2). Further provision with respect to contracting-out is made: see s 2G(3)-(11).

### **5. Good cause for failure to comply with regulations**

The Social Security Administration Act 1992 s 2H applies to any regulations made under s 2A, 2AA or 2D (see PARAS 337A, 337C.1) that prescribe matters to be taken into account in determining whether a person has good cause for any failure to comply with the regulations: s 2H(1) (s 2H added by Welfare Reform Act 2009 s 2(2)). The provision made by the regulations prescribing those matters must include provision relating to (1) the person's physical or mental health or condition; (2) the availability of childcare: Social Security Administration Act 1992 s 2H(2)

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in

arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(2) CLAIMS FOR BENEFIT/(i) General Requirements/338. Making a claim for benefit.

### **338. Making a claim for benefit.**

Every claim for benefit<sup>1</sup> other than a claim for income support or jobseeker's allowance must be made in writing on a form approved by the Secretary of State for the purpose of the benefit for which the claim is made, or in such other manner, being in writing, as the Secretary of State may accept as sufficient in the circumstances of any particular case<sup>2</sup>.

A person wishing to make a claim for benefit must (1) if it is a claim for a jobseeker's allowance, unless the Secretary of State otherwise directs, attend in person at an appropriate office<sup>3</sup> or such other place, and at such time, as the Secretary of State may specify in his case in a notice<sup>4</sup>; (2) if it is a claim for any other benefit, deliver or send the claim to an appropriate office<sup>5</sup>. If a claim, other than a claim for income support or jobseeker's allowance, is defective<sup>6</sup> at the date when it is received or has been made in writing but not on the form approved for the time being, the Secretary of State may refer the claim to the person making it or, as the case may be, supply him with the approved form, and if the form is received properly completed within one month, or such longer period as the Secretary of State may consider reasonable, from the date on which it is so referred or supplied, the Secretary of State must treat the claim as if it has been duly made in the first instance<sup>7</sup>.

A person who has made a claim may amend it at any time by notice in writing received in an appropriate office before a determination has been made on the claim, and any claim so amended may be treated as if it had been so amended in the first instance<sup>8</sup>. A person who has made a claim may withdraw it at any time before a determination has been made on it, by notice to an appropriate office, and any such notice of withdrawal has effect when it is received<sup>9</sup>.

Subject to statutory provision<sup>10</sup>, every person who makes a claim for benefit must furnish such certificates, documents, information and evidence in connection with the claim, or any question arising out of it, as may be required by the Secretary of State and must do so within the month of being required to do so or such longer period as the Secretary of State may consider reasonable<sup>11</sup>. Failure to provide such matters is not stated to make the claim invalid, and so the claim can proceed but subject to the caveat that, as the burden of proof on eligibility is usually on the claimant, a claim with incomplete information may well fail on the merits<sup>12</sup>.

Where it appears that a person who has made a claim for a specified benefit<sup>13</sup> may be entitled to another specified benefit<sup>14</sup>, any such claim may be treated by the Secretary of State as a claim alternatively, or in addition, to the second such benefit<sup>15</sup>.

1 'Claim for benefit' includes (1) an application for a declaration that an accident was an industrial accident; (2) an application for the review of an award or a decision for the purpose of obtaining any increase of benefit in respect of a child or adult dependant, or an increase in disablement benefit (in respect of special hardship, constant attendance, hospital treatment allowance or exceptionally severe disablement), but does not include any other application for the review of an award or a decision: see the Social Security (Claims and Payments) Regulations 1987 SI 1987/1968 reg 2(1) (definition amended by SI 1989/1686; and SI 1992/247).

2 Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 4(1) (amended by SI 1992/247; and SI 1997/793). In the case of a claim for family credit (see PARA 202 et seq ante), where a married or unmarried couple is included in the family, the claim must be made by the woman, unless the Secretary of State is satisfied that it would be reasonable to accept a claim by the man: Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 4(2). Subject to reg 4(3C) (as added), in the case of a married or unmarried couple, a claim for income support (see PARA 176 et seq ante) must be made by whichever partner they agree should so claim or, in default of agreement, by such one of them as the Secretary of State must in

his discretion determine: see reg 4(3) (amended by SI 1996/2431). In the case of a married or unmarried couple where both partners satisfy the conditions set out in the Social Security Contributions and Benefits Act 1992 s 129(1) (as amended) (see PARA 218 ante), a claim for disability working allowance must be made by whichever partner they agree should so claim, or in default of agreement, by such one of them as the Secretary of State must determine: see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 4(3A) (added by SI 1991/2741); Interpretation Act 1978 s 17(2)(b). Where one of a married or unmarried couple is entitled to income support under an award and, with his agreement, his partner claims income support, that entitlement terminates on the day before that claim is made or treated as made: Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 4(4). 'Married couple' means a man and a woman who are married to each other and are members of the same household: reg 2(1). 'Unmarried couple' means a man and a woman who are not married to each other but are living together as husband and wife (as to which see PARA 83 ante) otherwise than in prescribed circumstances: reg 2(1). As to the Secretary of State see PARA 1 ante.

3 'Appropriate office' means an office of the Department of Social Security or the Department for Education and Employment: *ibid* reg 2(1) (amended by SI 1996/1460); and see the Transfer of Functions (Health and Social Security) Order 1988, SI 1988/1843, art 5(3).

4 le a notice under the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 23: see PARA 291 ante.

5 See the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 4(6) (substituted by SI 1996/1460).

6 A claim, other than a claim for income support or jobseeker's allowance, which is made on the form approved for the time being is, for the purposes of the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, properly completed if completed in accordance with the instructions on the form and defective if not so completed: see reg 4(8) (substituted by SI 1997/793).

7 Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 4(7) (amended by SI 1997/793).

8 Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 5(1).

9 *Ibid* reg 5(2).

10 Subject to *ibid* reg 7(7) (as added).

11 *Ibid* reg 7(1) (amended by SI 1996/1460). Subject to the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 7(7) (as added), where a benefit may be claimed by either of two partners or where entitlement to or the amount of any benefit is or may be affected by the circumstances of a partner, the Secretary of State may require the partner other than the claimant to certify in writing whether he agrees to the claimant making the claim or, as the case may be, that he confirms the information given about his circumstances: reg 7(2) (amended by SI 1996/1460). In the case of a claim for family credit or disability working allowance, the employer of the claimant or, as the case may be, of the partner must furnish such certificates, documents, information and evidence in connection with the claim or any question arising out of it as may be required by the Secretary of State: Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 7(3) (amended by SI 1991/2741).

In the case of a person who is claiming disability working allowance, family credit, income support or jobseeker's allowance where that person or any partner is aged not less than 60 and is a member of, or a person deriving entitlement to a pension under, a personal pension scheme, or is a party to, or a person deriving entitlement to a pension under, a retirement annuity contract, he must where the Secretary of State so requires furnish the following information (1) the name and address of the pension fund holder; (2) such other information including any reference or policy number as is needed to enable the personal pension scheme or retirement annuity contract to be identified: Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 7(4) (added by SI 1995/1302; and amended by SI 1996/1460). Where the pension fund holder receives from the Secretary of State a request for details concerning the personal pension scheme or retirement annuity contract relating to a person or any partner to whom the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 7(4) (as added and amended) refers, the pension fund holder must provide the Secretary of State with any information to which reg 7(6) (as added) refers: see reg 7(5).

The information to which reg 7(6) (as added) refers is (a) where the purchase of an annuity under a personal pension scheme has been deferred, the amount of any income which is being withdrawn from the personal pension scheme; (b) in the case of (i) a personal pension scheme where income withdrawal is available, the maximum amount of income which may be withdrawn from the scheme; or (ii) a personal pension scheme where income withdrawal is not available, or a retirement annuity contract, the maximum amount of income which might be withdrawn from the fund if the fund were held under a personal pension scheme where income withdrawal was available, calculated by or on behalf of the pension fund holder by means of tables prepared from time to time by the Government Actuary which are appropriate for this purpose: see reg 7(6) (added by SI

1995/2303). As to personal pension schemes see PARA 710 et seq post; and as to retirement annuity contracts see PARA 677 et seq post.

12 Decision R(IS)4/93.

13 le specified in the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, Sch 1 Pt I col (1) (as amended).

14 le specified opposite to it in ibid Sch 1 Pt I col (2) (as amended).

15 See ibid reg 9(1).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of

facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **338 Making a claim for benefit**

TEXT AND NOTES--Where a claimant resides in both the area of a local authority specified in the Social Security (Claims and Information) Regulations 1999, SI 1999/3108, Sch 1 Pt I or II (see PARA 337B NOTE 7), and a postcode district identified in Sch 2 Pt I or II (see PARA 337B NOTE 7), any claim for a specified benefit may be made to any office of a relevant authority displaying the 'One' logo (whether or not that office is situated within the area of the local authority in which the claimant resides): SI 1987/1968 reg 4A(1) (regs 4A, 4B added by SI 1999/3108; and amended by SI 2000/897). The 'specified benefits' are (1) a jobseeker's allowance; (2) income support; (3) incapacity benefit; (4) invalid care allowance; (5) severe disablement allowance; (6) widow's benefit; (7) bereavement benefits; and (8) disability living allowance: SI 1987/1968 reg 4A(2). A claim made in accordance with reg 4A(1), other than a claim for income support or a jobseeker's allowance, must be made in writing on a form approved by the Secretary of State for the purpose of the benefit to which the claim is made, or in such other manner, being in writing, as the person to whom the claim is made may accept as sufficient in the circumstances of the particular case: reg 4A(3). Regulation 4(1A)-(1C) applies to a claim for income support or a jobseeker's allowance: reg 4A(4). A participating authority may record information or evidence relating to any social security matter supplied by or obtained from a person at an office displaying the 'One' logo, whether or not the information or evidence is supplied or obtained in connection with the making of a claim for benefit, and may give information or advice with respect to any social security matter to persons who are making, or have made, claims for any benefit to which reg 4A(2) applies: reg 4B(1). A participating authority must forward to the Secretary of State any claim for benefit, other than a claim for housing benefit or council tax benefit, together with any information or evidence supplied to the authority in connection with that claim, and any information or evidence relating to any other social security matter, except where the information or evidence relates solely to housing benefit or council tax benefit given to the authority by a person making a claim for, or who has claimed, a benefit to which SI 1987/1968 reg 4A(2) applies: reg 4B(2).

A claim for carer's allowance, attendance allowance, disability living allowance, graduated retirement benefit, retirement pension and shared additional pension, may be made by means of an electronic communication: SI 1987/1968 reg 4ZC, Sch 9ZC (both added by SI 2003/2800; and amended by SI 2005/3321).

As to making a claim for state pension credit, see SI 1987/1968 regs 4D-4F (added by SI 2002/3019; SI 1987/1968 reg 4D amended by SI 2003/1632, SI 2005/2877, SI 2006/832, SI 2006/2377, SI 2007/2911, SI 2009/2655; SI 1987/1968 reg 4F amended by SI 2003/1632, SI 2004/2327, SI 2006/832). As to making a claim for employment and support allowance, see SI 1987/1968 reg 4G-4I (added by SI 2008/1554; SI 1987/1968 regs 4G, 4H amended by SI 2009/2655).

NOTE 2--1987/1968 reg 4(1) further amended: SI 2005/34, SI 2008/2667. Subject to SI 1987/1968 reg 4(11A), in the case of a claim for income support or jobseeker's allowance, the claim must (1) be made in writing on a form approved by the Secretary of State for the purpose of the benefit for which the claim is made; (2) unless any of the reasons specified in reg 4(1B) applies, be made in accordance with the instructions on the form; and (3) unless any of those reasons applies, include such information and evidence as the form may require in connection with the claim: reg 4(1A) (reg 4(1A)-(1C) added by SI 1997/793; SI 1987/1968 reg 4(1A) amended by SI 2008/2667). The reasons referred to in SI 1987/1968 reg 4(1A) are (a)(i) the person making the claim is unable to complete the form in accordance with the instructions or to obtain the information or evidence it requires because he has a physical, learning, mental or communication difficulty; and (ii) it is not reasonably practicable for the claimant to

obtain assistance from another person to complete the form or obtain the information or evidence; or (b) the information or evidence required by the form does not exist; or (c) the information or evidence required by the form can only be obtained at serious risk of physical or mental harm to the claimant, and it is not reasonably practicable for the claimant to obtain the information or evidence by other means; or (d) the information or evidence required by the form can only be obtained from a third party, and it is not reasonably practicable for the claimant to obtain such information or evidence from such third party; or (e) the Secretary of State is of the opinion that the person making the claim or, in the case of a claim for a jobseeker's allowance by a joint-claim couple, either member of that couple has provided sufficient information or evidence to show that he is not entitled to the benefit for which the claim is made, and that it would be inappropriate to require the form to be completed or further information or evidence to be supplied: reg 4(1B) (as added; amended by SI 2000/1982). In the case of a joint-claim couple claiming a jobseeker's allowance jointly, head (a) does not apply to the extent that it is reasonably practicable for a member of a joint-claim couple to obtain assistance from the other member of that couple: SI 1987/1968 reg 4(1BA) (added by SI 2000/1982). If a person making a claim is unable to complete the claim form or supply the evidence or information it requires because one of the reasons specified in heads (a)-(d) applies, he may so notify an appropriate office by whatever means: SI 1987/1968 reg 4(1C). In the case of a claim for working families' tax credit, where a married or unmarried couple is included in the family, the claim must be made by whichever partner they agree should so claim: reg 4(2) (substituted by SI 1999/2572). Where the partners are unable to agree which of them should make the claim, the Commissioners of Inland Revenue may in their discretion determine that the claim must be made by the partner who, on the information available to the commissioners at the time of its determination, is in its opinion mainly caring for the children: SI 1987/1968 reg 4(2A) (added by SI 1999/2572). Where the commissioners determine under SI 1987/1968 reg 4(2A) that a claim for working families' tax credit must be made by the partner who in their opinion is mainly caring for the children, a claim for working families' tax credit is made by that partner on the form approved for the time being, and the claim is not completed in accordance with the instructions on the form by reason only that, in consequence of the other partner not agreeing which of them should make the claim, it has not been signed by the other partner, the commissioners may in their discretion treat that claim as completed in accordance with the instructions on the form for the purposes of reg 4(8) (see NOTE 6), notwithstanding that it has not been signed by the other partner in accordance with those instructions: reg 4(8A) (added by SI 1999/2572). A claim for graduated retirement benefit, a shared additional pension or retirement pension may be made by telephone call to the telephone number specified by the Secretary of State, unless he directs in a particular case that the claim must be made in writing: SI 1987/1968 reg 4(11) (added by SI 2005/34; amended by SI 2005/1551). Now SI 1987/1968 reg 4(1) no longer applies to a claim for state pension credit or (subject to SI 1987/1968 reg 6(1G) (PARA 339) an employment and support allowance: reg 4(10) (added by SI 2002/3019; and amended by SI 2008/1554, SI 2009/1490). A claim for income support or jobseeker's allowance may be made by telephone call to the telephone number specified by the Secretary of State where such a claim falls within a category of case for which the Secretary of State accepts telephone claims, or in any other case where the Secretary of State is willing to do so: SI 1987/1968 reg 4(11A) (added by SI 2008/2667; and amended by SI 2009/1490). SI 1987/1968 reg 4(11A) applies unless in any particular case the Secretary of State directs that the claim must be made in writing: SI 1987/1968 reg 4(11B) (added by SI 2008/2667). A claim made by telephone is properly completed if the Secretary of State is provided with all the information required to determine the claim and the claim is defective if not so completed: SI 1987/1968 reg 4(12) (added by SI 2005/34; and substituted by SI 2009/1490). As to

the provisions applicable where a claim made by telephone is defective, see SI 1987/1968 reg 4(13) (added by SI 2005/34; and substituted by SI 2009/1490).

SI 1987/1968 reg 4(3) further amended, reg 4(4) amended: SI 2005/2877. SI 1987/1968 reg 4(3C) lapsed on the repeal of the enabling authority by the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 12(2).

Definitions of 'married couple' and 'unmarried couple' omitted and definition of 'couple' added: SI 1987/1968 reg 2 (amended by SI 2005/2877).

TEXT AND NOTES 3-5--For 'Secretary of State' read 'employment officer': SI 1987/1968 reg 4(6) (amended by SI 1999/3108).

NOTE 3--'Appropriate office' now means an office of the Department for Work and Pensions: SI 1987/1968 reg 2(1) (amended by SI 2002/1397).

NOTE 5--SI 1987/1968 reg 4(6) amended, reg 4(6A)-(6D) added: SI 2003/1632. SI 1987/1968 reg 4(6A) amended: SI 2005/1551, SI 2006/832, SI 2007/2911, SI 2009/1490. SI 1987/1968 reg 4(6B), (6C) amended: SI 2007/2911.

TEXT AND NOTE 7--In calculating any period of one month for the purposes of SI 1987/1968 regs 4(7) and 6(1A)(b) (see PARA 339), there is disregarded any period commencing on a day on which a person is first notified of a decision that he failed to take part in a work-focused interview and ending on a day on which he was notified that that decision has been revised so that the decision as revised is that he did take part: reg 4(1D) (added by SI 2000/897).

NOTE 7--SI 1987/1968 reg 4(7) substituted by SI 2009/1490; and amended by SI 2009/2655. SI 1987/1968 reg 4(7ZA) added: SI 2009/1490.

NOTE 8--Now, where a claim is made by telephone (see SI 1987/1968 reg 4(11); and NOTE 2) the amendment may be made by telephone: SI 1987/1968 reg 5(1) (amended by SI 2005/34, SI 2006/832, SI 2009/1490).

NOTE 11--References to 'family credit' are now to 'working families' tax credit' and references to 'disability working allowance' to 'disabled person's tax credit': SI 1987/1968 reg 7(3), (4) (both amended by SI 1999/2572). Now where a benefit may be claimed by either of two partners or where entitlement to or the amount of any benefit is or may be affected by the circumstances of a partner, the Secretary of State may require the partner other than the claimant to do either or both of the following, within one month of being required to do so or such longer period as the commissioners may consider reasonable (1) to certify in writing whether he agrees to the claimant making the claim or, as the case may be, that he confirms the information given about his circumstances; (2) to furnish such certificates, documents, information and evidence in connection with the claim, or any question arising out of it, as the commissioners may require: SI 1987/1968 reg 7(2) (amended by SI 1999/2572). The one-month time limit prescribed by SI 1987/1968 reg 7(2) is repeated in reg 7(3)-(5) (all amended by SI 1999/2572). SI 1987/1968 reg 7(4) further amended by SI 2008/1554. Every person providing childcare in respect of which a claimant to whom the Family Credit (General) Regulations 1987, SI 1987/1973, reg 46A (see PARA 208) applies is incurring relevant childcare charges, including a person providing childcare on behalf of a school, local authority, childcare scheme or prescribed establishment, must furnish such certificates, documents, information and evidence in connection with the claim made by the claimant, or any question arising out of it, as may be required by the commissioners, and must do so within one month of being required to do so or such longer period as the commissioners may consider reasonable: SI 1987/1968 reg 7(8) (added by SI 1999/2572).

A claimant must furnish such information and evidence as the Secretary of State may require as to the likelihood of further changes in his circumstances which is needed to determine whether a period should be specified as an assessed income period under the State Pension Credit Act 2002 and, if so, the length of the period to be so specified: see SI 1987/1968 reg 7(1A)-7(1C) (added by SI 2002/3019).

NOTES 13, 14--SI 1987/1968 Sch 1 Pt I cols (1), (2) further amended: SI 2000/1483, SI 2005/1551, SI 2008/1554.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(2) CLAIMS FOR BENEFIT/(i) General Requirements/339. Date of claim.

### 339. Date of claim.

Subject to statutory provision<sup>1</sup>, the date on which a claim is made must be:

- 1047 (1) in the case of a claim which meets the requirements of a prescribed provision<sup>2</sup>, the date on which it is received<sup>3</sup> in an appropriate office<sup>4</sup>;
- 1048 (2) in the case of a claim for family credit, disability working allowance, jobseeker's allowance if first notification is received before 6 October 1997, or income support if first notification is received before 6 October 1997, which meets the requirements of a prescribed provision<sup>5</sup> and which is received in an appropriate office within one month of first notification<sup>6</sup>, whichever is the later of:
- 117 153. (a) the date on which that notification is received; and
154. (b) the first date on which that claim could have been made<sup>7</sup>;
- 118 1049 (3) in the case of a claim which does not meet the requirements of a prescribed provision<sup>8</sup> but which is treated<sup>9</sup>, as having been duly made, the date on which the claim was received in an appropriate office in the first instance<sup>10</sup>.

In the case of a claim for income support, family credit, disability working allowance or jobseeker's allowance, where the time for claiming is extended<sup>11</sup> the claim must be treated as made on the first day of the period in respect of which the claim is, by reason of the operation of statutory provision<sup>12</sup>, timeously made<sup>13</sup>.

1    Ie subject to the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 6(2)-(29) (as amended): see PARA 340 post.

2    Ie *ibid* reg 4(1) (as amended): see PARA 338 text to note 2 ante.

3    Where an Act authorises or requires any document to be served by post (whether the expression 'serve' or the expression 'give' or 'send' or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post: see the Interpretation Act 1978 s 7; and Decision CSIS/48/1992. Where a person submits a claim for attendance allowance or disability living allowance or a request under the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 6(8) (as added and amended) by post and the arrival of that claim or request at an appropriate office is delayed by postal disruption caused by industrial action, whether within the postal service or elsewhere, the claim or request must be treated as received on the day on which it would have been received if it had been delivered in the ordinary course of post: see reg 6(5) (added by SI 1989/1686; and amended by SI 1991/2741).

4    For the meaning of 'appropriate office' see PARA 338 note 3 ante.

5    Ie the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 4(1) (as amended): see PARA 338 text to note 2 ante.

6    Ie first notification in accordance with *ibid* reg 4(5) (as substituted).

7    Ie in accordance with the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968 (as amended).

8    Ie the requirements of *ibid* reg 4(1) (as amended): see PARA 338 text to note 2 ante.

9    Ie treated under *ibid* reg 4(7) (as amended): see PARA 338 text to note 7 ante.

10 See *ibid* reg 6(1) (amended by SI 1990/725; and SI 1997/793). Subject to the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 6(8A) (as added) where (1) a request is received in an appropriate office for a claim form for disability living allowance or attendance allowance; and (2) in response to the request a claim form for disability living allowance or attendance allowance is issued from an appropriate office; and (3) within the time specified the claim form properly completed is received in an appropriate office, the date on which the claim is made is the date on which the request was received in the appropriate office: see reg 6(8) (added by SI 1991/2741; and amended by SI 1993/2113). Where, in a case which would otherwise fall within the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 6(8) (as added and amended), it is not possible to determine the date when the request for a claim form was received in an appropriate office because of a failure to record that date, the claim must be treated as having been made on the date six weeks before the date on which the properly completed claim form is received in an appropriate office: see reg 6(8A) (added by SI 1993/2113).

11 *Ie* under the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 19 (as substituted): see PARA 341 post.

12 *Ie* the operation of *ibid* reg 19 (as substituted): see PARA 341 post.

13 See *ibid* reg 6(3) (added by SI 1988/522; amended by SI 1988/1725; SI 1991/2284; SI 1991/2741; and SI 1997/793). The Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 6(3) (as added and amended) does not apply when the time for claiming income support or family credit, disability working allowance or jobseeker's allowance has been extended under reg 19 (as substituted) and the failure to claim within the prescribed time for the purposes of reg 19 (as substituted) is for the reason only that the claim has been sent by post: see reg 6(4) (added by SI 1988/522; amended by SI 1991/2741; and SI 1996/1460).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see *RATING AND COUNCIL TAX* vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and

accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents'

means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **339 Date of claim**

TEXT AND NOTES 1-10--In the case of a claim made by telephone in accordance with SI 1987/1968 reg 4(11) or reg 4(11A) (see PARA 338 NOTE 2), the date of the claim will be the date the claim is properly completed and in the case of a claim made by telephone which is defective but which is treated under reg 14(3)(a) (see PARA 338 NOTE 2) as having been properly made, the date of the claim will be the date of that telephone call: reg 6(1)(c), (d) (added by SI 2005/34; reg 6(1)(c) amended by SI 2008/2667, SI 2009/1490; reg 6(1)(d) amended by SI 2009/1490). In the case of a claim for income support (1) subject to heads (2), (3), the date on which a claim is made is to be the date on which a properly completed claim is received in an appropriate office or a claim made by telephone is properly completed or the first day in respect of which the claim is made if later; (2) where a properly completed claim is received in an appropriate office or a claim made by telephone is properly completed within one month of first notification of intention to make that claim, the date of claim is to be the date on which that notification is made or is deemed to be made or the first day in respect of which the claim is made if later; (3) a notification of intention to make a claim is deemed to be made on the date when an appropriate office receives (a) a notification in accordance with SI 1987/1968 reg 4(5); or (b) a defective claim: reg 6(1A)(a)-(c) (added by SI 1997/793; reg 6(1A)(a), (b) amended by SI 2009/1490). As to the date of claim by persons subject to work-focused interviews see SI 1987/1968 reg 6A (added by SI 2000/897 and amended by SI 2001/3210, SI 2004/959, SI 2006/832). As to the date of claim by a member of a joint-claim couple see SI 1987/1968 reg 6(4ZA)-(4ZD) (added by SI 2000/1982; reg 6(4ZC) amended by SI 2009/1490). As to work-focused interviews see PARA 337A. See also SI 1987/1968 reg 6(1ZA) (added by SI 1997/1632).

Subject to SI 1987/1968 reg 6(1C), in the case of a claim for working families' tax credit or disabled person's tax credit which meets the requirements of reg 4(1) and which is received in an appropriate office within one month of first notification in accordance with reg 4(5), (a) where the claimant is entitled to that credit on the date on which that notification is received ('the notification date') and the first day of the period in respect of which that claim is made is on or before the notification date, the date on which a claim is made is the notification date; or (b) where the claimant is not entitled to that credit on the notification date but becomes so entitled before the date on which the claim is received, the date on which a claim is made is (i) the date on which the claimant becomes so entitled, or (ii) if later, the first day of the period in respect of which the claim is made provided that it is not later than the date on which the claim is received: reg 6(1B) (added by SI 2001/567). SI 1987/1968 reg 6(1B) does not apply in the case of a claim which is received in an appropriate office (A) in the case of working families' tax credit, within the period specified opposite that credit at Sch 4 para (a) col (2) or para (aa) col (2); or (B) in the case of disabled person's tax credit, within the period specified opposite that credit Sch 4 para (a) col (2) or para (b) col (2), unless the previous award of working families' tax credit or disabled person's tax credit was terminated by virtue of the Family Credit (General) Regulations 1987, SI 1987/1973,

reg 49ZA (see PARA 203) or the Disability Working Allowance (General) Regulations 1991, SI 1991/2887, reg 54A (see PARA 219): SI 1987/1968 reg 6(1C) (added by SI 2001/567 and amended by SI 2001/892). See also SI 1987/1968 reg 6(1D), (1E) (added by SI 2006/832; reg 6(1E) amended by SI 2007/2911), reg 6(1F) (added by SI 2008/1554 and amended by SI 2009/1490), reg 6(1G) (added by SI 2009/1490).

NOTE 1--SI 1987/1968 reg 6(1) (amended by SI 2000/897) is also expressed to be subject to SI 1987/1968 reg 6A (see TEXT AND NOTES). SI 1987/1968 reg 6(11), (14) revoked in relation to tax credit: SI 1999/2572. SI 1987/1968 reg 6(15A) added: SI 2007/2470. SI 1987/1968 reg 6(16)-(26) substituted: SI 2000/1596. SI 1987/1968 reg 6(16), (18) amended: SI 2002/428. SI 1987/1968 reg 6(17) amended: SI 2002/428, SI 2006/832. SI 1987/1968 reg 6(19) amended: SI 2002/428, SI 2006/2377, SI 2007/2470. SI 1987/1968 reg 6(20) substituted by SI 2006/2377 and amended by SI 2007/2470. SI 1987/1968 reg 6(21) amended: SI 2002/428, SI 2007/2470, SI 2008/2667. SI 1987/1968 reg 6(21A) added: SI 2007/2470. SI 1987/1968 reg 6(22) amended: SI 2002/428, SI 2002/2497, SI 2005/337, SI 2005/2878, SI 2006/832. SI 1987/1968 reg 6(26) amended: SI 2006/832, SI 2008/2683. SI 1987/1968 reg 6(28) amended: SI 2003/455. SI 1987/1968 reg 6(29) amended: SI 2000/1596, SI 2002/2497. SI 1987/1968 reg 6(30) added by SI 2002/248 and amended by SI 2007/2470. SI 1987/1968 reg 6(31), (32) added by SI 2004/2283. SI 1987/1968 reg 6(31) amended: SI 2005/2877. SI 1987/1968 reg 6(33) added by SI 2006/832 and amended by SI 2007/2470, SI 2008/2667, SI 2008/2683. SI 1987/1968 reg 6(34) substituted by SI 2008/2667.

TEXT AND NOTE 5--In head (2) reference to family credit and disability working allowance omitted: SI 1987/1968 reg 6(1) (amended by SI 1999/2572, SI 2001/567).

NOTE 10--SI 1987/1968 reg 6(1) amended: SI 2005/34, SI 2009/1490. SI 1987/1968 reg 6(8) amended, reg 6(8B) added: SI 2003/1632.

TEXT AND NOTE 11--For 'family credit' read 'working families' tax credit' and for disability working allowance' read 'disabled person's tax credit': SI 1987/1968 reg 6(3) (amended by SI 1999/2572).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(2) CLAIMS FOR BENEFIT/(i) General Requirements/340. Time for claiming.

### **340. Time for claiming.**

Subject to statutory provision<sup>1</sup> the prescribed time for claiming any specified benefit<sup>2</sup> is the appropriate time specified for that benefit<sup>3</sup>.

<sup>1</sup> See subject to the provisions of the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 19(2)-(8) (reg 19 as substituted).

<sup>2</sup> See specified in ibid Sch 4 col (1) (as amended).

<sup>3</sup> See ibid reg 19(1) (as substituted). Times are specified opposite the relevant benefit in Sch 4 col (2) (as amended); as to the prescribed times for claiming benefit see Sch 4 (as amended).

The prescribed time for claiming the benefits specified in reg 19(3) (as substituted) is three months beginning with any day on which, apart from satisfying the condition of making a claim, the claimant is entitled to the benefit concerned: see reg 19(2) (reg 19 substituted by SI 1997/793). The benefits to which the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 19(2) (as substituted) applies are (1) child benefit (see PARA 237 et seq ante); (2) guardian's allowance (see PARAS 117-120 ante); (3) graduated retirement benefit (see PARA 583 post); (4) invalid care allowance (see PARAS 100-101 ante); (5) maternity allowance (see PARAS 76-79 ante); (6) retirement pension of any category (see PARA 561 et seq post); (7) widow's benefit (see PARA 80 et seq ante); (8) except in a case to which the Social Security Administration Act 1992 s 3(3) applies (late claims for widowhood benefits where death is difficult to establish: see PARA 347 post), any increase in any benefit (other than income support or jobseeker's allowance) in respect of a child or adult dependant: see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 19(3) (as so substituted).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of

facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **340 [Time for claiming]**

TEXT AND NOTES--For 'family credit' read 'working families' tax credit' and for 'disability working allowance' read 'disabled person's tax credit': SI 1987/1968 reg 19(4), (6) (amended by SI 1999/2572).

NOTE 3--SI 1987/1968 Sch 4 further amended: SI 2005/455, SI 2008/1554, SI 2010/986. Heads (3), (6) omitted: SI 1987/1968 reg 19(3) (amended by SI 2005/455, SI 2008/1554). The prescribed time for claiming graduated retirement benefit and retirement pension of any category, as regards any day on which, apart from satisfying the condition of making a claim, the claimant is entitled to the benefit or pension, is now that day and the period of 12 months immediately following it: Sch 4 cols (1), (2).

Also, heads (9) subject to SI 1987/1968 reg 19(3A), (3B), bereavement benefit (see PARA 54); (10) state pension credit (see PARA 210A): reg 19(3) (amended by SI 2000/1483, SI 2005/777, SI 2008/2424). The prescribed time for claiming a bereavement payment within the meaning of the Social Security Contributions and Benefits Act s 36 (see PARA 84) is 12 months beginning with the day on which, apart from satisfying the condition of making a claim, the claimant is entitled to such a payment except for a bereavement payment: SI 1987/1968 reg 19(3)(A) (added by SI 2002/2260; and amended by SI 2005/777). See further SI 1987/1968 reg 19(3B) (added by SI 2005/777; and amended by SI 2005/2878). In any case where the application of SI 1987/1968 reg 6(16)-(34) (see PARA 339) would be advantageous to the claimant, reg 19 applies subject to reg 6(16)-(34): reg 19(3C) (added by SI 2007/2470).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(2) CLAIMS FOR BENEFIT/(i) General Requirements/341. Late claims.

### **341. Late claims.**

Subject to statutory provision<sup>1</sup>, in the case of a claim for income support, jobseeker's allowance, family credit or disability working allowance, where the claim is not made within the time specified for that benefit<sup>2</sup>, the prescribed time for claiming the benefit must be extended, subject to a maximum extension of three months, to the date on which the claim is made, where (1) any of the specified circumstances<sup>3</sup> applies or has applied to the claimant; and (2) as a result of that circumstance or those circumstances the claimant could not reasonably have been expected to make the claim earlier<sup>4</sup>.

In the case of a claim for income support, jobseeker's allowance, family credit or disability working allowance, where (a) the claim is not made within the time specified for that benefit<sup>5</sup>, but is made within one month of the expiry of that time; and (b) the Secretary of State considers that to do so would be consistent with the proper administration of benefit, the Secretary of State may direct that the prescribed time for claiming must be extended by such period as he considers appropriate, subject to a maximum of one month, where any of the specified circumstances<sup>6</sup> applies<sup>7</sup>.

Where under statutory provision<sup>8</sup> a person is required to make a claim or to be treated as making a claim for a benefit in order to be entitled to it: (i) if the benefit is a widow's payment, she is not entitled to it in respect of a death occurring more than 12 months before the date on which the claim is made or treated as made; and (ii) if the benefit is any other benefit except disablement benefit or reduced earnings allowance, the person is not entitled to it in respect of any period more than 12 months before that date<sup>9</sup>.

1    Ie subject to the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 19(8) (as substituted): see note 7 infra.

2    Ie in *ibid* Sch 4 (as amended).

3    Ie in *ibid* reg 19(5) (as substituted): see note 4 infra.

4    See *ibid* reg 19(4) (reg 19 substituted by SI 1997/793). Prior to this substitution, the question of admissibility of a late claim was governed by general tests of 'good cause' on which there was considerable case law: see Neligan *Social Security Case Law: Digest of Commissioner's Decisions* Ch 13. The circumstances now referred to in the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 19(4) (as substituted) are (1) the claimant has difficulty communicating because (a) he has learning, language or literacy difficulties; or (b) he is deaf or blind, and it was not reasonably practicable for the claimant to obtain assistance from another person to make his claim; (2) except in the case of a claim for jobseeker's allowance, the claimant was ill or disabled, and it was not reasonably practicable for the claimant to obtain assistance from another person to make his claim; (3) the claimant was caring for a person who is ill or disabled, and it was not reasonably practicable for the claimant to obtain assistance from another person to make his claim; (4) the claimant was given information by an officer of the Department of Social Security or of the Department for Education and Employment which led the claimant to believe that a claim for benefit would not succeed; (5) the claimant was given written advice by a solicitor or other professional adviser, a medical practitioner, a local authority, or a person working in a Citizens Advice Bureau or a similar advice agency, which led the claimant to believe that a claim for benefit would not succeed; (6) the claimant or his partner was given written information about his income or capital by his employer or former employer, or by a bank or building society, which led the claimant to believe that a claim for benefit would not succeed; (7) the claimant was required to deal with a domestic emergency affecting him and it was not reasonably practicable for him to obtain assistance from another person to make his claim; or (8) the claimant was prevented by adverse weather conditions from attending the appropriate office: see reg 19(5) (as so substituted). For the meaning of 'appropriate office' see PARA 338 note 3 ante.

5    Ie in *ibid* Sch 4 (as amended).

6 le in ibid reg 19(7) (as substituted): see note 7 infra.

7 See ibid reg 19(6) (reg 19 substituted by SI 1997/793). As to the Secretary of State see PARA 1 ante. The circumstances referred to in the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 19(6) (as substituted) are (1) the appropriate office where the claimant would be expected to make a claim was closed and alternative arrangements were not available; (2) the claimant was unable to attend the appropriate office due to difficulties with his normal mode of transport and there was no reasonable alternative available; (3) there were adverse postal conditions; (4) the claimant was previously in receipt of another benefit, and notification of expiry of entitlement to that benefit was not sent to the claimant before the date that his entitlement expired; (5) in the case of a claim for family credit, the claimant had previously been entitled to income support or jobseeker's allowance ('the previous benefit'), and the claim for family credit was made within one month of expiry of entitlement to the previous benefit; (6) except in the case of a claim for family credit or disability working allowance, the claimant had ceased to be a member of a married or unmarried couple within the period of one month before the claim was made; (7) during the period of one month before the claim was made a close relative of the claimant had died, and for this purpose 'close relative' means partner, parent, son, daughter, brother or sister; or (8) in the case of a claim for disability working allowance, the claimant had previously been entitled to income support, jobseeker's allowance, incapacity benefit or severe disablement allowance ('the previous benefit') and the claim for disability working allowance was made within one month of expiry of entitlement to the previous benefit: see reg 19(7) (as so substituted; amended by SI 1997/2290).

The Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 19 (as substituted and amended) does not have effect with respect to a claim to which the Income Support (General) Regulations 1987, SI 1987/1967, reg 21ZA(2) (reg 21ZA as added) (treatment of refugees) applies: see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 19(8) (as so substituted).

8 le under the Social Security Administration Act 1992 s 1(1).

9 le except as provided by ibid s 3 (as amended): s 1(2). As to late claims for widowhood benefit where death is difficult to establish see s 3 (as amended); and PARA 347 post.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI

1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible

to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **341 Late claims**

NOTE 4--SI 1987/1968 reg 19(4) amended: SI 2002/428. In head (4) for 'Department of Social Security or of Department for Education and Employment' read 'Department for Work and Pensions': SI 1987/1968 reg 19(5) (amended by SI 2002/1397).

NOTE 7--SI 1987/1968 reg 19(6) amended: SI 2002/428. In the case of income support or jobseeker's allowance, head (4) now the claimant or his partner: SI 1987/1968 reg 19(7)(d) (amended by SI 2002/428). Now, head (5) in the case of a claim for working families' tax credit, the claimant had previously been entitled, or the partner of the claimant had previously been entitled in relation to the claimant, to income support or jobseeker's allowance and the claim for working families' tax credit was made within one month of (a) the expiry of entitlement to income support ignoring any period in which entitlement resulted from the person entitled not being treated as engaged in remunerative work by virtue of the Income Support (General) Regulations 1987, SI 1987/1967, reg 6(2), (3) or reg 6(5), (6) (see PARA 180) or the expiry of entitlement to jobseeker's allowance: SI 1987/1968 reg 19(7)(e) (substituted by SI 2000/2978; and amended by SI 2001/567).

Now, head (8) in the case of a claim for disabled person's tax credit (a) the claimant had previously been entitled to income support, jobseeker's allowance, incapacity benefit or severe disablement allowance and the claim for disabled person's tax credit was made within one month of (i) the expiry of entitlement to income support ignoring any period in which entitlement resulted from the claimant not being treated as engaged in remunerative work by virtue of SI 1987/1967 reg 6(2), (3) or reg 6(5), (6), or (ii) the expiry of entitlement to jobseeker's allowance, incapacity benefit or severe disablement allowance; or (9) in the case of a claim for disabled person's tax credit, the partner of the claimant had previously been entitled in relation to the claimant to income support or jobseeker's allowance, and the claim for disabled person's tax credit was made within one month of (a) the expiry of entitlement to income support ignoring any period in which entitlement resulted from the partner of the claimant not being treated as engaged in remunerative work by virtue of reg 6(2), (3) or reg 6(5), (6), or (b) the expiry of entitlement to jobseeker's allowance: SI 1987/1968 reg 19(7)(h), (ha) (substituted by SI 2000/2978; and amended by SI 2001/567).

In addition, heads (9) in the case of a claim for a jobseeker's allowance by a member of a joint-claim couple where the other member of that couple failed to attend at the time and place specified by the Secretary of State (SI 1987/1968 reg 19(7)(i) (added by SI 2000/1982)); (10) the claimant was unable to make telephone contact with the appropriate office where he would be expected to notify his intention of making a claim

because the telephone lines to that office were busy or inoperative (SI 1987/1968 reg 19(7)(j) (added by SI 2006/2377)).

SI 1987/1968 reg 19(8) lapsed on repeal, by Asylum and Immigration (Treatment of Claimants, etc) Act 2004 s 12(2), of enabling authority

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(2) CLAIMS FOR BENEFIT/(i) General Requirements/342. Advance claims and awards.

### **342. Advance claims and awards.**

Where, although a person does not satisfy the requirements for entitlement to benefit on the date on which a claim is made, the adjudicating authority<sup>1</sup> is of the opinion that unless there is a change of circumstances he will satisfy those requirements for a period beginning on a day ('the relevant day') not more than three months after the date on which the claim is made, then that authority may (1) treat the claim as if made for a period beginning with the relevant day; and (2) award benefit accordingly, subject to the condition that the person satisfies the requirements for entitlement when benefit becomes payable under the award<sup>2</sup>.

Special provisions apply in the case of family credit, disability working allowance<sup>3</sup>, disability living allowance<sup>4</sup>, maternity allowance<sup>5</sup> and retirement pensions<sup>6</sup>.

1 As to the adjudicating authorities see PARA 356 et seq post.

2 Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 13(1). An award under reg 13(1)(b) (see head (2) in the text) must be reviewed by the adjudicating authority if the requirements for entitlement are found not to have been satisfied on the relevant day: see reg 13(2). Subject to reg 13(4), reg 13(1), (2) does not apply to any claim for maternity allowance, attendance allowance, disability living allowance, retirement pension or increase, family credit, disability working allowance or any claim within reg 11(1)(a) or (b) (as amended): see reg 13(3) (amended by SI 1991/2741; and SI 1994/2319).

3 Where a person claims family credit or disability working allowance but does not satisfy the requirements for entitlement to that benefit on the date on which the claim is made, and the adjudicating authority is of the opinion that he will satisfy those requirements for a period beginning on a day not more than three days after the date on which the claim is made, the adjudicating authority may treat the claim as if made for a period beginning with that day, and award benefit accordingly: Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 13(6) (added by SI 1994/2319).

4 Where, although a person does not satisfy the requirements for entitlement to disability living allowance on the date on which the claim is made, the adjudicating authority is of the opinion that unless there is a change of circumstances he will satisfy those requirements for a period beginning on a day ('the relevant day') not more than three months after the date on which the claim is made, then that authority may award disability living allowance from the relevant day subject to the condition that the person satisfies the requirements for entitlement on the relevant day: Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 13A(1) (reg 13A added by SI 1991/2741). Where a person makes a claim for disability living allowance on or after 3 February 1992 and before 6 April 1992 the adjudicating authority may award benefit for a period beginning on any day after 5 April 1992 being a day not more than three months after the date on which the claim was made, subject to the condition that the person satisfies the requirements for entitlement when disability living allowance becomes payable under the award: Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 13A(2) (as so added). An award under reg 13A(1) or (2) (as added) must be reviewed by the adjudicating authority if the requirements for entitlement are found not to have been satisfied when disability living allowance becomes payable under the award: see reg 13A(3) (as so added).

A person entitled to an award of disability living allowance may make a further claim for disability living allowance during the period of six months immediately before the existing award expires: reg 13C(1) (reg 13C added by SI 1991/2741). Where a person makes a claim in accordance with the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 13C(1) (as added) the adjudicating authority may (1) treat the claim as if made on the first day after the expiry of the existing award ('the renewal date'); and (2) award benefit accordingly, subject to the condition that the person satisfies the requirements for entitlement on the renewal date: see reg 13C(2) (as so added). An award under reg 13C(2)(b) (see head (2) supra) must be reviewed by the adjudicating authority if the requirements for entitlement are found not to have been satisfied on the renewal date: see reg 13C(3) (as so added).

5 Subject to the provisions of *ibid* reg 14(2), a claim for maternity allowance in expectation of confinement, or for an increase in such an allowance in respect of an adult dependant, and an award on such a claim, may be made not earlier than 14 weeks before the beginning of the expected week of confinement: see reg 14(1). A

claim for an increase of maternity allowance in respect of an adult dependant may not be made in advance unless, on the date when made, the circumstances relating to the adult dependant concerned are such as would qualify the claimant for such an increase if they occurred in a period for which she was entitled to a maternity allowance: reg 14(2).

6 A claim for a retirement pension of any category, and for any increase in any such pension, and an award on such a claim, may be made at any time not more than four months before the date on which the claimant will, subject to the fulfilment of the necessary conditions, become entitled to such a pension: see *ibid* reg 15(1). For the purposes of facilitating the determination of a subsequent claim for a Category A, B or C retirement pension, a person may at any time not more than four months before the date on which he will attain pensionable age, and notwithstanding that he intends to defer his entitlement to a Category A or Category B retirement pension at that date, submit particulars in writing to the Secretary of State in a form approved by him for that purpose with a view to the determination (in advance of the claim) of any question relating to that person's title to such a retirement pension, and subject to the necessary modifications, the provisions of the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968 apply to any such particulars: see reg 15(7) (amended by SI 1989/1642).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see *RATING AND COUNCIL TAX* vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25

plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's

employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **342 Advance claims and awards**

TEXT AND NOTES--As to advance claims and awards of state pension credit, see SI 1987/1968 reg 13D (added by SI 2002/3019, and amended by SI 2007/1331).

NOTE 2--For 'reviewed by the adjudicating authority' read 'revised or superseded by the adjudicating authority under the Social Security Act 1998 s 9 or 10': SI 1987/1968 reg 13(2) (amended by SI 1999/2572). SI 1987/1968 reg 13(3) (amended by SI 2005/1551, SI 2007/1331) is no longer subject to SI 1987/1968 reg 13(4) and applies also to a shared additional pension. Regulation 13(1), (2) does not apply to a claim for income support or a claim for jobseeker's allowance made by a person from abroad or a claim for an employment and support allowance made by a person from abroad as defined in the Employment and Support Allowance Regulations 2008, SI 2008/794, reg 70: see reg 13(9) (added by SI 2007/1331; and amended by SI 2008/1554). 'Shared additional pension' means a shared additional pension under the Social Security Contributions and Benefits Act 1992 s 55A (see PARA 582A): SI 1987/1968 reg 2(1) (amended by SI 2005/1551). See *Bhakta v Secretary of State for Work and Pensions* [2006] EWCA Civ 65, [2006] All ER (D) 195 (Feb) (decision-maker not required to be certain that claimant would satisfy requirements for entitlement before he made an advance award).

TEXT AND NOTE 3--Subject to savings (see SI 2003/962) family credit (working families' tax credit) and disability working allowance (disabled person's tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

NOTE 3--SI 1987/1968 reg 13(6) revoked: SI 2007/1331.

NOTE 6--After 'increase in any such pension,' read 'or a shared additional pension': SI 1987/1968 reg 15(1) (amended by SI 2005/1551). Where a person's entitlement to a Category A or Category B retirement pension or a shared additional pension is deferred in accordance with the Social Security Contributions and Benefits Act 1992 s 55(3) (see PARA 585), or s 55C(3) a claim for a Category A or Category B retirement pension, any increase in that pension, and a shared additional pension may be made at any time not more than four months before the date on which the period of deferment, within the meaning of s 55(3), ends: SI 1987/1968 reg 15B (added by SI 2005/455, and amended by SI 2005/1551).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(2) CLAIMS FOR BENEFIT/(i) General Requirements/343. Duration of awards.

### **343. Duration of awards.**

Subject to statutory provision<sup>1</sup> a claim for benefit is to be treated as made for an indefinite period and any award of benefit on that claim is to be made for an indefinite period<sup>2</sup>. If it would be inappropriate to treat a claim as made and to make an award for an indefinite period (for example where a relevant change of circumstances is reasonably to be expected in the near future) the claim must be treated as made and the award must be for a definite period which is appropriate in the circumstances<sup>3</sup>. In any case where benefit is awarded in respect of days subsequent to the date of claim the award must be subject to the condition that the claimant satisfies<sup>4</sup> the requirements for entitlement, and where those requirements are not satisfied the award must be reviewed<sup>5</sup>.

1    The subject to the provisions of the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 17 (as amended) and of the Social Security Contributions and Benefits Act 1992 s 71 (disability living allowance: see PARA 102 ante) and ss 128(3) and 129(6) (family credit and disability working allowance: see PARAS 203, 219 ante): see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 17(1) (amended by SI 1991/2741); and the Interpretation Act 1978 s 17(2)(b).

Where an award of income support or an income-based jobseeker's allowance is made in respect of a married or unmarried couple and one member of the couple is, at the date of claim, a person to whom the Social Security Contributions and Benefits Act 1992 s 126 (as amended) (see PARA 178 ante) or, as the case may be, the Jobseekers Act 1995 s 14 (as amended) (see PARA 301 ante) applies, the award of benefit must cease when that person returns to work with the same employer: see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 17(1A) (added by SI 1988/522; and substituted by SI 1996/1460).

2    See the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 17(1) (as amended: see note 1 supra).

3    See *ibid* reg 17(3) (amended by SI 1996/1460); Decision R(S)1/92.

4    This means that the person continues to satisfy the requirements during the currency of the award, not just that he satisfies them at the beginning of the award: Decision R(S)3/94 (a case concerning the review of an award of invalidity benefit on the ground of fitness for other work, which stresses the breadth of the power of review in the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 17(4)).

5    *Ibid* reg 17(4). As to review of awards see PARA 356 et seq post.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit

(General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are

eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **343 Duration of awards**

NOTE 1--Subject to savings (see SI 2003/962) family credit (working families' tax credit) and disability working allowance (disabled person's tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

SI 1987/1968 reg 17(1A) amended: SI 2005/2877.

TEXT AND NOTE 5--The decision to make the award must now be revised or superseded under the Social Security Act 1998 s 9 (see PARA 356A.2) or 10 (see PARA 356A.3): SI 1987/1968 reg 17(4) (amended by SI 1999/2572).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(2) CLAIMS FOR BENEFIT/(i) General Requirements/344. Claims by third parties.

### **344. Claims by third parties.**

Where (1) a person is, or is alleged to be, entitled to benefit, whether or not a claim for benefit has been made by him or on his behalf; and (2) that person is unable for the time being to act; and either (3) no receiver has been appointed by the Court of Protection with power to claim, or as the case may be, receive benefit on his behalf; or (4) in Scotland, his estate is not being administered by any tutor, curator or other guardian acting or appointed in terms of law, the Secretary of State may, upon written application made to him by a person who, if a natural person, is over the age of 18, appoint that person to exercise, on behalf of the person who is unable to act, any right to which that person may be entitled and to receive and deal on his behalf with any sums payable to him<sup>1</sup>.

Where such an appointment is made:

- 1050 (a) anything required<sup>2</sup> to be done by or to any person who is for the time being unable to act may be done by or to the receiver, tutor, curator or other guardian, if any, or by or to the person appointed<sup>3</sup> and the receipt of any person so appointed is a good discharge to the Secretary of State for any sum paid<sup>4</sup>;
- 1051 (b) in determining whether there is good cause for a late claim<sup>5</sup>, the question is whether the appointee can show good cause for the delay, not the person unable to act<sup>6</sup>;
- 1052 (c) however, for the purposes of an overpayment of benefit<sup>7</sup>, the appointee's acts and statements are imputed to the claimant, and so if such acts or statements caused the overpayment, recovery is to be from the claimant, not the appointee<sup>8</sup>.

1 Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 33(1). The terms of any appointment must cover the benefit in question in any given case; an appointment for one purpose is not to be deemed to extend to another purpose: Decision R(IS)5/91 (decided under earlier legislation; note now the potentially wider statutory wording). Where the Secretary of State has made an appointment under the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 33(1), then (1) he may at any time revoke it; (2) the person appointed may resign his office after having given one month's notice in writing to the Secretary of State of his intention to do so; (3) any such appointment terminates when the Secretary of State is notified that a receiver or other person to whom reg 33(1)(c) or (d) applies has been appointed: see reg 33(2). As to payments on death see reg 30 (as amended). If a third party makes a claim on behalf of a person unable to act without having been made an appointee, and that claim is adjudicated upon, that adjudication is not a nullity: Decision R(SB)8/84. As to the Secretary of State see PARA 1 ante.

2 le required by the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968 (as amended).

3 le under ibid reg 33 (as amended) or reg 43 (as amended) (disability living allowance for a child).

4 See ibid reg 33(3) (amended by SI 1991/2741). As to payment to third parties see PARA 351 post.

5 As to late claims see PARA 341 ante.

6 Decision R(SB)17/83; see also Decision R(S)2/51 and Decision R(G)9/52; aliter if the benefit claimed falls outside the scope of the appointment (Decision R(IS)5/91) or if a third party acts on behalf of the incapable person without being an appointee (Decision R(SB)8/84).

7 As to overpayment of benefit see PARA 385 et seq post.

8 Decision CIS/332/1993. If the claimant has died, recovery may be from his estate: Decision CIS/649/1993, applying *Secretary of State for Social Services v Solly* [1974] 3 All ER 922, CA.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **344 Claims by third parties**

TEXT AND NOTE 1--SI 1987/1968 reg 33(1) amended: SI 2007/2470.

NOTE 1--The powers of the Secretary of State under SI 1987/1968 reg 33(2) (amended by SI 1999/2572) are exercisable by the Commissioners of Inland Revenue in relation to tax credit.

SI 1987/1968 reg 30 further amended: SI 2005/3078.

NOTE 4--In head (a) a direct credit transfer under SI 1987/1968 reg 21 (see PARA 348) into the account of any person so appointed is a good discharge to the Secretary of State for any sum paid: reg 33(3) (amended by SI 2002/2441).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(2) CLAIMS FOR BENEFIT/(ii) Particular Obligations in relation to Industrial Injuries/345. Particulars of accidents etc.

## **(ii) Particular Obligations in relation to Industrial Injuries**

### **345. Particulars of accidents etc.**

Every owner or occupier (being an employer) of any mine or quarry or of any premises to which any of the provisions of the Factories Act 1961 applies and every employer by whom ten or more persons are normally employed at the same time on or about the same premises in connection with a trade or business carried on by the employer must, subject to statutory provision<sup>1</sup> (1) keep readily accessible a means (whether in a book or books or by electronic means), in a form approved by the Secretary of State, by which a person employed by the employer or some other person acting on his behalf may record the appropriate particulars<sup>2</sup> of any accident causing personal injury to that person; and (2) preserve every such record for the period of at least three years from the date of its entry<sup>3</sup>.

Every employer must take reasonable steps to investigate the circumstances of every accident of which notice is given to him<sup>4</sup> or to his servant or agent in accordance with the prescribed provisions<sup>5</sup> and, if there appear to him to be any discrepancies between the circumstances found by him as a result of his investigation and the circumstances appearing from the notice so given, he must record the circumstances so found<sup>6</sup>.

Every employer who is required to do so by the Secretary of State must furnish to an officer of his department within such reasonable period as may be required, such information and particulars as are required (a) of any accident or alleged accident in respect of which benefit<sup>7</sup> may be payable to, or in respect of the death of, a person employed by him at the time of the accident or alleged accident; (b) of the nature of and other relevant circumstances relating to any occupation prescribed<sup>8</sup> in which any person to whom or in respect of whose death benefit may be payable under that provision<sup>9</sup> was or is alleged to have been employed by him<sup>10</sup>.

If any person contravenes or fails to comply with any prescribed requirement<sup>11</sup>, he is liable on summary conviction to a penalty not exceeding a prescribed amount or, where the offence consists of continuing any such contravention or failure after conviction thereof, a prescribed amount each day on which it is so continued<sup>12</sup>.

1    le subject to the Social Security (Claims and Payments) Regulations 1979, SI 1979/628, reg 25(3)(a), (b) (substituted by SI 1993/2113).

2    In the Social Security (Claims and Payments) Regulations 1979, SI 1979/628, regs 24 and 25 (as amended), 'appropriate particulars' mean the particulars indicated in Sch 4: reg 24(5). The appropriate particulars are: (1) full name, address and occupation of injured person; (2) date and time of accident; (3) place where accident happened; (4) cause and nature of injury; (5) name, address and occupation of person giving the notice, if other than the injured person: see Sch 4.

3    See *ibid* reg 25(3) (as so amended). As to the Secretary of State see PARA 1 ante.

4    As to the requirement to give notice see PARA 346 post.

5    le in accordance with the provisions of the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 24.

6    See *ibid* reg 25(1).

7    For the meaning of 'benefit' see PARA 14 note 9 ante.

8 le for the purposes of the Social Security Contributions and Benefits Act 1992 ss 108-110 (prescribed industrial diseases etc): see PARA 150 et seq ante.

9 le ibid ss 108-110: see PARA 150 et seq ante.

10 See the Social Security (Claims and Payments) Regulations 1979, SI 1979/628, reg 25(2); and the Interpretation Act 1978 s 17(2)(b).

Save in so far as they are expressly varied or excluded by, or are inconsistent with, the provisions of the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, Pt IV (regs 10-19) (as amended), or reg 25 or 36, the Social Security (Claims and Payments) Regulations 1979, SI 1979/628 (as amended) and the Social Security (General Benefit) Regulations 1982, SI 1982/1408 (as amended) apply in relation to prescribed diseases as they apply in relation to accidents: see the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 12(1). Save as provided in Pt IV (as amended) or where the context otherwise requires, references in the Social Security (Claims and Payments) Regulations 1979, SI 1979/628 (as amended) and the Social Security (General Benefit) Regulations 1982, SI 1982/1408 (as amended) to accidents must be construed as references to prescribed diseases, references to the relevant accident must be construed as references to the relevant disease, references to the date of the relevant accident must be construed as references to the date of onset of the relevant disease, and in the Social Security (General Benefit) Regulations 1982, SI 1982/1408, reg 17 (as amended) (increase of disablement pension in cases of special hardship), the reference to the effects of the relevant injury must be construed as a reference to the effects of the relevant disease: see the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 12(2).

As to the special provisions relating to accidents to mariners see the Social Security (Industrial Injuries) (Mariners' Benefits) Regulations 1975, SI 1975/470, reg 6.

11 le any requirement of the Social Security (Claims and Payments) Regulations 1979, SI 1979/628 (not being a requirement to give notice of an accident or a requirement to submit himself to medical treatment or examination in respect of which no special penalty is provided): see reg 31 (as amended).

12 See ibid reg 31 (amended by SI 1982/1241). As to the prescribed amounts see the Social Security (Claims and Payments) Regulations 1979, SI 1979/628, reg 31 (as amended).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of

facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **345 Particulars of accidents etc**

NOTE 5--SI 1987/1968 reg 24 amended: SI 2000/3120, SI 2002/2441, SI 2009/604.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(2) CLAIMS FOR BENEFIT/(ii) Particular Obligations in relation to Industrial Injuries/346. Duties and obligations of claimants and beneficiaries.

### **346. Duties and obligations of claimants and beneficiaries.**

Every employed earner<sup>1</sup> who suffers personal injury by accident<sup>2</sup> in respect of which benefit<sup>3</sup> may be payable must give notice of that accident<sup>4</sup> either in writing or orally as soon as is practicable after its happening<sup>5</sup>. Every such notice must be given to the employer<sup>6</sup>, or (if there is more than one employer) to one of such employers, or to any foreman or other official under whose supervision the employed earner is employed at the time of the accident, or to any person designated for the purpose by the employer, and must give the appropriate particulars<sup>7</sup>.

Subject to statutory provision<sup>8</sup>, every claimant for, and every beneficiary in receipt of disablement benefit<sup>9</sup> must comply with every notice<sup>10</sup> given to him by the Secretary of State which requires him either (1) to submit himself to a medical examination<sup>11</sup> by a medical authority<sup>12</sup> for the purpose of determining the effects of the relevant accident<sup>13</sup> or the treatment appropriate to the relevant injury<sup>14</sup> or loss of faculty<sup>15</sup>; or (2) to submit himself to such medical treatment<sup>16</sup> for that injury or loss of faculty as is considered appropriate in his case by the medical practitioner in charge of the case or by any medical authority to whose examination he has submitted himself<sup>17</sup>.

Every claimant and every beneficiary who, in accordance with statutory provision<sup>18</sup>, is required to submit himself to a medical examination or to medical treatment (a) must attend at every such place and at every such time as may be required; and (b) may, in the discretion of the Secretary of State, be paid such travelling and other allowances (including compensation for loss of remunerative time) as the Secretary of State may determine<sup>19</sup>.

1 'Employed earner' means a person who is or is treated as an employed earner for the purposes of industrial injuries benefit: Social Security (Claims and Payments) Regulations 1979, SI 1979/628, reg 24(4). See PARAS 32, 128 ante.

2 These provisions are applied in the case of prescribed diseases: see PARA 345 note 10 ante.

3 For the meaning of 'benefit' see PARA 14 note 9 ante.

4 Every such notice must be given to the employer, or (if there is more than one employer) to one of such employers, or to any foreman or other official under whose supervision the employed earner is employed at the time of the accident, or to any person designated for the purpose by the employer, and must give the appropriate particulars: see the Social Security (Claims and Payments) Regulations 1979, SI 1979/628, reg 24(2). As to notice of accident and obligations of employers in the case of a mariner see the Social Security (Industrial Injuries) (Mariners' Benefits) Regulations 1975, SI 1975/470, reg 6. As to the employer's duties and obligations generally see PARA 345 ante.

5 Any such notice required to be given by an employed earner may, however, be given by some other person acting on his behalf: Social Security (Claims and Payments) Regulations 1979, SI 1979/628, reg 24(1).

6 'Employer' means, in relation to any person, the employer of that person at the time of the accident and 'employers' must be construed accordingly: see *ibid* reg 24(4).

7 See *ibid* reg 24(2). As to the appropriate particulars see PARA 345 note 2 ante.

8 *Ie* subject to the provisions of *ibid* reg 26(1)-(4) (as amended).

9 As to disablement benefit see PARA 141 *et seq* ante.

10 Every notice given to a claimant or beneficiary requiring him to submit himself to medical examination must be given in writing and must specify the time and place for examination and must not require the claimant

or beneficiary to submit himself to examination (1) by a medical board, before the expiration of the period of six days beginning with the date of the notice or such shorter period as may be reasonable in the circumstances; (2) in any other case, on a date earlier than the third day after the day on which the notice was sent: see Social Security (Claims and Payments) Regulations 1979, SI 1979/628, reg 26(2).

11 For the meaning of 'medical examination' see PARA 65 note 7 ante.

12 'Medical authority' means a medical appeal tribunal, an adjudicating medical authority or any medical practitioner appointed or nominated by the Secretary of State: see the Social Security (Claims and Payments) Regulations 1979, SI 1979/628, reg 26(4) (substituted by SI 1984/458). As to the Secretary of State see PARA 1 ante.

13 As to the application of the Social Security (Claims and Payments) Regulations 1979, SI 1979/628 (as amended) and the Social Security (General Benefit) Regulations 1982, SI 1982/1408 (as amended), see the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 12; and PARA 345 note 10 ante.

14 For the meaning of 'relevant injury' see PARA 142 note 7 ante.

15 For the meaning of 'relevant loss of faculty' see PARA 142 note 7 ante.

16 For the meaning of 'medical treatment' see PARA 149 note 1 ante.

17 Ie in accordance with the previous provisions of the Social Security (Claims and Payments) Regulations 1979, SI 1979/628, reg 26(1) (as amended).

18 Ie in accordance with the provisions of the Social Security (Claims and Payments) Regulations 1979, SI 1979/628, reg 26(1), (2) (as amended).

19 See *ibid* reg 26(3).

## **UPDATE**

### **330-450 Administration**

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Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or

falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist

with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **346 Duties and obligations of claimants and beneficiaries**

TEXT AND NOTES 8-19--SI 1987/628 reg 26(1) amended: SI 2006/832, SI 2007/1626. SI 1987/628 reg 26(2), (3) omitted: SI 2006/832.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(2) CLAIMS FOR BENEFIT/(iii) Particular Provision in relation to Certain Widowhood Benefits/347. In general.

### **(iii) Particular Provision in relation to Certain Widowhood Benefits**

#### **347. In general.**

This provision<sup>1</sup> applies where a woman's husband has died or may be presumed to have died and the circumstances are such that:

- 1053 (1) more than 12 months have elapsed since the date of death<sup>2</sup>;
- 1054 (2) Either: (a) the husband's body has not been discovered or identified or, if it has been discovered and identified, the woman does not know that fact; or (b) less than 12 months have elapsed since she first knew of the discovery and identification of the body; and
- 1055 (3) no claim for any of the widowhood benefits, that is to say: (a) widow's benefit, (b) an invalidity pension<sup>3</sup>, or (c) a Category A retirement pension<sup>4</sup>, was made or treated as made in respect of the death by the woman before 13 July 1990<sup>5</sup>.

If, in a case where a claim for a widowhood benefit is made or treated as made<sup>6</sup>, the claimant would<sup>7</sup> be entitled to:

- 1056 (i) a widow's payment in respect of the husband's death more than 12 months before the date on which the claim is made or treated as made; or
- 1057 (ii) any other widowhood benefit in respect of his death for a period more than 12 months before that date,

then she is entitled<sup>8</sup> to that payment or, as the case may be, to that other benefit<sup>9</sup>.

In any case where:

- 1058 (A) a claim for a widow's pension or a widowed mother's allowance is made, or treated as made, before 13 July 1990; and
- 1059 (B) the Secretary of State has made a payment to or for the claimant on the ground that if the claim had been received immediately after the passing of that Act she would have been entitled to that pension or allowance, or entitled to it at a higher rate, for the period in respect of which the payment is made,

the payment so made must be treated as a payment of that pension or allowance; and, if and to the extent that an award of the pension or allowance, or an award at a higher rate, is made for the period in respect of which the payment was made, the payment must be treated as made in accordance with that award<sup>10</sup>.

1    Ie the Social Security Administration Act 1992 s 3 (as amended).

2    Ie whether he died, or is presumed to have died, before or after the coming into force of *ibid* s 3.

3    Ie under the Social Security Pensions Act 1975 s 15 (repealed); replaced by the Social Security Contributions and Benefits Act 1992 s 40 (as originally enacted): see PARA 88 ante.

4 le by virtue of the the Social Security Pensions Act 1975 s 15(5) (repealed).

5 Social Security Administration Act 1992 s 3(1) (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 24). The date set out in the text (ie 13 July 1990) is the date of the coming into force of the Social Security Act 1990 s 6 (partly repealed), which added in the Social Security Act 1975 s 165C (repealed), the predecessor provision to the Social Security Administration Act 1992 s 3 (as amended).

Where s 3 (as amended) applies, notwithstanding that any time prescribed for making a claim for a widowhood benefit in respect of the death has elapsed, then: (1) in any case falling within s 3(1)(b)(i) where it has been determined: (a) under s 20(1)(b) (as amended) (see PARA 359 post) on a claim made by the woman; or (b) under s 20(4) (see PARA 359 post) on the submission of a question by her, that the husband has died or is presumed to have died; or (2) in any case falling within s 3(1)(b)(ii) where the identification was made not more than 12 months before the woman first knew of the discovery and identification of the body, such a claim may be made or treated as made at any time before the expiration of the period of 12 months beginning with the date on which that determination was made or, as the case may be, the date on which she first knew of the discovery and identification: see s 3(2).

6 le by virtue of *ibid* s 3 (as amended).

7 le apart from *ibid* s 1(2): see PARA 341 note 9 ante.

8 le notwithstanding anything in *ibid* s 1 (as amended).

9 *Ibid* s 3(3). She is entitled to that payment or other benefit together with any increase under the Social Security Contributions and Benefits Act 1992 s 80(5) (see PARA 590 post): Social Security Administration Act 1992 s 3(3).

10 See *ibid* s 4. As to the Secretary of State see PARA 1 ante.

## UPDATE

### 330-450 Administration

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### 337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is

participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during

that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **347 In general**

TEXT AND NOTES 1-9--Replaced. The following provision applies where a person's spouse or civil partner has died or may be presumed to have died on or after the appointed day and the circumstances are such that (1) more than 12 months have elapsed since the date of death; and (2) either (a) the spouse's or civil partner's body has not been discovered or identified or, if it has been discovered and identified, the surviving spouse or civil partner does not know that fact; or (b) less than 12 months have elapsed since the surviving spouse or civil partner first knew of the discovery and identification of the body: Social Security Administration Act 1992 s 3(1) (s 3 substituted by the Welfare Reform and Pensions Act 1999 Sch 8 para 17; and amended by Civil Partnership Act 2004 Sch 24 para 56). Where this provision applies, notwithstanding that any time prescribed for making a claim for a bereavement benefit in respect of the death has elapsed, then (i) in any case falling within head (2)(a) where it has been decided under the Social Security Act 1998 s 8 (see PARA 356A.1) that the spouse or civil partner has died or is presumed to have died; or (ii) in any case falling within head (2)(b) where the identification was made not more than 12 months before the surviving spouse or civil partner first knew of the discovery and identification of the body, such a claim may be made or treated as made at any time before the expiration of the period of 12 months beginning with the date on which that decision was made or, as the case may be, the date on which the surviving spouse or civil partner first knew of the discovery and identification: Social Security Administration Act 1992 s 3(2) (s 3 as substituted and amended). If, in a case where a claim for a bereavement benefit is made or treated as made by virtue of s 3, the claimant would, apart from s 1(2), be entitled to (A) a bereavement payment in respect of the spouse's or civil partner's death more than 12 months before the date on which the claim is made or treated as made; or (B) any other bereavement benefit in respect of his or her death for a period more than 12 months before that date then, notwithstanding anything in s 1, the surviving spouse or civil partner is entitled to that payment or, as the case may be, to that other benefit: Social Security Administration Act 1992 s 3(3) (s 3 as substituted; and amended (subject to savings: SI 2003/938) by Tax Credits Act 2002 Sch 6; and 2004 Act Sch 24 para 56). 'The appointed day' means the day appointed for the coming into force of the Welfare Reform and Pensions Act 1999 ss 54-56 (see PARA 85-89): Social Security Administration Act 1992 s 3(4) (s 3 as substituted).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(3) PAYMENT OF BENEFIT/348. In general.

### **(3) PAYMENT OF BENEFIT**

#### **348. In general.**

Subject to statutory provision<sup>1</sup>, benefit must be paid in accordance with an award as soon as is reasonably practicable after the award has been made, by means of an instrument of payment or by such other means as appears to the Secretary of State to be appropriate in the circumstances of any particular case<sup>2</sup>.

Where it appears to the Secretary of State to be appropriate in any class of case, benefit due to a beneficiary falling within such a class must be paid on presentation of an instrument for benefit payment in accordance with the arrangements set out<sup>3</sup>. Provision is also made for payment by way of automated credit transfer into a bank or other account of certain benefits<sup>4</sup>. Intervals and times of payment for the various benefits are prescribed<sup>5</sup>.

Except in the case of a jobseeker's allowance, every beneficiary and every person by whom or on whose behalf sums payable by way of benefit are receivable must furnish in such manner and at such times as the Secretary of State may determine such certificates and other documents and such information or facts affecting the right to benefit or to its receipt as the Secretary of State may require (either as a condition on which any sum or sums must be receivable or otherwise), and in particular must notify the Secretary of State of any change of circumstances which he might reasonably be expected to know might affect the right to benefit, or to its receipt, as soon as reasonably practicable after its occurrence, by giving notice in writing (unless the Secretary of State determines in any particular case to accept notice given otherwise than in writing) of any such change to the appropriate office<sup>6</sup>.

Where a person who is in receipt of benefit fails to comply with statutory provisions<sup>7</sup>, in so far as they relate to documents, information or facts required by the Secretary of State, that benefit may be withheld, in whole or in part, from a date not earlier than 28 days after the date on which the requirement is imposed<sup>8</sup>.

<sup>1</sup> ie subject to the provisions of the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, regs 20A-27 (as amended).

<sup>2</sup> See the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 20 (amended by SI 1994/3196). Failure to do so can only be challenged in the courts, as the statutory authorities have no jurisdiction: Decision R(IS) 7/91. For the meaning of 'Secretary of State' see PARA 1 ante.

<sup>3</sup> ie in the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 20A (as added and amended): reg 20A(1) (reg 20A added SI 1994/3196).

Where a beneficiary falls within a class mentioned in the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 20A(1) (as added) the Secretary of State must issue an instrument for benefit payment to whichever one or more of the following persons seems to him to be appropriate in the circumstances of the case (1) that beneficiary; (2) in England and Wales, the receiver appointed by the Court of Protection with power to receive benefit on behalf of that claimant; (3) in Scotland, the tutor, curator or other guardian acting or appointed in terms of law to administer the estate of that beneficiary; (4) the person appointed by the Secretary of State under reg 33 (as amended) (see PARA 344 ante) to act on behalf of that beneficiary; (5) subject to reg 20A(4A) (as added), the person authorised by that beneficiary to act on his behalf (see reg 20A(4A) (as added)); (6) the person to whom benefit is to be paid on that beneficiary's behalf further to a direction by the Secretary of State under reg 34 (as amended) (see PARA 351 post); and (7) the alternative payee under reg 36 (as amended) (see PARA 351 post): see reg 20A(2) (as so added; and substituted by SI 1996/672). Benefit must not be paid under the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 20A (as added) other than to (a) a person to whom an instrument for benefit payment has been issued in accordance with reg 20A(2) (as added and amended); or (b) subject to reg 20A(4A) (as added), a

person not falling within reg 20A(4)(a) (as added) who has been authorised by a beneficiary to whom an instrument for benefit payment has been issued to act on his behalf: see reg 20A(4) (as so added; and amended by SI 1996/672). As to the form of instruments for benefit payment see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 20A(3) (as added).

The Secretary of State must provide the paying agent with information as to the amount of benefit, if any, due to the beneficiary where the paying agent uses the instrument for benefit payment to request that information: reg 20A(5) (as so added). As to the acceptance of payment see reg 20A(5A) (as added). Where a paying agent pays benefit in accordance with reg 20A (as added), the person receiving it must sign a receipt in a form approved by the Secretary of State and such signature is sufficient discharge to the Secretary of State for any sum so paid: see reg 20A(6) (as so added). In reg 20A (as added), 'paying agent' means a person authorised by the Secretary of State to make payments of benefit in accordance with the arrangements for payment set out in reg 20A (as added): see reg 20A(7) (as so added).

4 Subject to the provisions of *ibid* reg 21 (as amended), benefit may, on the application of the person claiming, or entitled to it, and with the consent of the Secretary of State, be paid by way of automated credit transfer into a bank or other account (1) in the name of the person entitled to benefit, or his spouse or partner, or a person acting on his behalf; or (2) in the joint names of the person entitled to benefit and his spouse or partner, or the person entitled to benefit and a person acting on his behalf: see reg 21(1) (amended by SI 1992/247; SI 1994/2319; and SI 1996/672). An application for the benefit to be paid in accordance with the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 21(1) (as amended) (a) must be in writing on a form approved for the purpose by the Secretary of State or in such other manner, being in writing, as he may accept as sufficient in the circumstances, and (b) must contain a statement or be accompanied by a written statement made by the applicant declaring that he has read and understood the conditions applicable to payment of benefit in accordance with reg 21 (as amended): see reg 21(2). Subject to reg 21(3A) (as added) benefit must be paid in accordance with reg 21(1) (as amended) within seven days of the last day of each successive period of entitlement as may be provided in the application: see reg 21(3) (amended by SI 1993/1113). Income Support must be paid in accordance with the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 21(1) (as amended) within seven days of the time determined for the payment of income support in accordance with Sch 7 (as amended): see reg 21(3A) (added by SI 1993/1113).

In respect of benefit which is the subject of an arrangement for payment under the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 21 (as amended), the Secretary of State may make a particular payment of credit transfer otherwise than is provided by reg 21(3) (as amended) or reg 21(3A) (as added) if it appears to him appropriate to do so for the purpose of (i) paying any arrears of benefit, or (ii) making a payment in respect of a terminal period of an award or for any similar purpose: see reg 21(4) (amended by SI 1993/1113). The arrangement for benefit to be payable in accordance with the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 21 (as amended) may be terminated (A) by the person entitled to benefit or a person acting on his behalf by notice in writing delivered or sent to an appropriate office or (B) by the Secretary of State if the arrangement seems to him to be no longer appropriate to the circumstances of the particular case: see reg 21(5).

As to the recovery of overpayments by automated or other direct credit transfer see the Social Security (Payment on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 11.

5 As to payments see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, regs 22-27 (as amended), Schs 6, 7 (both as amended).

6 *Ibid* reg 32(1) (amended by SI 1992/2595; and SI 1996/1460). Where any sum is receivable on account of an increase of benefit in respect of an adult dependant, the Secretary of State may require the beneficiary to furnish a declaration signed by such dependant confirming the particulars respecting him, which have been given by the claimant: Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 32(2). In the case of a person who is claiming income support or a jobseeker's allowance, where that person or any partner is aged not less than 60 and is a member of, or a person deriving entitlement to a pension under, a personal pension scheme, or is a party to, or a person deriving entitlement to a pension under, a retirement annuity contract, he must where the Secretary of State so requires furnish the following information: (1) the name and address of the pension fund holder; (2) such other information including any reference or policy number as is needed to enable the personal pension scheme or retirement annuity contract to be identified: see reg 32(3) (added by SI 1995/2303; and amended by SI 1996/1460). As to further information to be given when obtaining payment of benefit see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 32(4)-(5) (as added). Failure to notify the Secretary of State of a relevant change of circumstances may mean that any resulting overpayment of benefit is recoverable from the claimant: see PARA 385 *et seq* post.

7 *Ibid* the provisions of *ibid* reg 32(1) (as amended).

8 See *ibid* reg 37AA(1) (reg 37AA added by SI 1994/2319). As to withholding of benefit in prescribed circumstances see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 37AA (as added). As to payment of withheld benefit see reg 37AB (as added). As to similar powers in the case of a person

failing to attend an office when required to do so or failing to provide evidence of incapacity for work when that is relevant to a claim see reg 37AA(3), (4) (respectively substituted by SI 1996/1460; and SI 1996/2306).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to

entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **348 In general**

TEXT AND NOTES--As to the delayed payment of a lump sum see SI 1987/1968 reg 21A (added by SI 2005/2677).

NOTE 2--SI 1987/1968 reg 20 substituted: SI 2006/832.

NOTE 3--SI 1987/1968 reg 20A omitted: SI 2006/832.

NOTE 4--Benefit may, by an arrangement between the Secretary of State and the person claiming or entitled to it or person appointed under SI 1987/1968 reg 33 or specified in reg 33(1)(c) or (d), be paid by way of direct credit transfer into a bank or other account of a person specified in head (1) or (2) without the need for an application: reg 21(1) (reg 21(1) replaced, reg 21(2) and reference to an application in reg 21(3) omitted by SI 2002/2441; SI 1987/1968 reg 21(1) amended by SI 2006/832). As to payment of guardian's allowance (see PARA 120), see SI 1987/1968 reg 21(3B), (3C) (both added by SI 1999/2358; and amended by SI 2002/2441). Working families' tax credit or disabled person's tax credit benefit must be paid within such time as the Commissioners of Inland Revenue may direct: SI 1987/1968 reg 21(3) (amended by SI 1999/2572). SI 1988/664 reg 11 amended: SI 1999/2571. In relation to payment of a joint-claim jobseeker's allowance, references in SI 1987/1968 reg 21 to the person entitled to benefit are construed as references to the member of the joint-claim couple who is the nominated member: reg 21(4A) (added by SI 2000/1982).

SI 1988/664 replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit and Guardian's Allowance (Administration) Regulations 2003, SI 2003/492 (amended by SI 2003/2107, SI 2003/2155, SI 2004/761, SI 2005/343, SI 2005/2919, SI 2008/2683, SI 2009/3268).

NOTE 5--SI 1987/1968 reg 22 amended: SI 2002/2441, SI 2008/2667, SI 2009/604. SI 1987/1968 reg 24 amended: SI 2002/2441, SI 2009/604. SI 1987/1968 reg 23 amended: SI 1999/2358; SI 2002/2441. SI 1987/1968 reg 27 amended: SI 1999/2572. SI 1987/1968 regs 26, 26A amended: SI 2000/1596. SI 1987/1968 reg 26B added by SI 2002/3019; and amended by SI 2006/832. SI 1987/1968 reg 26C added: SI 2008/1554. SI 1987/1968 Sch 6 amended: SI 1999/2358, SI 2000/1483, SI 2002/2441, SI 2005/1551, SI 2009/604. SI 1987/1968 Sch 7 amended: SI 2000/1483, SI 2000/1596, SI 2009/604. For the payment of arrears of joint-claim jobseeker's allowance where the nominated person can no longer be traced see SI 1987/1968 reg 30A (added by SI 2001/518). For the meaning of joint-claim jobseeker's allowance see PARA 260A.

NOTE 6--SI 1987/1968 reg 32(1) now reg 32(1)-(1B) (as substituted by SI 2003/1050). SI 1987/1968 reg 32(1B) amended: SI 2003/3209. SI 1987/1968 reg 32(1C) added by SI 1999/3108; and amended by SI 2003/1632. SI 1987/1968 reg 32(3) amended: SI 2008/1554.

Any information required to be given in relation to child benefit may be given electronically: SI 1987/1968 reg 32A, Sch 9C (both added by SI 2002/1789). As to information relating to awards of specified benefits see SI 1987/1968 reg 32B (added by SI 2007/2911 and amended by SI 2009/1490).

As to the application of SI 1987/1968 to state pension credit, see reg 32(6) (added by SI 2002/3019; and amended by SI 2003/2274, SI 2008/1599).

TEXT AND NOTE 8--SI 1987/1968 regs 37-37B omitted in relation to tax credit: SI 1999/2572.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(3) PAYMENT OF BENEFIT/349. Payments to persons unable to act.

### **349. Payments to persons unable to act.**

Where (1) a person is, or alleged to be, entitled to benefit, whether or not a claim for benefit has been made by him or on his behalf; and (2) that person is unable for the time being to act; and either (3) no receiver has been appointed by the Court of Protection with power to claim, or as the case may be, receive benefit on his behalf; or (4) in Scotland, his estate is not being administered by any tutor, curator or other guardian acting or appointed in terms of law, the Secretary of State may, upon written application made to him by a person who, if a natural person, is over the age of 18, appoint that person to exercise, on behalf of the person who is unable to act, any right to which that person may be entitled and to receive and deal on his behalf with any sums payable to him<sup>1</sup>.

Anything required<sup>2</sup> to be done by or to any person who is for the time being unable to act may be done by or to the receiver, tutor, curator or other guardian, if any, or by or to the person appointed<sup>3</sup> and the receipt of any person so appointed is a good discharge to the Secretary of State for any sum paid<sup>4</sup>.

1 See the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 33(1). As to the termination of an appointment see PARA 344 note 1 ante.

2 Ie by the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968 (as amended).

3 Ie under ibid regs 33 (as amended) or 43 (as amended) (disability living allowance for a child).

4 See ibid reg 33(3) (amended by SI 1991/2741). As to the Secretary of State see PARA 1 ante.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be

treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the

Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **349 Payments to persons unable to act**

NOTE 4--SI 1987/1968 reg 33(3) further amended: SI 2002/2441.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(3) PAYMENT OF BENEFIT/350. Payments on death.

### **350. Payments on death.**

On the death of a person who has made a claim for benefit<sup>1</sup>, the Secretary of State may appoint such person as he may think fit to proceed with the claim<sup>2</sup>.

Subject to statutory provision<sup>3</sup>, any sum payable by way of benefit which is payable under an award on a claim proceeded with<sup>4</sup> may be paid or distributed by the Secretary of State to or amongst persons over the age of 16 claiming as personal representatives, legatees, next of kin, or creditors of the deceased (or, where the deceased was illegitimate, to or amongst other persons over the age of 16), and prescribed provisions for the extinguishment of rights<sup>5</sup> apply to any such payment or distribution; and (1) the receipt of any such person is a good discharge to the Secretary of State for any sum so paid; and (2) where the Secretary of State is satisfied that any such sum or part of such sum is needed for the benefit of any person under the age of 16, he may obtain a good discharge for it by paying the sum or part to a person over that age who satisfies the Secretary of State that he will apply the sum so paid for the benefit of the person under the age of 16<sup>6</sup>.

Subject to statutory provision<sup>7</sup>, any sum payable by way of benefit to the deceased, payment of which he had not obtained at the date of his death, may, unless the right to it was already extinguished at that date, be paid or distributed to or amongst such persons as are mentioned in heads (1) and (2) above<sup>8</sup> and the provisions for the extinguishment of rights<sup>9</sup> apply to any such payment or distribution<sup>10</sup>.

1 As to claims by third parties see PARA 344 ante.

2 Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 30(1). Such an appointment may have retrospective effect: Decision R(SB)5/90. As to the Secretary of State see PARA 1 ante.

3 Ie subject to the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 30(4).

4 Ie under reg 30(1): see the text to note 2 supra.

5 Ie the provisions of reg 38 (as amended) (extinguishment of rights) apply: see PARA 355 post.

6 See ibid reg 30(2).

7 Ie subject to ibid reg 30(2): see the text to note 6 supra.

8 Ie as are mentioned in ibid reg 30(2).

9 Ie ibid reg 38 (as amended) applies.

10 See ibid reg 30(3). For the purpose of ibid reg 38 (as amended), however, the period of 12 months must be calculated from the date on which the right to payment of any sum is treated as having arisen in relation to any such person and not from the date on which that right is treated as having arisen in relation to the deceased: see reg 30(3). Regulation 30(2), (3) does not apply in any case unless written application for the payment of any such sum is made to the Secretary of State within 12 months from the date of the deceased's death or within such longer period as the Secretary of State may allow in any particular case: see reg 30(4).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in

arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **350 Payments on death**

TEXT AND NOTES--In a case where a joint-claim jobseeker's allowance has been awarded to a joint-claim couple and one member of that couple dies, the amount payable under that award is payable to the other member of that couple: SI 1987/1968 reg 30(4A) (added by SI 2000/1982). SI 1987/1968 reg 30 further amended: SI 2005/3078, SI 2007/2470.

NOTE 6--In head (1) a direct credit transfer under SI 1987/1968 reg 21 (see PARA 348) into any such person's account, or the receipt by him of a payment made by some other means is a good discharge to the Secretary of State for any sum so paid: reg 30(2) (amended by SI 2002/2441).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(3) PAYMENT OF BENEFIT/351. Payments to third parties.

### **351. Payments to third parties.**

The Secretary of State may direct that benefit must be paid, wholly or in part, to another natural person on the beneficiary's behalf if such a direction as to payment appears to the Secretary of State to be necessary for protecting the interests of the beneficiary, or any child or dependant in respect of whom benefit is payable<sup>1</sup>.

In addition, there are more specific powers, of considerable practical importance, permitting (1) the payment out of benefit of sums in respect of mortgage interest<sup>2</sup> to the qualifying lenders<sup>3</sup>; (2) deduction from benefit and direct payment to be made to third parties on behalf of a beneficiary<sup>4</sup>.

1 Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 34 (amended by SI 1992/2595). Where one of a married or unmarried couple residing together is entitled to child benefit, family credit or disability working allowance the Secretary of State may make arrangements whereby that benefit, as well as being payable to the person entitled to it, may, in the alternative, be paid to that person's partner on behalf of the person entitled: Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 36 (amended by SI 1991/2741). As to the Secretary of State see PARA 1 ante.

2 As to income support housing costs see PARAS 185-186 ante. As to the similar jobseeker's allowance provisions see PARA 272 ante.

3 As to the payment out of benefit of sums in respect of mortgage interest etc see PARA 352 post.

4 As to deductions which may be made from benefit and paid to third parties see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 35(1) (reg 35 as substituted and amended), Sch 9 (as amended). As to the specified benefit which may be paid direct to a third party in discharge of a liability of the beneficiary or his partner to that third party see Sch 9 para 2 (as amended). As to the maximum amounts that may be deducted see Sch 9 para 8 (as amended). As to the priority as between certain debts see Sch 9 para 9 (as amended).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act

1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **351 Payments to third parties**

NOTE 1--SI 1987/1968 reg 34 renumbered reg 34(1): SI 2000/1982. The Secretary of State may direct that a joint-claim jobseeker's allowance must be paid wholly or in part to a natural person who is not the member of the joint-claim couple who is the nominated member if such a direction as to payment appears to the Secretary of State to be necessary for protecting the interests of the other member of that couple or, as the case may be, both members of that couple: SI 1987/1968 reg 34(2) (added by SI 2000/1982).

For 'family credit or disability working allowance' read 'family credit, disability working allowance or guardian's allowance': SI 1987/1968 reg 36; SI 1999/2358. The Secretary of State may make the arrangements under SI 1987/1968 reg 36 except where a wife has elected in accordance with the Social Security (Guardian's Allowances) Regulations 1975, SI 1975/515 reg 6A (see PARA 120) that guardian's allowance is not to be paid to her husband: SI 1987/1968 reg 36; SI 1999/2358.

SI 1987/1968 reg 36 now reg 36(1) (renumbered by SI 2002/2660). Where a person is entitled to a winter fuel payment within the meaning of the Social Fund Winter Fuel Payment Regulations 2000, SI 2000/729, and (1) that person is one member of a couple or a member of a polygamous marriage; (2) the other member of that couple or another member of that marriage ('the other person') is in receipt of income support, an income-based jobseeker's allowance or an income-related employment and support allowance; and both members of the couple or marriage are living together within the meaning of reg 1(3)(b), the Secretary of State may pay the winter fuel payment to the other person on behalf of the person entitled to the payment as an alternative to paying the person entitled notwithstanding that the other person has not yet attained the age of 60 in the qualifying week: SI 1987/1968 reg 36(2) (added by SI 2002/2660; and amended by SI 2005/2877, SI 2008/1554).

NOTE 4--SI 1987/1968 reg 35(1) amended: SI 2001/18. SI 1987/1968 Sch 9 amended: SI 2002/2441, SI 2002/3019, SI 2003/2325, SI 2004/576, SI 2005/777, SI 2005/2687, SI

2006/832, SI 2006/2377, SI 2006/3188, SI 2007/1866, SI 2007/2870, SI 2008/698, SI 2008/1554, SI 2009/607, SI 2009/1490. See also SI 1987/1968 Sch 9B (added by SI 2001/18; and amended by SI 2002/1950, SI 2002/3019, SI 2008/1554) (deductions from benefit in respect of child support maintenance and payment to persons with care).

See also Transfer of Housing Corporation Functions (Modifications and Transitional Provisions) Order 2008, SI 2008/2839.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(3) PAYMENT OF BENEFIT/352. Payment out of benefit of sums in respect of mortgage interest etc.

### **352. Payment out of benefit of sums in respect of mortgage interest etc.**

The following provisions apply in relation to cases where:

- 1060 (1) mortgage interest<sup>1</sup> is payable to a qualifying lender<sup>2</sup> by a person ('the borrower') who is entitled, or whose partner<sup>3</sup>, former partner or qualifying associate<sup>4</sup> is entitled, to income support<sup>5</sup> or an income-based jobseeker's allowance<sup>6</sup>; and
- 1061 (2) a sum in respect of that mortgage interest is or was brought into account in determining the applicable amount<sup>7</sup> for the purposes of income support or an income-based jobseeker's allowance in the case of the borrower or the partner, former partner or qualifying associate<sup>8</sup>.

Regulations<sup>9</sup> may, in relation to cases where these provisions apply, make provision<sup>10</sup>:

- 1062 (a) requiring that, in prescribed circumstances<sup>11</sup>, a prescribed part of any relevant benefits<sup>12</sup> to which the relevant beneficiary<sup>13</sup> is entitled must be paid by the Secretary of State<sup>14</sup> directly to the qualifying lender and applied by that lender towards the discharge of the liability in respect of the mortgage interest;
- 1063 (b) for the expenses of the Secretary of State in administering the making of payments under the regulations to be defrayed, in whole or in part, at the expense of qualifying lenders, whether by requiring them to pay prescribed fees or by deducting and retaining a prescribed part of the payments that would otherwise be made to them under the regulations or by such other method as may be prescribed;
- 1064 (c) for requiring a qualifying lender, in a case where by virtue of head (b) above the amount of the payment made to him under the regulations is less than it would otherwise have been, to credit against the liability in respect of the mortgage interest (in addition to the payment actually made) an amount equal to the difference between the payment that would have been so made, apart from head (b) above, and the payment actually made, and, in any such case, for treating the amount so credited as properly paid on account of benefit due to the relevant beneficiary;
- 1065 (d) for enabling a body which, or person who, would otherwise be a qualifying lender to elect not to be regarded as such for these purposes, other than the purposes of this head;
- 1066 (e) for the recovery from any body or person of any sums paid to that body or person by way of payment under the regulations that ought not to have been so paid or of any fees or other sums due from that body or person by virtue of head (b) above;
- 1067 (f) for cases where the same person is the borrower in relation to mortgage interest payable in respect of two or more different loans; and
- 1068 (g) for any person of a prescribed class or description who would otherwise be regarded for these purposes as the borrower in relation to any mortgage interest not to be so regarded, except for the purposes of this head;

but the Secretary of State must not make any regulations under head (b) above unless he has consulted with such organisations representing qualifying lenders likely to be affected by the regulations as he considers appropriate<sup>15</sup>.

For these purposes, regulations may make provision as to circumstances in which residential land is or is not to be treated as intended for occupation by the borrower as his home, or as to circumstances in which persons are to be treated as being or not being members of the same household<sup>16</sup>.

1 For these purposes, 'mortgage interest' means interest on a loan which is secured by a mortgage of or charge over land, or (in Scotland) by a heritable security, and which has been taken out to defray money applied for any of the following purposes, that is to say (1) acquiring any residential land which was intended, at the time of the acquisition, for occupation by the borrower as his home; (2) carrying out repairs or improvements to any residential land which was intended, at the time of taking out the loan, for occupation by the borrower as his home; (3) paying off another loan; or (4) any prescribed purpose not falling within heads (1)-(3) supra; but interest must be regarded as mortgage interest by virtue of head (3) supra only to the extent that interest on that other loan would have been regarded as mortgage interest for these purposes had the loan not been paid off: Social Security Administration Act 1992 s 15A(4) (s 15A added by the Social Security (Mortgage Interest Payments) Act 1992 s 1(2), Schedule para 1). 'Residential land' means any land which consists of or includes a dwelling: Social Security Administration Act 1992 s 15A(4) (as so added).

2 The bodies and persons who are 'qualifying lenders' for these purposes are: (1) any authorised institution, within the meaning of the Banking Act 1987, to which s 67 applies (companies and partnerships which may describe themselves as banks etc); (2) any building society incorporated under the Building Societies Act 1986; (3) any body or person carrying on insurance business, within the meaning of the Insurance Companies Act 1982; (4) any county council, county borough council, district council or London Borough Council; (5) the Common Council of the City of London; (6) the Council of the Isles of Scilly; (7) any new town corporation, and such bodies or persons not falling within heads (1)-(7) supra as may be prescribed: Social Security Administration Act 1992 s 15A(3) (as added: see note 1 supra; amended by the Local Government etc (Scotland) Act 1994 s 180, Sch 13 para 175(1), (2), Sch 14; the Local Government (Wales) Act 1994 s 22(2), Sch 8 para 11).

3 'Partner' means: (1) any person to whom the borrower is married and who is a member of the same household as the borrower; or (2) any person to whom the borrower is not married but who lives together with the borrower as husband and wife, otherwise than in prescribed circumstances; and 'former partner' means a person who has at some time been, but no longer is, the borrower's partner: Social Security Administration Act 1992 s 15A(4) (as added: see note 1 supra).

4 'Qualifying associate', in relation to the borrower, means a person who, for the purposes of income support or an income-based jobseeker's allowance, falls to be treated by regulations under the Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) (as amended) or, as the case may be, under the Jobseekers Act 1995, as responsible for so much of the expenditure which relates to housing costs (within the meaning of those regulations) as consists of any of the mortgage interest payable by the borrower, and who falls to be so treated because (1) the borrower is not meeting those costs, so that the person has to meet them if he is to continue to live in the dwelling occupied as his home; and (2) the person is one whom it is reasonable, in the circumstances, to treat as liable to meet those costs: Social Security Administration Act 1992 s 15A(4) (as added: see note 1 supra; definition amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 40).

5 As to entitlement to income support see PARA 176 et seq ante.

6 As to entitlement to an income-based jobseeker's allowance see PARA 271 et sq ante.

7 For the meaning of 'applicable amount' see PARAS 174 note 3, 272 ante.

8 Social Security Administration Act 1992 s 15A(1) (as added: see note 1 supra; amended by the Jobseekers Act 1995 Sch 2 para 40).

9 As to the power to make regulations generally see PARA 30 ante.

10 Ie without prejudice to the Social Security Administration Act 1992 s 5(1)(i), (p): see PARA 330 ante.

11 For the meaning of 'prescribed' see PARA 19 note 3 ante.

12 'Relevant benefits' means such of the following benefits as may be prescribed, namely (1) benefits, as defined in the Social Security Contributions and Benefits Act 1992 s 122 (as amended) (see PARA 13 note 8

ante); (2) a jobseeker's allowance; and (3) income support: Social Security Administration Act 1992 s 15A(4) (as added: see note 1 supra; definition amended by the Jobseekers Act 1995 Sch 2 para 40).

13 Any reference in these provisions to 'the relevant beneficiary' is a reference to the person whose applicable amount for the purposes of income support or an income-based jobseeker's allowance is or was determined as mentioned in head (2) in the text: see the Social Security Administration Act 1992 s 15A(1) (as added and amended: see notes 1, 8 supra).

14 As to the Secretary of State see PARA 1 ante.

15 Social Security Administration Act 1992 s 15A(2) (as added: see note 1 supra).

16 Ibid s 15A(5) (as added: see note 1 supra). As to the exercise of the power conferred by s 15A (as added and amended) see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 34A (as added), Sch 9A (as added and amended).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory

top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's

employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **352 Payment out of benefit of sums in respect of mortgage interest etc**

TEXT AND NOTES--The provisions also apply where (1) mortgage interest is payable to a qualifying lender by a person ('the borrower') who is entitled, or whose partner, former partner or qualifying associate is entitled, to income support or an income-based jobseeker's allowance, and (2) a sum in respect of that mortgage interest is or was brought into account in determining the applicable amount for the purposes of income support or an income-based jobseeker's allowance in the case of the borrower or the partner, former partner or qualifying associate: 1992 Act s 15A(1A) (added by the State Pension Credit Act 2002 Sch 2 para 9). Any reference in the 1992 Act s 15A to 'the relevant beneficiary' is a reference to the person whose applicable amount for the purposes of income support or an income-based jobseeker's allowance is or was determined as mentioned in head (2): s 15A(1A) (as so added). 'Appropriate minimum guarantee' has the meaning given by the 2002 Act s 2(3): 1992 Act s 15A(4) (amended by the 2002 Act Sch 2 para 9).

NOTE 2--Now, head (1) a deposit taker; head (2) omitted; and head (3) an insurer: Social Security Administration Act 1992 s 15A(3) (amended by Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649). For the meaning of 'deposit taker' and 'insurer' see Social Security Administration Act 1992 s 15A(4), (4A) (s 15A(4) amended by SI 2001/3649, SI 2002/1555; 1992 Act s 15A(4A) added by SI 2001/3649).

NOTE 3--Definition of 'partner' in Social Security Administration Act 1992 s 15A(4) amended: Civil Partnership Act 2004 Sch 24 para 57(2). See further Social Security Administration Act 1992 s 15A(4B) (added by the 2004 Act Sch 24 para 57(3)).

NOTE 4--Now refers to an income-based jobseeker's allowance under the Jobseekers Act 1995 or state pension credit under the 2002 Act: 1992 Act s 15A(4) (amended by the 2002 Act Sch 2 para 9). Definition of 'qualifying associate' in 1992 Act s 15A(4) further amended: Welfare Reform Act 2007 Sch 3 para 10(5)(b).

TEXT AND NOTE 8--In 1992 Act s 15A(1) references to an income-based jobseeker's allowance are now to an income-based jobseeker's allowance or an income-related employment and support allowance: Welfare Reform Act 2007 Sch 3 para 10(5)(a).

TEXT AND NOTES 9-15--Head (a) refers to any relevant benefits other than state pension credit: 1992 Act s 15A(2) (amended by the 2002 Act Sch 2 para 9).

Also, head (h) authorising or requiring that, in prescribed circumstances, a prescribed part of any state pension credit to which the relevant beneficiary is entitled may or, as the case may be, will be paid by the Secretary of State directly to the qualifying lender and is to be applied by that lender towards the discharge of the liability in respect of the mortgage interest: 1992 Act s 15A(2).

NOTE 12--'Relevant benefits' also includes an employment and support allowance: 1992 Act s 15A(4) (amended by 2007 Act Sch 3 para 10(5)(c)).

NOTE 16--SI 1987/1968 Sch 9A further amended: SI 1997/3034, SI 1998/3039, SI 2000/1366, SI 2002/355, SI 2002/2441, SI 2003/470, SI 2004/576, SI 2004/2825, SI 2005/777, SI 2005/2154, SI 2006/551, SI 2006/2378, SI 2007/541, SI 2007/3183, SI 2008/1554, SI 2008/2831, SI 2009/583.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(3) PAYMENT OF BENEFIT/353. Interim payments and emergency payments.

### **353. Interim payments and emergency payments.**

Subject to statutory provision<sup>1</sup>, the Secretary of State<sup>2</sup> may, in his discretion, make an interim payment, that is to say a payment on account of any benefit to which it appears to him that a person is or may be entitled, in the following circumstances:

- 1069 (1) a claim for that benefit has not been made in accordance with prescribed regulations<sup>3</sup> and it is impracticable for such a claim to be made immediately; or
- 1070 (2) a claim for that benefit has been so made, but it is impracticable for it or a reference, review, application or appeal which relates to it to be determined immediately; or
- 1071 (3) an award of that benefit has been made but it is impracticable for the beneficiary to be paid immediately, except by means of an interim payment<sup>4</sup>.

Where it is practicable to do so and, where notice is required to be given under statutory provision<sup>5</sup>, such notice has been given:

- 1072 (a) any interim payment<sup>6</sup>:  
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- 155. (i) which was made in anticipation of an award of benefit must be offset by the adjudicating authority in reduction of the benefit to be awarded; and
- 156. (ii) (whether or not made in anticipation of an award) which is not offset under head (i) above<sup>7</sup> must be deducted by the Secretary of State from (A) the sum payable under the award of benefit on account of which the interim payment was made; or (B) any sum payable under any subsequent award of the same benefit to the same person; and  
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- 1073 (b) any interim payment made<sup>8</sup> must be offset by the Secretary of State against any sum received by him in respect of arrears of child support maintenance payable to the person to whom the interim payment was made<sup>9</sup>.

Subject to statutory provision<sup>10</sup>, on or before the making of an interim payment the recipient must be given notice in writing of his liability<sup>11</sup> to have it brought into account and to repay any overpayment<sup>12</sup>.

The Secretary of State may make arrangements with a local authority<sup>13</sup>, or with any other body, for the making on his behalf by members of the staff of any such authority or body of payments on account of benefits to which a prescribed provision<sup>14</sup> applies in circumstances corresponding to those in which the Secretary of State himself has the power to make such payments<sup>15</sup>; and a local authority<sup>16</sup> has power to enter into any such arrangements<sup>17</sup>.

1    le subject to the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 2(1A) (as added); see note 4 infra.

2    As to the Secretary of State see PARA 1 ante.

3    le in accordance with the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968 (as amended).

4 See the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 2(1) (amended by SI 1996/30). The Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 2(1) (as amended) does not apply pending the determination of an appeal unless the Secretary of State is of the opinion that there is entitlement to benefit: see reg 2(1A) (added by SI 1996/30).

5 Ie given under the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 2(2) (as amended).

6 Ie other than an interim payment made in the circumstances mentioned in *ibid* reg 2(4) (as added).

7 Ie under *ibid* reg 3(a)(i) (reg 3 as substituted).

8 Ie in the circumstances mentioned in *ibid* reg 2(4) (as added).

9 See *ibid* reg 3 (substituted by SI 1993/650). The circumstances in which an interim payment may be determined to have been overpaid are as follows: (1) an interim payment has been made under the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 2(1)(a) or (b) (as amended) but (a) the recipient has failed to make a claim in accordance with the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, as soon as practicable or has made a claim which is either defective or is not made on the form approved for the time being by the Secretary of State and the Secretary of State has not treated the claim as duly made under reg 4(7) (as amended), or (b) it has been determined that there is no entitlement on the claim, or that the entitlement is less than the amount of the interim payment, or that benefit on the claim is not payable, or (c) the claim has been withdrawn under reg 5(2); or (2) an interim payment has been made under the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 2(1)(c) (as amended) which exceeds the entitlement under the award of benefit on account of which the interim payment was made; or (3) an interim payment of income support has been made under reg 2(1)(b) (as amended) in the circumstances mentioned in reg 2(4) (as added): see *ibid* reg 4(3) (amended by SI 1993/650).

Where the adjudicating authority has determined that an interim payment has been overpaid in circumstances which fall within the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 4(3) (as amended) and where notice is required to be given under reg 2(2) (as amended), such notice has been given, that authority must determine the amount of the overpayment: see reg 4(1) (amended by SI 1993/650). The amount of the overpayment is recoverable by the Secretary of State by the same procedures and subject to the same conditions as if it were recoverable under the Social Security Administration Act 1992 s 71(1) (see *PARA 385 et seq post*): see the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 4(2).

10 Ie subject to *ibid* reg 2(3) (as added).

11 Ie under *ibid* Pt II (regs 2-4) (as amended).

12 See *ibid* reg 2(2) (amended by SI 1991/2742). Where the recipient of an interim payment of disability living allowance (1) is terminally ill within the meaning of the Social Security Contributions and Benefits Act 1992 s 66 (see *PARA 110 note 1 ante*); or (2) had an invalid carriage or other vehicle provided by the Secretary of State under the National Health Service Act 1977 s 5(2)(a), Sch 2 (as amended) or under the National Health Service (Scotland) Act 1978 s 46, the requirement to give notice in the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 2(2) (as amended) is omitted: see reg 2(3) (added by SI 1991/2742); and the Interpretation Act 1978 s 17(2)(b).

13 Ie to which the Social Security Administration Act 1992 s 16 applies: see s 16(1). The local authorities to which s 16 applies are (1) a local authority as defined by the Local Government Act 1972 s 270(1) (as amended), other than a parish or community council; (2) the Common Council of the City of London: see the Social Security Administration Act 1992 s 16(4).

14 Ie to which *ibid* s 5 (as amended) applies: see *PARA 330 ante*.

15 Ie under *ibid* s 5(1)(r): see *PARA 330 ante*.

16 Ie to which *ibid* s 16 applies.

17 See *ibid* s 16(1). A payment under any such arrangements is to be treated for the purposes of any Act of Parliament or instrument made under an Act of Parliament as if it had been made by the Secretary of State: s 16(2). The Secretary of State must repay a local authority or other body such amount as he determines to be the reasonable administration expenses incurred by the authority or body in making payments in accordance with arrangements under s 16: see s 16(3).

## UPDATE

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **353 Interim payments and emergency payments**

TEXT AND NOTES--SI 1988/664 replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit and Guardian's Allowance (Administration) Regulations 2003, SI 2003/492 (amended by SI 2003/2107, SI 2003/2155, SI 2004/761, SI 2005/343, SI 2005/2919, SI 2008/2683, SI 2009/3268).

TEXT AND NOTE 2--In relation to tax credit, for 'the Secretary of State' read 'the Commissioners of Inland Revenue': SI 1988/664 reg 2(1) (amended by SI 1999/2571).

TEXT AND NOTE 4--In relation to tax credit, in head (2) for 'review' read 'revision, supersession': SI 1988/664 reg 2(1) (as amended: see TEXT AND NOTE 2).

NOTE 4--In relation to tax credit, for 'the Secretary of State' read 'the Commissioners of Inland Revenue': SI 1988/664 reg 2(1A) (amended by SI 1999/2571).

NOTES 6, 8, 9--SI 1988/664 reg 2(4) amended: SI 2008/1554.

NOTE 9--SI 1988/664 amended: SI 2008/1554.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(3) PAYMENT OF BENEFIT/354. Offsetting and prevention of duplication.

### **354. Offsetting and prevention of duplication.**

Subject to statutory provision<sup>1</sup>, any sum paid in respect of a period covered by a subsequent determination in any of the specified cases<sup>2</sup> must be offset against arrears of entitlement under the subsequent determination and, except to the extent that the sum exceeds the arrears, must be treated as properly paid on account of them<sup>3</sup>. Where:

- 1074 (1) a payment by way of prescribed income is made after the date which is the prescribed date in relation to the payment; and
- 1075 (2) it is determined that an amount which has been paid by way of income support or an income-based jobseeker's allowance would not have been paid if the payment had been made on the prescribed date,

the Secretary of State is entitled to recover that amount from the person to whom it was paid<sup>4</sup>.

1    le subject to Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 6 (exception from offset of recoverable overpayment): see note 3 infra.

2    le the cases set out in ibid reg 5(2): see note 3 infra.

3    See ibid reg 5(1). No amount may be offset under reg 5(1) which has been determined to be a recoverable overpayment for the purposes of the Social Security Administration Act 1992 s 71(1) (see PARA 385 post): see the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 6. Regulation reg 5(1) applies in the following cases (reg 5(2)):

- 145 (1) where a person has been paid a sum by way of benefit under an award which is subsequently varied on appeal or revised on a review;
- 146 (2) where a person has been paid a sum by way of benefit under the original award and it is subsequently determined, on review or appeal, that another benefit should be awarded or is payable in lieu of the first;
- 147 (3) where either: (a) a person has been awarded and paid child benefit for a period in respect of which severe disablement allowance is subsequently determined to be payable to the child concerned; or (b) severe disablement allowance is awarded and paid for a period in respect of which child benefit is subsequently awarded to someone else, the child concerned in the subsequent determination being the beneficiary of the original award;
- 148 (4) where a person has been paid a sum by way of an increase in respect of a dependent person under the original award and it is subsequently determined that that other person is entitled to benefit for that period, or that a third person is entitled to the increase for that period in priority to the beneficiary of the original award;
- 149 (5) where a person has been paid a sum by way of an increase in respect of a partner (as defined in the Income Support (General) Regulations 1987, SI 1987/1967, reg 2: see PARA 182 note 5 ante) and it is subsequently determined that that other person is entitled to benefit for that period.

4    See the Social Security Administration Act 1992 s 74(1) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 50). As to duplication and prescribed income see the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 7 (as amended). As to duplication and prescribed payments see reg 8 (as amended). As to duplication and maintenance payments see reg 9. As to the Secretary of State see PARA 1 ante.

### **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive

Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **354 Offsetting and prevention of duplication**

TEXT AND NOTES--SI 1988/664 replaced, in so far as it relates to child benefit or guardian's allowance, by SI 2003/492 (amended by SI 2003/2107, SI 2003/2155, SI 2004/761, SI 2005/343, SI 2005/2919, SI 2008/2683, SI 2009/3268).

TEXT AND NOTE 2--SI 1988/664 reg 5(1) amended, so as to render it subject to reg 5(1A), (2A), (6) (as added): SI 1999/2571, SI 2006/516. The reference to 'any sum paid' includes, in relation to tax credit, a reference to any amount or calculation of tax credit payable in respect of a period prior to the date of the subsequent determination, which is included in a start notification given by the Commissioners of Inland Revenue to an employer, and for the payment of which the employer remains responsible: SI

1988/664 reg 5(1A) (added by SI 1999/2571). SI 1988/664 reg 5(2) amended: SI 2005/1551. See also SI 1988/664 reg 5(6) (added by SI 2006/516).

NOTE 3--In relation to tax credit, in head (1) for 'on a review' read 'or superseded', and in head (2) for 'determined, on review or appeal' read 'decided, on a revision, supersession or appeal': SI 1988/664 reg 5(2) (amended by SI 1999/2571). SI 1988/664 reg 5(1) does not apply where either the sum paid under the original award, or the subsequent decision on the revision, supersession or appeal, referred to in head (2) (but not both) is or relates to tax credit: reg 5(2A) (added by SI 1999/2571).

Head (3)(a), (b) refer also to incapacity benefit for persons incapacitated in youth in accordance with the Social Security Contributions and Benefits Act 1992 s 30A(1)(b), (2A): SI 1988/664 reg 5(2) (amended by SI 2000/3120).

See *Brown v Secretary of State for Work and Pensions* [2007] EWCA Civ 89, [2007] All ER (D) 168 (Feb).

NOTE 4--1992 Act s 74(1) amended: State Pension Credit Act 2002 Sch 2 para 11; Welfare Reform Act 2007 Sch 3 para 10(8). SI 1988/664, reg 7 further amended: SI 2002/3019, SI 2008/1554. SI 1988/664 reg 8 further amended: SI 1999/2571, SI 2000/1483, SI 2008/1554.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(3) PAYMENT OF BENEFIT/355. Suspension, withholding and extinguishment of the right to payment.

### **355. Suspension, withholding and extinguishment of the right to payment.**

Subject to statutory provision<sup>1</sup>, where it appears to the Secretary of State that a question arises whether (1) the conditions for entitlement are or were fulfilled; (2) an award ought to be revised; or (3) subject to statutory provision<sup>2</sup>, an appeal ought to be brought against an award, the Secretary of State may direct that payment of benefit under an award be suspended, in whole or in part, pending the determination of that question on review, appeal or reference<sup>3</sup>.

Where it appears to the Secretary of State that:

- 1076 (a) an appeal<sup>4</sup> has been brought or a question arises whether an appeal ought to be brought against a decision of a commissioner<sup>5</sup> or of the appropriate court in relation to a case ('the primary case'); and
- 1077 (b) if such an appeal were to be allowed a question would arise in relation to another case ('the secondary case') whether the award of benefit (whether the same benefit as in the primary case or not) in that case ought to be revised,

he may direct that payment of benefit under the award in the secondary case be suspended, in whole or in part:

- 1078 (i) until the time limit for making an application or lodging a petition for leave to appeal in the primary case has expired; or
- 1079 (ii) if such an application is made or petition lodged, until that application or petition and any consequent appeal has been determined,

whichever is the later<sup>6</sup>.

Where a person who is in receipt of benefit fails to comply with the prescribed provisions<sup>7</sup>, in so far as they relate to documents, information or facts required by the Secretary of State, that benefit may be withheld, in whole or in part, from a date not earlier than 28 days after the date on which the requirement is imposed<sup>8</sup>.

Where it appears to the Secretary of State that a question arises whether any amount paid or payable to a person by way of, or in connection with, a claim for benefit is recoverable<sup>9</sup>, he may direct that any payment of arrears of benefit to that person must be withheld in whole or in part, pending determination of that question<sup>10</sup>.

Subject to statutory provision<sup>11</sup>, the right to payment of any sum by way of benefit must be extinguished where payment of that sum is not obtained within the period of 12 months from the date on which the right is to be treated as having arisen<sup>12</sup>.

<sup>1</sup> ie subject to the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 37(1A) (as added).

<sup>2</sup> ie subject to ibid reg 37(2) (as substituted and amended); see note 3 infra.

<sup>3</sup> See ibid reg 37(1) (reg 37 substituted by SI 1992/247; and amended by SI 1996/1460). Where it appears to the Secretary of State that a question arises under the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 37(1)(c) (as substituted and amended), he may only give directions that payment of benefit under the award be suspended within the relevant period: see reg 37(2) (as so substituted; and amended by SI

1993/2113). For the purposes of the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 37 (as substituted and amended) 'relevant period' means the period of three months beginning with the date on which notice in writing of the decision in question and of the reasons for it is received by the adjudication officer; and a claimant is to be treated as having been given the notice required by reg 37(3) (as substituted and amended) on the date that it is posted to him at his last known address: see reg 37(5) (substituted by SI 1993/2113; and amended by SI 1996/2306). A suspension under the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 37(1)(c) (as substituted and amended) ceases unless, within the relevant period, the claimant is given notice in writing that either an appeal or an application or petition for leave to appeal, whichever is appropriate, has been made against that decision: see reg 37(3) (amended by SI 1993/2113). Where the claimant has been given notice within the relevant period that either an appeal or an application or petition for leave to appeal has been made, the suspension may continue until the appeal or the application or the petition and any subsequent appeal have been determined: see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 37(4) (as substituted; amended by SI 1993/2113). As to the Secretary of State see PARA 1 ante.

4 In the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 37A (as substituted) 'appeal' includes an appeal in relation to an application for judicial review made in accordance with the RSC Ord 53: see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 37A(2) (reg 37A substituted by SI 1993/2113).

5 For the meaning of 'commisioner' see PARA 30 note 3 ante.

6 See the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 37A(1) (as substituted: see note 4 supra).

7 In provisions of ibid reg 32(1) (as amended): see PARA 348 note 6 ante.

8 See ibid reg 37AA(1) (reg 37AA added by SI 1994/2319). As to payment of withheld benefit see the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 37AB (as added); see PARA 348 notes 6-8 ante.

9 In under the Social Security Administration Act 1992 s 71 or s 74 (both as amended), or regulations made under either section: see PARAS 354 ante, 385 et seq, 396 et seq post.

10 See the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 37B (substituted by SI 1992/247).

11 In the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 38(2A) (as added and amended).

12 See reg 38(1) (amended by SI 1989/1686; and SI 1996/672). For the purposes of the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 38 (as amended) the right must be treated as having arisen: (1) in relation to any such sum contained in an instrument of payment which has been given or sent to the person to whom it is payable, or to a place approved by the Secretary of State for collection by him (whether or not received or collected as the case may be): (a) on the date of that instrument of payment, or (b) if a further instrument of payment has been so given or sent as a replacement, on the date of the last such instrument of payment; (2) in relation to any such sum which is payable by means of an instrument for benefit payment, on the first date when payment of that benefit could be obtained by that means; (3) in relation to any such sum to which head (1) supra does not apply, where notice is given (whether orally or in writing) or is sent that the sum contained in the notice is available for collection on the date of the notice or, if more than one such notice is given or sent, the date of the first such notice; (4) in relation to any such sum to which none of heads (1), (2) or (3) supra apply, on such date as the Secretary of State determines: see reg 38(1) (amended by SI 1989/1686; and SI 1996/672).

For the purposes of the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 38(1) (as amended) the date of an instrument of payment is the date of issue of that instrument or, if the instrument specifies a date which is the earliest date on which payment can be obtained on the instrument and which is later than the date of issue, that date: see reg 38(3).

Where a question arises whether the right to payment of any sum by way of benefit has been extinguished by the operation of reg 38 (as amended) and the adjudicating authority is satisfied that: (i) the Secretary of State has first received written notice requesting payment of that sum after the expiration of 12 months; and (ii) from a day within that period of 12 months and continuing until the day the written notice was given, there was good cause for not giving the notice; and (iii) the Secretary of State has certified either: (A) that no instrument of payment has been given or sent to the person to whom it is payable and that no payment has been made under the provisions of reg 21 (as amended) (automated credit transfer); or (B) that such instrument has been produced to him and that no further instrument has been issued as a replacement, the period of 12 months must be extended to the date on which the adjudicating authority decides that question, and reg 38 (as

amended) accordingly applies as though the right to payment had arisen on that date: see reg 38(2A) (added by SI 1989/1686; and amended by SI 1993/2113).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **337-355 The necessity of a claim ... Suspension, withholding and extinguishment of the right to payment**

Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, now replaced, in so far as they relate to child benefit or guardian's allowance, by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494; and PARA 385-396.

For the purposes of SI 1987/1968, if, for any period commencing with or falling after 2 March 1998, during which a person is a New Deal participant and is participating in either the Full-time Education and Training Option, the Voluntary Sector Option or the Environment Task Force Option, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 1998, SI 1998/217, art 2(1), (2), Schedule; SI 1998/1425. If, for any period commencing with or falling after 3 July 1998, during which a person is a New Deal participant and is participating in the Employment Option in a capacity other than that of employee, that person receives a training allowance, he is to be treated for that period as not being employed but as participating in arrangements for training under the 1973 Act s 2; and accordingly any payment, other than a trading receipt, made to such a person during that period in connection with his use of facilities must be treated in the same manner as a payment of training allowance made in respect of such training: SI 1998/217 art 2(1), (3), Schedule; SI 1998/1425. See further PARA 31-46.

Also for the purposes of SI 1987/1968, if, during any period or periods commencing with or falling after 2 April 1999, a person is participating in the New Deal Pilot for 25 plus within the self employment route and that person receives either a mandatory top-up payment or other payment made to him in order to assist with the expenses of participation, he is to be treated for that period as not being employed and any such payments made to such a person during that period in connection with his use of facilities must be treated as a grant and not as a training allowance: New Deal (25 plus) (Miscellaneous Provisions) Order 1999, SI 1999/779, reg 2(1), (2), Schedule. 'The self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the intensive activity period of the New Deal Pilots for 25 plus; and 'the intensive activity period of the New Deal Pilot for 25 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged over 25 years immediately prior to

entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work: SI 1999/779 reg 1(2).

Further, for the purposes of SI 1987/1968, if, for any period or periods commencing with or falling after 9 April 2001, during which a person is participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus, that person receives, or is eligible to receive, a training allowance, he is to be treated for that period or those periods and in respect of his participation as not being employed but as participating in arrangements for training under the Employment and Training Act 1973 s 2; and accordingly any payment made to such a person during that period or those periods in connection with his use of facilities is to be treated in the same manner as a payment of training allowance made in respect of such training: New Deal (Miscellaneous Provisions) Order 2001, SI 2001/970, art 2(2). Article 2(2) does not apply in respect of any trading payment made to a person receiving assistance in pursuing self-employed earner's employment while participating in the Intensive Activity Period or the Intensive Activity Period for 50 plus: art 2(3). 'Facilities' means facilities provided for the participant in pursuance of the Intensive Activity Period or the Intensive Activity Period for 50 plus; 'the Intensive Activity Period' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 25 years or over and less than 50 years on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'the Intensive Activity Period for 50 plus' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are aged 50 years or over on the day of entry are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; and 'training allowance' means a payment made directly by the Secretary of State to a participant in the Intensive Activity Period or the Intensive Activity Period for 50 plus in connection with his participation: SI 2001/970 art 1(2).

Also, for the purposes of SI 1987/1968, if during any period or periods commencing with or falling after 13 September 2001 a person is participating in the New Deal for Lone Parents within the self-employment route and that person receives, or is eligible to receive, either a top-up payment or other payment made to him in order to assist with the expenses of participation, any such payments made to such a person during that period or those periods in connection with his use of those facilities are to be treated as a training premium: New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915, art 2(1), (2), Schedule. 'The New Deal for Lone Parents' means the arrangements known by that name and made under the Employment and Training Act 1973 s 2 for which only persons who are lone parents are eligible and which are designed to help participants to obtain work or to improve their prospects of obtaining work; 'lone parent' means a person who has no partner and who is responsible for, and a member of the same household as, a child or young person; 'the self-employment route' means receiving assistance in pursuing self-employed earner's employment while participating in the New Deal for Lone Parents: SI 2001/2915 art 1(2).

### **355 Suspension, withholding and extinguishment of the right to payment**

TEXT AND NOTES 1-10--SI 1987/1968 regs 37-37B omitted in relation to tax credit: SI 1999/2572.

NOTE 4--RSC replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

NOTE 12--SI 1987/1968 reg 38(1) further amended: SI 2006/832. In head (A) reference to automated credit transfer is now to direct credit transfer: SI 1987/1968 reg 38(2A) (amended by SI 2002/2441).

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## **(4) ADJUDICATION**

### **(i) Determination of Claims by the Statutory Authorities**

#### **356. The statutory authorities.**

In general, claims for benefit and questions arising from such claims are normally determined in the first instance by an adjudication officer<sup>1</sup>. Appeal from an adjudication officer's decision ordinarily lies to a social security appeal tribunal<sup>2</sup>. To this normal procedure there are, however, three principal exceptions:

- 1080 (1) certain questions (relating primarily to contributions and employment status) are reserved for decision by the Secretary of State<sup>3</sup>, in which case the normal appeal procedures do not apply<sup>4</sup>;
- 1081 (2) certain medical questions relating to disablement for the purposes of industrial injury benefit<sup>5</sup> and severe disablement benefit<sup>6</sup> are determined by the adjudicating medical authorities, with appeal lying to a medical appeal tribunal<sup>7</sup>;
- 1082 (3) certain disability questions relating to disability living allowance<sup>8</sup>, disability working allowance<sup>9</sup> and attendance allowance<sup>10</sup>, though determined in the first instance by an adjudication officer, have special rules as to the form of that adjudication, and are subject to an appeal to a disability appeal tribunal<sup>11</sup>.

Appeal from a social security appeal tribunal, a medical appeal tribunal or a disability appeal tribunal lies on a point of law to a social security commissioner<sup>12</sup>, from whose decision a further appeal on a point of law lies to the Court of Appeal<sup>13</sup>.

The appeal tribunals are administered by the Independent Tribunal Service which is headed by the President of social security appeal tribunals, medical appeal tribunals and disability appeal tribunals. The President is appointed by the Lord Chancellor, after consultation with the Lord Advocate<sup>14</sup>. Similarly appointed are regional and other full-time chairmen of such tribunals<sup>15</sup>. The President is responsible for the nomination of a chairman for a tribunal<sup>16</sup>, the appointment of members on the panels of such tribunals<sup>17</sup>, the appointment of officers and staff<sup>18</sup>, the assignment of clerks to a tribunal<sup>19</sup>, the arrangement of meetings and training for chairmen and members and the provision to them of works of reference on social security law<sup>20</sup>. The social fund is subject to an entirely separate system of adjudication<sup>21</sup>.

Social security adjudication is not absolutely privileged for the purposes of the law of defamation<sup>22</sup>.

1 As to adjudication by adjudication officers see PARA 359 post.

2 As to appeal to a social security appeal tribunal see PARA 360 post. As to review as an alternative to appeal see PARA 373 post.

3 As to the Secretary of State see PARA 1 ante.

4 As to adjudication by the Secretary of State see PARA 357 post.

5 As to industrial injuries benefit generally see PARA 126 et seq ante.

- 6 As to severe disablement allowance generally see PARA 92 et seq ante.
- 7 As to medical adjudication see PARA 379 et seq post.
- 8 As to disability living allowance generally see PARA 102 et seq ante.
- 9 As to disability working allowance generally see PARA 218 et seq ante.
- 10 As to attendance allowance generally see PARA 112 et seq ante.
- 11 As to disability adjudication see PARA 374 et seq post.
- 12 As to social security commissioners see PARA 362 post.
- 13 As to appeal from a social security commissioner see PARA 362 post. As to provision for regulations in the context of reviews and appeals generally see the Social Security Administration Act 1992 ss 58-62 (as amended); and PARAS 75, 330 et seq ante.
- 14 See *ibid* s 51(1)(a). A person is qualified to be appointed President if he has a ten-year general qualification or he is an advocate or solicitor in Scotland of at least ten years' standing: s 51(2). As to the terms of appointment of the President and the constitution of social security, medical and disability appeal tribunals see ss 41, 43, 50-52, Sch 2 (ss 41, 43, 50, Sch 2 as amended); and PARAS 360, 378, 381 post. For the meaning of 'general qualification' see *LEGAL PROFESSIONS* vol 65 (2008) PARA 742.
- 15 See *ibid* s 51(1)(b). A person is qualified to be appointed a full-time chairman if he has a five-year general qualification or he is an advocate or solicitor in Scotland of at least five years' standing: s 51(3). Part-time chairmen are appointed from the panels maintained by the Lord Chancellor for this purpose under the Tribunals and Inquiries Act 1992 s 6. The Social Security Administration Act 1992 Sch 2 (as amended) has effect for the supplementing of s 51: s 51(4).
- 16 See *ibid* ss 41, 43, 50 (all as amended); and PARAS 360, 378, 381 post.
- 17 See *ibid* ss 40, 42, 50 (as amended); and PARAS 360, 378, 381 post.
- 18 See *ibid* Sch 2 para 3.
- 19 See *ibid* Sch 2 para 4.
- 20 See *ibid* Sch 2 para 5.
- 21 As to social fund adjudication see PARA 383 et seq post; and as to the social fund generally see PARA 228 et seq ante.
- 22 See *LIBEL AND SLANDER* vol 28 (Reissue) PARA 98.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see *RATING AND COUNCIL TAX* vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **356 The statutory authorities**

TEXT AND NOTES 14, 15--The Lord Chancellor's functions under the 1992 Act s 51(1) are protected functions for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

NOTE 15--1992 Act s 6 amended: Constitutional Reform Act 2005 Sch 4 para 224, Sch 18 Pt 2. See also ss 19, 85, Sch 7 para 4, Sch 14 Pt 3.

TEXT AND NOTE 18--Repealed: Social Security Act 1998 Sch 8.

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### **356A. Social security decisions and appeals.**

These provisions are in force, with exceptions in respect of specified benefits (see SI 1999/1958, SI 1999/2422, SI 1999/2739, SI 1999/2860, SI 1999/3178).

#### **1. Decisions by Secretary of State**

It is for the Secretary of State (1) to decide any claim for a relevant benefit<sup>1</sup>; (2) to decide any claim for a social fund payment<sup>2</sup>; and (3) to make any decision that falls to be made under or by virtue of a relevant enactment<sup>3</sup>. Where at any time a claim for a relevant benefit is decided by the Secretary of State the claim is not to be regarded as subsisting after that time; and accordingly, the claimant<sup>4</sup> is not (without making a further claim) entitled to the benefit on the basis of circumstances not obtaining at that time<sup>5</sup>.

1 Social Security Act 1998 s 8(1)(a). 'Relevant benefit' means any of the following: (1) benefit under the Social Security Contributions and Benefits Act 1992 Pts II-V (ss 20-111); (2) a jobseeker's allowance; (3) an employment and support allowance; (4) state pension credit; (5) income support; (6) a social fund payment mentioned in s 138(1)(a) or (2); (7) child benefit; (8) such other benefit as may be prescribed: 1998 Act s 8(3) (amended by the Welfare Reform and Pensions Act 1999 Sch 13 Pt VI; the State Pension Credit Act 2002 Sch 1 para 6; the Tax Credits Act 2002 Sch 6; and the Welfare Reform Act 2007 Sch 3 para 17(3)(a)). See further the Social Security Act 1998 (Prescribed Benefits) Regulations 2006, SI 2006/2529. The Social Security Act 1998 Pt 1 Ch II (ss 8-39) is to have effect as if health in pregnancy grant (see PARA 236A) were a relevant benefit for these purposes; and the functions of the Secretary of State are, in relation to that grant, exercisable by the Commissioners for Her Majesty's Revenue and Customs: Health and Social Care Act 2008 s 132(8). As to notice of decisions of the Commissioners in relation to health in pregnancy grant see Health in Pregnancy Grant (Notices, Revisions and Appeals) (No 2) Regulations 2009, SI 2009/751, reg 2.

2 1998 Act s 8(1)(b), referring to the social fund payment mentioned in the Social Security Contributions and Benefits Act 1992 s 138(1)(b).

3 1998 Act s 8(1)(c). This does not include any decision which under the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 8 (see PARA 357) falls to be made by an officer of the Inland Revenue: 1998 Act s 8(5) (substituted by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 22(3)).

'Relevant enactment' means any enactment contained in the Social Security Act 1998 Pt I Ch II (ss 8-39), the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992, the Social Security (Consequential Provisions) Act 1992, the Jobseekers Act 1995, the State Pension Credit Act 2002 or the Welfare Reform Act 2007 Pt 1, other than one contained in Social Security Contributions and Benefits Act 1992 Pt VII (ss 123-137) so far as relating to housing benefit and council tax benefit, the Social Security Administration Act 1992 Pt VIII (ss 134-140G) (arrangements for housing benefit and council tax benefit and related subsidies): 1998 Act s 8(4) (amended by the State Pension Credit Act 2002 Sch 1 para 6; and the Welfare Reform Act 2007 Sch 3 para 17(3)(b)).

4 'Claimant', in relation to a joint-claim couple claiming a joint-claim jobseeker's allowance (within the meaning of the Jobseekers Act 1995), means the couple or either member of the couple: 1998 Act s 39(1) (amended by the Welfare Reform and Pensions Act Sch 7 paras 1, 17). For the meaning of 'joint-claim couple' see PARA 260. For the meaning of 'joint-claim jobseeker's allowance' see PARA 260A.

5 1998 Act s 8(2).

#### **2. Revision of decisions**

Any decision of the Secretary of State<sup>1</sup> may be revised by the Secretary of State either within the prescribed period or in prescribed cases or circumstances; and either on an application made for the purpose or on his own initiative<sup>2</sup>. In making a decision under this provision, the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative<sup>3</sup>.

A revision takes effect as from the date on which the original decision took (or was to take) effect<sup>4</sup> but regulations may provide that, in prescribed cases or circumstances, a revision takes effect as from such other date as may be prescribed<sup>5</sup>. Where a decision is revised under these provisions, for the purpose of any rule as to the time allowed for bringing an appeal, the decision is to be regarded as made on the date on which it is so revised<sup>6</sup>. Except in prescribed circumstances, an appeal against a decision of the Secretary of State lapses if the decision is revised before the appeal is determined<sup>7</sup>.

1    Ie under the Social Security Act 1998 s 8 (see PARA 356A.1) or 10 (see PARA 356A.3).

2    Ibid s 9(1). This is subject to s 36(3) (see PARA 228): s 9(1). Regulations may prescribe the procedure by which a decision of the Secretary of State may be so revised: s 9(1). See the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991 (see PARA 356A.13). As to the revision of decisions in relation to health in pregnancy grant (see PARA 236A) see Health in Pregnancy Grant (Notices, Revisions and Appeals) (No 2) Regulations 2009, SI 2009/751, regs 3, 4

3    1998 Act s 9(2).

4    Ibid s 9(3). This is subject to ss 9(4), (5) and 27 (see PARA 356A.16): s 9(3).

5    Ibid s 9(4).

6    Ibid s 9(5).

7    Ibid s 9(6).

### **3. Decisions superseding earlier decisions**

The following, namely (1) any decision of the Secretary of State<sup>1</sup>, whether as originally made or as revised<sup>2</sup>; and (2) any decision<sup>3</sup> of the First-tier Tribunal<sup>4</sup> or any decision of the Upper Tribunal<sup>5</sup> which relates to any such decision, may be superseded by a decision made by the Secretary of State, either on an application made for the purpose or on his own initiative<sup>6</sup>. In making such a decision, the Secretary of State need not consider any issue that is not raised by the application or, as the case may be, did not cause him to act on his own initiative<sup>7</sup>.

A decision under these provisions take effect as from the date on which it is made or, where applicable, the date on which the application was made<sup>8</sup>.

1    Ie under the Social Security Act 1998 s 8 (see PARA 356A.1) or 10.

2    Ie under ibid s 9: see PARA 356A.2.

3    Ie under ibid Pt I Ch II (ss 8-39).

4    As to the First-tier Tribunal see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A.

5    As to the Upper Tribunal see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A.

6    1998 Act s 10(1) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 23(a)), which is subject to the 1998 Act s 10(3) (see NOTE 7).

7    Ibid s 10(2). Regulations may prescribe the cases and circumstances in which, and the procedure by which, such a decision may be made: s 10(3). See the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991 (see PARA 356A.13).

8 1998 Act s 10(5). Regulations may provide that, in prescribed cases or circumstances, such a decision takes effect as from such other date as may be prescribed: s 10(6). See *Wood v Secretary of State for Work and Pensions* [2003] EWCA Civ 53, [2003] All ER (D) 330 (Jan) (Secretary of State not entitled to alter benefit award; no change in claimant's circumstances).

#### **4. Reference of issues by Secretary of State to Inland Revenue**

Regulations may make provision requiring the Secretary of State, where on consideration of any claim or other matter he is of the opinion that there arises any issue which falls to be decided<sup>1</sup> by an officer of the Inland Revenue, to refer the issue to the Inland Revenue<sup>2</sup>. Regulations under these provisions may (1) provide for the Inland Revenue to give the Secretary of State a preliminary opinion on any issue referred to it, (2) specify the circumstances in which an officer of the Inland Revenue is to make a decision<sup>3</sup> on a reference by the Secretary of State, (3) enable or require the Secretary of State, in specified circumstances, to deal with any other issue arising on consideration of the claim or other matter pending the decision on the referred issue, and (4) require the Secretary of State to decide the claim or other matter in accordance with the decision of an officer of the Inland Revenue on the issue referred to it, or in accordance with any determination of the tax appeal commissioners made on appeal from their decision<sup>4</sup>.

1 I.e. under the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 8: see PARA 357.

2 Social Security Act 1998 s 10A(1) (s 10A added by the 1999 Act Sch 7 para 24). See the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991 (see PARA 356A.13), reg 11A (added by SI 1999/1670).

3 I.e. under the 1999 Act s 8.

4 1998 Act s 10A(2) (s 10A as added: see NOTE 2).

#### **5. Regulations with respect to decisions**

Provision may be made by regulations for the making of any decision by the Secretary of State under or in connection with the current legislation<sup>1</sup>, or the former legislation<sup>2</sup>, including a decision on a claim for benefit<sup>3</sup>. Where it appears to the Secretary of State that a matter before him involves a question of fact requiring special expertise, he may direct that in dealing with that matter he is to have the assistance of one or more experts<sup>4</sup>.

1 I.e. the Social Security Contributions and Benefits Act 1992, the Jobseekers Act 1995, the Social Security (Recovery of Benefits) Act 1997, the State Pension Credit Act 2002 and the Welfare Reform Act 2007 Pt 1: Social Security Act 1998 s 11(3) (amended by 2007 Act Sch 3 para 17(4)).

2 I.e. the National Insurance Acts 1965-1974, the National Insurance (Industrial Injuries) Acts 1965-1974, the Social Security Act 1975 and the Social Security Act 1986 Pt II: 1998 Act s 11(3).

3 Ibid s 11(1). See the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991 (see PARA 356A.13).

4 1998 Act s 11(2). 'Expert' means a person appearing to the Secretary of State to have knowledge or experience which would be relevant in determining the question of fact requiring special expertise: s 11(3).

#### **6. Appeal to First-tier Tribunal**

The following provisions apply to any decision of the Secretary of State<sup>1</sup> which (1) is made on a claim for, or on an award of, a relevant benefit, and is not a decision against which no appeal lies<sup>2</sup>, or (2) is made otherwise than on such a claim or award, and is a decision against which an

appeal lies<sup>3</sup>. In the case of any such decision, the claimant<sup>4</sup> and such other person as may be prescribed has a right to appeal to the First-tier Tribunal but this does not confer a right of appeal in relation to a prescribed decision, or a prescribed determination embodied in or necessary to a decision<sup>5</sup>.

Where the Secretary of State has determined that any amount is recoverable<sup>6</sup>, any person from whom he has determined that it is recoverable has the same right of appeal to the First-tier Tribunal as a claimant<sup>7</sup>. In any case where the Secretary of State has made a decision in relation to a claim for industrial injuries benefit<sup>8</sup>; and the entitlement to benefit of any person other than the claimant is or may be affected<sup>9</sup> by that decision, that other person has the same right of appeal to the First-tier Tribunal as the claimant<sup>10</sup>.

A person with a right of appeal under the provisions above must be given such notice of a decision under those provisions and of that right as may be prescribed<sup>11</sup>. Regulations may make provision as to the manner in which, and the time within which, appeals are to be brought<sup>12</sup>.

In deciding an appeal, the First-tier Tribunal need not consider any issue that is not raised by the appeal, and must not take into account any circumstances not obtaining at the time when the decision appealed against was made<sup>13</sup>.

1   Ie under the Social Security Act 1998 s 8 (see PARA 356A.1) or 10 (see PARA 356A.3) (whether as originally made or as revised under s 9: see PARA 356A.2).

2   Ie does not fall within ibid Sch 2. The reference to a decision under s 10 is a reference to a decision superseding any such decision as is mentioned in s 10(1)(a) or (b): s 12(9).

3   Ibid s 12(1) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 25(2)(b), Sch 10 Pt I). Those decisions against which an appeal lies are those which fall within the 1998 Act Sch 3 (amended by the 1999 Act Sch 7 para 36, Sch 10 Pt I, the Social Security Fraud Act 2001 s 12(2); the State Pension Credit Act 2002 Sch 1 para 12; and the Welfare Reform Act 2009 s 1(4), Sch 4 para 10, Sch 7 Pt 3). See also the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, SI 2008/2685, regs 21, 25, Schs 1, 2 (Sch 1 amended by SI 2009/1975).

4   For the meaning of claimant see PARA 356A.1.

5   1998 Act s 12(2) (substituted by the 1999 Act Sch 7 para 25(3); amended by SI 2008/2833). Regulations under the Social Security Act 1998 s 12(2) must not prescribe any decision or determination that relates to the conditions of entitlement to a relevant benefit for which a claim has been validly made or for which no claim is required: s 12(3).

6   Ie under or by virtue of the Social Security Administration Act 1992 s 71 or 74.

7   1998 Act s 12(4) (amended by SI 2008/2833).

8   Ie under the Social Security Contributions and Benefits Act 1992 Pt V (ss 94-111).

9   Ie under ibid Sch 7 Pt VI (paras 14-21) (industrial death benefit).

10   1998 Act s 12(5) (amended by SI 2008/2833).

11   1998 Act s 12(6).

12   Ibid s 12(7). See the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991; and PARA 356A.13. As to appeals against decisions in relation to health in pregnancy grant (see PARA 236A) see Health in Pregnancy Grant (Notices, Revisions and Appeals) (No 2) Regulations 2009, SI 2009/751, regs 5-10.

13   1998 Act s 12(8) (amended by SI 2008/2833).

## **7. Redetermination etc of appeals by tribunal**

Where an application is made to the First-tier Tribunal for permission to appeal to the Upper Tribunal<sup>1</sup> from any decision of the First-tier Tribunal<sup>2</sup>. If each of the principal parties<sup>3</sup> to the case

expresses the view that the decision was erroneous in point of law, the First-tier Tribunal must set aside the decision and refer the case for determination by a differently constituted First-tier Tribunal<sup>4</sup>.

1 As to the First-tier Tribunal and the Upper Tribunal see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A.

2 Ie under the Social Security Act 1998 s 12 or 13: s 13(1) (amended by SI 2008/2833).

3 'The principal parties' means the persons mentioned in the 1998 Act s 14(3)(a) and (b) (see PARA 356A.8), and where applicable, the person mentioned in s 14(3)(d) (see PARA 356A.8) and such a person as is first mentioned in s 14(4) (see PARA 356A.8): s 13(4) (substituted by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 26).

4 1998 Act s 13(3) (amended by SI 2008/2833).

## **8. Appeal from tribunal to the Upper Tribunal**

An appeal to the Upper Tribunal<sup>1</sup> lies under these provisions at the instance of any of the following; (1) the Secretary of State; (2) the claimant<sup>2</sup> and such other person as may be prescribed; (3) in any of the cases mentioned in heads (a)-(c) below, a trade union; and (4) a person from whom it is determined that any amount is recoverable<sup>3</sup>.

In a case relating to industrial injuries benefit an appeal to the Upper Tribunal<sup>4</sup> lies at the instance of a person whose entitlement to benefit is, or may be, affected<sup>5</sup> by the decision appealed against, as well as at the instance of any person or body such as is mentioned in head (3) above<sup>6</sup>. An appeal lies at the instance of a trade union (a) where the claimant is a member of the union at the time of the appeal and was so immediately before the matter in question arose; (b) where that matter in any way relates to a deceased person who was a member of the union at the time of his death; (c) where the case relates to industrial injuries benefit and the claimant or, in relation to industrial death benefit, the deceased, was a member of the union at the time of the relevant accident<sup>7</sup>.

1 Ie under the Tribunals, Courts and Enforcement Act 2007 s 11 from any decision of the First-Tier Tribunal under s 12 or 13.

2 For the meaning of claimant see PARA 356A.1.

3 1998 Act s 14(3) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 27(b), Sch 10 Pt I; and SI 2008/2833), referring to any amount recoverable under or by virtue of the Social Security Administration Act 1992 s 71 or 74. The 1998 Act s 14(3) applies also to any other association which exists to promote the interests and welfare of its members: s 14(6) (amended by the 1999 Act Sch 10 Pt I).

4 Ie under the Tribunals, Courts and Enforcement Act 2007 s 11 from any decision of the First-Tier Tribunal under s 12 or 13.

5 Ie under the Social Security Contributions and Benefits Act 1992 Sch 7 Pt VI (paras 14-21) (industrial death benefit).

6 1998 Act s 14(4).

7 Ibid s 14(5). This provision applies also to any other association which exists to promote the interests and welfare of its members: s 14(6).

## **9. Applications for permission to appeal against a decision of the Upper Tribunal**

An application for permission to appeal from a decision of the Upper Tribunal<sup>1</sup> may only be made by (1) a person who, before the proceedings before the Upper Tribunal were begun, was entitled to appeal to the Upper Tribunal from the decision to which the Upper Tribunal's decision relates; (2) any other person who was a party to the proceedings in which the first

decision mentioned in head (1) above was given; (3) any other person who is authorised by regulations to apply for permission<sup>2</sup>.

The Senior President of Tribunals must ensure that appropriate steps are taken by the First-tier Tribunal to secure the confidentiality, in such circumstances as may be prescribed, of any prescribed material, or any prescribed classes or categories of material<sup>3</sup>.

1    Ie in respect of a decision of the First-tier Tribunal under the Social Security Act 1998 s 12 or 13.

2    Ibid s 15(3) (amended by SI 2008/2833).

3    1998 Act s 15A(1) (s 15A added by SI 2008/2833). Each year the Senior President of Tribunals must make to the Secretary of State and the Child Maintenance and Enforcement Commission a written report, based on the cases coming before the First-tier Tribunal, on the standards achieved by the Secretary of State and the Child Maintenance and Enforcement Commission in the making of decisions against which an appeal lies to the First-tier Tribunal: 1998 Act s 15A(2). The Lord Chancellor shall publish the report: s 15A(3).

## 10. Procedure

Procedure regulations may make provision (1) prescribing the procedure to be followed in connection with (a) the making of decisions or determinations by the Secretary of State, and (b) the withdrawal of claims, applications, appeals or references falling to be decided or determined by the Secretary of State, (2) as to the form which is to be used for any document, the evidence which is to be required and the circumstances in which any official record or certificate is to be sufficient or conclusive evidence, (3) as to the time within which, or the manner in which any evidence is to be produced, or any application, reference or appeal is to be made, (4) for the non-disclosure to a person of the particulars of any medical advice or medical evidence given or submitted for the purposes of a determination<sup>1</sup>.

It is declared that the power to provide for the procedure to be followed in connection with the making of decisions by the Secretary of State includes power to make provision with respect to the formulation of the matters to be decided<sup>2</sup>.

In proceedings for the determination of an issue (i) as to whether a Class 1A contribution is payable, or otherwise relating to a Class 1A contribution; or (ii) relating to emoluments in respect of which a Class 1A contribution would be payable<sup>3</sup>, there must be available to a witness (other than the relevant person<sup>4</sup>) any privilege against self-incrimination or incrimination of a spouse which is available to a witness in legal proceedings<sup>5</sup>.

1    Social Security Act 1998 s 16(1), Sch 5 (Sch 5 amended by SI 2008/2833). See the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991 (see PARA 356A.13); Social Security Commissioners (Procedure) Regulations 1999, SI 1999/1495 (see PARA 81 NOTE 8).

2    Ie whether on a reference under the Social Security Administration Act 1992 s 117 (see PARA 405) or otherwise: 1998 Act s 16(3).

3    Ie but for the Social Security Contributions and Benefits Act 1992 s 10(8A): see PARA 38.

4    Ie the person who is liable or alleged to be liable, or (as the case may be) who would be liable or who it is alleged would be liable, to pay the Class 1A contribution in question: 1998 Act s 16(4).

5    Ibid s 16(4), (5). Section 16(4), (5) prospectively repealed: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 28, Sch 10 Pt I.

## 11. Finality of decisions

Any decision made in accordance with specified provisions<sup>1</sup> is final; and subject to the provisions of any regulations<sup>2</sup>, any decision made in accordance with those regulations is final<sup>3</sup>.

If and to the extent that regulations so provide, any finding of fact or other determination embodied in or necessary to such a decision, or on which such a decision is based, is conclusive for the purposes of further such decisions, decisions made under the Child Support Act 1991, and decisions made under the Vaccine Damage Payments Act 1979<sup>4</sup>.

<sup>1</sup> I.e. the Social Security Act 1998 Pt 1 Ch 2 (ss 8-39), and to any provision made by or under the Tribunals, Courts and Enforcement Act 2007 Pt 1 Ch 2 (ss 3-29).

<sup>2</sup> I.e. under the Social Security Act 1998 s 11: see PARA 356A.5.

<sup>3</sup> Ibid s 17(1). See the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991; and PARA 356A.13.

<sup>4</sup> 1998 Act s 17(2).

## **12. Matters arising as respects decisions**

Regulations may make provision as respects matters arising pending any decision<sup>1</sup> of the Secretary of State, or the First-tier Tribunal, or any decision of the Upper Tribunal which relates to any decision<sup>2</sup> of the First-Tier Tribunal, which relates to (1) any claim for a relevant benefit; (2) any person's entitlement to such a benefit or its receipt; or (3) out of the revision of a decision<sup>3</sup> or on appeal of any such decision<sup>4</sup>.

<sup>1</sup> I.e. under the Social Security Act 1998 Pt I Ch II (ss 8-39).

<sup>2</sup> I.e. under ibid Pt I Ch II (ss 8-39).

<sup>3</sup> I.e. under ibid s 9: see PARA 356A.2.

<sup>4</sup> Ibid s 18(1) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 29, Sch 10 Pt I). Regulations under the 1998 Act s 18(1) as it applies to child benefit may include provision as to the date from which child benefit is to be payable to a person in respect of a child or qualifying young person in a case where, before the benefit was awarded to that person, child benefit in respect of the child or qualifying young person was awarded to another person: s 18(2) (amended by Child Benefit Act 2005 Sch 1 para 26). See the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991; and PARA 356A.13. As to qualifying young persons see PARA 238.

## **13. Medical examinations**

Before making a decision on a claim for a relevant benefit<sup>1</sup>, or as to a person's entitlement to such a benefit, the Secretary of State may refer the person in respect of whom the claim is made, or whose entitlement is at issue, to a health care professional<sup>2</sup> approved by the Secretary of State for such examination and report as appears to the Secretary of State to be necessary for the purpose of providing him with information for use in making the decision<sup>3</sup>.

Where the Secretary of State has exercised this power, and the health care professional approved by the Secretary of State requests the person referred to him to attend for or submit himself to medical examination, if the person fails without good cause to comply with the request, the Secretary of State must make the decision against him<sup>4</sup>.

Where an appeal has been brought<sup>5</sup> against a decision on a claim for a relevant benefit, or as to a person's entitlement to such a benefit<sup>6</sup>, the First-tier Tribunal<sup>7</sup> may, if conditions prescribed by Tribunal Procedure Rules are satisfied, refer the person in respect of whom the claim is made, or whose entitlement is at issue, to a health care professional approved by the Secretary of State for such examination and report as appears to the First-tier Tribunal to be necessary for the purpose of providing it with information for use in determining the appeal<sup>8</sup>. At a hearing before the First-tier Tribunal, except in cases or circumstances prescribed by Tribunal Procedure Rules, the tribunal may not carry out a physical examination of the person in respect

of whom the claim is made, or whose entitlement is at issue, and may not require that person to undergo any physical test for the purpose of determining whether he is suffering from physical disablement such that he is either unable to walk or virtually unable to do so<sup>9</sup>.

Regulations may provide for the suspension of benefit in prescribed circumstances<sup>10</sup> or for the suspension of benefit for failure to comply with information requirements<sup>11</sup>. Regulations may also provide that a person who has failed to furnish information, or a person whose benefit has been suspended, ceases to be entitled to the benefit<sup>12</sup>. In the case of a failure to submit to medical examination where required to do so, regulations may provide for the suspension or termination of the relevant benefit<sup>13</sup>.

1 For the meaning of 'relevant benefit' see PARA 356A.1.

2 'Health care professional' means (1) a registered medical practitioner, (2) a registered nurse, (3) an occupational therapist or physiotherapist registered with a regulatory body established by an Order in Council under the Health Act 1999 s 60, or (4) a member of such other profession regulated by a body mentioned in the National Health Service Reform and Health Care Professions Act 2002 s 25(3) as the Secretary of State may prescribe: Social Security Act 1998 s 39(1) (amended by Welfare Reform Act 2007 s 62(5)).

3 1998 Act s 19(1) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 30, Sch 10 Pt I; and the Welfare Reform Act 2007 s 62(2)).

4 1998 Act s 19(2), (3) (s 19(2) amended by 2007 Act s 62(2)).

5 Ie under the 1998 Act s 12: see PARA 356A.6.

6 Ibid s 20(1) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 31, Sch 10 Pt I).

7 As to the First-tier Tribunal see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A.

8 Ibid s 20(2) (amended by 2007 Act s 62(3); SI 2008/2833). The power under the 1998 Act s 20(2) to refer a person to a health care professional approved by the Secretary of State includes power to specify the description of health care professional to whom the person is to be referred: s 20(2A) (added by 2007 Act s 62(4)).

9 1998 Act s 20(3) (amended by SI 2008/2833). The Lord Chancellor may pay to any person required under the 1998 Act Pt I (ss 8-39) to attend for or to submit to medical or other examination or treatment such travelling and other allowances as the Lord Chancellor may determine: s 20A (amended by SI 2008/2833).

10 1998 Act s 21 (amended by the 1999 Act Sch 7 para 32, Sch 10 Pt I, SI 2008/2833). See the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991 (amended by SI 2008/1554, SI 2008/1596, SI 2008/2543, SI 2008/2544, SI 2008/2656, SI 2008/2667, SI 2009/659, SI 2009/1490, SI 2009/2715, SI 2009/3151, SI 2010/424); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 557. See also the Child Benefit and Guardian's Allowance (Decisions and Appeals) Regulations 2003, SI 2003/916 (amended by SI 2004/3377, SI 2005/343, SI 2008/2683, SI 2009/3268).

11 1998 Act s 22 (amended by the 1999 Act Sch 7 para 33, Sch 10 Pt I; and the State Pension Credit Act 2002 Sch 1 para 8)). As to regulations see NOTE 9.

12 1998 Act s 23. As to regulations see NOTE 9.

13 Ibid s 24. As to regulations see NOTE 9.

#### **14. Appeals dependent on issues falling to be decided by the Inland Revenue**

Regulations may make provision for the First-tier Tribunal or Upper Tribunal, where on any appeal there arises any issue which falls to be decided<sup>1</sup> by the Inland Revenue, to require the Secretary of State to refer the issue to the Inland Revenue<sup>2</sup>. Such regulations may provide for the appeal to be referred to the Secretary of State pending the decision by an officer of the Inland Revenue, enable or require the Secretary of State, in specified circumstances, to deal with any other issue arising on the appeal pending the decision on the referred issue, and

enable the Secretary of State, on receiving the decision of an officer of the Inland Revenue, or any determination of the First-tier Tribunal or Upper Tribunal made on an appeal from his decision (1) to revise his decision, (2) to make a decision superseding his decision, or (3) to refer the appeal to the First-tier Tribunal or Upper Tribunal for determination<sup>3</sup>.

1 He under the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 8: see PARA 357.

2 Social Security Act 1998 s 24A(1) (s 24A added by the 1999 Act Sch 7 para 33; amended by SI 2008/2833). See the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991 (see PARA 356A.13), reg 38A (added by SI 1999/1670, amended by SI 2008/2683).

3 1998 Act s 24A(2) (s 24A as added and amended: see NOTE 2).

## **15. Decisions and appeals dependent on other cases**

Where a decision by the Secretary of State falls to be made<sup>1</sup> in relation to a particular case, and an appeal is pending against the decision given in another case by the Upper Tribunal or a court (whether or not the two cases concern the same benefit), in a case relating to a relevant benefit<sup>2</sup>, the Secretary of State need not make the decision while the appeal is pending if he considers it possible that the result of the appeal will be such that, if it were already determined, there would be no entitlement to benefit<sup>3</sup>.

If the Secretary of State considers it possible that the result of the appeal will be such that, if it were already determined, it would affect the decision in some other way, (1) he need not, except in such cases or circumstances as may be prescribed, make the decision while the appeal is pending, (2) he may, in such cases or circumstances as may be prescribed, make the decision on such basis as may be prescribed<sup>4</sup>. Where the Secretary of State acts in accordance with head (2), following the determination of the appeal he must if appropriate revise his decision<sup>5</sup> in accordance with that determination<sup>6</sup>.

For these purposes, an appeal against a decision is pending if an appeal against the decision has been brought but not determined, an application for leave to appeal against the decision has been made but not determined, or in such circumstances as may be prescribed, an appeal against the decision has not been brought (or, as the case may be, an application for leave to appeal against the decision has not been made) but the time for doing so has not yet expired<sup>7</sup>.

Where (1) an appeal ('appeal A') in relation to a decision<sup>8</sup> is made to the First-tier Tribunal, or from the First-tier Tribunal to the Upper Tribunal<sup>9</sup>; and (2) an appeal ('appeal B') is pending against a decision given in a different case by the Upper Tribunal or a court (whether or not the two appeals concern the same benefit), if the Secretary of State considers it possible that the result of appeal B will be such that, if it were already determined, it would affect the determination of appeal A, he may serve notice requiring the First-tier Tribunal or Upper Tribunal (a) not to determine appeal A but to refer it to him, or (b) to deal with the appeal in accordance with the following provisions<sup>10</sup>.

Where appeal A is referred to the Secretary of State<sup>11</sup>, following the determination of appeal B and in accordance with that determination, he must if appropriate in a case where appeal A has not been determined by the First-tier Tribunal, revise<sup>12</sup> his decision which gave rise to that appeal, or in a case where appeal A has been determined by the First-tier Tribunal, make a decision<sup>13</sup> superseding the tribunal's decision<sup>14</sup>.

Where appeal A is to be dealt with in accordance with this provision, the First-tier Tribunal or Upper Tribunal must either (i) stay appeal A until appeal B is determined, or (ii) if the First-tier Tribunal or Upper Tribunal considers it to be in the interests of the appellant to do so, determine appeal A as if (A) appeal B had already been determined, and (B) the issues arising on appeal B had been decided in the way that was most unfavourable to the appellant<sup>15</sup>. Where the First-tier Tribunal or Upper Tribunal acts in accordance with head (ii) above, following the

determination of appeal B the Secretary of State must, if appropriate, make a decision<sup>16</sup> superseding the decision of the First-tier Tribunal or Upper Tribunal in accordance with that determination<sup>17</sup>.

For these purposes, an appeal against a decision is pending if an appeal against the decision has been brought but not determined, an application for leave to appeal against the decision has been made but not determined, or in such circumstances as may be prescribed, an appeal against the decision has not been brought (or, as the case may be, an application for leave to appeal against the decision has not been made) but the time for doing so has not yet expired<sup>18</sup>.

Regulations may make provision supplementing these provisions<sup>19</sup>.

1     Ie under the Social Security Act 1998 s 8 (see PARA 356A.1), s 9 (see PARA 356A.2) or s 10 (see PARA 356A.3).

2     For the meaning of 'relevant benefit' see PARA 356A.1.

3     1998 Act s 25(1), (2) (s 25(1) amended by SI 2008/2833).

4     1998 Act s 25(3). See the Social Security and Child Support (Decisions and Appeals) Regulations 1999, SI 1999/991: see PARA 356A.13.

5     Ie under the 1998 Act s 9.

6     Ibid s 25(4).

7     Ibid s 25(5). Any reference to an appeal, or an application for leave to appeal, against a decision, includes an application for, or for leave to apply for, judicial review of the decision under the Senior Courts Act 1981 s 31: 1998 Act s 25(6)(a).

8     Ie under the 1998 Act s 8, 9 or 10.

9     As to the First-tier Tribunal and the Upper Tribunal see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A.

10    Ibid s 26(1), (2) (amended by SI 2008/2833).

11    Ie under the 1998 Act s 26(2)(a): see TEXT AND NOTE 4 head (2).

12    Ie under ibid s 9.

13    Ie under ibid s 10.

14    Ibid s 26(3) (amended by SI 2008/2833).

15    1998 Act s 26(4) (amended by SI 2008/2833). 'The appellant' means the person who appealed or, as the case may be, first appealed against the decision mentioned in TEXT AND NOTE 4 head (1).

16    Ie under 1998 Act s 10.

17    Ibid s 26(5) (amended by SI 2008/2833).

18    1998 Act s 26(6). A reference to an appeal, or to an application for leave to appeal, against a decision includes an application for, or for leave to apply for, judicial review of the decision under the Senior Courts Act 1981 s 31 (as amended: see NOTE 7): 1998 Act s 26(6)(b)(i). See SI 1999/991, NOTE 4.

19    1998 Act s 26(8).

## 16. Cases of error

The following provisions apply, where (1) the effect of the determination, whenever made, of an appeal to the Upper Tribunal or the court<sup>1</sup> ('the relevant determination')<sup>2</sup> is that the adjudicating authority's<sup>3</sup> decision out of which the appeal arose was erroneous in point of law<sup>4</sup>, and (2) after the date of the relevant determination a decision falls to be made by the

Secretary of State in accordance with that determination (or would, apart from this provision, fall to be so made) (a) in relation to a claim for benefit<sup>5</sup>, (b) as to whether to revise<sup>6</sup> a decision as to a person's entitlement to benefit<sup>7</sup>, or (c) on an application<sup>8</sup> for a decision as to a person's entitlement to benefit to be superseded<sup>9</sup>.

In so far as the decision relates to a person's entitlement to a benefit in respect of a period before the date of the relevant determination, or in the case of a widow's payment, a death occurring before that date, it must be made as if the adjudicating authority's decision had been found by the Upper Tribunal or court not to have been erroneous in point of law<sup>10</sup>.

Regulations may be made with respect to the correction of accidental errors in decisions of the Secretary of State or records of decisions of the Secretary of State<sup>11</sup>.

1 'The court' means the High Court, the Court of Appeal, the Supreme Court or the Court of Justice of the European Community: Social Security Act 1998 s 27(7) (amended as from 1 October 2009 (see SI 2009/1604) by Constitutional Reform Act 2005 Sch 9 para 64).

2 The date of the relevant determination must be determined, in prescribed cases, for the purposes of the 1998 Act s 27 in accordance with any regulations made for that purpose: s 27(9). Regulations under s 27(9) may include provision for a determination of a higher court to be treated as if it had been made on the date of a determination of a lower court or the Upper Tribunal, or for a determination of a lower court or the Upper Tribunal to be treated as if it had been made on the date of a determination of a higher court: s 27(10) (amended by SI 2008/2833).

3 'Adjudicating authority' means the Secretary of State, or any former officer, tribunal or body: 1998 Act s 27(7). 'Former officer, tribunal or body' means any of the following: (1) an adjudication officer or, in the case of a decision given on a reference under the Social Security Administration Act 1992 s 21(2) or 25(1) a social security appeal tribunal, a disability appeal tribunal or a medical appeal tribunal; (2) an adjudicating medical practitioner appointed under s 49 or a specially qualified adjudicating medical practitioner appointed in accordance with regulations under s 62(2); or (3) the National Assistance Board, the Supplementary Benefits Commission, the Attendance Allowance Board, a benefit officer, an insurance officer or a supplement officer: 1998 Act s 27(7).

4 Ibid s 27(1)(a) (amended by SI 2008/2833). This is to be read as including a case where the effect of the relevant determination is that part or all of a purported regulation or order is invalid, and the error of law made by the adjudicating authority was to act on the basis that the purported regulation or order (or the part held to be invalid) was valid: 1998 Act s 27(5).

5 'Benefit' means (1) benefit under the Social Security Contributions and Benefits Act 1992 Pts II-V (ss 20-111), other than Old Cases payments; (2) benefit under the Social Security Act 1975 Pt II (ss 12-92) (repealed) (in respect of a period before 1 July 1992 but not before 6 April 1975); (3) benefit under the National Insurance Act 1946 or 1965, or the National Insurance (Industrial Injuries) Act 1946 or 1965 (in respect of a period before 6 April 1975); (4) a jobseeker's allowance; (5) state pension credit; (6) an employment and support allowance; (7) any benefit corresponding to a benefit mentioned in heads (1)-(6); and (8) any income-related benefit: 1998 Act s 27(7) (amended by the State Pension Credit Act 2002 Sch 1 para 9; and the Welfare Reform Act 2007 Sch 3 para 17(5)).

6 Ibid under the 1998 Act s 9: see PARA 356A.2.

7 Any reference to entitlement to benefit includes a reference to entitlement to any increase in the rate of a benefit, or to a benefit, or increase of benefit, at a particular rate: ibid s 27(8).

8 Ibid under ibid s 10: see PARA 356A.3.

9 Ibid s 27(1)(b). Section 27 does not apply where the decision of the Secretary of State mentioned in s 27(1)(b) is one which, but for s 25(2) or (3)(a) (see PARA 356A.15), would have been made before the date of the relevant determination, or is one made in pursuance of s 26(3) or (5): s 27(2). It is immaterial for the purposes of s 27(1) where such a decision as is mentioned in TEXT head (2)(a) falls to be made, whether the claim was made before or after the date of the relevant determination, where such a decision as is mentioned in head (2)(b) or (c) in the text falls to be made on an application under s 9 or 10, whether the application was made before or after that date: s 27(6).

10 Ibid s 27(3) (amended by SI 2008/2833). In deciding whether a person is entitled to benefit in a case where his entitlement depends on his having been entitled to the same or some other benefit before attaining a

particular age, the 1998 Act s 27(3) must be disregarded for the purpose only of deciding whether he was so entitled before attaining that age: s 27(4).

11 Ibid s 28 (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 34; the State Pension Credit Act 2002 Sch 1 para 10; the Welfare Reform Act 2007 Sch 3 para 17(6), Sch 8; and SI 2008/2833).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/357. Adjudication by the Secretary of State.

### **357. Adjudication by the Secretary of State.**

Subject to specified provisions<sup>1</sup>, any of the following questions are to be determined by the Secretary of State<sup>2</sup>:

- 1083 (1) a question whether a person is an earner and, if he is, as to the category of earners<sup>3</sup> in which he is to be included;
- 1084 (2) a question<sup>4</sup> whether the contribution conditions for any benefit are satisfied<sup>5</sup>, or otherwise relating to a person's contributions or his earnings factor<sup>6</sup>;
- 1085 (3) a question whether a Class 1A contribution is payable or otherwise relating to a Class 1A contribution<sup>7</sup>;
- 1086 (4) a question whether a person is or was employed in employed earner's employment<sup>8</sup>;
- 1087 (5) a question as to whether a person was, within the meaning of regulations, precluded from regular employment by responsibilities at home;
- 1088 (6) any question as to which surpluses are to be taken into account<sup>9</sup>;
- 1089 (7) any question arising under any provision of Part XI of the Social Security Contributions and Benefits Act 1992 or the Social Security Administration Act 1992, or under any provision of regulations or an order under that Part, as to:
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  - 157. (a) whether a person is or was an employee or employer of another;
  - 158. (b) whether an employer is entitled to make any deduction from his contributions payments<sup>10</sup>;
  - 159. (c) whether a payment falls to be made to an employer in accordance with the regulations or order;
  - 160. (d) the amount that falls to be so deducted or paid;
  - 161. (e) the amount of an employer's contributions payments for any period<sup>11</sup>; or
  - 162. (f) whether two or more employers or two or more contracts of service are<sup>12</sup> to be treated as one;
- 122
  - 1090 (8) any question arising under any provision of Part XII of the Social Security Contributions and Benefits Act 1992 or the Social Security Administration Act 1992, or under any provision of regulations under that Part, as to:
- 123
  - 163. (a) whether a person is or was an employee or employer of another;
  - 164. (b) whether an employer is entitled to make any deduction from his contributions payments<sup>13</sup>;
  - 165. (c) whether a payment falls to be made to an employer in accordance with the regulations;
  - 166. (d) the amount that falls to be so deducted or paid; or
  - 167. (e) whether two or more employers or two or more contracts of service are<sup>14</sup> to be treated as one; and
- 124
  - 1091 (9) any question arising under specified provisions of the Jobseekers Act 1995<sup>15</sup>, or under any provision of regulations under that Act, as to:
- 125
  - 168. (a) whether a person is or was an employee or employer of another;

- 169. (b) whether an employer is entitled to make any deduction from his contributions payments<sup>16</sup>;
  - 170. (c) whether a payment falls to be made to an employer in accordance with those regulations;
  - 171. (d) the amount that falls to be so deducted or paid; or
  - 172. (e) whether two or more employers or two or more contracts of service are<sup>17</sup> to be treated as one;
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and any question arising under specified<sup>18</sup> regulations<sup>19</sup>.

The Secretary of State may, if he thinks fit, before determining any such question mentioned above, appoint a person to hold an inquiry into the question, or any matters arising in connection with it, and to report on the question, or on those matters, to the Secretary of State<sup>20</sup>.

In addition, it is for the Secretary of State to determine:

- 1092 (i) a question whether an increase of disablement pension<sup>21</sup> or a further increase in cases of exceptionally severe disablement<sup>22</sup> is to be granted or renewed and, if so, for what period and of what amount;
- 1093 (ii) a question how the limitations to the Social Security Contributions and Benefits Act 1992<sup>23</sup> on the benefit payable in respect of any death are to be applied in the circumstances of any case;
- 1094 (iii) a question arising in claims in the alternative or in addition<sup>24</sup> as specified<sup>25</sup>.

1    Ie subject to the Social Security Administration Act 1992 Pt II (ss 17-70) (as amended): see the text and notes 2-25 infra; and PARA 357 et seq post.

2    As to the Secretary of State see PARA 1 ante.

3    For the meaning of 'earnings and 'earner' see PARA 33 ante; and as to the categories of earners see PARA 32 ante.

4    For the purposes of the Social Security Administration Act 1992 s 17(1)(b) (see head (2) in the text), 'question' includes any question arising (1) under the Social Security Contributions and Benefits Act 1992 s 17(1) as to whether by regulations thereunder a person is excepted from liability for Class 4 contributions (as to which see PARAS 43-45 ante), or his liability is deferred; or (2) under regulations made by virtue of s 17(3) or s 18 (as amended), but not any other question relating to Class 4 contributions, nor any question within the Social Security Administration Act 1992 s 20(1)(c) (as substituted) (see PARA 359 post): s 17(2).

5    The exclusive nature of the Secretary of State's jurisdiction over all matters concerning contribution conditions is particularly strong: see *Secretary of State for Social Services v Scully* [1992] 4 All ER 1, [1992] 1 WLR 927, CA (overruling Decision R(G)1/82 which had sought to place limitations on it).

6    For the meaning of 'earnings factor' see PARA 56 ante.

7    In proceedings for the determination of such a question, including proceedings on an inquiry, in England and Wales there must be available to a witness (other than the person who is liable, or alleged to be liable, to pay the Class 1A contribution in question) any privilege against self-incrimination or incrimination of a spouse which is available to a witness in legal proceedings: Social Security Administration Act 1992 s 59(4)(a). As to Class 1A contributions see PARAS 38-39 ante.

8    Ie for the purposes of the Social Security Contributions and Benefits Act 1992 Pt V (ss 94-111) (as amended): see PARA 126 et seq ante. For the meaning of 'employed earners' employment' see PARAS 32, 128 ante.

9    Ie under the Social Security Contributions and Benefits Act 1992 s 45(1): see PARA 569 post.

10   Ie in accordance with an order under ibid s 159A (as added): see EMPLOYMENT vol 39 (2009) PARA 532.

- 11    Ie for the purposes of *ibid* s 159A (as added).
- 12    Ie by virtue of regulations made under *ibid* s 163(5): see EMPLOYMENT vol 39 (2009) PARAS 504, 511.
- 13    Ie in accordance with regulations under *ibid* s 167 (as amended): see EMPLOYMENT vol 39 (2009) PARAS 403, 405.
- 14    Ie by virtue of regulations made under *ibid* s 171(2): see EMPLOYMENT vol 39 (2009) PARAS 372, 378.
- 15    Ie under the Jobseekers Act 1995 s 27: see PARAS 314-316 ante.
- 16    Ie in accordance with regulations under *ibid* s 27.
- 17    Ie by virtue of regulations under *ibid* s 27.
- 18    Ie regulations made by virtue of the Social Security Contributions and Benefits Act 1992 s 164(9)(c), (d) or (f): see EMPLOYMENT vol 39 (2009) PARA 369.
- 19    Social Security Administration Act 1992 s 17(1) (amended by the Statutory Sick Pay Percentage Threshold Order 1995, SI 1995/512, art 6(2)(a); and the Jobseekers Act 1995 s 41(4), (5), Sch 2 para 41). Regulations may make provision restricting the persons who may apply to the Secretary of State for the determination of any such question as is mentioned in s 17(1) (as amended): s 17(3).
- A Secretary of State's decision on such a matter may be requested in writing by a person interested (ie whose own liability or rights are actually or potentially affected) or, in the case of statutory sick pay or statutory maternity pay, an employer or employee or appointed inspector: see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, regs 12, 13. The Secretary of State's decision (and the right to request a statement of his reasons) are to be notified in writing to the applicant and to any persons interested: see reg 15.
- 20    Social Security Administration Act 1992 s 17(4). Any person appointed by the Secretary of State under s 17(4) to hold an inquiry into any question or any matters arising in connection therewith and to report to him thereon may by summons (1) require persons to attend any such inquiry to give evidence or to produce documents reasonably required for the purpose of the inquiry; (2) require any person so summoned, or who otherwise attends to give evidence, to be examined on oath; and (3) for that purpose administer oaths: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 14.
- 21    Ie under the Social Security Contributions and Benefits Act 1992 s 104 (constant attendance): see PARA 147 ante.
- 22    Ie under *ibid* s 105: see PARA 149 ante.
- 23    Ie the limitations under *ibid* s 106, Sch 7 Pt VI (paras 14-21) (industrial death benefit).
- 24    Ie under regulations made under the Social Security Administration Act 1992 s 7 (as amended) (council tax benefit: see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq).
- 25    Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 17(1).

## UPDATE

### 330-450 Administration

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### 356-384 Adjudication

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **357 Adjudication by [officers of the Commissioners of Inland Revenue]**

TEXT AND NOTES--Social Security Administration Act 1992 s 17 repealed: Social Security Act 1998 Sch 8. Adjudication is now made by an officer of the Commissioners of Inland Revenue: see the Social Security Contributions (Transfer of Functions) Act 1999 ss 8, 9 (s 8 amended by the Welfare Reform and Pensions Act 1999 Sch 13 Pt VI; the Child Support, Pensions and Social Security Act 2000 ss 76(6), (7), 77(5), Sch 9 Pt VIII; and the Work and Families Act 2006 Sch 1 para 46 (Sch 1 para 46 in force 3 March 2010: SI 2010/495)). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777). As to the transfer to the Inland Revenue of certain contracts, property, rights and liabilities to which the Secretary of State is entitled or subject, see the Social Security Contributions (Transfer of Functions) Act 1999 ss 21, 22; Social Security (Transfer of Functions, etc) (Specification of Contracts) Order 1999, SI 1999/979.

As to the use of computers in making assessments under or by virtue of the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992 or the Jobseekers Act 1995, see the Social Security Act 1998 s 2(1), (2) (s 2(2) amended by Welfare Reform Act 2007 Sch 3 para 17(2), Sch 8).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/358. Appeal from and review of determinations and decisions of the Secretary of State.

### **358. Appeal from and review of determinations and decisions of the Secretary of State.**

A question of law arising in connection with the determination by the Secretary of State<sup>1</sup> of any relevant question<sup>2</sup>, is not subject to the normal forms of appeal<sup>3</sup>. Such a question may, if the Secretary of State thinks fit, be referred for decision to the High Court or, in Scotland, to the Court of Session<sup>4</sup>. Any person aggrieved by the decision of the Secretary of State on any such question of law which is not so referred may appeal from that decision to the court<sup>5</sup>. Notwithstanding anything in any Act, the decision of the court on such a reference or appeal is final<sup>6</sup>.

The Secretary of State may review any decision given by him on any such question, if:

- 1095 (1) new facts have been brought to his notice; or
- 1096 (2) he is satisfied that the decision was (a) given in ignorance of some material fact; (b) based on a mistake as to some material fact; or (c) erroneous in point of law<sup>7</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 Ie any question as is mentioned in the Social Security Administration Act 1992 s 17(1) (as amended): see PARA 357 ante.

3 As to the normal forms of appeal see PARA 356 ante.

4 See the Social Security Administration Act 1992 s 18(1). If the Secretary of State determines to refer any question of law to the court, he must give notice in writing of his intention to do so (1) in a case where the question arises on an application made to the Secretary of State, to the applicant; and (2) in any case, to such persons as appear to him to be concerned with the question: s 18(2).

5 Ibid s 18(3). The Secretary of State is entitled to appear and be heard on any such reference or appeal; and on any such reference or appeal the court may order him to pay the costs of any other person, whether or not the decision is in that other person's favour and whether or not the Secretary of State appears on the reference or appeal: see s 18(4), (7).

6 Ibid s 18(6). Rules of court are to include provision for regulating references and appeals under s 18 and for limiting the time within which such appeals may be brought: s 18(5). The relevant provisions are contained in RSC Ord 111.

7 Social Security Administration Act 1992 s 19(1). A decision may not, however, be reviewed while an appeal under s 18 is pending against the decision of the Secretary of State on a question of law arising in connection with it, or before the time for so appealing has expired: s 19(2). On a review any question of law may be referred under s 18(1) or, where it is not so referred, may be the subject of an appeal under s 18(3), and the other provisions of s 18 apply accordingly: s 19(3). See also the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 17(2), which applies similar review powers to any determination given by the Secretary of State on any question referred to in reg 17(1): see PARA 357 ante. A decision of the Secretary of State on a question under the Social Security Contributions and Benefits Act 1992 s 70(7) (see PARA 101 ante) or on any question which by virtue of regulations falls to be determined by the Secretary of State in his discretion may be given so as to have effect with respect to a period before the date of the decision; and he may at any time and from time to time reconsider the exercise of his discretion with respect to such a question and decide it again with such other effects as may seem to him to be proper in the circumstances of the case: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 17(3).

### **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **358 Appeal from and review of determinations and decisions of the Secretary of State**

TEXT AND NOTES--Social Security Administration Act 1992 ss 18, 19 repealed: Social Security Act 1998 Sch 8. Appeals are now made to the tax appeal commissioners: see Social Security Contributions (Transfer of Functions) Act 1999 ss 10-12 (ss 10, 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(6); s 11 amended by the Employment Act 2002 s 9). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/359. Adjudication by adjudication officers.

### **359. Adjudication by adjudication officers.**

Adjudication officers are appointed by the Secretary of State<sup>1</sup>, subject to the consent of the Treasury as to numbers, and may include officers of the Department for Education and Employment appointed with the concurrence of the Secretary of State in charge of that department, or officers of the Northern Ireland department appointed with the concurrence of that department<sup>2</sup>. An adjudication officer is appointed to perform all the functions of adjudication officers under any enactment or such functions of such officers as may be specified in his instrument of appointment<sup>3</sup>. The Secretary of State also appoints a chief adjudication officer, whose duty it is to advise adjudication officers on the performance of their functions under the Social Security Administration Act 1992 or any other Act, to keep under review the operation of the system of adjudication by adjudication officers and matters connected with the operation of that system and to report annually in writing to the Secretary of State on standards of adjudication<sup>4</sup>.

There must be submitted forthwith to an adjudication officer for determination<sup>5</sup>:

- 1097 (1) any claim for a relevant benefit<sup>6</sup>;
- 1098 (2) any question arising in connection with a claim for, or award of, such a benefit<sup>7</sup>;
- 1099 (3) any question whether, if he otherwise had a right to it, a person would be disqualified under or by virtue of any provision of the Social Security Contributions and Benefits Act 1992 for receiving such a benefit; and
- 1100 (4) any question whether a jobseeker's allowance is not payable, in specified circumstances<sup>8</sup>, to a person<sup>9</sup>.

An adjudication officer to whom a claim or question is so submitted<sup>10</sup> must take it into consideration and, so far as practicable<sup>11</sup>, dispose of it<sup>12</sup> within 14 days of its submission to him<sup>13</sup>.

The adjudication officer must decide a claim for or question relating to an attendance allowance, a disability living allowance or a disability working allowance himself<sup>14</sup>. In addition, if on consideration of any claim or question an adjudication officer is of the opinion that there arises any question which falls to be determined otherwise than by an adjudication officer, he must refer the question for such determination<sup>15</sup>. Subject to these exceptions, however, he may either decide a claim or question himself or refer it to a social security appeal tribunal<sup>16</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 Social Security Administration Act 1992 s 38(1).

3 Ibid s 38(2).

4 See ibid s 39(1)-(4). The Secretary of State must publish the annual report so provided: see s 39(4).

5 I.e. determination in accordance with the Social Security Administration Act 1992 Pt II (ss 17-70) (as amended): see PARAS 356-358 ante, 360 et seq post.

6 The relevant benefits are: (1) benefits as defined in the Social Security Contributions and Benefits Act 1992 s 122 (as amended) (see PARA 13 note 8 ante); (2) a jobseeker's allowance (see PARA 258 et seq ante); (3)

income support (see PARA 176 et seq ante); (4) family credit (see PARA 202 et seq ante); (5) disability working allowance (see PARA 218 et seq ante); (6) any social fund payment as is mentioned in s 138(1)(a) or (2) (see PARA 228 ante); (7) child benefit (see PARA 237 et seq ante); (8) statutory sick pay (see EMPLOYMENT vol 39 (2009) PARA 498 et seq); and (9) statutory maternity pay (see EMPLOYMENT vol 39 (2009) PARA 365 et seq): Social Security Administration Act 1992 s 20(6) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 42).

7 This provision does not apply to any question which (1) may be determined by an adjudication officer under the Jobseekers Act 1995 s 9(6) or s 10(5) (see PARAS 297, 299 ante); or (2) falls to be determined otherwise than by an adjudication officer: Social Security Administration Act 1992 s 20(2) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 42). If a person submits a question relating to the age, marriage or death of any person, and it appears to the adjudication officer that the question may arise if the person who has submitted it to him submits a claim to a benefit to which the Social Security Administration Act 1992 s 20 (as amended) applies, the adjudication officer may determine the question: s 20(4).

Any question as to, or in connection with, entitlement to statutory sick pay or statutory maternity pay may be submitted to an adjudication officer by the Secretary of State or, subject to and in accordance with regulations, by the employee concerned, for determination in accordance with Pt II (ss 17-70) (as amended): s 20(3). A question in relation to statutory sick pay or statutory maternity pay to which s 20(3) applies may be submitted to an adjudication officer by the employee concerned by way of application in writing in a form approved for the purpose of the Secretary of State or in such other manner, being in writing, as he may accept as sufficient in the circumstances and such an application must be delivered or sent to a local office within six months of the earliest day in respect of which liability for statutory sick pay or statutory maternity pay is in dispute and state the grounds (if any) on which the applicant's employer has denied liability in respect of the period specified in the application: see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 20. As to the special provisions which apply in relation to certain questions concerning child benefit see reg 21.

8 Is not payable to a person by virtue of the Jobseekers Act 1995 s 19 (as amended): see PARAS 304-306 ante.

9 Social Security Administration Act 1992 s 20(1) (amended by the Jobseekers Act 1995 s 41(4), (5), Sch 2 para 42, Sch 3; and the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 46). Different aspects of the same claim or question may be submitted to different adjudication officers; and for that purpose the Social Security Administration Act 1992 s 20 (as amended) and the other provisions of Pt II with respect to the determination of claims and questions apply with any necessary modifications: s 20(5).

10 Is submitted under *ibid* s 20 (as amended), other than a claim which under s 30(12), (13) or s 35(7) falls to be treated as an application for review: see s 21(1).

11 This requirement does not impose a duty on the Secretary of State to ensure that all claims be considered within 14 days and then disposed of within that time or as soon as practicable thereafter; instead it is sufficient if consideration of the claim enables it to be disposed of within 14 days or as soon as reasonably practicable thereafter and accordingly matters independent of the claim, such as the volumes of claims awaiting determination or the number of adjudication officers available, can be relevant in determining whether a claim has been disposed of within 14 days or as soon as reasonably practicable thereafter: *R v Secretary of State for Social Services, ex p Child Poverty Action Group* [1990] 2 QB 540, [1989] 1 All ER 1047, CA.

12 Is in accordance with the Social Security Administration Act 1992 s 21 and with procedure regulations under s 59.

13 *Ibid* s 21(1). Subject to the Social Security (Adjudication) Regulations 1995, SI 1995/1801, regs 18(2), 55 (as substituted), the decision of an adjudication officer on any claim or question and the reasons for it must be notified in writing to the claimant who must at the same time be informed (1) in the case of a decision of an adjudication officer (a) under the Social Security Administration Act 1992 s 21 relating to attendance allowance, disability living allowance or disability working allowance; or (b) on a review under s 30(2), (4) or s 35, of his right to a review under s 30(1); (2) in the case of a decision of an adjudication officer under s 30(1), of his right of appeal (a) to a disability appeal tribunal where the appeal relates to the determination of a disability question; and (b) to an appeal tribunal in any other case; (3) in all other cases, of his right of appeal to an appeal tribunal under s 22: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 18(1). Regulation 18(1) does not apply in relation to a decision (other than a decision given on review) awarding benefit for a period which begins immediately after a period in respect of which the claimant had been awarded benefit of the same kind and at the same rate as that awarded by the first-mentioned decision: reg 18(2). A claimant may in certain cases also have to be informed of his right to have a question which was decided by an adjudication officer and with which the claimant is dissatisfied remitted to the Secretary of State for decision (see PARA 357 ante): see reg 19.

14 See the Social Security Administration Act 1992 s 21(3).

15 *Ibid* s 37(1)(a). As to similar provision in the case of a social security appeal tribunal or commissioner see s 37(1)(b). The person or tribunal making or directing the reference must then deal with any other question as if

the referred question had not arisen: s 37(2). The adjudication officer may (1) postpone the reference of, or dealing with, any question until other questions have been determined; or (2) in cases where the determination of any question disposes of a claim or any part of it, make an award or decide that an award cannot be made, as to the claim or that part of it, without referring or dealing with, or before the determination of, any other question: s 37(3).

16 See *ibid* s 21(2). Where an adjudication officer refers a question as to, or in connection with, entitlement to statutory sick pay or statutory maternity pay to a social security appeal tribunal, the employee and employer concerned must each be given notice in writing of the reference: s 21(4). In any other case notice in writing of the reference must be given to the claimant: s 21(5). Where a case has been referred to a social security appeal tribunal and the claimant makes a further claim which raises the same or similar questions, which is itself referred to the tribunal by the adjudication officer, then the tribunal may proceed to determine the further claim whether or not notice has been given under s 21(4) or (5): s 21(6).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see *RATING AND COUNCIL TAX* vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **359 Adjudication by adjudication officers**

TEXT AND NOTES--Social Security Administration Act 1992 ss 20, 21 repealed: Social Security Act 1998 Sch 8. Adjudication is now made by an officer of the Inland Revenue: see the Social Security Contributions (Transfer of Functions) Act 1999 ss 8, 9 (s 8 amended by the Welfare Reform and Pensions Act 1999 Sch 13 Pt VI; the Child Support, Pensions and Social Security Act 2000 ss 76(6), (7), 77(5), Sch 9 Pt VIII; and the Work and Families Act 2006 Sch 1 para 46 (Sch 1 para 46 in force 3 March 2010: SI 2010/495)). Subject to savings (see SI 2003/962) family credit (working families' tax credit) and disability working allowance (disabled person's tax credit) abolished and replaced: see Tax Credits Act 2002; and PARA 227A.

NOTE 7--1995 Regulations reg 20 revoked: SI 1999/776. An application for the determination of any issue arising as to, or in connection with, entitlement to statutory sick pay or statutory maternity pay may now be submitted to an officer of the Board of Inland Revenue by the Secretary of State or the employee concerned: Statutory Sick Pay and Statutory Maternity Pay (Decisions) Regulations 1999, SI 1999/776, reg 2(1). Such an issue must be decided by the officer only on the basis of such an application or on his own initiative: reg 2(2). The application must be made in writing, in a form approved for the purpose by the Board, or in such manner, being in writing, as an officer may accept as sufficient in the circumstances: reg 3(1). Where such an application is made by an employee it must (1) be delivered or sent to an office of the Board within six months of the earliest day in respect of which entitlement to statutory sick pay or statutory maternity pay is in issue, (2) state the period in respect of which entitlement is in issue, and (3) state the grounds (if any) on which the applicant's employer has denied liability in respect of the period specified in the application: reg

3(2). In relation to statutory sick pay 'employee' and 'employer' have the meanings given by the Social Security Contributions and Benefits Act 1992 s 163(1) (see EMPLOYMENT vol 39 (2009) PARAS 504, 511): SI 1999/776 reg 1(2). In relation to statutory maternity pay 'employee' and 'employer' have the meanings given by the Social Security Contributions and Benefits Act 1992 s 171(1) (see EMPLOYMENT vol 39 (2009) PARAS 372, 378): SI 1999/776 reg 1(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/360. Social security appeal tribunals.

### **360. Social security appeal tribunals.**

The President of social security appeal tribunals, disability appeal tribunals and medical appeal tribunals<sup>1</sup>, constitutes for the whole of Great Britain<sup>2</sup>, to act for such areas as he thinks fit and be composed of such persons as he thinks fit to appoint, panels of persons to act as members of social security appeal tribunals<sup>3</sup>. A social security appeal tribunal consists of a chairman<sup>4</sup> and two other persons<sup>5</sup>. If practicable, at least one of the members of the appeal tribunal hearing a case must be of the same sex as the claimant<sup>6</sup>.

Where a matter before a social security appeal tribunal involves a question as to whether a person satisfies the 'all work test'<sup>7</sup> that tribunal must sit with a medical assessor<sup>8</sup>.

1 As to the President of social security appeal tribunals, disability appeal tribunals and medical appeal tribunals see PARA 356 ante.

2 For the meaning of 'Great Britain' see PARA 15 note 4 ante.

3 Social Security Administration Act 1992 s 40(1). The panel for an area is composed of persons appearing to the President to have knowledge or experience of conditions in the area and to be representative of persons living or working in the area: s 40(2). Before appointing members of a panel, the President must take into consideration any recommendations from such organisations or persons as he considers appropriate: s 40(3). The members of the panels hold office for such period as the President may direct, but he may at any time terminate the appointment of any member of the panel: s 40(4).

4 The chairman is nominated by the President; and the President may so nominate as chairman (1) himself; (2) one of the full-time chairmen appointed under *ibid* s 51(1); or (3) a person drawn from the panel appointed by the Lord Chancellor or, as the case may be, the Lord President of the Court of Session under the Tribunals and Inquiries Act 1992 s 6: see the Social Security Administration Act 1992 s 41(3), (4) (amended by the Tribunals and Inquiries Act 1992 s 18(1), Sch 3 para 36). No person may be appointed chairman of a tribunal under head (3) *supra* (Social Security Administration Act 1992 s 41(4)(c) (as amended)) unless he has a five-year general qualification or he is an advocate or solicitor in Scotland of at least five years' standing: see s 41(5). For the meaning of 'general qualification' see LEGAL PROFESSIONS vol 65 (2008) PARA 742.

5 *Ibid* s 41(1). The members other than the chairman are drawn from the appropriate panel constituted under s 40: s 41(2).

6 *Ibid* s 41(6). Every effort should be made to comply with this provision subject only to the 'practicability' exception, which is not to be construed loosely: see Decision R(SB)2/811. As to tenure of office, remuneration, staff and administration of a social security appeal tribunal see the Social Security Administration Act 1992 s 41(7), Sch 2 (as amended).

7 The 'all work test' is a test of the extent of a person's incapacity, by reason of some specific disease or bodily or mental disablement, to perform the activities prescribed in the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, Schedule (as amended): see the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 24; and PARA 68 ante.

8 See the Social Security Administration Act 1992 s 61A(4) (added by the Social Security (Incapacity for Work) Act 1994 s 6(2)); and the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 21. This specific requirement is separate from and additional to the general power (rarely exercised) of a tribunal to appoint one or more assessors in a case involving a question of fact of special difficulty: see the Social Security Administration Act 1992 s 56; and PARA 372 post.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **360-373 Social security appeal tribunals ... Reviews**

Following the transfer of functions relating to adjudication of social security matters from the Secretary of State to the Inland Revenue, the tax appeal commissioners (ie the General or the Special Commissioners of Inland Revenue) now hear appeals on both points of fact and law against a decision of an officer of the Inland Revenue: see the Social Security Contributions (Transfer of Functions, etc) Act 1999 ss 11-14 (ss 11, 14 amended by the Employment Act 2002 s 9; 1999 Act s 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(7), and SI 2009/777). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

### **360-361 Social security appeal tribunals, Appeal to a social security appeal tribunal**

Replaced. See now Tribunals, Courts and Enforcement Act 2007 Pt 1 (ss 1-49); and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARAS 13A-13C.

### **360 Social security appeal tribunals**

NOTE 4--1992 Act s 6 amended: Constitutional Reform Act 2005 Sch 4 para 224, Sch 18 Pt 2. See also s 19, Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/361. Appeal to a social security appeal tribunal.

### **361. Appeal to a social security appeal tribunal.**

Where an adjudication officer<sup>1</sup> has decided a claim or question (other than a claim or question relating to an attendance allowance, a disability living allowance or a disability working allowance) (1) if it relates to statutory sick pay or statutory maternity pay, the employee and employer concerned each has a right to appeal to a social security appeal tribunal; and (2) in any other case the claimant has the right to do so<sup>2</sup>. However, no such appeal lies where, in connection with the decision of the adjudication officer, there has arisen any question which under or by virtue of the Social Security Administration Act 1992 falls to be determined otherwise than by an adjudication officer, the question has been determined and the adjudication officer certifies the decision on that question is the sole ground of his decision<sup>3</sup>.

Where an appeal or reference is made to an appeal tribunal, the clerk to the tribunal must direct every party to the proceedings to notify him if that party wishes an oral hearing of that appeal or reference to be held<sup>4</sup>, and where he receives such notification the appeal tribunal must hold an oral hearing<sup>5</sup>. The chairman of an appeal tribunal may of his own motion require an oral hearing to be held if he is satisfied that such a hearing is necessary to enable the tribunal to reach a decision<sup>6</sup>. Any case may with the consent of the claimant or his representative, but not otherwise, be proceeded with in the absence of any one member of the tribunal other than the chairman<sup>7</sup>. Where an oral hearing is adjourned and at the hearing after the adjournment the tribunal is differently constituted, otherwise than through the operation on that occasion of the absence of one member with the consent of the claimant or representative, the proceedings at that hearing must be by way of a complete rehearing of the case<sup>8</sup>.

The decision of the majority of the appeal tribunal must be the decision of the tribunal but, where the tribunal consists of an even number, the chairman has a second or casting vote<sup>9</sup>. Every decision of an appeal tribunal must be recorded in summary by the chairman in such written form of decision notice as approved by the President and such decision notice must be signed by the chairman<sup>10</sup>. As soon as practicable after the case has been decided, a copy of the decision notice must be sent or given to every party to the proceedings, who must also be informed of his right to a copy of the statement of reasons and findings on questions of fact and the conditions governing appeals to a social security commissioner<sup>11</sup>. A statement of the reasons for the tribunal's decision and of its findings on questions of fact material thereto may be given orally at the hearing or in writing at such later date as the chairman may determine<sup>12</sup>, and a copy of the statement must be supplied to the parties to the proceedings if requested by any of them within 21 days after the decision notice has been sent or given<sup>13</sup>.

The proceedings of a social security appeal tribunal are inquisitorial in nature; the tribunal must listen fairly to the contentions of all persons entitled to be represented, uninhibited by the normal rules of evidence<sup>14</sup>. Although an appeal will normally be against a decision taken as at a particular date, it may be necessary for the tribunal also to consider the position after that date, sometimes up to the date of the hearing<sup>15</sup>.

Where a question which would fall to be determined by an adjudication officer first arises in the course of an appeal to a social security appeal tribunal, a disability appeal tribunal or a social security commissioner, the tribunal or the commissioner may, if they or he thinks fit, proceed to determine the question notwithstanding that it has not been considered by an adjudication officer<sup>16</sup>. However, a social security appeal tribunal may not determine such a question if an appeal in relation to it would have lain to a disability appeal tribunal<sup>17</sup>.

1 As to adjudication by adjudication officers see PARA 359 ante.

2 Social Security Administration Act 1992 s 22(1). A person with a right of appeal must be given such notice of a decision falling within s 22(1) and of that right as may be prescribed: s 22(2). Where an adjudication officer has determined that any amount, other than an amount of an attendance allowance, disability living allowance, disability working allowance, statutory sick pay, or statutory maternity pay, is recoverable under or by virtue of ss 71 or 74 (both as amended) (overpayment and abatement cases: see PARA 385 et seq post), any person from whom he has determined that it is recoverable has the same right of appeal to a social security appeal tribunal as a claimant: s 22(5). In any case where an adjudication officer has decided any claim or question under the Social Security Contributions and Benefits Act 1992 Pt V (ss 94-111) (as amended) (see PARA 126 et seq ante) and the right to claim benefit under Pt V (as amended) of any person other than the claimant is or may be, under s 106, Sch 7 Pt VI, affected by that decision, that other person has the like right of appeal to a social security appeal tribunal as the claimant: s 22(6). There is no right of appeal where the sole ground for the officer's decision is a determination on a question which arose but fell to be determined otherwise than by an adjudication officer (in particular, a Secretary of State's decision, which the officer merely applied: see PARA 357 ante). Regulations may make provision as to the manner in which, and the time within which, appeals are to be brought: s 22(4). Section 22(2) applies to a person with a right of appeal under s 22(5) or (6) as it applies to a claimant: s 22(7).

3 Ibid s 22(3).

4 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 22(1) (substituted by SI 1996/2450). Such a notification must be made in writing and must be made within ten days of receipt of the direction from the clerk to the tribunal or within such other period as the clerk to the tribunal or the chairman of the tribunal may direct: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 22(1A) (added by SI 1996/2450).

5 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 22(1B) (added by SI 1996/2450).

6 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 22(1C) (added by SI 1996/2450).

7 See the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 22(2).

8 See ibid reg 22(3). See also Decision R(U)3/88. The Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 21(3), (4) (reference of special question in child benefit cases) applies to an appeal tribunal as it applies to an adjudication officer, except that a tribunal must, instead of referring a question in accordance with reg 21(3)(a), direct it to be so referred by an adjudication officer: reg 22(4).

9 Ibid reg 23(1).

10 Ibid reg 23(2) (substituted by SI 1996/2450). In addition, a record of the proceedings at the hearing must be made by the chairman in such medium as he may direct and preserved by the clerk to the tribunal for 18 months, and a copy of such record must be supplied to the parties if requested by any of them within that period: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 23(4) (added by SI 1996/182; amended by SI 1996/2450).

11 See the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 23(3) (substituted by SI 1996/2450).

12 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 23(3A) (added by SI 1996/2450). Where the statement is given orally, it must be recorded in such medium as the chairman may determine: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 23(3B) (added by SI 1996/2450). If a decision is not unanimous, the statement referred to in the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 23(3A) (as added) must record that one of the members dissented and the reasons given by him for dissenting: reg 23(3D) (added by SI 1996/2450).

13 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 23(3C) (added by SI 1996/2450). If the statement is one to which the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 23(3A)(a) (as added) applies, that copy must be supplied in such medium as the chairman may direct: see reg 23(3C) (as so added).

14 See Decision R(IS)5/93, where a refusal to consider hearsay evidence was held to be an error of law. In making findings of fact, the tribunal may make reference to other documents (such as the adjudication officer's summary of facts in the appeal papers), but this must be done with care: Decision R(IS)4/93.

15 See Decision R(IS)17/94; and Decision R(IS)3/93.

16 Social Security Administration Act 1992 s 36(1).

17 Ibid s 36(2).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see *RATING AND COUNCIL TAX* vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **360-373 Social security appeal tribunals ... Reviews**

Following the transfer of functions relating to adjudication of social security matters from the Secretary of State to the Inland Revenue, the tax appeal commissioners (ie the General or the Special Commissioners of Inland Revenue) now hear appeals on both points of fact and law against a decision of an officer of the Inland Revenue: see the Social Security Contributions (Transfer of Functions, etc) Act 1999 ss 11-14 (ss 11, 14 amended by the Employment Act 2002 s 9; 1999 Act s 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(7), and SI 2009/777). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

### **360-361 Social security appeal tribunals, Appeal to a social security appeal tribunal**

Replaced. See now Tribunals, Courts and Enforcement Act 2007 Pt 1 (ss 1-49); and *ADMINISTRATIVE LAW* vol 1(1) (2001 Reissue) PARAS 13A-13C.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/362. Social security commissioners.

### **362. Social security commissioners.**

The Crown may from time to time appoint, from among persons who have a ten-year general qualification or advocates or solicitors in Scotland of at least ten years' standing, (1) a chief social security commissioner; and (2) such number of other social security commissioners as it thinks fit<sup>1</sup>. In addition, deputy commissioners may be appointed by the Lord Chancellor for such periods or on such occasions as he may think fit in order to facilitate the disposal of the business of the social security commissioners<sup>2</sup>.

Social security commissioners normally sit alone to determine appeals, but if it appears to the chief social security commissioner, or in the case of his inability to act, to such other of the commissioners as he may have nominated to act for the purpose, that an appeal falling to be heard involves a question of law of special difficulty, he may direct that the appeal be dealt with, not by that commissioner alone, but by a tribunal consisting of any three of the commissioners<sup>3</sup>.

<sup>1</sup> Social Security Administration Act 1992 s 52(1). As to the terms of appointment of such officers see s 52(4), Sch 2 (as amended). For the meaning of 'general qualification' see LEGAL PROFESSIONS vol 65 (2008) PARA 742.

<sup>2</sup> See *ibid* s 52(2). When the Lord Chancellor proposes to exercise the power conferred on him by s 52(2), it is his duty to consult the Lord Advocate with respect to the proposal: s 52(3).

<sup>3</sup> *Ibid* s 57(1). If the decision of the tribunal is not unanimous, the decision of the majority must be the decision of the tribunal: s 57(2).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **360-373 Social security appeal tribunals ... Reviews**

Following the transfer of functions relating to adjudication of social security matters from the Secretary of State to the Inland Revenue, the tax appeal commissioners (ie the General or the Special Commissioners of Inland Revenue) now hear appeals on both points of fact and law against a decision of an officer of the Inland Revenue: see

the Social Security Contributions (Transfer of Functions, etc) Act 1999 ss 11-14 (ss 11, 14 amended by the Employment Act 2002 s 9; 1999 Act s 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(7), and SI 2009/777). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

### **362 Social security commissioners**

NOTE 2--The Lord Chancellor's function under the 1992 Act s 52(2) is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/363. Appeal to a social security commissioner.

### **363. Appeal to a social security commissioner.**

An appeal lies to a social security commissioner<sup>1</sup> from any decision of a social security appeal tribunal<sup>2</sup>, a disability appeal tribunal<sup>3</sup> or a medical appeal tribunal<sup>4</sup>, on the ground that the decision of the tribunal was erroneous in point of law<sup>5</sup>.

An appeal may be brought at the instance of the following:

- 1101 (1) in the case of an appeal from a social security appeal tribunal or a disability appeal tribunal to a commissioner (subject to head (3) below), an adjudication officer, the claimant, in specified instances<sup>6</sup> the claimant's trade union<sup>7</sup>, and a person from whom it is determined any amount is recoverable<sup>8</sup> in respect of overpayment and abatement<sup>9</sup>;
- 1102 (2) in the case of an appeal from a decision of a medical appeal tribunal, an adjudication officer, the claimant, a trade union of which the claimant was a member at the time of the relevant accident (or, in a case relating to severe disablement allowance, at the prescribed time), or the Secretary of State<sup>10</sup>;
- 1103 (3) in the case of statutory sick pay or statutory maternity pay, an adjudication officer, the employee concerned, the employer concerned, a trade union<sup>11</sup> or an association of employers of which the employer is a member at the time of the appeal and was so immediately before the question at issue arose<sup>12</sup>;
- 1104 (4) in a case relating to industrial injuries benefit, a person whose right to benefit is, or may be<sup>13</sup>, affected by the decision appealed against, as well as at the instance of any person or body mentioned in head (1) above<sup>14</sup>.

No appeal lies without leave of either the person who was the chairman of the tribunal when the decision was given (or, in a prescribed case, the leave of some other chairman of a tribunal) or, subject to and in accordance with regulations, of a commissioner<sup>15</sup>.

For the purposes of bringing an appeal, a tribunal decision may be erroneous in point of law if:

- 1105 (a) it contains a false proposition ex facie;
- 1106 (b) it is supported by no evidence<sup>16</sup>;
- 1107 (c) the facts found are such that no person acting judicially and properly instructed as to the law could have come to the determination in question;
- 1108 (d) there has been any breach of the requirement to act according to the demands of natural justice<sup>17</sup>; or
- 1109 (e) there has been a failure adequately to comply with the statutory requirement<sup>18</sup> to record the tribunal's findings of fact and reasons<sup>19</sup>.

In addition, a commissioner may hear and determine an argument that a particular regulation under which a decision has been taken is ultra vires and void<sup>20</sup>.

Where the commissioner holds that a decision was erroneous in point of law, he must set it aside and he has the power, in the case of an appeal from a social security tribunal, either to give the decision which he considers the tribunal should have given (if he can do so without making fresh or further findings of fact) or, if he considers it expedient, to make such findings and to give such decision as he considers appropriate in light of them; and in any other case,

he must refer the case to a tribunal, or medical appeal tribunal as the case may be, with directions for its determination<sup>21</sup>.

1 As to social security commissioners see PARA 362 ante.

2 Ie a decision of a social security appeal tribunal under the Social Security Administration Act 1992 s 22: see PARA 361 ante.

3 Ie a decision of a disability appeal tribunal under ibid s 33: see PARA 376 post.

4 Ie if given after 27 September 1959: see ibid s 48(1).

5 See ibid ss 23(1), 34(1), 48(1). Regulations may make provision as to the manner in which, and the time within which, appeals are to be brought and applications made for leave to appeal: see ss 23(10), 34(4), 48(3). As to applications for leave to appeal to a commissioner from an appeal tribunal see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 24 (as amended); and the Jobseeker's Allowance Regulations 1996, SI 1996/207 (as amended). In addition, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Commissioners Procedure) Regulations 1987, SI 1987/214, Pt II (regs 3-9), have effect as if made under the Social Security Administration Act 1992 s 23(10). See also PARA 364 post.

6 The following are the cases in which an appeal lies at the instance of a trade union:

150 (1) in the case of an appeal from a social security appeal tribunal, (a) where the claimant is a member of the union at the time of the appeal and was so immediately before the issue arose; (b) where that question in any way relates to a deceased person who was a member of the union at the time of his death; (c) where the case relates to industrial injuries benefit and the claimant or, in relation to industrial death benefit, the deceased, was a member of the union at the time of the relevant accident (see ibid s 23(3)(c), (5));

151 (2) in the case of an appeal from a social security appeal tribunal or disability appeal tribunal, (a) where the claimant is a member of the union at the time of the appeal and was so immediately before the question at issue arose; (b) where that question in any way relates to a deceased person who was a member of the union at the time of his death (see s 34(2)(c)).

7 References to a trade union apply also to any other association which exists to promote the interests and welfare of its members: see ibid s 23(6), 34(3), 48(2).

8 Ie recoverable under ibid s 71(1) or, in the case of an appeal from a social security appeal tribunal, s 74 (see PARA 385 et seq post): see ss 23(3)(d), 34(2)(d).

9 See ibid ss 23(3), 34(2).

10 See ibid s 48(1).

11 Ie where (1) the employee is a member of the union at the time of the appeal and was so immediately before the question at issue arose; or (2) the question at issue is a question as to or in connection with entitlement of a deceased person who was at the time of his death a member of the union: see ibid s 23(2)(d).

12 See ibid s 23(2).

13 Ie under the Social Security Contributions and Benefits Act 1992 s 106, Sch 7 Pt VI: see PARA 127 ante.

14 See the Social Security Administration Act 1992 s 23(4).

15 See ibid ss 23(9), 34(4), 48(3). As to the procedure on appeal to a commissioner see PARA 364 post.

16 Under this head and head (d) in the text (breach of natural justice) the commissioner may need to consider not only the record but also direct evidence of what occurred at the tribunal hearing, bearing in mind that the jurisdiction is inquisitorial, not adversarial: Decision R(M)1/89.

17 See further PARA 369 post.

18 See PARA 361 ante.

19 See Decision R(SB)11/83 para 13. See also Decision R(A)1/72; and Decision R(I)14/75.

20 *Chief Adjudication Officer v Foster* [1993] AC 754, [1993] 1 All ER 705, HL. This proposition applies primarily to an argument that a particular regulation is ultra vires the statutory power under which it is made (see also Decision R(SB)10/88); quaere whether it would apply to an argument that a regulation, though made intra vires, is in substance void for irrationality (see Decision CIS/391/1992, which gives support to such a possibility).

21 See the Social Security Administration Act 1992 ss 23(7), 34(4), 48(5). Subject to any direction of the commissioner, the tribunal on a reference must consist of persons who were not members of the tribunal which gave the erroneous decision: see ss 23(8), 34(4), 48(6). Section 23(7)-(10) also applies to appeals under the Social Security (Recovery of Benefits) Act 1997 s 13: see s 13(3).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **360-373 Social security appeal tribunals ... Reviews**

Following the transfer of functions relating to adjudication of social security matters from the Secretary of State to the Inland Revenue, the tax appeal commissioners (ie the General or the Special Commissioners of Inland Revenue) now hear appeals on both points of fact and law against a decision of an officer of the Inland Revenue: see the Social Security Contributions (Transfer of Functions, etc) Act 1999 ss 11-14 (ss 11, 14 amended by the Employment Act 2002 s 9; 1999 Act s 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(7), and SI 2009/777). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

### **363 Appeal to a social security commissioner**

NOTE 5--SI 1987/214 replaced: Social Security Commissioners (Procedure) Regulations 1999, SI 1999/1495 (see PARA 81 NOTE 8). See *Roach v The Secretary of State for Work and Pensions* [2006] EWCA Civ 1746, [2007] 1 FCR 238 (a commissioner was wrong to re-analyse evidence from his perspective and overrule a tribunal's finding of fact that a claimant was lying).

TEXT AND NOTE 10--Words '(or, in a case ... at the prescribed time)' omitted: Social Security Administration Act 1992 s 48(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 13 Pt IV (amendment subject to a saving in respect of existing severe disablement allowance beneficiaries: see SI 2000/2958 art 4)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/364. Procedure on appeal to a social security commissioner.

### **364. Procedure on appeal to a social security commissioner.**

An application may be made to a social security commissioner<sup>1</sup> for leave to appeal against a decision of an appeal tribunal<sup>2</sup> or a medical appeal tribunal<sup>3</sup> only where the applicant has been refused leave to appeal by the chairman of an appeal tribunal or, as the case may be, of a medical appeal tribunal<sup>4</sup>. Where there has been a failure to apply to the chairman for leave within the specified time, an application for leave to appeal may be made to a commissioner who may, if for special reasons he thinks fit, accept and proceed to consider and determine the application<sup>5</sup>. The application for leave to appeal must be made to the commissioner within 42 days from the date on which notice in writing of the refusal of leave to appeal was given to the applicant<sup>6</sup>. Application to the commissioner must be by a notice containing the name and address of the applicant, the grounds on which he intends to rely and an address for service of notices and documents, and the notice must have annexed to it a copy of the full statement of the tribunal's decision against which leave to appeal is being sought<sup>7</sup>.

The commissioner's decision is to be notified to the applicant and each respondent in writing; with their consent, a successful application may also be treated as the substantive appeal and determined accordingly<sup>8</sup>. Refusal of leave to appeal is not itself subject to appeal<sup>9</sup>.

The appeal itself is also commenced by a notice of appeal, containing the name and address of the appellant, the date on which leave to appeal was granted, the grounds on which the appellant intends to rely and an address for service of notices and other documents and the notice must have annexed to it a copy of the determination granting leave to appeal and a copy of the full statement of the tribunal's decision against which leave to appeal was granted<sup>10</sup>. This notice must be served on a commissioner within 42 days of the date on which the applicant was given notice in writing that leave to appeal had been granted<sup>11</sup>. The appeal may and will normally be dealt with from written observations from the parties rather than orally<sup>12</sup>, but a party may request an oral hearing which is to be granted unless the commissioner is satisfied that the matter can properly be determined without a hearing<sup>13</sup>; alternatively, a commissioner may at any stage order an oral hearing of his own motion if he is satisfied that an oral hearing is desirable<sup>14</sup>.

An oral hearing before a commissioner must be in public except where the commissioner is satisfied that intimate personal or financial circumstances may have to be disclosed or that considerations of public security are involved in which case the hearing or any part thereof must be in private<sup>15</sup>. At any oral hearing a party may conduct his case himself, with assistance from any person if he wishes, or be represented by any person whom he may appoint for the purpose<sup>16</sup>. Any person entitled to be heard<sup>17</sup> at an oral hearing may address the commissioner and, with his leave, give evidence, call witnesses and put questions directly to any other person called as a witness<sup>18</sup>. The commissioner has a broad power to determine the procedure in any proceedings before him<sup>19</sup>.

The determination of a commissioner on an appeal, or an application for leave to appeal, must be in writing and signed by him, and except in respect of a decision made with the consent of the parties, he must record the reasons and send them to the parties<sup>20</sup>.

1 As to social security commissioners see PARA 362 ante.

2 For the purposes of the Social Security Commissioners Procedure Regulations 1987, SI 1987/214 (as amended), 'appeal tribunal' means a social security appeal tribunal or a disability appeal tribunal constituted in

accordance with the provisions of the Social Security Administration Act 1992: see the Social Security Commissioners Procedure Regulations 1987, SI 1987/214, reg 2; and the Interpretation Act 1978 s 17(2)(b).

3 As to medical appeal tribunals see PARA 381 post.

4 Social Security Commissioners Procedure Regulations 1987, SI 1987/214, reg 3(1).

5 Ibid reg 3(2).

6 Ibid reg 3(3). As to the position upon appeals from the former Attendance Allowance Board see reg 3(4). A commissioner may accept and proceed to consider and determine an application for leave to appeal under regs 3(1), (4) notwithstanding that the period specified for making the application has expired, if for special reasons he thinks fit: reg 3(5).

7 See ibid reg 4(1) (amended by SI 1197/955). See further the Social Security Commissioners Procedure Regulations 1987, SI 1987/214, reg 4(2)-(4) (reg 4(2) as amended); and as to appeals to the commissioner under the Jobseekers Act 1995 see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 44.

8 See the Social Security Commissioners Procedure Regulations 1987, SI 1987/214, reg 5.

9 See *Bland v Chief Supplementary Benefit Officer* [1983] 1 All ER 537, [1983] 1 WLR 262, CA. As to judicial review of such a refusal see *R v Secretary of State for Social Services, ex p Connolly* [1986] 1 All ER 998, [1986] 1 WLR 421, CA.

10 Social Security Commissioners Procedure Regulations 1987, SI 1987/214, reg 6 (amended by SI 1997/955).

11 See the Social Security Commissioners Procedure Regulations 1987, SI 1987/214, reg 7(1). As to the application of the Social Security Commissioners Procedure Regulations 1987, SI 1987/214, to appeals to the commissioner under the Jobseekers Act 1995 s 11(6) (see PARA 300 ante) see the Jobseeker's Allowance Regulations 1996, SI 1996/207 (as amended). A commissioner may accept a notice of appeal served after the expiry of the period prescribed if for special reasons he thinks fit: Social Security Commissioners Procedure Regulations 1987, SI 1987/214, reg 7(2). Receipt of the notice must be sent to the appellant, and a copy of it to each respondent: see reg 9. As to references to a commissioner see reg 8; and as to acknowledgment of notice of appeal see reg 9.

12 See ibid reg 15(1). A respondent who wishes to submit to the commissioner written observations on the appeal or on the reference must do so within 30 days of being given notice in writing of it, such observations including the respondent's name, address and address for service and in the case of observations on an appeal, a statement as to whether or not he opposes the appeal and in any case, the grounds upon which he proposes to rely: see ibid reg 10(1), (2). A copy of any written observations from a respondent must be sent by the office of the social security commissioners to the other parties: reg 10(3).

Any party within 30 days of being sent written observations in accordance with reg 10, may submit to a commissioner written observations in reply, a copy of which must be sent to the other parties: see reg 11(1), (2). The commissioner has a wide power to issue directions, in particular with a view to obtaining further information: see reg 12.

13 See ibid reg 15(2).

14 See ibid reg 15(3).

15 Ibid reg 17(4). As to the notice to be given for such a hearing and attendance at the same see reg 17(2), (3).

16 Ibid reg 16.

17 Where a commissioner holds an oral hearing the following persons or organisations are entitled to be present and heard: (1) the person or organisation making the application, appeal or reference; (2) the claimant; (3) the Secretary of State; (4) an adjudication officer; and (5) a trade union, employers' association or other association which would have had a right of appeal under the Social Security Administration Act 1992 ss 23, 34 (see PARA 363 ante): see the Social Security Commissioners Procedure Regulations 1987, SI 1987/214, reg 17(5); and the Interpretation Act 1978 s 17(2)(b).

18 Social Security Commissioners Procedure Regulations 1987, SI 1987/214, reg 17(6). A commissioner may summon a witness, on giving at least seven days notice: see reg 18. As to the powers of postponement, adjournment, withdrawal of applications for leave and irregularities see regs 19, 20, 21.

19 See *ibid* reg 27. In particular, the commissioner may extend or abridge time limits, and strike out any application for want of prosecution on giving due notice to the party in question: see reg 27.

20 See *ibid* reg 22(1)-(3). Without prejudice to reg 22(2), (3), a commissioner may announce his determination or decision at the conclusion of the oral hearing: reg 22(4). As to the correction of accidental errors in decisions see reg 24. A decision may be set aside by a commissioner (on an application made in writing within 30 days of notification of the decision) where it appears just to do so on the ground that (1) a document relating to the proceedings was not sent to or received by a party or his representative at an appropriate time, or was not received at an appropriate time by the commissioner; (2) a party or his representative had not been present at an oral hearing; or (3) the interests of justice so require: see reg 25. See also Decision R(U)3/89.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see *RATING AND COUNCIL TAX* vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **360-373 Social security appeal tribunals ... Reviews**

Following the transfer of functions relating to adjudication of social security matters from the Secretary of State to the Inland Revenue, the tax appeal commissioners (ie the General or the Special Commissioners of Inland Revenue) now hear appeals on both points of fact and law against a decision of an officer of the Inland Revenue: see the Social Security Contributions (Transfer of Functions, etc) Act 1999 ss 11-14 (ss 11, 14 amended by the Employment Act 2002 s 9; 1999 Act s 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(7), and SI 2009/777). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

### **364 Procedure on appeal to a social security commissioner**

TEXT AND NOTES--SI 1987/214 replaced: Social Security Commissioners (Procedure) Regulations 1999, SI 1999/1495 (see PARA 81 NOTE 8).

NOTE 2--See *Rydqvist v Secretary of State for Work and Pensions* [2002] EWCA Civ 947, [2002] ICR 1383 (withdrawal of appeal).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/365. Appeal from social security commissioners on point of law.

### **365. Appeal from social security commissioners on point of law.**

An appeal on a question of law lies to the appropriate court<sup>1</sup> from any decision of a social security commissioner<sup>2</sup>. However, no appeal will lie from a decision except (1) with the leave of the commissioner who gave the decision or, in a prescribed case, with the leave of a commissioner selected in accordance with regulations; or (2) if he refuses leave, with the leave of the appropriate court<sup>3</sup>. Further, an application for leave under this provision in respect of a commissioner's decision may only be made by (a) a person who, before the proceedings before the commissioner were begun, was entitled to appeal to the commissioner from the decision to which the commissioner's decision relates; (b) any other person who was a party to the proceedings in which the first decision was given; (c) the Secretary of State, in a case where he is not entitled to apply for leave by virtue of head (a) or head (b) above; and (d) any other person who is authorised by regulations to apply for leave<sup>4</sup>.

1 For the purposes of the Social Security Administration Act 1992 s 24, except s 24(4), 'the appropriate court' means the court specified in pursuance of s 24(4): see s 24(5); and note 3 *infra*.

2 See *ibid* s 24(1). As to social security commissioners see PARA 362 *ante*.

3 Social Security Administration Act 1992 s 24(2). On an application to a commissioner for leave under s 24, it is the duty of the commissioner to specify as the appropriate court (1) the Court of Appeal, if it appears to him that the relevant place is in England or Wales; (2) the Court of Session, if it appears to him that the relevant place is in Scotland; and (3) the Court of Appeal in Northern Ireland, if it appears to him that the relevant place is in Northern Ireland, except that if it appears to him, having regard to the circumstances of the case and in particular to the convenience of the persons who may be parties to the proposed appeal, that he should specify a different court as the appropriate court, it is his duty to specify that court: s 24(4). In s 24, 'the relevant place', in relation to an application for leave to appeal from a decision of a commissioner, means the premises where the authority whose decision was the subject of the commissioner's decision usually exercises its functions: see s 24(5).

A decision of a commissioner to grant or refuse leave to appeal to him from a decision of a tribunal is not a 'decision' from which s 24 contemplates there is an appeal to the Court of Appeal with leave since it is not a decision determinative of the matters in dispute. If a commissioner's refusal of leave to appeal to him causes a wrong decision of a tribunal to stand, the proper remedy is to seek judicial review of the tribunal's decision. It follows that the Court of Appeal has no jurisdiction to grant leave under s 24(2)(b) to appeal from a commissioner's refusal of leave to appeal in such a case: see *Bland v Chief Supplementary Benefit Officer* [1983] 1 All ER 537, [1983] 1 WLR 262, CA.

4 Social Security Administration Act 1992 s 24(3). Regulations may make provision with respect to the manner in which and the time within which applications must be made to a commissioner for leave under s 24 and with respect to the procedure for dealing with such applications. At the date at which this volume states the law, no such regulations had been made, but by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security Commissioners Procedure Regulations 1987, SI 1987/214, reg 31 partly has effect as if so made. An application to a commissioner for leave to appeal against a decision of a commissioner must be made in writing and must be made within three months from the date on which the appellant was given written notice of the decision: see reg 31(1). See further reg 31(2)-(9). The powers to make regulations conferred by the Social Security Administration Act 1992 s 24 are exercisable by the Lord Chancellor: s 24(6). Section 24 applies to a decision of a commissioner under s 34 (appeal from a social security appeal tribunal or disability appeal tribunal) as it applies to a decision of a commissioner under s 23: s 34(5). As to the Secretary of State see PARA 1 *ante*.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **360-373 Social security appeal tribunals ... Reviews**

Following the transfer of functions relating to adjudication of social security matters from the Secretary of State to the Inland Revenue, the tax appeal commissioners (ie the General or the Special Commissioners of Inland Revenue) now hear appeals on both points of fact and law against a decision of an officer of the Inland Revenue: see the Social Security Contributions (Transfer of Functions, etc) Act 1999 ss 11-14 (ss 11, 14 amended by the Employment Act 2002 s 9; 1999 Act s 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(7), and SI 2009/777). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

### **365 Appeal from social security commissioners on point of law**

NOTE 4--SI 1987/214 reg 31 revoked: SI 1999/1495.

The Lord Chancellor's function under the 1992 Act s 24 is a protected function for the purposes of the Constitutional Reform Act 2005 s 19: see s 19(5), Sch 7 para 4; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 489A.1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/366. Time limits for making applications, appeals or references.

### **366. Time limits for making applications, appeals or references.**

In general, the time limit for making applications, appeals or references is three months<sup>1</sup>. In the case of the following matters that time limit is calculated beginning with the date when notice of the relevant decision was given to the appellant:

- 1110 (1) an appeal to a medical board from an adjudication officer's determination of a diagnosis or recrudescence question;
- 1111 (2) an appeal to a medical appeal tribunal<sup>2</sup> from a decision of an adjudicating medical authority<sup>3</sup>;
- 1112 (3) an appeal to an appeal tribunal from a decision of an adjudicating officer;
- 1113 (4) an appeal to a disability appeal tribunal from a decision on review of an adjudication officer<sup>4</sup>;
- 1114 (5) an appeal to an appeal tribunal from a decision on a review of an adjudication officer<sup>5</sup>; and
- 1115 (6) an application to an adjudicating authority<sup>6</sup> to set aside a decision<sup>7</sup>.

In the case of (a) an application to the chairman for leave to appeal to a commissioner from the decision of an appeal tribunal; (b) an application to the chairman for leave to appeal to a commissioner from the decision of a medical appeal tribunal; (c) an application to the chairman for leave to appeal to a commissioner from the decision of a disability appeal tribunal, the time limit of three months is calculated beginning with the date when a copy of the full statement of the tribunal's decision was given or sent to the applicant<sup>8</sup>. In the case of a reference by the Secretary of State notifying the adjudication officer that a decision of an adjudicating medical practitioner ought to be considered by a medical appeal tribunal, the three month time limit is calculated beginning with the date of the decision of the adjudicating medical practitioner<sup>9</sup>.

1 See the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 3, Sch 2 (as amended); modified to include appeals to the social security appeal tribunal under the Jobseekers Act 1995 s 11(3) (see PARA 300 ante); see the Jobseeker's Allowance Regulations 1996, SI 1996/207, reg 42 (as amended).

2 As to medical appeal tribunals see PARA 381 post.

3 'Adjudicating medical authority' means, as the case may be, an adjudicating medical practitioner, a specially qualified adjudicating medical practitioner, a medical board or a special medical board: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 34.

4 Ie under the Social Security Administration Act 1992 s 30(1): see PARA 376 post.

5 See note 4 supra.

6 For the purposes of the Social Security (Adjudication) Regulations 1995, SI 1995/1801 (as amended), 'adjudicating authority' means, as the case may be, an adjudicating medical practitioner, the chief or any other adjudication officer, an appeal tribunal, a medical appeal tribunal, a disability appeal tribunal, a medical board or a special medical board; and 'appeal tribunal' means a social security appeal tribunal constituted in accordance with the Social Security Administration Act 1992 s 41 (as amended): see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 1(2).

7 See *ibid* Sch 2 paras 1-2, 4-6, 11 (amended by SI 1996/1518).

8 See the Social Security (Adjudication) Regulations 1995, SI 1995/1801, Sch 2 paras 7-9 (amended by SI 1997/955) PARA 10.

9 See the Social Security (Adjudication) Regulations 1995, SI 1995/1801, Sch 2 para 3. As to the Secretary of State see PARA 1 ante.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **360-373 Social security appeal tribunals ... Reviews**

Following the transfer of functions relating to adjudication of social security matters from the Secretary of State to the Inland Revenue, the tax appeal commissioners (ie the General or the Special Commissioners of Inland Revenue) now hear appeals on both points of fact and law against a decision of an officer of the Inland Revenue: see the Social Security Contributions (Transfer of Functions, etc) Act 1999 ss 11-14 (ss 11, 14 amended by the Employment Act 2002 s 9; 1999 Act s 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(7), and SI 2009/777). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/367. Extension of time.

### **367. Extension of time.**

Except in the case of an application to the chairman of an appeal tribunal, a medical appeal tribunal or a disability appeal tribunal for leave to appeal to a commissioner, the time limit for making an application, appeal or reference<sup>1</sup> may be extended, even though the time so specified may already have expired, (1) in the case of an application or reference, for 'special reasons'<sup>2</sup>; and (2) in the case of an appeal, provided certain specified conditions are satisfied; any application for an extension of time must be made to and determined by the person or body to whom the application, appeal or reference is sought to be made or, in the case of a tribunal or board, its chairman<sup>3</sup>. However, no appeal may in any event be brought later than six years after the beginning of the time limit specified<sup>4</sup>. The conditions so specified for the purpose of extending time in the case of an appeal are as follows:

- 1116 (a) an application for extension of time for an appeal may not be granted unless the applicant has satisfied the person considering the application that (i) if the application is granted there are reasonable prospects that such an appeal will be successful; and (ii) it is in the interests of justice that the application be granted<sup>5</sup>;
- 1117 (b) it may not be considered to be in the interests of justice to grant an application unless the person considering the application is satisfied that (i) special reasons exist, which are wholly exceptional and which relate to the history or facts of the case; and (ii) such special reasons have existed throughout the period beginning with the day following the expiration of the specified time limit for the making of an appeal and ending with the day on which the application for an extension of time is made; and (iii) such special reasons manifestly constitute a reasonable excuse of compelling weight for the applicant's failure to make an appeal within the time specified<sup>6</sup>;
- 1118 (c) in determining whether there are special reasons for granting an application for an extension of time, the person considering the application must have regard to the principle that the greater the amount of time that has elapsed between the expiration of the time specified for the making of the appeal and the making of the application for an extension of time, the more cogent should be the special reasons on which the application is based<sup>7</sup>;
- 1119 (d) in determining whether facts constitute special reasons, no account is to be taken of the following: (i) that the applicant or anyone acting for him or advising him was unaware of or misunderstood the law applicable to his case (including ignorance or misunderstanding of any time limits imposed); (ii) that a commissioner or a court has taken a different view of the law from that previously understood and applied<sup>8</sup>.

In the case of an application for an extension of time for making an appeal, the person who determines that application must record his decision in writing together with a statement of the reasons for the decision<sup>9</sup>; and as soon as practicable after the decision has been made it must be communicated to the applicant and to every other party to the proceedings and if within three months of such communication being sent the applicant or any other party to the proceedings so requests in writing, a copy of the record must also be supplied to him<sup>10</sup>.

- 1 See PARA 366 ante.
- 2 'Special reasons' is a broad phrase, which means that all the circumstances can be taken into consideration, not just the particular reasons for the delay: see Decisions R(M)1/87; R(I)5/91.
- 3 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 3(3) (substituted by SI 1996/2450). An application for an extension of time which has been refused may not be renewed: reg 3(4).
- 4 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 3(3E) (reg 3(3A)-(3E) added by SI 1996/182).
- 5 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 3(3A) (as added: see note 4 supra).
- 6 Ibid reg 3(3B) (as added: see note 4 supra).
- 7 Ibid reg 3(3C) (as added: see note 4 supra).
- 8 Ibid reg 3(3D) (as added: see note 4 supra).
- 9 Ibid reg 3(8) (added by SI 1996/182).
- 10 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 3(9) (added by SI 1996/182).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **360-373 Social security appeal tribunals ... Reviews**

Following the transfer of functions relating to adjudication of social security matters from the Secretary of State to the Inland Revenue, the tax appeal commissioners (ie the General or the Special Commissioners of Inland Revenue) now hear appeals on both points of fact and law against a decision of an officer of the Inland Revenue: see the Social Security Contributions (Transfer of Functions, etc) Act 1999 ss 11-14 (ss 11, 14 amended by the Employment Act 2002 s 9; 1999 Act s 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(7), and SI 2009/777). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/368. Manner of making an application, appeal, or reference; withdrawal and striking out.

**368. Manner of making an application, appeal, or reference; withdrawal and striking out.**

Any application, appeal or reference must contain, in the case of an appeal, the date of the notification of the decision against which the appeal is made, the claim or question to which the decision relates and a summary of the arguments relied on by the person making the appeal to support his contention that the decision was wrong; in the case of an application for extension of time in which to appeal<sup>1</sup>, in relation to the appeal which it is proposed to bring, the particulars of the special reasons<sup>2</sup> on which the application is based are required in addition to those previously mentioned; and in the case of any other application or any reference, the grounds on which it is made or given<sup>3</sup>. A chairman of an appeal tribunal, a medical appeal tribunal or a disability appeal tribunal may give directions for the disposal of any purported appeal where he is satisfied that the tribunal does not have jurisdiction to entertain the appeal<sup>4</sup>.

An application, appeal or reference may be withdrawn by written notice<sup>5</sup>, or may be struck out for want of prosecution<sup>6</sup>.

1 As to the extension of time see PARA 367 ante.

2 As to the meaning of 'special reasons' see PARA 367 note 2.

3 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 3(5) (substituted by SI 1996/2450). Where it appears (1) to the chairman of a tribunal or board or the clerk to the tribunal that an application, appeal or reference which is made to him or to the tribunal or board; or (2) to the Secretary of State or an adjudication officer that an application or reference which is made to him, does not contain the particulars required under the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 3(5) (as substituted), he may direct the person making the application, appeal or reference to provide such particulars: reg 3(6) (substituted by SI 1996/2450). As to the position where further particulars are required see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 3(6A)-(6C) (as added). As to the Secretary of State see PARA 1 ante.

4 Ibid reg 3(7).

5 See ibid reg 6 (as amended). In the case of an appeal, withdrawal is only possible before the hearing begins if no notice opposing a withdrawal has been received from an adjudication officer or the Secretary of State and consent in writing is received from any other party; after a hearing has begun, withdrawal needs the leave of the adjudicating authority, or in the case of a tribunal or board, its chairman: see reg 6(2), (2A) (respectively substituted and added by SI 1996/2450). As to the postponement and adjournment of hearings see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 5 (as amended).

6 See ibid reg 7 (as amended). A tribunal chairman may do so on application of any party or of his own motion: see reg 7(1) (amended by SI 1996/2450). Before doing so, notice must be given to the person concerned giving them a reasonable opportunity to show cause why such an order should not be made: see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 7(2). The chairman may give leave to reinstate a struck out application, appeal or reference, in certain circumstances: see reg 7(3) (amended by SI 1996/2450).

**UPDATE**

**330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **360-373 Social security appeal tribunals ... Reviews**

Following the transfer of functions relating to adjudication of social security matters from the Secretary of State to the Inland Revenue, the tax appeal commissioners (ie the General or the Special Commissioners of Inland Revenue) now hear appeals on both points of fact and law against a decision of an officer of the Inland Revenue: see the Social Security Contributions (Transfer of Functions, etc) Act 1999 ss 11-14 (ss 11, 14 amended by the Employment Act 2002 s 9; 1999 Act s 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(7), and SI 2009/777). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/369. Hearings.

### **369. Hearings.**

Any oral hearing before an adjudicating authority<sup>1</sup> and any inquiry must be in public except where (in the case of an oral hearing) the claimant requests a private hearing or (in any case) the chairman or the person holding the inquiry is satisfied that intimate personal or financial circumstances may have to be disclosed or that considerations of public security are involved, in which case the hearing must be in private<sup>2</sup>. At any oral hearing of an application, appeal or reference and any inquiry, any party to the proceedings is entitled to be present and to be heard<sup>3</sup>, and may address the adjudicating authority or person holding the inquiry, give evidence, call witnesses and put questions directly to any other person called as a witness<sup>4</sup>. Any such person may be accompanied and may be represented by another person whether having professional qualifications or not<sup>5</sup>.

There is a general requirement that an adjudicating authority (particularly a tribunal) should act in accordance with the rules of natural justice<sup>6</sup>, though this must be considered in the context of a tribunal's inquisitorial function and the fact that it is not bound by the formal rules of evidence<sup>7</sup>.

For the purposes of arriving at its decision a tribunal must, and for the purpose of discussing any question of procedure may, order all persons not being members of the tribunal or board, other than the person acting as clerk to the tribunal or board, to withdraw from the sitting<sup>8</sup>.

1 For the meaning of 'adjudicating authority' see PARA 366 note 6 ante.

2 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 4(4). Whether the hearing is private or public, certain persons are entitled to be present (eg another chairman or a chairman, member or department officer undertaking training): see reg 4(6)-(8).

Except where reg 4(2C) (as added) applies, not less than seven day's notice beginning with the day on which the notice is given and ending on the day before the hearing of the case or, as the case may be, the inquiry is to take place of the time and place of any oral hearing before an adjudicating authority or of an inquiry must be given to every party to the proceedings, and if such notice has not been given to a person to whom it should have been given the hearing or inquiry may proceed only with the consent of that person: reg 4(2) (amended by SI 1996/2450). The chairman of an appeal tribunal, a medical appeal tribunal or a disability appeal tribunal may give notice for the determination forthwith of an appeal notwithstanding that a party to the proceedings has failed to indicate his availability for a hearing or to provide all the information which may have been requested, if the chairman is satisfied that such a party has failed to comply with a direction regarding his availability or requiring information under the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 2(1)(aa) or (ab) (as added) and has not given any explanation for his failure to comply with such a direction, provided that the chairman is satisfied that the tribunal has sufficient particulars in order for the appeal to be determined: reg 4(2A) (added by SI 1996/2450). The chairman of an appeal tribunal, a medical appeal tribunal or a disability appeal tribunal may give notice for the determination forthwith of an appeal which he believes has no prospect of success: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 4(2B) (added by SI 1996/2450). Any party to the proceedings may waive his right to receive not less than seven days' notice of the time and place of any oral hearing as specified in the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 4(2) (as substituted): reg 4(2C) (added by SI 1996/2450). As to the absence of a duly notified party at the proceedings see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 4(3) (amended by SI 1996/2450), reg 4(3A) (added by SI 1996/2450).

3 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 4(1), (5).

4 Ibid reg 4(9).

5 See ibid reg 2(1)(b). This provision is subject to the provisions of the Social Security Administration Act 1992 and the Social Security (Adjudication) Regulations 1995, SI 1995/1801 (as amended): see reg 2(1).

6 *R v Deputy Industrial Injuries Comr, ex p Moore* [1965] 1 QB 456, [1965] 2 WLR 89, CA. See also Decisions R(S)4/82; R(IS)5/93. In the absence of mala fides or bias, this in practice means (1) basing a decision on evidence before the tribunal; and (2) listening fairly to the contentions of all persons entitled to be represented: *R v Deputy Industrial Injuries Comr, ex p Moore* supra. One statutory exception to the normal requirement of full and open consideration of the evidence is that medical evidence of which a person is not aware, the disclosure of which could be harmful to his health, is not required to be disclosed to that person: see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 8.

7 See Decision R(S)5/93. This may mean a positive duty to investigate further than the parties' initial contentions, and to consider matters such as hearsay evidence: Decision R(S)5/93; and see *TA Miller Ltd v Minister of Housing and Local Government* [1968] 2 All ER 633 at 634, [1968] 1 WLR 992 at 995, CA, per Lord Denning MR.

8 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 2(2). Exceptions are made in the case of a member of the Council on Tribunals or of the Scottish Committee of the Council, the President and any full-time chairman, and, with the leave of the chairman of the tribunal or board, and if no person having the right to be heard objects, any person mentioned in reg 4(6)(b), (d), except a person undergoing training as an adjudication officer or as an adjudicating medical practitioner: see reg 2(2).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see **RATING AND COUNCIL TAX** vol 39(1B) (Reissue) **PARA 384**.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see **PARA 330A**.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further **PARA 356A**.

### **360-373 Social security appeal tribunals ... Reviews**

Following the transfer of functions relating to adjudication of social security matters from the Secretary of State to the Inland Revenue, the tax appeal commissioners (ie the General or the Special Commissioners of Inland Revenue) now hear appeals on both points of fact and law against a decision of an officer of the Inland Revenue: see the Social Security Contributions (Transfer of Functions, etc) Act 1999 ss 11-14 (ss 11, 14 amended by the Employment Act 2002 s 9; 1999 Act s 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(7), and SI 2009/777). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

### **369 Hearings**

**NOTE 8**--The Council on Tribunals and the Scottish Committee of the Council on Tribunals are abolished and replaced by the Administrative Justice and Tribunals Council: see Tribunals, Courts and Enforcement Act 2007 ss 44, 45, Sch 7; and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) **PARA 57A**.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/370. Errors and setting aside decisions.

### **370. Errors and setting aside decisions.**

Regulations may make provision with respect to (1) the correction of accidental errors in any decision or record of a decision given with respect to a claim or question arising under or in connection with any relevant enactment<sup>1</sup> by a body or person authorised to decide the claim or question; and (2) the setting aside of any such decision in a case where it appears just to set the decision aside on the ground that (a) a document relating to the proceedings in which the decision was given was not sent to, or was not received at an appropriate time by, a party to the proceedings or a party's representative or was not received at an appropriate time by the body or person who gave the decision; or (b) a party to the proceedings or a party's representative was not present at a hearing related to the proceedings<sup>2</sup>.

Accidental errors in any decision or any record of a decision may at any time be corrected by the adjudicating authority<sup>3</sup> who gave the decision or by an authority of like status<sup>4</sup>.

On an application made by a party to the proceedings, a decision may be set aside by the adjudicating authority who gave the decision, or by an authority of like status, in a case where it appears just to set the decision aside, on the ground that (i) a document relating to the proceedings in which the decision was given was not sent to, or was not received at an appropriate time by, a party to the proceedings or the party's representative or was not received at an appropriate time by the adjudicating authority who gave the decision<sup>5</sup>; or (ii) a party to the proceedings in which the decision was given or the party's representative was not present at a hearing or inquiry relating to the proceedings<sup>6</sup>; or (iii) the interests of justice so require<sup>7</sup>. There is no appeal against a correction of an accidental error (or a refusal to make such a correction) or against a determination on an application to set aside<sup>8</sup>.

1 For the purposes of the Social Security Administration Act 1992 s 70 (as amended), 'relevant enactment' means any enactment contained in (1) the National Insurance Acts 1965 to 1974 (repealed); (2) the National Insurance (Industrial Injuries) Acts 1965 to 1974 (repealed); (3) the Industrial Injuries and Diseases (Old Cases) Acts 1967 to 1974 (largely repealed); (4) the Social Security Act 1973 (largely repealed); (5) the Social Security Acts 1975 to 1991 (largely repealed); (6) the Industrial Injuries and Diseases (Old Cases) Act 1975 (repealed); (7) the Child Benefit Act 1975 (repealed); (8) the Family Income Supplements Act 1970 (repealed); (9) the Supplementary Benefits Act 1976 (largely repealed); (10) the Social Security Contributions and Benefits Act 1992; (11) the Pension Schemes Act 1993; or (12) the Jobseekers Act 1995: see the Social Security Administration Act 1992 s 70(3) (amended by the Jobseekers Act 1995 s 41(4), (5), Sch 2 para 47, Sch 3; and the Pension Schemes Act 1993 s 190, Sch 8 para 25). As to the Acts that were cited by the collective titles given in heads (1)-(3), (5) supra see 40 Halsbury's Statutes (1997 Reissue) 597, 611.

2 Social Security Administration Act 1992 s 70(1). Nothing in s 70(1) is to be construed as derogating from any power to correct errors or set aside decisions which is exercisable apart from regulations made by virtue of s 70(1): s 70(2).

3 For the purposes of the Social Security (Adjudication) Regulations 1995, SI 1995/1801, regs 9, 10 (as amended), 'adjudicating authority' includes the Secretary of State: reg 11(1). For the meaning of 'adjudicating authority' generally see PARA 366 note 6 ante.

4 See the Social Security Administration Act 1992 s 70 (as amended); and the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 9(1). A correction made to, or to the record of, a decision is deemed to be part of the decision or of that record and written notice of it must be given as soon as practicable to every party to the proceedings: reg 9(2). Nothing in Pt II (regs 2-11) (as amended) is to be construed as derogating from any power to correct errors or set aside decisions which is exercisable apart from these regulations: reg 11(4).

5 For the purposes of determining an application to set aside a decision, *ibid* reg 1(3)(b), and any provision in any enactment or instrument to the effect that any notice or other document required or authorised to be

given or sent to any person is deemed to have been given or sent if it was sent by post to that person's last known or notified address, is to be disregarded: reg 10(5).

6 In determining whether it is just to set aside a decision on the ground set out in *ibid* reg 10(1)(b) (see head (2) in the text), the adjudicating authority must determine whether the party making the application gave notice that he wished an oral hearing to be held, and if that party did not give such notice the adjudicating authority must not set the decision aside unless it is satisfied that the interests of justice manifestly so require: reg 10(1A) (added by SI 1996/2450).

7 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 10(1). Regulation 10(1)(c) (see head (3) in the text), though apparently wide, is limited to procedural irregularities and is not to be used to rectify substantive mistakes by a tribunal as to the relevant law: see Decisions R(S)89; R(SB)4/90. Likewise, it is not to be used merely where a party failed to produce sufficient evidence at a hearing: Decision R(SB)1/92. Where an application to set aside a decision is entertained, every party to the proceedings must be sent a copy of the application and be afforded a reasonable opportunity of making representations on it before the application is determined: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 10(3). Notice in writing of a determination on an application to set aside a decision must be given to every party to the proceedings as soon as may be practicable and the notice must contain a statement giving the reasons for the determination: reg 10(4). Such an application must be made in accordance with reg 3, Sch 2 (both as amended): reg 10(2). In calculating any time specified in Sch 2 (as amended) there must be disregarded any day falling before the day on which notice was given of a correction of a decision or the record of it pursuant to reg 9, or on which notice is given of the determination that a decision is not to be set aside following an application made under reg 10, as the case may be: reg 11(2).

As to substance, it is these stated grounds that have to be considered, not whether the content of the applicant's evidence would have been likely to affect the outcome of the case: Decision R(S)12/81.

8 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 11(3).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see *RATING AND COUNCIL TAX* vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **360-373 Social security appeal tribunals ... Reviews**

Following the transfer of functions relating to adjudication of social security matters from the Secretary of State to the Inland Revenue, the tax appeal commissioners (ie the General or the Special Commissioners of Inland Revenue) now hear appeals on both points of fact and law against a decision of an officer of the Inland Revenue: see the Social Security Contributions (Transfer of Functions, etc) Act 1999 ss 11-14 (ss 11, 14 amended by the Employment Act 2002 s 9; 1999 Act s 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(7), and SI 2009/777). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/371. Restrictions on entitlement to benefit following erroneous decision.

### **371. Restrictions on entitlement to benefit following erroneous decision.**

Where (1) on the determination, whenever made, of a social security commissioner<sup>1</sup> or the court<sup>2</sup> (the relevant determination), a decision made by an adjudicating authority<sup>3</sup> is or was found to have been erroneous in point of law; and (2) after both 13 July 1990<sup>4</sup> and the date of the relevant determination, a claim which falls, or which would apart from this provision fall, to be decided in accordance with the relevant determination is made or treated as made by any person for any benefit<sup>5</sup>, any question which arises on, or on the review of a decision which is referable to, the claim set out in head (2) above and which relates to the entitlement of the claimant or any other person to any benefit (a) in respect of a period before the relevant date<sup>6</sup>; or (b) in the case of a widow's payment, in respect of a death occurring before that date, must be determined as if the decision referred to in head (1) above had been found by the commissioner or court in question not to have been erroneous in law<sup>7</sup>.

<sup>1</sup> As to social security commissioners see PARA 362 ante.

<sup>2</sup> 'The court' means the High Court, the Court of Appeal, the Court of Session, the High Court or Court of Appeal of Northern Ireland, the House of Lords or the Court of Justice of the European Community: see the Social Security Administration Act 1992 s 68(4).

<sup>3</sup> 'Adjudicating authority' means, for these purposes, (1) an adjudication officer or, where the original decision was given on a reference under *ibid* s 21(2) or 25(1) (as amended), a social security appeal tribunal, a disability appeal tribunal or a medical appeal tribunal; (2) any of the following former bodies or officers, that is to say, the National Assistance Board, the Supplementary Benefits Commission, the Attendance Allowance Board, a benefit officer, an insurance officer or a supplement officer; or (3) any of the officers who, or tribunals or other bodies which, in Northern Ireland correspond to those mentioned above: see s 68(4).

<sup>4</sup> I.e. the date of the coming into force of the Social Security Act 1975 s 165D (repealed), the provision of that Act corresponding to the Social Security Administration Act 1992 s 68 (as amended): see s 68(1)(b)(i).

<sup>5</sup> 'Benefit' means, for these purposes, (1) benefit as defined in the Social Security Contributions and Benefits Act 1992 s 122 (as amended) (see PARA 13 note 8 ante); (2) a jobseeker's allowance (see PARA 258 et seq ante); and (3) any income-related benefit (see PARA 173 et seq ante): see the Social Security Administration Act 1992 s 68(4) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 46).

<sup>6</sup> 'The relevant date' means, for these purposes, whichever is the latest of (1) the date of the relevant determination; (2) the date which falls 12 months before the date on which the claim referred to in the Social Security Administration Act 1992 s 68(1)(b) is made or treated under s 7(1) as made; and (3) the earliest date in respect of which the claimant would, apart from s 68 (as amended), be entitled on that claim to the benefit in question: see s 68(4).

<sup>7</sup> *Ibid* s 68(1), (2). In determining whether a person is entitled to benefit in a case where (1) his entitlement depends on his having been entitled to the same or some other benefit before attaining a particular age; and (2) he attained that age before both the date of the relevant determination and the date of the claim referred to in s 68(1)(b) (see head (2) in the text), but not before the earliest day in respect of which benefit could, apart from s 68 (as amended) have been awarded on that claim, s 68(2) must be disregarded for the purpose only of determining the question whether he was entitled as mentioned in head (2) *supra*: see s 68(3). For the purposes of s 68 (as amended) any reference to entitlement to benefit includes a reference to entitlement to any increase in the rate of benefit or to a benefit, or increase of benefit, at a particular rate; and any reference to a decision which is 'referable to' a claim is a reference to a decision on the claim, a decision on a review of the decision on the claim, or a decision on a subsequent review of the decision on the review and so on: s 68(5). The date of the relevant determination must, in prescribed cases, be determined for the purposes of s 68 (as amended) in accordance with any regulations made for that purpose: s 68(6).

### **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **360-373 Social security appeal tribunals ... Reviews**

Following the transfer of functions relating to adjudication of social security matters from the Secretary of State to the Inland Revenue, the tax appeal commissioners (ie the General or the Special Commissioners of Inland Revenue) now hear appeals on both points of fact and law against a decision of an officer of the Inland Revenue: see the Social Security Contributions (Transfer of Functions, etc) Act 1999 ss 11-14 (ss 11, 14 amended by the Employment Act 2002 s 9; 1999 Act s 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(7), and SI 2009/777). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/372. References by authorities.

### **372. References by authorities.**

An adjudication officer<sup>1</sup>, an adjudicating medical practitioner (or two or more such practitioners acting together), a specially qualified adjudicating medical practitioner (or two as the case may be)<sup>2</sup>, a social security appeal tribunal<sup>3</sup>, a disability appeal tribunal<sup>4</sup>, a medical appeal tribunal, a social security commissioner<sup>5</sup> and the Secretary of State<sup>6</sup> all have the power to refer any question of special difficulty arising for decision by the authority to one or more experts for examination and report<sup>7</sup>. For these purposes, 'expert' means a person appearing to the authority to have knowledge or experience which would be relevant in determining the question of special difficulty<sup>8</sup>. Equally, where it appears to any of the authorities listed above<sup>9</sup> that a matter before the authority involves a question of fact of special difficulty, then, unless regulations otherwise provide, the authority may direct that in dealing with that matter it is to have the assistance of one or more assessors<sup>10</sup>.

1 As to adjudication by adjudicating officers see PARA 359 ante.

2 As to medical adjudication see PARA 379 et seq post.

3 As to social security appeal tribunals see PARA 360 ante.

4 As to disability adjudication see PARA 374 et seq post.

5 As to social security commissioners see PARA 362 ante.

6 As to the Secretary of State see PARA 1 ante; and as to adjudication by the Secretary of State see PARA 357 ante.

7 Social Security Administration Act 1992 s 53(1), (2). Regulations may prescribe cases in which a social security commissioner may not exercise this power: see s 53(3).

8 Ibid s 53(4).

9 In the case of adjudicating medical practitioners and specially qualified adjudicating medical practitioners, however, this provision only applies where two or more of them are acting together: see ibid s 56(2)(a), (b).

10 Ibid s 56(1), (2).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **360-373 Social security appeal tribunals ... Reviews**

Following the transfer of functions relating to adjudication of social security matters from the Secretary of State to the Inland Revenue, the tax appeal commissioners (ie the General or the Special Commissioners of Inland Revenue) now hear appeals on both points of fact and law against a decision of an officer of the Inland Revenue: see the Social Security Contributions (Transfer of Functions, etc) Act 1999 ss 11-14 (ss 11, 14 amended by the Employment Act 2002 s 9; 1999 Act s 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(7), and SI 2009/777). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(i) Determination of Claims by the Statutory Authorities/373. Reviews.

### **373. Reviews.**

There are two general statutory powers<sup>1</sup> for an adjudicating authority to review a decision on a question of fact:

- 1120 (1) any decision under the provisions of the Social Security Administration Act 1992 of an adjudication officer<sup>2</sup>, a social security appeal tribunal<sup>3</sup> or a social security commissioner<sup>4</sup>, other than a decision relating to an attendance allowance<sup>5</sup>, a disability living allowance<sup>6</sup> or a disability working allowance<sup>7</sup>, may be reviewed<sup>8</sup> at any time by an adjudication officer, or, on a reference by an adjudication officer, by a social security appeal tribunal, if:
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173. (a) the officer or tribunal is satisfied that the decision was given in ignorance of, or was based on a mistake as to, some material fact<sup>9</sup>; or
174. (b) there has been any relevant change of circumstances<sup>10</sup> since the decision was given<sup>11</sup>; or
175. (c) it is anticipated that a relevant change of circumstances will so occur<sup>12</sup>; or
176. (d) the decision was based on a decision of a question which by statute falls to be determined otherwise than by an adjudication officer, and the decision of that question is revised; or
177. (e) the decision falls to be reviewed under specified provisions<sup>13</sup> of the Jobseekers Act 1995<sup>14</sup>;
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- 1121 (2) in any case where benefit is awarded in respect of days subsequent to the date of claim the award is subject to the condition that the claimant satisfies the requirements for entitlement; and where those requirements are not satisfied the award must be reviewed<sup>15</sup>.

Any decision of an adjudication officer, other than a decision relating to an attendance allowance, a disability living allowance or a disability working allowance, may be reviewed, upon the ground that it was erroneous in point of law, by an adjudication officer or, on a reference from an adjudication officer, by a social security appeal tribunal<sup>16</sup>.

1 There are specific provisions relating to reviews in relation to attendance allowance, disability living allowance and disability working allowance (necessary because a challenge to an award of one of those benefits lies in the first instance only by way of review, with appeal lying against an unfavourable review decision): see the Social Security Administration Act 1992 ss 30-35; and PARAS 376-378 ante. There are separate provisions applying to the review of medical decisions (see PARA 382 post) and the review of a social security commissioner's decision (see PARA 362 ante).

2 As to adjudication by adjudication officers see PARA 359 ante.

3 As to social security appeal tribunals see PARA 360 ante.

4 As to social security commissioners see PARA 362 ante.

5 As to attendance allowance see PARA 112 et seq ante.

6 As to disability living allowance see PARA 102 et seq ante.

7 As to disability working allowance see PARA 218 et seq ante.

8 A question may be raised with a view to such a review by means of an application in writing to an adjudication officer, stating the grounds of the application: Social Security Administration Act 1992 s 26(1). On receipt of any such application, the adjudication officer must proceed to deal with or refer any question arising on it in accordance with ss 21-23 (see PARA 359 et seq ante): s 26(2). Regulations may provide for enabling, or requiring, in prescribed circumstances, a review under s 25 (as amended) notwithstanding that no application for a review has been made: see s 26(3); and the Social Security (Adjudication) Regulations 1995, SI 1995/1801 (as amended).

A decision given on a review, and a refusal to review, is subject to appeal in like manner as the original decision and the Social Security Administration Act 1992 ss 21-23 apply, with the necessary modifications, in relation to a decision given on such a review as they apply to the original decision of a question: s 28. Where a claimant has appealed against a decision of an adjudication officer and the decision is reviewed by an adjudication officer under s 25 (as amended), (1) if the adjudication officer considers that the decision which he has made on the review is the same as the decision that would have been made on the appeal had every ground of the claimant's appeal succeeded, the appeal lapses; but (2) in any other case, the review is of no effect and the appeal proceeds accordingly: s 29.

9 A fact is material if it would have influenced, or required serious consideration by, the person or body making the decision: *Saker v Secretary of State for Social Services* (1988) Times, 16 January, CA, applied in Decision R(A)2/90. Regulations may provide that a decision may not be reviewed on the ground set out in the Social Security Administration Act 1992 s 25(1)(a) (see head (1)(a) in the text) unless the officer or tribunal is satisfied as mentioned in that paragraph by fresh evidence: s 25(3). At the date at which this volume states the law, no such regulations had been made and no such regulations have effect by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2).

10 The question whether a change is relevant is similar to the question whether a fact is material under the previous heading: see Decision R(A)2/90. The two heads remain, however, separate grounds for review: Decision R(M)5/86. The giving of a new medical opinion on the claimant's condition is not per se a relevant change of circumstances: Decisions R(S)6/78; R(S)4/86. The fact that some assumption or estimate made by an adjudication officer in determining the claim later proves to have been inaccurate does not mean that there has been such a change: Decision R(I)3/87. Regulations (1) may prescribe what are, or are not, relevant changes of circumstances for the purposes of the Social Security Administration Act 1992 s 25 (as amended); and (2) may make provision restricting the payment of any benefit, to which a person would, but for this provision, be entitled by reason of a review in respect of any period before or after the review (whether that period falls wholly or partly before or after the making of the regulations): s 27(1); and see the Social Security (Adjudication) Regulations 1995, SI 1995/1801 (as amended); and the Family Credit (General) Regulations 1987, SI 1987/1973 (as amended). Regulations under the Social Security Administration Act 1992 s 27(1)(b) do not restrict the payment to or for a woman of so much of any widow's benefit, any incapacity benefit under the Social Security Contributions and Benefits Act 1992 s 40 (as substituted) or any Category A or Category B retirement pension, or any increase of such a benefit or pension, as falls to be paid by reason of a review which takes place by virtue of the Social Security Administration Act 1992 s 25(1)(a) or (b) in consequence of a claim for a widowhood benefit, within the meaning of s 3 (as amended) (see PARA 347 ante), which is made or treated as made by virtue of s 3 (as amended): s 27(2) (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 Pt II para 48).

11 In its application to family credit, the Social Security Administration Act 1992 s 25(1)(b), (c) (see heads (1)(b)-(1)(c) in the text) have effect subject to the Social Security Contributions and Benefits Act 1992 s 128(3) (change of circumstances not to affect award or rate during specified period: see PARA 203 ante): Social Security Administration Act 1992 s 25(4).

12 Where a decision is reviewed on this ground (ie *ibid* s 25(1)(c)), the decision given on the review takes effect on the day prescribed for that purpose by reference to the date on which the relevant change of circumstances is expected to occur and must be reviewed again if the relevant change of circumstances either does not occur or occurs otherwise than on that date: s 25(5). At the date at which this volume states the law, no regulations had been made under or for the purposes of s 25(5)(a) and no such regulations have effect by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2).

13 Ie the Jobseekers Act 1995 ss 6(6), 7(7), which permit reviews of determinations that a claimant is available for employment and actively seeking employment: see PARAS 276, 285 ante.

14 Social Security Administration Act 1992 s 25(1) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 43). As to the date from which a review is to take effect in the case of the various different benefits see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, regs 58-67A (amended by, *inter alia*, SI 1997/2290). As to the date on which a revised decision has effect on a review see reg 57 (as amended).

15 Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 17(4). The application of this provision, and its relationship with the review power in the Social Security Administration Act 1992 s 25(1), has

caused difficulties. The Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 17(4) has been held to provide the adjudication officer with an independent, concurrent and alternative review power to that in the Social Security Administration Act 1992 s 25(1): Decision R(S)5/89. See also Decision R(S)3/94, where a challenge to the vires of the regulation was dismissed and it was stated that an adjudication officer can 'review' a case at any time, but that to actually 'revise' it he must have statutory authority.

The Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 17(4) requires a decision that the claimant no longer satisfies the requirements for entitlement, and on that question the burden of proof is on the adjudication officer: Decisions R(S)3/90; R(S)1/92. It is possible that Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 17(4) can only be used to deprive a claimant of a benefit altogether, and so cannot be used in an income support case where only one element of entitlement is in issue: see Decision CIS/627/1992. Where, however, an adjudication officer has wrongly relied on the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 17(4) (where the Social Security Administration Act 1992 s 25 should have been relied on), it appears that this mistake does not vitiate the review decision and can be rectified by a tribunal on appeal: see Decisions CSIS/134/94; CSIS/137/94; CSS/035/95 (joint decision).

16 Social Security Administration Act 1992 s 25(2). Where, however, the ground for arguing that the decision was erroneous is a later decision of a commissioner or court that a similar decision was erroneous in point of law, any review must (in so far as it relates to a period before the date of the commissioner's or court's decision in the other case) be determined as if in that other case the decision had not been found to have been erroneous: see s 69. This provision has the effect that any change in the law through a decision of a commissioner or court is not to be back-dated through reviews of similar cases already determined. The effectiveness of this unusual rule (introduced in 1990 to ensure prospective effect only for a change in legal interpretation through a decision of a commissioner or court, especially in a test case) was accepted in *Bate v Chief Adjudication Officer* [1996] 2 All ER 790, [1996] 1 WLR 814, HL. There are similar provisions in the Social Security Administration Act 1992 s 68 to prevent retrospectivity by bringing a fresh claim (as opposed to an application for review) based on the new interpretation in the test case: see PARA 371 ante.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see *RATING AND COUNCIL TAX* vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **360-373 Social security appeal tribunals ... Reviews**

Following the transfer of functions relating to adjudication of social security matters from the Secretary of State to the Inland Revenue, the tax appeal commissioners (ie the General or the Special Commissioners of Inland Revenue) now hear appeals on both points of fact and law against a decision of an officer of the Inland Revenue: see the Social Security Contributions (Transfer of Functions, etc) Act 1999 ss 11-14 (ss 11, 14 amended by the Employment Act 2002 s 9; 1999 Act s 12 amended by the Child Support, Pensions and Social Security Act 2000 s 77(7), and SI 2009/777). See the Social Security Contributions (Decisions and Appeals) Regulations 1999, SI 1999/1027 (amended by SI 2001/4023, SI 2002/3120, SI 2009/56, SI 2009/777).

### **373 Reviews**

TEXT AND NOTE 15--The decision to make the award must now be revised or superseded under the Social Security Act 1998 s 9 or 10: SI 1987/1968 reg 17(4) (amended by SI 1999/2572).

SI 1987/1968 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(ii) Disability Adjudication/374. Disability questions.

## **(ii) Disability Adjudication**

### **374. Disability questions.**

A 'disability question' means a question as to:

- 1122 (1) whether the claimant satisfies the conditions for entitlement to the care or mobility components of a disability living allowance<sup>1</sup>, to an attendance allowance<sup>2</sup> or to a disability working allowance<sup>3</sup>;
- 1123 (2) the period throughout which the claimant is likely to satisfy the conditions for entitlement to an attendance allowance or a disability living allowance;
- 1124 (3) the rate at which an attendance allowance is payable; and
- 1125 (4) the rate at which the care or mobility component of a disability living allowance is payable<sup>4</sup>.

1    Ie the care component of a disability living allowance specified in the Social Security Contributions and Benefits Act 1992 s 72(1), (2) (see PARAS 104-105 ante); and the mobility component of a disability living allowance specified in s 73(1), (8), (9) (see PARAA 106, 108 ante). As to disability living allowance generally see PARA 102 et seq ante.

2    Ie an attendance allowance as specified in ibid ss 64, 65(1): see PARAS 113-114 ante. As to attendance allowance generally see PARA 112 et seq ante.

3    Ie a disability working allowance as specified in ibid s 129(1)(b) (as amended): see PARA 218 ante. As to disability working allowance generally see PARA 218 et seq ante.

4    Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 27(2).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(ii) Disability Adjudication/375. Medical examination.

### **375. Medical examination.**

Before a claim for an attendance allowance<sup>1</sup>, a disability living allowance<sup>2</sup> or a disability working allowance<sup>3</sup> or any question relating to such an allowance is submitted to an adjudication officer<sup>4</sup>, the Secretary of State<sup>5</sup> may refer the person in respect of whom the claim is made or the question is raised to a medical practitioner for such examination and report as appears to him to be necessary for the purpose of providing the adjudication officer with information for use in determining the claim or question or for the purpose of general monitoring of claims for attendance allowances, disability living allowances and disability working allowances<sup>6</sup>. Similarly, an adjudication officer may refer a person in respect of whom such a claim is made or such a question is raised or a person in respect of whom an application for a review<sup>7</sup> has been made or is treated as having been made, to a medical practitioner for such examination and report as appears to the adjudication officer to be needed to enable him to reach a decision on the claim or question or the matter under review<sup>8</sup>. Where there has been such a reference and the medical practitioner has requested the person to attend for or submit himself to medical examination, but the person has failed without good cause to do so, the adjudication officer must decide the claim or question or matter under review against him<sup>9</sup>. Further, regulations may make provision (1) enabling the Secretary of State to require a person to whom attendance allowance or disability living allowance has been awarded to submit to medical examination in prescribed circumstances; (2) for withholding payments of benefit in prescribed circumstances where a person has failed to submit himself to a medical examination to which he has been required to submit in accordance with those regulations; and (3) for the subsequent making in prescribed circumstances of payments withheld in accordance with those regulations<sup>10</sup>.

Where an appeal has been brought to a disability appeal tribunal from a review of a decision of an adjudication officer<sup>11</sup>, the chairman of the appeal tribunal may, if he is satisfied that an appeal by the claimant cannot be properly determined unless the claimant is examined by a medical practitioner and the medical practitioner has provided the disability appeal tribunal with information for use in determining the appeal, refer the claimant to a medical practitioner for such examination and report as appears to him to be necessary for the purpose of providing a disability appeal tribunal with information for use in determining the appeal, but only if he is satisfied that the appeal cannot be properly determined otherwise<sup>12</sup>. Other than that, the tribunal has no power to carry out a physical examination of the claimant or require him to undergo any physical test for specified purposes<sup>13</sup>.

1 As to attendance allowance generally see PARA 112 et seq ante.

2 As to disability living allowance generally see PARA 102 et seq ante.

3 As to disability working allowance generally see PARA 218 et seq ante.

4 Ie under the Social Security Administration Act 1992 s 20 (as amended): see PARA 359 ante.

5 As to the Secretary of State see PARA 1 ante.

6 Social Security Administration Act 1992 s 54(1).

7 Ie under ibid s 30 (as amended) or s 35: see PARAS 376-377 post.

8 Ibid s 54(2) (prospectively amended by the Social Security Administration (Fraud) Act 1997 s 22, Sch 1 para 2, as from a day to be appointed). The Secretary of State may direct adjudication officers to refer for

advice to a medical practitioner who is an officer of the Secretary of State any case falling within a specified class of cases relating to attendance allowance or disability living allowance, and an adjudication officer may refer for advice any case relating to attendance allowance or disability living allowance to such a medical practitioner without such a direction: Social Security Administration Act 1992 s 54(3). An adjudication officer may refer for advice any case relating to a disability working allowance to such a medical practitioner: s 54(4). Such an officer may refer the case or question to the Disability Living Allowance Advisory Board (see PARA 410 post) for advice, and obtain information from another medical practitioner: see s 54(5)-(7). Any reference in s 54(3)-(7) to a medical practitioner who is an officer of the Secretary of State includes a reference to a medical practitioner who is provided by any person in pursuance of a contract entered into with the Secretary of State: s 54(7A) (added by the Deregulation and Contracting Out Act 1994 s 76, Sch 16 para 20(1)).

9 See the Social Security Administration Act 1992 s 54(8).

10 Ibid s 57A (added by the Social Security Administration (Fraud) Act 1997 s 18). Failure by a person to attend for, or submit to, a medical examination under the provisions so made is prescribed as a relevant change of circumstances for the purposes of the Social Security Administration Act 1992 s 30(2)(b) (see PARA 376 post) or s 35(1)(b) (see PARA 377 post): see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 67A (added by SI 1997/1839).

11 Ie under the Social Security Administration Act 1992 s 33(1)(a): see PARA 376 post.

12 See ibid s 55(1); and the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 30.

13 See the Social Security Administration Act 1992 s 55(2). The purposes here specified are for determining whether he satisfies the condition mentioned in the Social Security Contributions and Benefits Act 1992 s 73(1)(a): see PARAS 106, 108 ante.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(ii) Disability Adjudication/376. Review of adjudication officer's decision and appeal.

### **376. Review of adjudication officer's decision and appeal.**

On an application made within the prescribed period of three months beginning with the date on which notice in writing of the decision was given to the claimant<sup>1</sup>, a decision of an adjudication officer which relates to an attendance allowance, a disability living allowance or a disability working allowance may be reviewed on any ground<sup>2</sup>. On an application made after the end of the prescribed period, a decision of an adjudication officer which relates to an attendance allowance or a disability allowance may be reviewed if:

- 1126 (1) the adjudication officer is satisfied that the decision was given in ignorance of, or was based on a mistake as to, some material fact<sup>3</sup>; or
- 1127 (2) there has been any relevant, or in the case of disability working allowance<sup>4</sup> prescribed, change of circumstances since the decision was given; or
- 1128 (3) Except in the case of disability working allowance, it is anticipated that a relevant change of circumstances<sup>5</sup> will so occur<sup>6</sup>; or
- 1129 (4) the decision was erroneous in point of law; or
- 1130 (5) the decision was to make an award for a period wholly or partly after the date on which the claim was made or treated as made but subject to a condition being fulfilled and that condition has not been fulfilled<sup>7</sup>.

Where an adjudication officer has made a decision on such a review, the claimant or such other person as may be prescribed<sup>8</sup> may appeal to a disability appeal tribunal in any case in which there arises a disability question<sup>9</sup> or both a disability question and any other question relating to attendance allowance, disability living allowance or disability working allowance, and in any other case he may appeal to a social security appeal tribunal<sup>10</sup>.

There can be an application to review a review decision, as well as a refusal to review a decision<sup>11</sup>.

An award of an attendance allowance, a disability living allowance or a disability working allowance on such a review replaces any award which was the subject of the review<sup>12</sup>. No decision which relates to an attendance allowance or a disability living allowance can be reviewed on the ground that the person is or was at any time terminally ill<sup>13</sup> unless an application for review is expressly made on that that ground either by the person himself or by any other person purporting to act on his behalf, whether or not that other person is acting with his knowledge or authority<sup>14</sup>.

1    le the period prescribed by the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 25(1). Where a claimant submits an application for such review by post which would have arrived in a local office in the ordinary course of the post within the period prescribed but is delayed by postal disruption caused by industrial action whether within the postal service or elsewhere, that period expires on the day the application is received in the local office if that day does not fall within the period prescribed: see reg 25(2).

2    Social Security Administration Act 1992 s 30(1). In the case of disability working allowance, the ground of review is subject to the Social Security Contributions and Benefits Act 1992 s 129(6) (see PARA 219 ante): see the Social Security Administration Act 1992 s 30(1). The claimant must be given such notification as may be prescribed of a decision which may be reviewed under s 30 (as amended) and of his right to a review under s 30(1): s 30(6). A question may be raised with a view to a review under s 30 (as amended) by means of an application made in writing to an adjudication officer stating the grounds of the application and supplying such information and evidence as may be prescribed: s 30(7). The Secretary of State may undertake investigations

to obtain information and evidence for the purposes of making applications under s 30(7): s 30(7A) (added by the Social Security Administration (Fraud) Act 1997 s 17(1)). Regulations (1) may provide for enabling or requiring, in prescribed circumstances, a review under the Social Security Administration Act 1992 s 30 (as amended) notwithstanding that no application under s 30(7) has been made; and (2) if they do so provide, must specify under which provision of s 30 (as amended) a review carried out by virtue of any such regulation falls: s 30(8). Reviews under s 30 (as amended) must be carried out by adjudication officers: s 30(9). Different aspects of any question which arises on such a review may be dealt with by different adjudication officers; and for this purpose s 30 (as amended) and the other provisions of Pt II (ss 17-70) (as amended) which relate to reviews must apply with any necessary modifications: s 30(10). If a review is under s 30(1), the officer who took the decision under review must not deal with any question which arises on the review: s 30(11). Except in prescribed circumstances, where a claim for a disability living allowance in respect of a person already awarded such an allowance by an adjudication officer is made or treated as made during the period for which he has been awarded the allowance, it must be treated as an application for a review under s 30 (as amended): s 30(12). Where a claim for an attendance allowance, a disability living allowance or a disability working allowance in respect of a person has been refused and a further claim for the same allowance is made in respect of him within the period prescribed under s 30(1), the further claim must be treated as an application for a review under s 30(1): s 30(13).

Where the Secretary of State is undertaking an investigation under s 30(7A) (as added), a person who is awarded attendance allowance or disability living allowance may be required to attend for, or submit himself to, a medical examination: see the Attendance Allowance Regulations 1991, SI 1991/2470, reg 8C; the Disability Living Allowance Regulations 1991, SI 1991/2890, reg 5A (both added by SI 1997/1839). Where a person fails to comply, payment of benefit may be withheld: see the Attendance Allowance Regulations 1991, SI 1991/2470, reg 8D; the Disability Living Allowance Regulations 1991, SI 1991/2890, reg 5B (both as so added). Where the Secretary of State is satisfied that no question arises in connection with his investigation, payment of the amount withheld and of the relevant allowance must be made forthwith: see the Attendance Allowance Regulations 1991, SI 1991/2470, reg 8E; the Disability Living Allowance Regulations 1991, SI 1991/2890, reg 5C (both as so added).

3 Regulations may provide that a decision may not be reviewed on this ground (Social Security Administration Act 1992 s 30(2)(a)) unless the officer is satisfied as mentioned therein by fresh evidence: see s 30(2), (5).

4 Ie subject to the Social Security Contributions and Benefits Act 1992 s 129(6) (see PARA 219 ante): see the Social Security Administration Act 1992 s 30(5)(b).

5 Regulations may prescribe what are, or are not, relevant changes of circumstances for the purposes of ibid s 30(2)(b), (c) (see heads (2)-(3) in the text): s 30(3). Failure by a person to attend for, or submit to, a medical examination under the provisions made under s 57A (as added) (see PARA 375 ante) is prescribed as a relevant change of circumstances for these purposes: see PARA 375 note 10 ante.

6 Where a decision is reviewed under ibid s 30 (as amended) on the ground that it is anticipated that a change of circumstances will occur, the decision given on review takes effect on the day prescribed for that purpose by reference to the date on which the change of circumstances is expected to occur and is reviewed again if the change of circumstances either does not occur or occurs otherwise than on that date: s 32(6).

7 See ibid s 30(2), (5). An adjudication officer can reconsider a decision at any time, but can only revise it if one of these conditions is satisfied: Decision CDLA/1715/1995. A decision that a person is or was at any time terminally ill for the purposes of the Social Security Contributions and Benefits Act 1992 ss 66(1), 72(5) or 73(12) (see PARA 110 note 1 ante) may be reviewed if there has been a change of medical opinion with respect to his condition or his reasonable expectation of life: see the Social Security Administration Act 1992 s 30(4). Where a claimant has appealed against a decision of an adjudication officer under s 33 and the decision is reviewed again under s 30(2), (4) or (5) by an adjudication officer, then (1) if the adjudication officer considers that the decision which he has made on the review is the same as the decision that would have been made on the appeal had every ground of the appeal succeeded, then the appeal lapses; but (2) in any other case, the review is of no effect and the appeal proceeds accordingly: s 32(7). Regulations may make provision restricting the payment of any benefit, or any increase of benefit, to which a person would, but for this provision, be entitled by reason of a review in respect of any period before or after the review (whether that period falls wholly or partly before or after the making of the regulations): s 32(8). Where an adjudication officer has determined that any amount paid by way of an attendance allowance, a disability living allowance or a disability working allowance is recoverable under or by virtue of s 71 (as amended) (see PARA 385 post), any person from whom he has determined that it is recoverable has the same right of review under s 30 (as amended) as a claimant: s 32(9). The Social Security Administration Act 1992 and the Social Security Contributions and Benefits Act 1992 have effect in relation to a review by virtue of the Social Security Administration Act 1992 s 32(9) as if any reference to the claimant were a reference to the person from whom the adjudication officer has determined that the amount in question is recoverable: s 32(10).

8 A person purporting to act on behalf of a person who is terminally ill (as defined in the Social Security Contributions and Benefits Act 1992 s 66(2): see PARA 110 note 1 ante), whether or not that other person is

acting with his knowledge or authority, may appeal to a disability appeal tribunal or an appeal tribunal, as appropriate, in accordance with the Social Security Administration Act 1992 s 33(1) in any case where the ground of appeal is that that person is or was at any time terminally ill: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 28.

9 For the meaning of 'disability question' see PARA 374 ante.

10 Social Security Administration Act 1992 s 33(1); Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 27(1). Regulations may make provision as to the manner in which, and the time within which, appeals are to be brought: Social Security Administration Act 1992 s 33(2); and see the Social Security (Adjudication) Regulations 1995, SI 1995/1801 (as amended).

An award on an appeal under the Social Security Administration Act 1992 s 33 replaces any award which was the subject of appeal: s 33(3). Where a person who has been awarded a disability living allowance consisting of one component alleges on an appeal that he is also entitled to the other component, the tribunal need not consider the question of his entitlement to the component which he has already been awarded or the rate of that component; and where a person who has been awarded a disability living allowance consisting of both components alleges on an appeal that he is entitled to one component at a rate higher than that at which it has been awarded, the tribunal need not consider the question of his entitlement to the other component or the rate of that component: s 33(4), (5). The tribunal is not to consider (1) a person's entitlement to a component which has been awarded for life; or (2) the rate of a component so awarded; or (3) the period for which a component has been so awarded, unless (a) the appeal expressly raises that question; or (b) information is available to the tribunal which gives it reasonable grounds for believing that entitlement to the component, or entitlement to it at the rate awarded or for that period, ought not to continue: s 33(6). See also Decision CSDLA/251/94.

11 See the Social Security Administration Act 1992 s 31. Section 30(2), (4)-(5) applies to a decision on a review under s 30(1) as it applies to a decision of an adjudication officer under s 21 but as if the words 'made after the end of the prescribed period' were omitted from each subsection: s 31(1). Section 30(1)-(2), (4)-(5) applies to a decision on a review under s 30(2), (4)-(5) and to a refusal to review a decision under those provisions as they apply to a decision of an adjudication officer under s 21: s 31(2). The claimant must be given such notification as may be prescribed (1) of a decision on a review under s 30 (as amended); (2) if the review was under s 30(1), of his right of appeal under s 33; and (3) if it was under s 30(2), (4) or (5), of his right to a further review under s 30(1): s 31(3).

12 See *ibid* s 32(1). Where a person who has been awarded a disability living allowance consisting of one component applies or is treated as applying for a review under s 30 (as amended) and alleges that he is also entitled to the other component, the adjudication officer need not consider the question of his entitlement to the component which he has already been awarded or the rate of that component: s 32(2). Where a person who has been awarded a disability living allowance consisting of both components applies or is treated as applying for a review under s 30 (as amended) and alleges that he is entitled to one component at a rate higher than that at which it has been awarded, the adjudication officer need not consider the question of his entitlement to the other component or the rate of that component: s 32(3). Where a person has been awarded a component for life, on a review under s 30 (as amended) the adjudication officer must not consider the question of his entitlement to that component or the rate of that component or the period for which it has been awarded unless (1) the person awarded the component expressly applies for the consideration of that question; or (2) there has been supplied to the adjudication officer by the Secretary of State, or is otherwise available to him, information which gives him reasonable grounds for believing that entitlement to the component, or entitlement to it at the rate awarded or for that period, ought not to continue: s 32(4) (amended by the Social Security Administration (Fraud) Act 1997 s 17(2)).

13 *Ie* within the meaning of the Social Security Contributions and Benefits Act 1992 s 66(2): see PARA 110 note 1 ante.

14 Social Security Administration Act 1992 s 32(5).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see *RATING AND COUNCIL TAX* vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(ii) Disability Adjudication/377. Reviews of decisions on appeal.

### **377. Reviews of decisions on appeal.**

Any decision under the Social Security Administration Act 1992 of a social security appeal tribunal<sup>1</sup>, a disability appeal tribunal<sup>2</sup> or a social security commissioner<sup>3</sup> which relates to an attendance allowance<sup>4</sup>, a disability living allowance<sup>5</sup> or a disability working allowance<sup>6</sup> may be reviewed at any time by an adjudication officer<sup>7</sup> if:

- 1131 (1) he is satisfied that the decision was given in ignorance of, or was based on a mistake as to, some material fact<sup>8</sup>; or
- 1132 (2) there has been any relevant, or in the case of disability working allowance<sup>9</sup> prescribed, change of circumstances since the decision was given; or
- 1133 (3) Except in the case of disability working allowance, it is anticipated that a relevant change of circumstances<sup>10</sup> will so occur<sup>11</sup>; or
- 1134 (4) Except in the case of disability working allowance, the decision was that a person is or was terminally ill<sup>12</sup> and there has been a change of medical opinion with respect to his condition or his reasonable expectation of life; or
- 1135 (5) the decision was to make an award for a period wholly or partly after the date on which the claim was made or treated as made but subject to a condition being fulfilled and that condition has not been fulfilled<sup>13</sup>.

Such reviews must be carried out by adjudication officers<sup>14</sup>. The person whose claim was the subject of the appeal the decision on which has been reviewed must be given such notification as may be prescribed of the decision on the review and of his right to a further review<sup>15</sup>.

1 As to social security appeal tribunals see PARA 360 ante.

2 As to disability appeal tribunals see PARA 378 post.

3 As to social security commissioners see PARA 362 ante.

4 As to attendance allowance generally see PARA 112 et seq ante.

5 As to disability living allowance generally see PARA 102 et seq ante.

6 As to disability working allowance generally see PARA 218 et seq ante.

7 As to adjudication officers see PARA 359 ante.

8 Regulations may provide that a decision may not be reviewed on this ground (Social Security Administration Act 1992 s 35(1)(a)) unless the officer is satisfied as mentioned in that paragraph by fresh evidence: see s 35(1), (3).

9 Ie subject to the Social Security Contributions and Benefits Act 1992 s 129(7) (as amended) (see PARA 219 ante): see the Social Security Administration Act 1992 s 35(3)(b).

10 Regulations may prescribe what are, or are not, relevant changes of circumstances for the purpose of ibid s 35(1)(b), (c) (see heads (2)-(3) in the text): s 35(2).

11 Where a decision is reviewed on this ground (ibid s 35(1)(c)), the decision given on the review (1) takes effect on the day prescribed for that purpose by reference to the date on which the relevant change of circumstances is expected to occur; and (2) is reviewed again if the relevant change of circumstances does not occur or occurs otherwise than on that date: s 35(11).

12 le for the purposes of the Social Security Contributions and Benefits Act 1992 ss 66(1), 72(5) or 73(12): see the Social Security Administration Act 1992 s 35(1)(d).

13 See *ibid* s 35(1), (3). A question may be raised with a view to review under s 35 by means of an application made in writing to an adjudication officer, stating the grounds of the application and supplying such information and evidence as may be prescribed: s 35(4). Regulations may provide for enabling or requiring, in prescribed circumstances, a review under s 35 notwithstanding that no application for a review has been made under s 35(4): s 35(5). Except in prescribed circumstances, where a claim for a disability living allowance in respect of a person already awarded such an allowance on an appeal is made or treated as made during the period for which he has been awarded the allowance, it must be treated as an application for a review under s 35: s 35(7). Section 30(1),(2), (4),(5) (see PARA 376 ante) applies (1) to a decision on a review under s 35; and (2) to a refusal to review a decision such as is mentioned in s 35(1), as it applies to a decision of an adjudication officer under s 21: see s 35(8).

14 *Ibid* s 35(6).

15 *Ibid* s 35(9). Regulations may make provision restricting the payment of any benefit, or any increase of benefit, to what a person would, but for this provision, be entitled by reason of a review in respect of any period before or after the review (whether that period falls wholly or partly before or after the making of the regulations): s 35(10). Section 35(10) and s 32(1)-(5) (as amended) (see PARA 376 ante) apply in relation to a review under s 35 as they apply to a review under s 30 (as amended) (see PARA 376 ante): s 35(12).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(ii) Disability Adjudication/378. Disability appeal tribunals.

### **378. Disability appeal tribunals.**

The President of social security appeal tribunals, disability appeal tribunals and medical appeal tribunals<sup>1</sup> constitutes, for the whole of Great Britain<sup>2</sup>, to act for such areas as he thinks fit and be composed of such persons as he thinks fit to appoint, panels of persons to act as members of disability appeal tribunals<sup>3</sup>. There are two such panels for each area<sup>4</sup>. One panel is composed of medical practitioners and the other of persons who are experienced in dealing with the needs of disabled persons either in a professional or voluntary capacity or because they are themselves disabled, but may not include medical practitioners<sup>5</sup>. A disability appeal tribunal consists of a chairman<sup>6</sup>, nominated by the President, and two other persons<sup>7</sup>, one from an area panel of medical practitioners and one from an area panel of persons experienced in dealing with the needs of disabled persons (in a professional or voluntary capacity or because themselves disabled)<sup>8</sup>.

Where an appeal is made to a disability appeal tribunal, the clerk to the tribunal must direct every party to the proceedings to notify him if that party wishes an oral hearing of that appeal to be held<sup>9</sup>, and where he receives such notification the tribunal must hold an oral hearing<sup>10</sup>.

Where any member of a disability appeal tribunal is not present at the consideration of the case, the tribunal must not proceed to determine the case but must adjourn it for consideration by another tribunal<sup>11</sup>. The chairman may refer a claimant to a medical practitioner for examination and report, but only if satisfied that the appeal cannot be properly determined otherwise<sup>12</sup>. Where a disability appeal tribunal is unable to reach a unanimous decision on any case the decision of the majority of its members is to be the decision of the tribunal<sup>13</sup>.

Appeal lies from a decision of a disability appeal tribunal (or a social security appeal tribunal) to a social security commissioner<sup>14</sup>, on the ground that the decision of the tribunal was erroneous in point of law<sup>15</sup>, at the suit of an adjudication officer, the claimant, a trade union<sup>16</sup> (or other association existing to promote the interests and welfare of its members<sup>17</sup>) or any other person where it is determined that any amount is recoverable<sup>18</sup> from him<sup>19</sup>.

1 As to the President of social security appeal tribunals, disability appeal tribunals and medical appeal tribunals see PARA 356 ante.

2 For the meaning of 'Great Britain' see PARA 15 note 4 ante.

3 Social Security Administration Act 1992 s 42(1). In considering the appointment of members of the panels the President must have regard to the desirability of appointing disabled persons: s 42(5). Before appointing members of a panel, the President must take into consideration any recommendations from such organisations or persons as he considers appropriate: s 42(6).

4 Ibid s 42(2). The members of the panels hold office for such periods as the President may direct, but the President may at any time terminate the appointment of any member of a panel: s 42(7).

5 Ibid s 42(3), (4).

6 The chairman may be (1) the President himself; (2) one of the full-time chairmen appointed under ibid s 51(1); or (3) a person drawn from the panel appointed by the Lord Chancellor or, as the case may be, the Lord President of the Court of Session under the Tribunal and Inquiries Act 1992 s 6: Social Security Administration Act 1992 s 43(5) (amended by the Tribunals and Inquiries Act 1992 s 18(1), Sch 3 para 36). No person may be appointed chairman of a tribunal under the Social Security Administration Act 1992 s 43(5)(c) (see head (3) supra) unless he has a five-year general qualification or he is an advocate or solicitor in Scotland of at least five years' standing: s 43(6). For the meaning of 'general qualification' see LEGAL PROFESSIONS vol 65 (2008) PARA 742.

7 See the Social Security Administration Act 1992 s 43(1), (4). The tribunal is convened by its clerk, who is to have regard to the desirability of at least one of the members being a disabled person: see s 43(7).

8 See *ibid* s 43(2), (3). If practicable, at least one of the members of the tribunal is to be of the same sex as the claimant: s 43(8). A person may not act as a member of a disability appeal tribunal if he (1) is or may be directly affected by that case; or (2) has taken any part in the case as an assessor, a medical practitioner who has regularly attended the claimant or to whom any question has been referred for report or advice, or as a witness: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 31(1). If a disability appeal tribunal is unable to determine a question by reason of the provisions of reg 31(1) the case must be referred to another such tribunal: reg 31(2). As to tenure of office, remuneration and officers and staff relating to disability appeal tribunals see also the Social Security Administration Act 1992 s 43(9), Sch 2 (as amended).

9 See the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 29(1) (substituted by SI 1996/2450). A notification under the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 29(1) (as substituted) must be in writing and made within ten days of receipt of the direction from the clerk to the tribunal or within such other period as the clerk to the tribunal or the chairman of the tribunal may direct: reg 29(1A) (added by SI 1996/2450).

10 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 29(1B) (added by SI 1996/2450). The chairman of a disability appeal tribunal may of his own motion require an oral hearing to be held if he is satisfied that such a hearing is necessary to enable the tribunal to reach a decision: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 29(1C) (added by SI 1996/2450).

11 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 29(2). Where an oral hearing is adjourned and at the hearing after the adjournment the tribunal is differently constituted, otherwise than through the operation on that occasion of reg 29(2), the proceedings at that hearing must be by way of a complete rehearing of the case: reg 29(3).

12 See *ibid* reg 30; and PARA 375 ante.

13 *Ibid* reg 29(4). Every decision of a disability appeal tribunal must be recorded in summary by the chairman in such written form of decision notice as has been approved by the President, and such decision notice must be signed by the chairman: reg 29(5) (substituted by SI 1996/2450). As soon as may be practicable after a case has been decided by a disability appeal tribunal, a copy of the decision notice made in accordance with the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 29(5) (as substituted) must be sent or given to every party to the proceedings who must also be informed of his right to a statement of reasons for the tribunals' decision and of its findings on questions of fact material thereto (which may be given orally at the hearing or in writing at such later date as the chairman may determine) if requested by him, and of the conditions governing appeal to a commissioner: see reg 29(6), (6A), (6C) (substituted by SI 1996/2450). If a decision is not unanimous, the statement of reasons and findings on material facts must record that one of the members dissented and the reasons given by him for dissenting: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 29(6D) (added by SI 1996/2450). A record of the proceedings at the hearing must be made by the chairman in such medium as he may direct and preserved by the clerk to the tribunal for 18 months, and a copy of such record must be supplied to the parties if requested by any of them within that period: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 29(7) (added by SI 1996/182; amended by SI 1996/2450).

14 As to social security commissioners see PARA 362 ante.

15 See the Social Security Administration Act 1992 s 34(1). For the interpretation of the phrase 'erroneous in point of law' in the analogous context of appeals from social security appeal tribunals see PARA 362 ante.

16 *Ie* where the claimant is a member of the union at the time of the appeal and was so immediately before the question at issue arose; and where that question in any way relates to a deceased person who was a member of the union at the time of his death: see *ibid* s 34(2).

17 See *ibid* s 34(3).

18 *Ie* recoverable under *ibid* s 71(1) (as amended): see PARA 385 post.

19 *Ibid* s 34(2). Section 23(7)-(10) has effect for the purposes of s 34 as it has effect for the purposes of s 23 (see PARA 363 ante): s 34(4). Section 24 (as prospectively amended) (see PARA 365 ante) applies to a decision of a commissioner under s 34 as it applies to a decision of a commissioner under s 23: s 34(5).

## UPDATE

### 330-450 Administration

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **378 Disability appeal tribunals**

NOTE 6--See Constitutional Reform Act 2005 s 19, Sch 7 para 4 (protected functions of the Lord Chancellor); and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(iii) Medical Adjudication/379. Determination of disablement questions.

### **(iii) Medical Adjudication**

#### **379. Determination of disablement questions.**

In relation to industrial injuries benefit<sup>1</sup> and severe disablement allowance<sup>2</sup>, the 'disablement questions' are the questions:

- 1136 (1) in relation to industrial injuries benefit, whether the relevant accident<sup>3</sup> has resulted in a loss of faculty;
- 1137 (2) in relation to both benefits, at what degree the extent of disablement resulting from a loss of faculty is to be assessed, and what period is to be taken into account by the assessment<sup>4</sup>.

Such disablement questions are to be referred to and determined by (a) an adjudicating medical practitioner<sup>5</sup>; or (b) by two or more adjudicating medical practitioners; or (c) by a medical appeal tribunal<sup>6</sup>; or (d) in such cases relating to severe disablement allowance as may be prescribed, by an adjudication officer<sup>7</sup>.

1 As to industrial injuries benefit see PARA 126 et seq ante.

2 As to severe disablement allowance see PARA 92 et seq ante.

3 A primary question is whether the relevant accident was or was not an 'industrial accident' for the purposes of the legislation; a person may apply for a declaration to be made on this question (either before or after making a claim), and this is to be determined in the normal way (ie by an adjudication officer, with appeal lying to a social security appeal tribunal), not under the special provisions for medical adjudication: see the Social Security Administration Act 1992 s 44; and PARA 129 ante. A decision (given under s 44(2) or otherwise) that an accident was an industrial accident is to be taken as determining only that s 44(5)(a)-(c) is satisfied in relation to the accident, and neither any such decision nor the reference to an adjudicating medical practitioner or a medical appeal tribunal under s 45 (see the text and notes 4-7 infra) of the disablement questions in connection with any claim to or award of disablement benefit is to be taken as importing a decision as to the origin of any injury or disability suffered by the claimant, whether or not there is an event identifiable as an accident apart from any injury that may have been received; but (1) a decision that on a particular occasion when there was no such event a person had an industrial accident by reason of an injury is to be treated as a decision that, if the injury was suffered by accident on that occasion, the accident was an industrial accident; and (2) a decision that an accident was an industrial accident may be given, and a declaration to that effect be made and recorded in accordance with s 44, without its having been found that personal injury resulted from the accident (saving always the discretion under s 44(3) to refuse to determine the question if it is unlikely to be necessary for the purposes of a claim for benefit): s 60(3). Notwithstanding anything in s 60(2) (see PARA 333 ante) or s 60(3), but subject to the provisions of Pt II (ss 17-70) (as amended) as to appeal and review, where for the purposes of disablement pension or disablement gratuity in respect of an accident it has been found by an adjudicating medical practitioner or a medical appeal tribunal, on the determination or last determination of the disablement questions, that an injury resulted in whole or in part from the accident, then for the purposes of industrial death benefit in respect of that accident the finding is to be conclusive that the injury did so result: s 60(4). Section 60(2)-(4) applies as regards the effect to be given in any proceedings to any decision, or to a reference under s 45, whether the decision was given or reference made or the proceedings were commenced before or after the passing of the National Insurance Act 1972 (repealed) (s 5 (repealed) originally containing the provisions contained in the Social Security Administration Act 1992 s 60), except that it does not affect the determination of any appeal under s 48 (see PARA 381 post) from a decision of a medical appeal tribunal given before the passing of that Act, nor affect any proceedings consequent on such an appeal from a decision so given; and accordingly: (a) any decision given before the passing of that Act that a claimant was not entitled to industrial death benefit may be reviewed in accordance with the Social Security Administration Act 1992 Pt II (as amended) to give effect to s 60(4); and (b) the references in s 60(2), (3) to provisions of that 1992 Act, and

the reference in this provision to s 45 include, so far as necessary, the corresponding provisions of previous Acts: Social Security Administration Act 1992 s 60(5).

4 Ibid s 45(1). Questions relating to the aggregation of percentages of disablement resulting from different accidents (see PARA 146 ante) are not disablement questions (and accordingly fall to be determined by an adjudication officer): see s 45(1). Where the case of a claimant for disablement benefit has been referred by the adjudication officer to one or more adjudicating medical practitioners for determination of the disablement questions and on that or any subsequent reference, the extent of the disablement is provisionally assessed, the case must again be referred under s 45, to one or more adjudicating medical practitioners as regulations may provide for the purposes of such subsequent references, not later than the end of the period taken into account by the provisional assessment: s 45(3). On such a referral, the assessment of disablement is at large: see *Parker v Chief Adjudication Officer* (1991), CA, reported as an Appendix to Decision R(I)2/90.

5 As to adjudicating medical practitioners see PARA 380 post.

6 As to medical appeal tribunals see PARA 381 post.

7 Social Security Administration Act 1992 s 45(2). Where, in the case of a claimant for disablement benefit, the extent of any disablement of his resulting from an aggregable accident (ie, an accident other than the one which is the basis of the claim in question) has been assessed in accordance with the Social Security Contributions and Benefits Act 1992 Sch 6 para 6(3) at less than 14% (see PARA 145 note 6 ante), then the adjudication officer may refer the disablement questions relating to the aggregable accident to one or more adjudicating medical practitioners for fresh determination and on any such reference (1) those questions must be determined as at the first day of the common period; and (2) the period to be taken into account is the period beginning with that day; and for these purposes 'the first day of the common period' means whichever is the later of (a) the first day of the period taken into account by the assessment of the extent of the claimant's disablement resulting from the accident which is the basis of the claim in question; (b) the first day of the period taken into account by the assessment of the extent of his disablement resulting from the aggregable accident: Social Security Administration Act 1992 s 45(4), (5).

In relation to severe disablement allowance, the disablement question is determinable by an adjudication officer where the Department of Social Security has an official record of the person's relevant loss of faculty: see the Social Security (Severe Disablement Allowance) Regulations 1984, SI 1984/1303, reg 10(1)-(3) (as amended); and PARA 94 ante. There are further specialised provisions applying to adjudication of claims relating to prescribed industrial diseases: see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, regs 43-54 (as amended).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **379 Determination of disablement questions**

TEXT AND NOTES--Words 'and severe disablement allowance', 'in relation to industrial injuries benefit' (second place) and 'in relation to both benefits' omitted; and head (d) omitted: Social Security Administration Act 1992 s 45(1), (2) (amended by the Welfare Reform and Pensions Act 1999 Sch 13 Pt IV (amendment subject to a saving in respect of existing severe disablement allowance beneficiaries: see SI 2000/2958 art 4)).



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(iii) Medical Adjudication/380. The adjudicating medical authorities.

### **380. The adjudicating medical authorities.**

'Adjudicating medical authority' means, as the case may be, an adjudicating medical practitioner<sup>1</sup>, a specially qualified adjudicating medical practitioner, a medical board<sup>2</sup> or a special medical board<sup>3</sup>. Adjudicating practitioners (ordinary or specially qualified) are appointed by the Secretary of State to act for such area or areas as may be specified in the instrument of appointment<sup>4</sup>.

In general, any question which falls to be determined by an adjudicating medical authority is to be referred to and determined by an adjudicating medical practitioner<sup>5</sup>. However, questions relating to certain prescribed industrial diseases<sup>6</sup> are to be referred to a specially qualified adjudicating medical practitioner<sup>7</sup>. Further, in either case the Secretary of State may refer the matter to a medical board, if he is of the opinion that it should be determined by more than one adjudicating practitioner<sup>8</sup>.

In general, a person may not act as an adjudicating medical authority, or as a member thereof, or as a member of a medical appeal tribunal<sup>9</sup>, in any case if he (1) is or may be directly affected by that case; (2) has taken any part in such case as a medical assessor or as a medical practitioner who has regularly attended the claimant or to whom any question has been referred for report or as an employer or as a witness; or (3) in the case only of a medical appeal tribunal, has acted as an adjudicating medical authority, or a member thereof, to whom the case was referred<sup>10</sup>.

Reasonable notice<sup>11</sup> of the time and place at which the adjudicating medical authority will sit for the consideration of any case must be given to the claimant<sup>12</sup>. A sitting of an adjudicating medical authority is not an oral hearing, and the only persons entitled to be present and be heard during the consideration of any question by such an authority are the claimant and any other person whom the authority may, with the claimant's consent, allow to be present as being a person who, in his or their opinion, is likely to assist in the determination of that question<sup>13</sup>.

An adjudicating medical authority must in each case record his or their decision in writing in such form as may from time to time be approved by the Secretary of State and must include in that record (which must be signed by all members of the authority) (a) a statement of his or their findings on all questions of fact material to the decision; and (b) in a case in which the decision of a medical board or special medical board consisting of three members was not unanimous, a statement that one of the members dissented and of the reasons given by him for dissenting<sup>14</sup>.

1 'Adjudicating medical practitioner' means, in relation to any case, one such practitioner, unless regulations applicable to cases of that description provide for references to more than one: Social Security Administration Act 1992 s 45(6). Adjudicating medical practitioners are appointed by the Secretary of State and their appointment is determined by regulations: see s 49(1), (2); and the Social Security (Adjudication) Regulations 1995, SI 1995/1801 reg 35. As to the Secretary of State see PARA 1 ante.

2 'Medical board' means two or more adjudicating medical practitioners nominated by the Secretary of State to act jointly in the consideration of a case: *ibid* reg 34. If a board of two members is unable to agree, the reference to that board is revoked and the case referred to a board consisting of three members and if they are not unanimous the decision of the majority is to be the decision of the board: reg 36(5). One member of a medical or special medical board is to be appointed chairman: see reg 36(6). A board may not determine any question unless all members thereof are present at the consideration of that question, and if any member of the board is absent the reference must be revoked and the case referred to another such board: reg 36(7).

3 Ibid reg 34. 'Special medical board' means a medical board of which at least two of the members are specially qualified adjudicating medical practitioners: see reg 34. Regulations 36(5)-(7) (see note 2 *supra*) apply equally to special medical boards.

4 See *ibid* reg 35.

5 See *ibid* reg 36(3).

6 In any question arising in connection with a claim made in respect of any of the diseases numbered B6, C15, C17, C18, C22(b), D1, D2, D3, D7, D8, D9, D10, D11 or D12 in the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967 (as amended): see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 36(2). As to prescribed industrial diseases see PARA 150 *et seq ante*; and as to the special adjudication provisions applying to such claims see PARA 379 *ante*.

7 See *ibid* reg 36(2). Regulation 36(2) is subject to the provisions of Pt IV Section A (regs 43-54) (as amended): see reg 36(2).

8 See *ibid* reg 36(1)(b), (2).

9 As to medical appeal tribunals see PARA 381 *post*.

10 See *ibid* reg 40(1). A medical practitioner to whom a question has been referred under reg 45(1) (reference of diagnosis and recrudence questions for medical report) is not precluded from acting as an adjudicating medical practitioner or a specially qualified adjudicating medical practitioner solely by reason of his having prepared, under that regulation, a report on the case of the claimant (whether in relation to the question for determination or otherwise) if he proposes to determine the question in favour of the claimant: reg 40(2). A medical practitioner is not precluded from acting as a member of a special medical board for the purposes of the consideration of a case solely because he has taken part in that case as a medical practitioner to whom a question relating to any of the diseases numbered B6, C15, C17, C18, C22(b), D1, D2, D3, D7, D8, D9, D10, D11 or D12 in the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, Sch 1 Pt I (as amended) has been referred for report: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 40(3). If an adjudicating medical authority or a medical appeal tribunal is unable to determine a question by reason of the provision of reg 40(1), the reference to that authority or tribunal is revoked and the case referred to another such authority or tribunal: reg 40(4).

11 In being not less than ten days beginning with the day on which the notice is given and ending on the day before the sitting is to take place: see *ibid* reg 36(8).

12 *Ibid* reg 36(8). If such notice is not given or if, after such notice has been given, the claimant should fail to appear at the sitting of the authority, the authority may proceed to determine the questions referred to him or them only with the claimant's consent: see reg 36(8).

13 *Ibid* reg 36(9).

14 *Ibid* reg 37(1). As soon as may be practicable, the claimant must be sent written notice of the decision of the adjudicating medical authority, and such notice must be in such form as may from time to time be approved by the Secretary of State and must contain a summary of the findings of the authority, including, where the decision was not unanimous, a statement that one of the members dissented and of the reasons given by him for dissenting: reg 37(2). A person to whom written notice of the decision of an adjudicating authority is sent in accordance with reg 36(2) must be informed in writing of the conditions governing an appeal to a medical appeal tribunal: reg 37(3).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(iii) Medical Adjudication/381. Medical appeal tribunals.

### **381. Medical appeal tribunals.**

A claimant who is dissatisfied with a decision of an adjudicating medical practitioner<sup>1</sup> on a disablement question<sup>2</sup> may appeal to a medical appeal tribunal<sup>3</sup>. A medical appeal tribunal consists of a chairman<sup>4</sup> and two other persons, who are medical practitioners appointed by the President of social security appeal tribunals, disability appeal tribunals and medical appeal tribunals<sup>5</sup> after consultation with such academic medical bodies as appear to him to be appropriate<sup>6</sup>. Where an appeal or reference is made to a medical appeal tribunal, the clerk to the tribunal must direct every party to the proceedings to notify him if that party wishes an oral hearing of that appeal or reference to be held<sup>7</sup>, and where he receives such notification the medical appeal tribunal must hold an oral hearing<sup>8</sup>.

At a medical appeal tribunal hearing the tribunal may reconsider any relevant question within its jurisdiction, but in doing so must observe the rules of natural justice and give the claimant a proper opportunity to consider and address any such matter arising<sup>9</sup>. Where a medical appeal tribunal is unable to reach a unanimous decision on any case the decision of the majority of its members is to be the decision of the tribunal<sup>10</sup>, but if a member is not present at the consideration of the case the tribunal must not proceed to determine that case but must instead adjourn it for consideration by another tribunal<sup>11</sup>. Every decision of a medical appeal tribunal must be recorded in summary by the chairman in such written form of decision notice as approved by the President, and such decision notice must be signed by the chairman<sup>12</sup>. A statement of the reasons for the tribunal's decision and of its findings on questions of fact material thereto may be given (1) orally at the hearing (in which case it must be recorded in such medium as the chairman may determine); or (2) in writing at such later date as the chairman may determine<sup>13</sup>. As soon as may be practicable after a case has been decided by a medical appeal tribunal, a copy of the decision notice must be sent or given to every party to the proceedings who must also be informed of his right to a statement of the reasons for the tribunal's decision and of its findings on questions of fact material thereto and the conditions governing appeals to a commissioner<sup>14</sup>.

An appeal lies from any decision of a medical appeal tribunal if given after 27 September 1959<sup>15</sup>, to a social security commissioner<sup>16</sup> on the ground that the decision is erroneous in point of law, at the instance of (a) an adjudication officer; (b) the claimant; (c) a trade union<sup>17</sup> of which the claimant was a member at the time of the relevant accident or, in the case relating to severe disablement allowance<sup>18</sup> at the prescribed time; or (d) the Secretary of State<sup>19</sup>. No appeal lies, however, without (i) the leave of the person who was the chairman of the medical appeal tribunal when the decision was given or, in a prescribed case, the leave of some other chairman of a medical appeal tribunal; or (ii) subject to and in accordance with regulations, of a commissioner<sup>20</sup>. Where the commissioner holds that the decision was erroneous in point of law, he must set it aside and refer the case to a medical appeal tribunal with directions for its determination<sup>21</sup>.

1 For the meaning of 'adjudicating medical practitioner' see PARA 380 note 1 ante.

2 For the meaning of 'disablement question' see PARA 379 ante.

3 See the Social Security Administration Act 1992 s 46(1), (2). A reference to an adjudicating medical practitioner and an appeal to a medical appeal tribunal under s 46 are proceedings for the determination by experts of matters of medical fact and opinion relevant to a claim for benefit, which are not analogous to a *lis inter partes*. On such an appeal, therefore, the tribunal's unfettered power under s 46 to determine disablement questions ought not to be limited by applying rules of practice adopted by appellate courts in litigation between

adverse parties, and the tribunal has jurisdiction to make a new determination and substitute that for the conclusions of the adjudicating medical practitioner, whether the tribunal's determination is more or less favourable to the claimant than were the conclusions of the practitioner: see *R v Medical Appeal Tribunal (North Midland Region)*, *ex p Hubble* [1958] 2 All ER 374; *affd* [1959] 2 QB 408, [1959] 3 All ER 40, CA.

If the Secretary of State notifies the adjudication officer within the prescribed time that he is of the opinion that any decision of the adjudicating medical practitioner ought to be considered by a medical appeal tribunal or the adjudication officer is of the opinion that any such decision ought to be so considered, the adjudication officer must refer the case to a medical appeal tribunal for its consideration, and the tribunal may confirm, reverse or vary the decision in whole or in part as on an appeal: s 46(3). As to the Secretary of State see PARA 1 ante.

4 The President of social security appeal tribunals, disability appeal tribunals and medical appeal tribunals must nominate the chairman of the tribunal, who may be (1) himself; (2) one of the full-time chairmen appointed under s 51(1); or (3) a person drawn from the panel appointed by the Lord Chancellor or, as the case may be, the Lord President of the Court of Session under the Tribunals and Inquiries Act 1992 s 6: see the Social Security Administration Act 1992 s 50(3), (4) (amended by the Tribunals and Inquiries Act 1992 s 18(1), Sch 3 para 36). No person can be appointed chairman of a tribunal under s 50(4)(c) (see head (3) *supra*) unless he has a five-year general qualification, or he is an advocate or solicitor in Scotland of at least five years' standing: s 50(5). For the meaning of 'general qualification' see LEGAL PROFESSIONS vol 65 (2008) PARA 742.

5 As to the President of social security appeal tribunals, disability appeal tribunals and medical appeal tribunals see PARA 356 ante.

6 See the Social Security Administration Act 1992 s 50(1), (2). Subject to s 50(1)-(5), the constitution of medical appeal tribunals is determined by regulations: s 50(6). As to the disqualification of particular medical practitioners from sitting to hear a particular case see PARA 380 ante. Schedule 2 (as amended) has effect for supplementing s 50 (as amended): s 50(7).

7 Social Security (Adjudications) Regulations 1995, SI 1995/1801, reg 38(1) (substituted by SI 1996/2450). A notification under the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 38(1) (as substituted) must be in writing and must be made within ten days of receipt of the direction from the clerk to the tribunal or within such other period as the clerk to the tribunal or the chairman of the tribunal may direct: reg 38(1A) (added by SI 1996/2450).

8 See the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 38(1B) (added by SI 1996/2450). The chairman of a medical appeal tribunal may of his own motion require an oral hearing to be held if he is satisfied that such a hearing is necessary to enable the tribunal to reach a decision: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 38(1C) (added by SI 1996/2450).

9 Decision R(1)2/91 (reference to tribunal on level of disablement; breach of natural justice for tribunal to go back to the diagnosis question and decide it against the claimant without giving him a proper opportunity to deal directly with that issue).

10 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 38(3).

11 *Ibid* reg 38(2).

12 *Ibid* s 38(4) (substituted by SI 1996/2450).

13 Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 38(5A), (5B) (both added by SI 1996/2450).

14 See the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 38(5) (substituted by SI 1996/2450), reg 38(5C) (added by SI 1996/2450). A copy of the statement referred to in the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 38(5A) (as added) must be supplied to the parties to the proceedings if requested by any of them within 21 days after the decision notice has been sent or given, and if the statement is one which was given orally at the hearing, that copy must be supplied in such medium as the chairman may direct: see reg 38(5C) (as so added). If a decision is not unanimous, the statement referred to in the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 38(5A) (as added) must record that one of the members dissented and the reasons given by him for dissenting: reg 38(5D) (added by SI 1996/2450). A record of the proceedings at the hearing must be made by the chairman in such medium as he may direct and preserved by the clerk to the tribunal for 18 months, and a copy of such record must be supplied to the parties if requested by any of them within that period: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 38(6) (added by SI 1996/182; amended by SI 1996/2450).

Older case law tended to minimise the requirement for a medical appeal tribunal to set out its reasons fully, or to explain any departure from earlier decisions relating to the claimant: see eg *R v National Insurance Comr, ex p Viscusi* [1974] 2 All ER 724, [1974] 1 WLR 646, CA; and *Baron v Secretary of State for Social Services* (1986), CA, reported as an Appendix to Decision R(M)6/86. In particular, the expert nature of this form of tribunal was

stressed: *R v Medical Appeal Tribunal, ex p Hubble* [1958] 2 QB 228, [1958] 2 All ER 374, DC, affd in [1959] 2 QB 408, [1959] 3 All ER 40, CA. However, when the matter was reconsidered in the leading modern case of *Evans v Secretary of State for Social Services* [1993] TLR 474, [1993] NLJR 1370, CA, a significantly stricter approach was taken. Neil LJ gave this guidance:

- 152 (1) the decision should record the medical question(s) at issue so that the parties can tell what was addressed;
- 153 (2) where the tribunal have medically examined the claimant they should record their findings;
- 154 (3) if the clinical findings do not point to an obvious diagnosis, it might be necessary for the tribunal to explain why they decided on the particular diagnosis that they chose (especially where this differs from the diagnosis below);
- 155 (4) questions of causation may require more than a statement as to the tribunal's conclusion, especially where the claimant has previously been in receipt of some relevant benefit or allowance; in fairness, a claimant or his advisers ought to be able to tell why the tribunal thought the chain of causation was broken.

15 The day preceding that on which the Family Allowances and National Insurance Act 1959 s 2 (repealed) came into force.

16 As to social security commissioners see PARA 362 ante.

17 This also applies to any other association which exists to promote the interests and welfare of its members: see the Social Security Administration Act 1992 s 48(2).

18 As to severe disablement allowance see PARA 92 et seq ante.

19 See the Social Security Administration Act 1992 s 48(1). As to the Secretary of State see PARA 1 ante. On any such appeal, the question of law arising for the decision of the commissioner and the facts on which it arises must be submitted for his consideration in the prescribed manner: s 48(4).

20 Ibid s 48(3). Regulations may make provision as to the manner in which, and the time within which, appeals are to be brought and applications made for leave to appeal: see s 48(3); and the Social Security (Adjudication) Regulations 1995, SI 1995/1801 (as amended). As to the relevant time limits see PARA 366 ante.

21 Social Security Administration Act 1992 s 48(5). Subject to any direction of the commissioner, the tribunal on a reference under s 48(5) must consist of persons who were not members of the tribunal which gave the erroneous decision: s 48(6). Subject to the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 48(2), (3), the provisions of these regulations apply for the disposal by a medical appeal tribunal of a case remitted to it following an appeal to a commissioner as if it were an original hearing of an appeal to the medical appeal tribunal: reg 42(1). If on appeal from the medical appeal tribunal to him, the commissioner has decided that the decision of the medical appeal tribunal is not erroneous in point of law, the medical appeal tribunal need not hold a hearing for the purpose of confirming its decision: see reg 42(2). If the case is remitted to the medical appeal tribunal following an appeal to the commissioner in which it was decided that the decision of the medical appeal tribunal was erroneous in point of law, the proceedings must, subject to any direction of the commissioner, be by way of a complete rehearing of the appeal by persons who were not members of the tribunal which gave the erroneous decision: reg 42(3).

## UPDATE

### 330-450 Administration

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### 356-384 Adjudication

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **381 Medical appeal tribunals**

TEXT AND NOTES--Replaced. The functions of medical appeal tribunals are transferred to appeal tribunals constituted under the Social Security Act 1998 ss 5-7, Sch 1: s 4(1)(a).

NOTE 4--1992 Act s 6 amended: Constitutional Reform Act 2005 Sch 4 para 224, Sch 18 Pt 2. See further s 19, Sch 7 para 4 (protected functions of the Lord Chancellor); and CONSTITUTIONAL LAW AND HUMAN RIGHTS.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(iii) Medical Adjudication/382. Review of medical decisions.

### **382. Review of medical decisions.**

Any decision under the Social Security Administration Act 1992 of an adjudicating medical practitioner<sup>1</sup> or a medical appeal tribunal<sup>2</sup> may be reviewed at any time by a medical board<sup>3</sup> if satisfied that it was given in ignorance of a material fact or was based on a mistake as to a material fact<sup>4</sup>, but only if so satisfied by fresh evidence<sup>5</sup>. Similarly, any decision of an adjudicating medical practitioner may be reviewed at any time by a medical board if it is satisfied that the decision was erroneous in law<sup>6</sup>.

Any assessment of the extent of disablement resulting from the relevant loss of faculty may be reviewed by an adjudicating medical practitioner if he is satisfied that, since the making of the assessment, there has been an unforeseen aggravation of the results of the relevant injury<sup>7</sup>. Where, however, such an assessment has been made, confirmed or varied by a medical appeal tribunal it may only be reviewed with the leave of a medical appeal tribunal<sup>8</sup>.

An adjudicating medical practitioner may deal with a case on a review in any manner in which he could deal with it on an original reference to him, and in particular may in any case relating to disablement benefit make a provisional assessment notwithstanding that the assessment under review was final<sup>9</sup>. The provisions relating to medical appeals<sup>10</sup> apply to an application for a review and to a decision of an adjudicating medical practitioner in connection with such an application as they apply to an original claim for disablement benefit or severe disablement allowance, as the case may be, and to a decision of an adjudicating medical practitioner in connection with such a claim<sup>11</sup>.

1 For the meaning of 'adjudicating medical practitioner' see PARA 380 note 1 ante.

2 As to medical appeal tribunals see PARA 381 ante.

3 As to medical boards see PARA 380 ante.

4 Social Security Administration Act 1992 s 47(1) (amended by the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 36(1)(a), 52). A 'material fact' is one which would influence the decision of the practitioner or tribunal: see *Locker and Woolf Ltd v Western Australian Insurance Co Ltd* [1936] 1 KB 408; and cf *Smith v Chadwick* (1884) 9 App Cas 187 at 194.

5 See the Social Security Administration Act 1992 s 47(3); and the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 61. Evidence is 'fresh' for this purpose if it is evidence which the claimant was unable to produce before the decision was given or which he could not reasonably be expected to have produced in the circumstances of the case: see *Saker v Secretary of State for Social Services* (1988) Times, 16 January, CA; and *R v Medical Appeal Tribunal, ex p Hubble* [1959] 2 QB 408, [1959] 3 All ER 40, CA.

6 Social Security Administration Act 1992 s 47(2) (amended by the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 36(1)(a), 52).

7 Social Security Administration Act 1992 s 47(4). A review on this basis supersedes the decision under review (even if that decision was expressed as final), thus potentially putting the issue at large: see *Parker v Chief Adjudication Officer* (1991), CA, reported as an Appendix to Decision R(I)2/90. On review of any assessment under the Social Security Administration Act 1992 s 47(4) the period to be taken into account by any revised assessment may include any period not exceeding one month before (1) if the review was in consequence of an application by a claimant, or a person acting on his behalf, the date of that application; or (2) if the review was in consequence of a decision on a recrudescence question within the meaning of the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 43(3)(b) given under the Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, SI 1985/967, reg 7(4), the date of the claim on which that decision was given, if the medical board is satisfied that throughout that period there has been unforeseen

aggravation of the results of the relevant injury since the making of the assessment under review: Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 62 (amended by SI 1997/793).

8 See the Social Security Administration Act 1992 s 47(7). Notwithstanding the provisions of the Social Security Contributions and Benefits Act 1992 Pt V (ss 94-111) (as amended) (see PARA 126 et seq ante), on a review under the Social Security Administration Act 1992 s 47(4) the period to be taken into account by any revised assessment may only include a period before the date of the application for the review if and in so far as regulations provide: see s 47(7). The adjudication officer must submit the application to a medical appeal tribunal so that such tribunal may consider whether such leave is to be granted and may not refer the question to an adjudicating medical authority with a view to review of that decision unless the medical appeal tribunal grants such leave: see the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 41. Where in connection with a claim for disablement benefit made after 25 August 1953 it is decided that the relevant accident has not resulted in a loss of faculty, the decision (1) may be reviewed under the Social Security Administration Act 1992 s 47(4) as if it were an assessment of the extent of disablement resulting from a relevant loss of faculty; but (2) subject to any further decision on appeal or review, must be treated as deciding the question whether the relevant accident had so resulted both for the time about which the decision was given and for any subsequent time: s 47(5). For the purposes of s 47(5), a final assessment of the extent of the disablement resulting from a loss of faculty made for a period limited by reference to a definite date must be treated as deciding that at that date the relevant accident had not resulted in a loss of faculty: s 47(6). In s 47(6), the reference to a final assessment does not include an assessment made for the purpose of the National Insurance (Industrial Injuries) Act 1946 s 12(1)(a) or (b) (repealed) as originally enacted and having the effect that benefit is not payable: Social Security Administration Act 1992 s 47(10). For the meaning of 'relevant loss of faculty' see PARA 142 note 7 ante.

9 Ibid s 47(8) (amended by the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 36(1)(a), 52). Where a final assessment of the extent of disablement resulting from a loss of faculty has been made for a period limited by reference to a definite date and an application for review on the ground that there has been unforeseen aggravation of the results of the relevant disease is made within a period of three months immediately following that date, the adjudicating medical authority must determine the extent of disablement resulting from the relevant loss of faculty both for the period limited by reference to a definite date and any time after that period: Social Security Administration Act 1992 s 47(8A) (added by the Social Security (Adjudication) Regulations 1995, SI 1995/1801, reg 36(1)(a), 52).

10 Ie the Social Security Administration Act 1992 s 46: see PARA 381 ante.

11 Ibid s 47(9).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **382 Review of medical decisions**

TEXT AND NOTE 11--Words 'or severe disablement allowance, as the case may be omitted': Social Security Administration Act 1992 s 47(9) (amended by the Welfare Reform and Pensions Act 1999 Sch 13 Pt IV (amendment subject to a saving in respect of existing severe disablement allowance beneficiaries: see SI 2000/2958 art 4)).



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(iv) Social Fund Adjudication/383. Social fund officers, inspectors and commissioner.

#### **(iv) Social Fund Adjudication**

##### **383. Social fund officers, inspectors and commissioner.**

The Secretary of State<sup>1</sup> appoints officers, to be known as 'social fund officers', for the purpose of performing functions in relation to discretionary payments<sup>2</sup> out of the social fund<sup>3</sup>. In addition, the Secretary of State appoints an officer known as 'the social fund commissioner'<sup>4</sup>, who in turn is to appoint such social fund inspectors, officers and staff for himself and for social fund inspectors as he thinks fit, but with the consent of the Secretary of State and the Treasury as to numbers<sup>5</sup>.

It is the duty of the social fund commissioner:

- 1138 (1) to monitor the quality of decisions of social fund inspectors and give them such advice and assistance as he thinks fit to improve the standards of their decisions;
- 1139 (2) to arrange such training of social fund inspectors as he considers appropriate; and
- 1140 (3) to carry out such other functions in connection with the work of social fund inspectors as the Secretary of State may direct<sup>6</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 I.e. payments under the Social Security Contributions and Benefits Act 1992 s 138(1)(b): see PARA 228 ante.

3 Social Security Administration Act 1992 s 64(1). A social fund officer may be appointed to perform all the functions of social fund officers or such functions of such officers as may be specified in his instrument of appointment: s 64(2). The Secretary of State may nominate for an area a social fund officer who is to issue general guidance to other social fund officers in the area about such matters relating to the social fund as the Secretary of State may specify: s 64(3). As to the social fund generally see PARA 228 et seq ante.

4 See *ibid* s 65(1), (2).

5 See *ibid* s 65(3). Appointments under s 65(3) are made from persons made available to the social fund commissioner by the Secretary of State: s 65(4).

6 *Ibid* s 65(5). The social fund commissioner must report annually in writing to the Secretary of State on the standard of reviews by social fund inspectors and the Secretary of State must publish his report: s 65(6).

#### **UPDATE**

##### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

##### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **383 Social fund officers, inspectors and commissioner**

TEXT AND NOTES--There continues to be an officer known as the social fund commissioner, who is appointed by the Secretary of State: Social Security Act 1998 s 37(1), (2). The social fund commissioner must appoint, from persons made available to the him by the Secretary of State, such social fund inspectors, and may appoint such officers and staff for himself and for social fund inspectors, as he thinks fit, but with the consent of the Secretary of State as to numbers: s 37(3), (4). It is the commissioner's duty to monitor the quality of decisions of social fund inspectors and give them such advice and assistance as he thinks fit to improve the standard of their decisions, to arrange such training of social fund inspectors as he considers appropriate, and to carry out such other functions in connection with the work of social fund inspectors as the Secretary of State may direct: s 37(5). The commissioner must report annually in writing to the Secretary of State on the standards of reviews by social fund inspectors, and the Secretary of State must publish his report: s 37(6).

NOTE 3--The functions of social fund officers are transferred to the Secretary of State: Social Security Act 1998 s 1(b).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(4) ADJUDICATION/(iv) Social Fund Adjudication/384. Reviews of social fund decisions.

### **384. Reviews of social fund decisions.**

Challenges to social fund<sup>1</sup> decisions operate by way of internal reviews, not by way of appeal to an independent tribunal<sup>2</sup>. There are two stages to such a review:

- 1141 (1) a social fund officer<sup>3</sup> must review a determination made under the Social Security Contributions and Benefits Act 1992 by himself or some other social fund officer, if an application<sup>4</sup> for a review is made within such time and in such form and manner as may be prescribed by or on behalf of the person who applied for the payment to which the determination relates, and may review such a determination in such other circumstances as he thinks fit<sup>5</sup>. The Social Fund Directions<sup>6</sup> further regulate this review power, as to both the circumstances in which a determination is to be reviewed<sup>7</sup> and the manner in which the review is to be conducted<sup>8</sup>;
- 1142 (2) on an application made by or on behalf of the person to whom a determination relates within such time and in such form and manner as may be prescribed, a determination of a social fund officer which has been reviewed must be further reviewed by a social fund inspector<sup>9</sup>, who has the power to confirm that determination, make any determination which a social fund officer could have made or refer the matter to such an officer for determination<sup>10</sup>. In addition, special directions to social fund inspectors further regulate the form of this review by an inspector<sup>11</sup>.

1 As to the social fund generally see PARA 228 et seq ante.

2 Arguments that this form of adjudication was unlawful failed in *R v Social Fund Inspector and the Secretary of State for Social Security, ex p Healey, Stitt and Ellison* [1992] COD 335, (1992) 4 Admin LR 713, CA. *R v Social Fund Inspector and the Secretary of State for Social Security, ex p Healey, Stitt and Ellison* supra also upheld the use of social fund directions to determine the manner of review.

3 As to social fund officers see PARA 383 ante.

4 Any application for a review of any determination made by a social fund officer and a further review by a social fund inspector of a determination of a social fund officer which has been reviewed must be in writing and made within 28 days of the date the determination or the determination on review was issued: see the Social Fund (Application for Review) Regulations 1988, SI 1988/34, reg 2(1), (2). For these purposes, the date on which a determination or determination on review is issued is the date on which notice of that determination was given or sent to the applicant for review or further review and, if sent by post to the applicant's last known or notified address, that notice must be treated as having been sent on the day that it was posted: reg 2(7). This time may be extended for special reasons, even though the time so specified may already have expired, by the social fund officer or, as the case may be, the social fund inspector. As to the particulars of such an application see reg 2(4), (5); and as to the making of such an application on behalf of a person see reg 2(6) (as substituted).

5 Social Security Administration Act 1992 s 66(1). On such a review the social fund officer may exercise any power exercisable by an officer under the Social Security Contributions and Benefits Act 1992 Pt VIII (ss 138-140) (see PARA 228 et seq ante): see the Social Security Administration Act 1992 s 66(1). The power to review a determination so conferred on a social fund officer includes the power to review a determination made by a social fund officer on a previous review: s 66(2).

6 As to the power to make such directions see PARA 228 ante.

7 A reviewing officer must review a determination if (1) it was based on a mistake as to the law or the directions; (2) it was given in ignorance of, or was based on a mistake as to, some material fact; or (3) there has been any relevant change of circumstances since the decision was given: see Social Fund Direction 31.

8 See the Social Security Administration Act 1992 s 66(7), (8). The reviewing officer must have full regard initially to (1) whether the previous officer applied the law correctly; (2) whether he acted fairly and exercised his discretion to arrive at a reasonable conclusion; and (3) whether the required procedural steps were followed (including whether the applicant had sufficient opportunity to put his case and there was no bias): Social Fund Direction 39. After such initial consideration, the officer, in thereafter reviewing the determination, must have full regard to (a) all the circumstances which existed at the time the original determination was made; (b) any new evidence which has since been produced; and (c) any relevant change of circumstances: see Social Fund Direction 32. Social Fund Directions 33-35 provide for the applicant to be given an opportunity to attend an interview with the officer (accompanied by a friend or representative if he wishes) if the officer decides not to review a determination wholly in the applicant's favour. If an applicant does not agree with a revised determination, or if the officer decides not to revise the previous determination, the officer must pass all the relevant papers to a social fund review officer who must freshly determine the review application: see Social Fund Directions 36-38.

9 Social Security Administration Act 1992 s 66(3). As to social fund inspectors see PARA 383 ante. An officer or inspector must determine any question on a review in accordance with any general directions issued by the Secretary of State under the Social Security Contributions and Benefits Act 1992 s 140(2) (see PARA 228 ante) and any general directions issued by him with regard to reviews and in determining any such questions must take account of any general guidance issued by him under that provision or with regard to reviews: Social Security Administration Act 1992 s 66(7).

10 See *ibid* s 66(4). A social fund inspector may review a determination under s 66(3) made by himself or some other social fund inspector: s 66(5). In determining a question on a review a social fund officer or social fund inspector must have regard, subject to s 66(7), to all the circumstances of the case and, in particular, to the matters specified in the Social Security Contributions and Benefits Act 1992 s 140(1)(a)-(e) (see PARA 228 ante): Social Security Administration Act 1992 s 66(6). A social fund inspector reviewing a determination is under the same duties in relation to such guidance as the social fund officer or inspector who made the determination: s 66(10).

11 See *ibid* s 66(7), (10). There are two stages in the review. The inspector is to consider initially whether the officer applied the law correctly, whether he acted fairly and exercised his discretion to reach a reasonable conclusion and whether the required procedural steps were followed: see Social Fund Direction 1. If satisfied that the decision was reached correctly, the inspector, in reviewing the determination, is to have full regard to (1) all the circumstances, including the state of the social fund budget and local priorities, that existed at the time that the original decision was made; (2) any new evidence which has since been produced; and (3) any relevant change of circumstances: see Social Fund Direction 2. In applying head (3) *supra*, the inspector is to apply the law in force at the date of his decision, not at the date of the original decision (where there has been a change in the law in the meantime): *R v Social Fund Inspector, ex p Ledicott* [1995] TLR 307, DC.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **356-384 Adjudication**

See now the Social Security Act 1998 Pt I Ch II (ss 8-39) which replaces the Social Security Administration Act 1992 Pt II (ss 17-70): Social Security Act 1998 s 39(3). See further PARA 356A.

### **384 Reviews of social fund decisions**

TEXT AND NOTES--Replaced. An appropriate officer (see PARA 228) (1) must review a social fund determination, if an application for a review is made, within such time and in such form and manner as may be prescribed, by or on behalf of the person who applied for

the payment to which the determination relates; (2) may review such a determination on the ground that the person who applied for the payment to which the determination relates misrepresented, or failed to disclose, any material fact; and (3) may review such a determination in such other circumstances as he thinks fit: Social Security Act 1998 s 38(1). The power to review a social fund determination includes power to review a determination made on a previous review: s 38(2). 'Social fund determination' means a determination made under the Social Security Contributions and Benefits Act 1992 by an appropriate officer: Social Security Act 1998 s 38(13).

A social fund determination which has been reviewed under s 38(1) must be further reviewed by a social fund inspector if an application is made, within such time and in such form and manner as may be prescribed, by or on behalf of the person who applied for the payment to which the determination relates: s 38(3). On a review under s 38(3) a social fund inspector has (a) power to confirm the determination made by the appropriate officer, (b) power to make any determination which an appropriate officer could have made, (c) power to refer the matter to such an officer for determination: s 38(4).

A social fund inspector may review a determination under s 38(3) made by himself or some other social fund inspector: s 38(5). In making a determination on a review an appropriate officer or a social fund inspector need not consider (i) in the case of a determination on a review under head (1), any issue that is not raised by the application, (ii) in the case of a determination on a review under head (2), any issue that is not raised by the material fact, (iii) in the case of a determination on a review under head (3), any issue that did not cause him to carry out the review: s 38(6). In making a determination on a review under head (1) or (3) an appropriate officer or a social fund inspector must (A) subject to s 38(7)(b), (c), have regard to criteria specified in s 38(7)(a); (B) act in accordance with any general directions issued by the Secretary of State under s 38(2), and any general directions issued by him with regard to reviews; and (C) take account of any general guidance issued by the Secretary of State under s 38(2) or with regard to reviews: s 38(7) (amended by Welfare Reform Act 2007 Sch 7 para 4, Sch 8).

In making a determination on a review under head (2) an appropriate officer or a social fund inspector must act in accordance with any general directions issued by the Secretary of State, and take account of any general guidance issued by the Secretary of State: s 38(8). Any reference in s 38(6), (7) or (8) to a determination on a review under a particular provision of s 38(1) above is to be construed, in relation to a social fund inspector, as a reference to a determination on a further review of a determination which has been reviewed under that provision: s 38(9).

Directions under s 38 may specify the circumstances in which a social fund determination is to be reviewed, and the manner in which a review is to be conducted: s 38(10). In making a determination on a review under head (1) or (3) an appropriate officer must take account (subject to any directions or guidance issued by the Secretary of State under s 38) of any guidance issued by the appropriate officer nominated for his area under s 36(2) (see PARA 228): s 38(11). A social fund inspector reviewing a social fund determination which has been reviewed under head (1) or (3) is under the same duties in relation to such guidance as the appropriate officer or social fund inspector who made the determination: s 38(12).

NOTE 4--Now any application for a review of any determination made by an appropriate officer and a further review by a social fund inspector which has been reviewed must be in writing and be made within the time specified: SI 1988/34 reg 2(1), (2) (amended by SI 2006/961).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(5) OVERPAYMENTS AND ADJUSTMENTS OF BENEFIT/385. Overpayment of benefit.

## (5) OVERPAYMENTS AND ADJUSTMENTS OF BENEFIT

### 385. Overpayment of benefit.

Where it is determined that, whether fraudulently or otherwise<sup>1</sup>, any person<sup>2</sup> has misrepresented<sup>3</sup>, or failed to disclose<sup>4</sup>, any material fact and in consequence<sup>5</sup> of the misrepresentation or failure either a payment has been made in respect of certain benefits<sup>6</sup> or any sum recoverable by or on behalf of the Secretary of State<sup>7</sup> in connection with any such payment has not been recovered, then the Secretary of State is entitled to recover the amount of any payment which he would not have made or any sum which he would have received but for the misrepresentation or failure to disclose<sup>8</sup>. Where such a determination is made, the person making the determination must also determine whether any, and if so what, amount is recoverable by the Secretary of State and specify the period during which that amount was paid to the person concerned<sup>9</sup>. An amount is not so recoverable unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review<sup>10</sup>. In an overpayment case, the burden of proof is on the adjudication officer<sup>11</sup>.

Regulations may provide (1) that amounts recoverable<sup>12</sup> are to be calculated or estimated in such manner and on such basis as may be prescribed<sup>13</sup>; (2) for treating any amount paid to any person under an award which it is subsequently determined was not payable as properly paid or as paid on account of a payment which it is determined should be or should have been made, and for reducing or withholding any arrears payable by virtue of the subsequent determination<sup>14</sup>; (3) for treating any amount paid to one person in respect of another as properly paid for any period for which it is not payable in cases where in consequence of a subsequent determination the other person is himself entitled to a payment for that period or a third person is entitled in priority to the payee to a payment for that period in respect of the other person, and for reducing or withholding any arrears payable for that period by virtue of the subsequent determination<sup>15</sup>.

1 This provision applies to innocent as well as fraudulent misrepresentation or failure to disclose: *Page v Chief Adjudication Officer* (1991) (reported as an Appendix to Decision R(IS)2/92), CA.

2 As to the persons from whom recovery may be sought see PARA 388 post.

3 See PARA 386 post; and MISREPRESENTATION AND FRAUD.

4 See PARA 387 post. While misrepresentation and failure to disclose are separate heads under this provision, a misrepresentation may be based on a statement that proper disclosure has been made, and so there may be an overlap between the two: *Jones v Chief Adjudication Officer* [1994] 1 All ER 225, [1994] 1 WLR 62, CA.

5 Causation must be shown: Decisions R(SB)21/82; R(SB)13/89. Thus, the proximate cause of an overpayment may be administrative error, especially where the claimant has made disclosure; however, a misrepresentation may still be the cause of an overpayment where there has been some earlier disclosure if the adjudication officer relies on that misrepresentation, since it is not sufficient for the claimant to argue that the officer had the means of checking his statement: Decision R(SB)3/90. There may be recovery as long as the claimant's misrepresentation or failure to disclose remained a cause, if not necessarily the sole cause: *Duggan v Chief Adjudication Officer* (1988) Times, 19 December, CA.

6 I.e (1) benefits as defined in the Social Security Contributions and Benefits Act 1992 s 122 (see PARA 13 note 8 ante); (2) jobseeker's allowance (see PARA 258 et seq ante); (3) income support (see PARAS 176-201 ante); (4) family credit (see PARAS 202-217 ante); (5) disability working allowance (see PARAS 218-227 ante); (6) any social fund payments such as are mentioned in the Social Security Contributions and Benefits Act 1992 s 138(1)

(a) or s 138(2) (see PARA 228 ante); and (7) child benefit (see PARA 237 et seq ante): see the Social Security Administration Act 1992 s 71(11) (amended by the Jobseekers Act 1995 s 41(4), (5), Sch 2 para 48, Sch 3).

7 As to the Secretary of State see PARA 1 ante.

8 Social Security Administration Act 1992 s 71(1). This provision applies to an overpayment of benefit made on or after 6 April 1987, when its predecessor (ie the Social Security Act 1986 s 53 (repealed)) came into force; an overpayment of benefit made before that date remains subject to the previous provisions (ie the Social Security Act 1975 s 119 (repealed) in relation to non-means-tested benefits and the Supplementary Benefits Act 1976 s 20 (repealed) in relation to means-tested benefits): *Plewa v Chief Adjudication Officer* [1995] 1 AC 249, [1994] 3 All ER 323, HL (overruling *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712, CA).

9 Social Security Administration Act 1992 s 71(2) (substituted by the Social Security (Overpayments) Act 1996 s 1).

10 Social Security Administration Act 1992 s 71(5A) (added by the Social Security (Overpayments) Act 1996 s 1).

11 See Decision R(SB)34/83.

12 Ie under the Social Security Administration Act 1992 s 71(1) or under regulations made under s 71(4) (see PARA 390 post).

13 Ibid s 71(6)(a). As to the calculation of the amount recoverable see PARA 388 post.

14 Ibid s 71(6)(b). See PARA 394 post.

15 Ibid s 71(6)(c). See PARA 394 post.

## UPDATE

### 330-450 Administration

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### 385-396 Overpayment of benefit ... Payment of benefit where maintenance payments are collected by the Secretary of State

Overpayments of benefit may be recovered out of the discretionary social fund (see PARA 228): see Social Security Administration Act 1992 s 71ZA (added by Social Security Act 1998 s 75; and amended by Welfare Reform Act 2007 Sch 8), applying the Social Security Administration Act 1992 s 71 with modifications.

Certain overpayments of benefit are not recoverable: see PARA 388A.

SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494 (amended by SI 2006/203).

### 385 Overpayment of benefit

TEXT AND NOTES--As to the approach of the court when considering whether to adjourn civil proceedings for the recovery of overpaid benefits in light of related criminal

proceedings for dishonesty, see *Mote v Secretary of State for Work and Pensions* [2007] EWCA Civ 1324, [2008] HLR 427, [2007] All ER (D) 212 (Dec).

NOTE 4--Failure by a person to disclose any material fact is a breach of a duty of strict liability even though he does not appreciate that there is a duty to make disclosure: *B v Secretary of State for Work and Pensions* [2005] EWCA Civ 929, [2005] 1 WLR 3796.

NOTE 6--Now also state pension credit, an employment and support allowance and health in pregnancy grant: Social Security Administration Act 1992 s 70(11) (amended by the State Pension Credit Act 2002 Sch 2 para 10; the Welfare Reform Act 2007 Sch 3 para 10(6); and the Health and Social Care Act 2008 s 132(4)). Heads (4) and (5) omitted: 2002 Act Sch 6.

NOTE 8--Overpaid benefits fall within the insolvency legislation: *R (on the application of Steele) v Birmingham City Council* [2005] EWCA Civ 1824, [2006] 1 WLR 2380 (overpayments received prior to person's bankruptcy, but decision to recover not taken until after his discharge, recoverable); *R (on the application of Balding) v Secretary of State for Work and Pensions* [2007] EWCA Civ 1327, [2008] 3 All ER 217 (overpaid benefit not recoverable on bankruptcy). See *Hooper v Secretary of State for Work and Pensions* [2007] EWCA Civ 495, [2007] All ER (D) 421 (May) (overpayment due to failure to give notification of return to work not recoverable, as fact sheet not sufficiently clear and unambiguous to impose mandatory requirement). The Social Security Administration Act 1992 s 71 is exhaustive of the rights of the Secretary of State to recover overpaid benefits; there is no coexisting right at common law to recover overpayments that do not fall within the scope of s 71: *R (on the application of Child Poverty Action Group) v Secretary of State for Work and Pensions* [2009] EWCA Civ 1058, [2010] 2 All ER 113.

TEXT AND NOTE 9--This is a duty in the case of the Secretary of State or the First-tier tribunal, and a discretion in the case of the Upper Tribunal or a court: Social Security Administration Act 1992 s 71(2) (amended by the Social Security Act 1998 Sch 7 para 81(1); SI 2008/2833).

TEXT AND NOTE 10--For 'revised on a review' read 'has been revised under the 1998 Act s 9 (see PARA 356A) or superseded under s 10 (see PARA 356A.3): Social Security Administration Act 1992 s 71(5A) (amended by the 1998 Act Sch 7 para 81(3)).

1992 Act s 71(5A) further amended: Welfare Reform Act 2007 s 44(3).

NOTE 10--An amount is not recoverable under the Social Security Administration Act 1992 s 71, as it applies in relation to social fund payments to which s 71ZA (see PARA 385-396) applies, unless the determination in pursuance of which it was paid has been revised on a review under s 38 (see PARA 359): s 71(5A) (modified by s 71ZA(2)(a) (s 71ZA added by the 1998 Act s 75)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(5) OVERPAYMENTS AND ADJUSTMENTS OF BENEFIT/386. Misrepresentation.

### **386. Misrepresentation.**

A misrepresentation<sup>1</sup> may arise from a written or oral statement<sup>2</sup>, but in order to decide whether such a misrepresentation actually occurred it may be necessary to consider all the facts surrounding the statement<sup>3</sup>. It may also be necessary to consider the form of any declaration signed by the claimant<sup>4</sup> which is said to give rise to the misrepresentation<sup>5</sup>. The necessary causal link must be established, in that the misrepresentation must have induced the representee to act or fail to act in such a way as to give rise to the overpayment<sup>6</sup>.

Mental incapacity on the part of the claimant does not mean that there cannot be a misrepresentation by that person<sup>7</sup>. Further, previous disclosure of facts on a previous claim is not a defence to an allegation of a misrepresentation as to the existence of those facts in a subsequent claim<sup>8</sup>.

A misrepresentation may be fraudulent or innocent<sup>9</sup> and may arise from what would otherwise come under the heading of failure to disclose<sup>10</sup> if the claimant has signed a declaration stating that he has disclosed or reported all material facts<sup>11</sup>. In such a case, however, a claimant cannot be guilty of misrepresentation in relation to a fact which was unknown to him<sup>12</sup>.

1 See PARA 385 ante.

2 Misrepresentation is founded on positive and deliberate action, such as signing a declaration: Decision R(SB)9/85.

3 Decision R(SB)18/85 (statement that claimant had no income negated by his production of his army pension book at interview); Decision R(SB)2/91 (misrepresentation significantly modified by reading letter and claim form together).

4 For the meaning of 'claimant' see PARA 19 note 5 ante. A misrepresentation may also be made by a person other than the claimant, in which case recovery of benefit is from that other person: see PARAS 385 ante, 388 post.

5 *Jones v Chief Adjudication Officer* [1994] 1 All ER 225, [1994] 1 WLR 62, CA (no misrepresentation where facts were unknown to the claimant and the declaration on the form he signed that the information was true and complete was qualified by the words 'as far as I know').

6 Decision R(SB)3/90.

7 *Chief Adjudication Officer v Sherriff* [1995] TLR 269, [1995] 22 LS Gaz R 41, CA (recovery permitted from 80-year old claimant, on the basis of a form filled out for her in the nursing home and merely signed by her).

8 Decision R(SB)3/90 (entitled to rely on the claimant's statements on a particular claim form without having to check their veracity against earlier documents).

9 See PARA 385 note 1 ante. Innocent misrepresentation may arise, for example, due to forgetfulness (Decision R(SB)21/82) or failure to realise the materiality of a particular fact (Decision CIS/695/1992).

10 See PARAS 385 ante, 387 post.

11 *Jones v Chief Adjudication Officer* [1994] 1 All ER 225, [1994] 1 WLR 62, CA. In such a case, an adjudication officer may therefore seek recovery under either limb (ie misrepresentation or failure to disclose).

12 *Franklin v Chief Adjudication Officer* [1995] TLR 720, CA (no recovery from claimant who had correctly reported her initial rate of mortgage interest, who had not known of subsequent changes to it, but who had signed further declarations stating that she had correctly reported any facts which could affect her entitlement); *Jones v Chief Adjudication Officer* [1994] 1 All ER 225, [1994] 1 WLR 62, CA. Cf Decisions R(SB)21/82; R(SB)9/85 (while knowledge of the facts was essential to show failure to disclose, it was not necessary where the

allegation was of misrepresentation); and see also *Chief Adjudication Officer v Sherriff* [1995] TLR 269, [1995] 22 LS Gaz R 41, CA.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **385-396 Overpayment of benefit ... Payment of benefit where maintenance payments are collected by the Secretary of State**

Overpayments of benefit may be recovered out of the discretionary social fund (see PARA 228): see Social Security Administration Act 1992 s 71ZA (added by Social Security Act 1998 s 75; and amended by Welfare Reform Act 2007 Sch 8), applying the Social Security Administration Act 1992 s 71 with modifications.

Certain overpayments of benefit are not recoverable: see PARA 388A.

SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494 (amended by SI 2006/203).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(5) OVERPAYMENTS AND ADJUSTMENTS OF BENEFIT/387. Failure to disclose.

### **387. Failure to disclose.**

A failure to disclose a material fact<sup>1</sup> necessarily imports the concept of some breach of obligation, moral or legal, so that the non-disclosure occurred in circumstances in which disclosure by the person in question<sup>2</sup> was reasonably to be expected<sup>3</sup>. The failure may be either fraudulent or innocent<sup>4</sup>.

In order to recover overpaid benefit on the basis of failure to disclose, it must be shown that<sup>5</sup>:

- 1143 (1) the Secretary of State<sup>6</sup> seeking to recover the expenditure is the Secretary of State who incurred it;
- 1144 (2) the person from whom it is sought to recover the expenditure knew the material fact<sup>7</sup>;
- 1145 (3) disclosure by the person in question was reasonably to be expected<sup>8</sup>;
- 1146 (4) there was a failure to disclose<sup>9</sup>;
- 1147 (5) the failure related to a material fact; and
- 1148 (6) the expenditure by the relevant Secretary of State was incurred in consequence of the failure<sup>10</sup>.

1 See PARA 385 ante.

2 The failure to disclose will usually be by the claimant but it may be by some other person, in which case recovery of the benefit is from that other person: see PARAS 385 ante, 388 post.

3 Decision R(SB)21/82 para 4. There is no requirement for these purposes that the disclosure be in writing: Decision R(SB) 40/84.

4 See PARA 385 ante. A failure to disclose will be innocent if, for example, the person did not realise the materiality of the fact or had simply forgotten it: Decision R(SB)28/83.

5 As to these requirements see Decision R(SB)54/83 para 13. A decision is not automatically erroneous in law because it fails to deal expressly with each of the requirements set out in heads (1)-(6) in the text: Decision R(IS)17/95.

6 As to the Secretary of State see PARA 1 ante.

7 Knowledge has always been a requirement under this head: *R v Medical Appeal Tribunal, ex p Hubble* [1958] 2 QB 228, [1958] 2 All ER 374, CA; *Franklin v Chief Adjudication Officer* [1995] TLR 720, CA; and see PARA 386 note 12 ante. If the person had the knowledge in the past, that will not be affected by his having forgotten it: Decision R(SB)21/82 para 20. It is enough if the person knew or with reasonable diligence ought to have known of the material fact: Decision R(SB)28/83 para 10.

8 Previous practice may be relevant when deciding what it was reasonable to disclose on the occasion in question: Decision R(SB)3/81. It may not be reasonable to expect disclosure of a matter entirely under the control of another party: Decision R(SB)2/91 para 8. Mental incapacity of the claimant may be a factor in determining whether it was reasonable to expect disclosure: Decisions R(SB)28/83; R(SB)40/84, Appendix; cf Decision CF/26/1990 (which emphasised the objective nature of the test; learning and reading difficulties not relevant). As to the effect of mental incapacity in relation to misrepresentation see PARA 386 text and note 7 ante.

9 The primary obligation is to disclose the material fact in question to the person or office handling the claim; provided this is done, there is no further obligation to disclose the same fact again: Decision R(SB)15/87. In cases where benefit is payable by one department but disclosure is made to another, the disclosure may be good: Decisions R(SB)54/83; R(SB)36/84; R(SB)10/85; R(SB)2/91. If the disclosure is to another person or office, then there may be a continuing duty to disclose again if it becomes apparent that the original disclosure has not been effective (eg, because the rate of benefit paid remains unaltered when the material fact should have

led to a change): Decision R(SB)15/87. Disclosure may be made on behalf of a claimant by another person, but casual or incidental disclosure by some other person does not suffice and where disclosure is made by another person in the course of some entirely different transaction the disclosure is only sufficient if (1) the information was given to the relevant benefit office; (2) the claimant was aware that the information had been so given; and (3) in the circumstances it was reasonable for the claimant to believe that it was unnecessary for him to take any action himself: Decision R(SB)15/87 para 29.

10 The failure to disclose need not be the sole cause of the overpayment, provided it is an operative cause: see *Duggan v Chief Adjudication Officer* (1988) Times, 19 December, CA. If normally efficient internal procedures for the passing on of information break down in the case in question, then the operative cause is likely to be administrative error rather than any failure by the claimant to make disclosure or further disclosure: Decisions R(SB)15/87; CIS/159/90.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **385-396 Overpayment of benefit ... Payment of benefit where maintenance payments are collected by the Secretary of State**

Overpayments of benefit may be recovered out of the discretionary social fund (see PARA 228): see Social Security Administration Act 1992 s 71ZA (added by Social Security Act 1998 s 75; and amended by Welfare Reform Act 2007 Sch 8), applying the Social Security Administration Act 1992 s 71 with modifications.

Certain overpayments of benefit are not recoverable: see PARA 388A.

SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494 (amended by SI 2006/203).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(5) OVERPAYMENTS AND ADJUSTMENTS OF BENEFIT/388. Recovery of overpaid benefit.

### **388. Recovery of overpaid benefit.**

Where the necessary misrepresentation or failure to disclose has been shown<sup>1</sup>, the amount in question is in all cases recoverable from the person who misrepresented the fact or failed to disclose it<sup>2</sup>. Where that person was the appointee for a claimant unable to act in person, recovery lies against the claimant, not the appointee<sup>3</sup>. If necessary, there can be recovery from the estate of the person liable after his death<sup>4</sup>.

The exact amount of benefit overpaid must be calculated by the adjudicating authority, on the basis of what benefit would have been payable had there been no misrepresentation or failure to disclose; and, if there is an appeal, the amount must be confirmed or, if necessary, recalculated by the appeal tribunal<sup>5</sup>. From the amount initially determined to have been overpaid the following amounts may be set off:

- 1149 (1) any amount which is subject to the general offsetting provisions in the case of arrears of entitlement<sup>6</sup>; and
- 1150 (2) any additional amount of income support<sup>7</sup> or income-based jobseeker's allowance<sup>8</sup> which was not payable under the original (or any other) determination but which should have been determined to be payable on the basis of the claim as presented<sup>9</sup> to the adjudicating authority or on the basis of the claim as it would have appeared had the misrepresentation or non-disclosure been remedied before the determination<sup>10</sup>.

No other deduction may be made in respect of any other entitlement to benefit which may be, or might have been, determined to exist<sup>11</sup>. Where an overpayment of certain benefits<sup>12</sup> was the consequence of a misrepresentation as to the capital a claimant possesses or a failure to disclose its existence, the diminishing capital rule applies on a quarterly basis<sup>13</sup>.

Once an amount has been determined by the adjudicating authorities to be properly recoverable, the question whether and how it should be recovered are matters for the Secretary of State whose decision on such a matter is not subject to appeal<sup>14</sup>.

1 See PARAS 385-387 ante.

2 Social Security Administration Act 1992 s 71(3). See also Decision R(SB)21/82.

Any amount which is recoverable (ie under the Social Security Administration Act 1992 s 71(1) (see PARA 385 ante) or regulations under s 71(4) (see PARA 390 post) or s 71(7) (see PARA 389 post), or under s 74 (see PARA 395 post)) from a person who resides in England and Wales is recoverable, if the county court so orders, by execution issued from the county court or otherwise as if it were payable under an order of that court: s 71(10).

As to recovery by deduction from benefits see PARA 391 post.

3 Decisions R(SB)28/83; CIS/332/1993; CIS/649/1993. Cf Decision CIS/734/1992.

4 *Secretary of State for Social Services v Solly* [1974] 3 All ER 922, CA (applied in Decisions R(SB)21/82; R(SB)28/83).

5 Decisions R(SB)9/85; Decision R(SB)10/85. An appeal tribunal may properly remit an issue of assessment of the amount back to the adjudication officer to be resolved between him and the claimant, provided it is made clear to the claimant that in the event of disagreement the matter is to be restored for decision by the tribunal:

Decisions R(SB)11/86; CIS/442/1992. For the meaning of 'adjudicating authority' see PARA 389 note 4 post. As to the appeal tribunal see PARA 360 ante.

6 See PARA 394 post.

7 As to income support see PARAS 176-201 ante.

8 As to income-based jobseeker's allowance see PARA 271 et seq ante.

9 This includes those factors which could have been established by reasonable inquiry prompted by the terms of the claim: Decision R(IS)5/92.

10 See the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 13 (amended by SI 1996/1345). See also Decision R(SB)10/85. The scope of the deduction is not limited to the period of the overpayment: Decisions R(IS)5/92; CSIS/8/95.

11 See the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 13 (as amended: see note 10 supra).

12 *Re* income support, income-based jobseeker's allowance, family credit or disability working allowance: see *ibid* reg 14(1) (amended by SI 1991/2742; SI 1996/1345).

13 *Re* the adjudicating authority must treat that capital as having been reduced at the end of each quarter from the start of the overpayment period by the amount overpaid by way of income support, income-based jobseeker's allowance or family credit within that quarter: see the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 14(1) (as amended: see note 12 supra). As to the diminishing capital rule see also PARA 196 note 8 ante. Capital must not be treated as reduced in any other circumstances or over any period other than a quarter: see reg 14(2). 'A quarter' means a period of 13 weeks starting with the first day on which the overpayment period began and ending on the ninetieth consecutive day thereafter; and 'overpayment period' is a period during which income support, income-based jobseeker's allowance, family credit or disability working allowance is overpaid in consequence of a misrepresentation as to capital or a failure to disclose its existence: reg 14(3) (amended by SI 1991/2742; SI 1996/2519).

14 Decision R(SB)44/83.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see *RATING AND COUNCIL TAX* vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **385-396 Overpayment of benefit ... Payment of benefit where maintenance payments are collected by the Secretary of State**

Overpayments of benefit may be recovered out of the discretionary social fund (see PARA 228): see Social Security Administration Act 1992 s 71ZA (added by Social Security Act 1998 s 75; and amended by Welfare Reform Act 2007 Sch 8), applying the Social Security Administration Act 1992 s 71 with modifications.

Certain overpayments of benefit are not recoverable: see PARA 388A.

SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494 (amended by SI 2006/203).

### **388 Recovery of overpaid benefit**

NOTE 1--See *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, [2005] 2 All ER 129.

TEXT AND NOTES 6-10--In relation to tax credit, SI 1988/664 reg 13 renumbered reg 13(1) (by SI 1999/2571), which applies to tax credit only where both the overpayment of benefit referred to in SI 1988/664 reg 13(1) and the amount referred to in TEXT head (1), are tax credit, and with the modification that head (2) is omitted: reg 13(2) (added by SI 1999/2571).

NOTES 10, 11--SI 1988/664 reg 13 amended by SI 2002/3019, SI 2008/1554.

NOTES 12, 13--For 'family credit or disability working allowance' read 'working families' tax credit or disability working allowance' and after 'or an income-based jobseeker's allowance' each time it occurs add 'or income-related employment and support allowance': SI 1988/664 reg 14(1), (3) (both amended by SI 1999/2571, SI 2008/1554).

NOTE 13--SI 1988/664 reg 14(1) (amended by SI 2002/3019) refers also to the amount overpaid by way of state pension credit.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(5) OVERPAYMENTS AND ADJUSTMENTS OF BENEFIT/388A. Non-recoverable overpayment of benefit.

### **388A. Non-recoverable overpayment of benefit.**

An overpayment<sup>1</sup> to which this provision applies is not recoverable<sup>2</sup> from the payee<sup>3</sup>, whether by the Secretary of State or a local authority<sup>4</sup>. This provision applies to an overpayment if (1) it is in respect of a qualifying benefit<sup>5</sup>; (2) it is referable to a decision given on a review<sup>6</sup> that there has been an alteration in the relevant person's<sup>7</sup> condition, being a decision to which effect is required to be given as from a date earlier than that on which it was given<sup>8</sup>; (3) the decision was given before 1 June 1999; and (4) the overpayment is not an excluded overpayment<sup>9</sup>. Nothing in these rules applies to an overpayment to the extent that it was recovered from the payee by any means before 26 February 1999<sup>10</sup>.

1 'Overpayment' means an amount of benefit paid in excess of entitlement: Welfare Reform and Pensions Act 1999 s 68(8).

2 Ie pursuant to any provision made by or under the Social Security Administration Act 1992 Pt III (ss 71-80).

3 'The payee', in relation to an overpayment, means the person to whom that amount was paid: Welfare Reform and Pensions Act 1999 s 68(8).

4 Ibid s 68(1).

5 'Qualifying benefit' means (1) attendance allowance; (2) disability living allowance; (3) any benefit awarded wholly or partly by reason of a person being (or being treated as being) in receipt of a component (at any rate) of disability living allowance or in receipt of attendance allowance; (4) incapacity benefit; (5) any benefit (other than incapacity benefit) awarded wholly or partly by reason of a person being (or being treated as being) incapable of work; or (6) any benefit awarded wholly or partly by reason of a person being (or being treated as being) in receipt of any benefit falling within head (3), (4) or (5) above: *ibid* s 68(4). 'Benefit' includes any amount included in (a) the applicable amount in relation to an income-related benefit (as defined by the Social Security Contributions and Benefits Act 1992 s 135(1): see PARA 174), or (b) the applicable amount in relation to a jobseeker's allowance (as defined by the Jobseekers Act 1995 s 4(5): see PARA 272); and 'income-related benefit' has the meaning given by the Social Security Contributions and Benefits Act 1992 s 123(1) (see PARA 173): Welfare Reform and Pensions Act 1999 s 68(8).

6 'Review' means a review taking place by virtue of the Social Security Administration Act 1992 ss 25(1)(a) or (b), 30(2)(a) or (b) or 35(1)(a) or (b): Welfare Reform and Pensions Act 1999 s 68(5)(a).

7 'The relevant person', in relation to a review, means the person to whose entitlement to a qualifying benefit or to whose incapacity for work the review related: *ibid* s 68(5)(b).

8 The reference to a decision on a review that there has been an alteration in the relevant person's condition is a reference to a decision so given that that person's physical or mental condition either was at the time when the original decision was given, or has subsequently become, different from that on which that decision was based, with the result (1) that he did not at that time, or (as the case may be) has subsequently ceased to, meet any of the conditions contained in the following provisions of the Social Security Contributions and Benefits Act 1992, namely (a) s 64 (attendance allowance: see PARA 113); (b) s 72(1) or (2) (care component of disability living allowance: see PARAS 104, 105); and (c) s 73(1) or (2) (mobility component of that allowance: see PARA 106); or (2) that he was at that time, or (as the case may be) has subsequently become, capable of work in accordance with regulations made under s 171C(2) (the all work test: see PARA 68): Welfare Reform and Pensions Act 1999 s 68(3). 'The original decision', in relation to a review, means the decision as to any such entitlement or incapacity to which the review related: s 68(5)(c).

9 Ie by virtue of *ibid* s 68(6): s 68(2). Section 68(6) provides that an overpayment is excluded if, before or after 11 November 1999, (1) the payee has agreed to pay a penalty in respect of the overpayment under the Social Security Administration Act 1992 s 115A; (2) the payee has been convicted of any offence, under ss 111A or 112(1) or (1A) or otherwise, in connection with the overpayment; or (3) proceedings have been instituted against the payee for such an offence and the proceedings have not been determined or abandoned.

10 Welfare Reform and Pensions Act 1999 s 68(7).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **385-396 Overpayment of benefit ... Payment of benefit where maintenance payments are collected by the Secretary of State**

Overpayments of benefit may be recovered out of the discretionary social fund (see PARA 228): see Social Security Administration Act 1992 s 71ZA (added by Social Security Act 1998 s 75; and amended by Welfare Reform Act 2007 Sch 8), applying the Social Security Administration Act 1992 s 71 with modifications.

Certain overpayments of benefit are not recoverable: see PARA 388A.

SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494 (amended by SI 2006/203).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(5) OVERPAYMENTS AND ADJUSTMENTS OF BENEFIT/389. Offsetting and recovery of interim payments.

### **389. Offsetting and recovery of interim payments.**

The Secretary of State<sup>1</sup> has a general discretion to make an interim payment, that is to say a payment on account of any benefit to which it appears to him that a person is or may be entitled, where it is impracticable for a claim to be made immediately in the proper manner, or for it to be determined immediately or for the award to be paid to the beneficiary immediately<sup>2</sup>. Any such interim payment is to be brought into account; and, if the interim payment is made in anticipation of an award of benefit, it must be offset in reduction of the benefit to be awarded or, if it not so offset, the interim payment must be deducted from any sum payable under the award of benefit<sup>3</sup>. Where the adjudicating authority<sup>4</sup> has determined that an interim payment has been overpaid, that authority must determine the amount of the overpayment, which is then recoverable by the Secretary of State<sup>5</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 See the Social Security Administration Act 1992 s 5(1)(r); and the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 2(1) (amended by SI 1996/30). This does not apply pending the determination of an appeal unless the Secretary of State is of the opinion that there is entitlement to benefit: Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 2(1A) (added by SI 1996/30). The recipient must generally be given notice in writing of his liability to have the interim payment brought into account or to repay any overpayment: see the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 2(2), (3) (respectively amended and added by SI 1991/2742).

3 Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 3 (substituted by SI 1993/650).

4 'Adjudicating authority' means, as the case may be, the chief or any other adjudication officer, a social security appeal tribunal, a disability appeal tribunal, the chief or any other social security commissioner or a tribunal of commissioners: Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 1 (definition amended by SI 1991/2742).

5 See the Social Security Administration Act 1992 s 71(7); and the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 4 (amended by SI 1993/650). The overpayment is recoverable by the same procedures and subject to the same conditions as if it were an ordinary overpayment case: see PARAS 388 ante, 390-391 post.

## **UPDATE**

### **330-450 Administration**

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As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

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Certain overpayments of benefit are not recoverable: see PARA 388A.

SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494 (amended by SI 2006/203).

### **389 Offsetting and recovery of interim payments**

TEXT AND NOTES--Where the interim payment is a payment on account of tax credit, the Commissioners of Inland Revenue exercise certain of the powers of the Secretary of State under SI 1988/664 regs 2-4 (reg 2 modified, regs 3, 4 amended, by SI 1999/2571).

NOTE 3--SI 1988/664 reg 3 renumbered reg 3(1) (amended by SI 1999/2571).

NOTE 4--'Adjudicating authority' means, as the case may require, the Secretary of State, the First-tier Tribunal or the Upper Tribunal: SI 1988/664 reg 1 (amended by SI 1999/2571, SI 2008/2683).

NOTE 5--SI 1988/664 reg 4 further amended: SI 2008/1554.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(5) OVERPAYMENTS AND ADJUSTMENTS OF BENEFIT/390. Recovery of automated or other direct credit transfer overpayments.

### **390. Recovery of automated or other direct credit transfer overpayments.**

Where it is determined by the adjudicating authority<sup>1</sup> that a payment in excess of entitlement has been credited to a bank or other account under an arrangement for automated or other direct credit transfer, the excess or any specified part of it is recoverable<sup>2</sup> provided that:

1151 (1) the Secretary of State<sup>3</sup> has certified that the overpayment is materially due to the arrangement for payments to be made by automated or other direct credit transfer<sup>4</sup>; and

1152 (2) notice of the effect of these provisions for recovery was given in writing to the beneficiary, or to a person acting for him, before he agreed to the arrangement<sup>5</sup>.

1 For the meaning of 'adjudicating authority' see PARA 389 note 4 ante.

2 See the Social Security Administration Act 1992 s 71(4); and the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 11(1). As to recovery see PARAS 388 ante, 391 post.

An amount is not recoverable under this provision unless the determination in pursuance of which it was paid has been reversed or varied on an appeal or revised on a review, and it has been determined on the appeal or review that the amount is so recoverable: Social Security Administration Act 1992 s 74(5) (amended by the Social Security (Overpayments) Act 1996 s 1). This does not, however, apply where the fact and circumstances of the misrepresentation or non-disclosure do not provide a basis for reviewing and revising the determination under which payment was made: Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 12.

3 As to the Secretary of State see PARA 1 ante.

4 See the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 11(2)(a).

5 See *ibid* reg 11(2)(b), (3).

## **UPDATE**

### **330-450 Administration**

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As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

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Overpayments of benefit may be recovered out of the discretionary social fund (see PARA 228): see Social Security Administration Act 1992 s 71ZA (added by Social

Security Act 1998 s 75; and amended by Welfare Reform Act 2007 Sch 8), applying the Social Security Administration Act 1992 s 71 with modifications.

Certain overpayments of benefit are not recoverable: see PARA 388A.

SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494 (amended by SI 2006/203).

### **390 Recovery of automated or other direct credit transfer overpayments**

TEXT AND NOTES--Where a payment in excess of entitlement is a payment of tax credit, SI 1988/664 reg 11 is modified so as to refer to the Commissioners of Inland Revenue instead of to the Secretary of State: SI 1999/2572.

NOTE 2--For 's 74(5)' read 's 71(5)'. 1992 Act s 71(5) repealed: Welfare Reform Act 2007 s 44(2), Sch 8.

TEXT AND NOTE 5--Now head (2) notice of the effect of these provisions would have, in the event of an overpayment, was given to the beneficiary or to a person acting for him in writing, where the claim was made in writing; or either orally or in writing, where the claim was made by telephone before he agreed to the arrangement: SI 1988/664 reg 11(2)(b) (substituted by SI 2005/34).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(5) OVERPAYMENTS AND ADJUSTMENTS OF BENEFIT/391. Recovery of overpayments by deductions from benefit.

### **391. Recovery of overpayments by deductions from benefit.**

An overpayment which is recoverable<sup>1</sup> may, without prejudice to any other method of recovery, be recovered by deduction from prescribed benefits<sup>2</sup>. Recovery may be made from any arrears of benefit<sup>3</sup>, but there are limits on the amounts that may be deducted from a payment of current income support or jobseeker's allowance<sup>4</sup>. Where the overpayment is of income support, income-based jobseeker's allowance, family credit or disability working allowance to one of a married or unmarried couple<sup>5</sup>, the amount to be recovered may be deducted from any of those benefits which is payable to either of them, provided that the two of them are still such a couple at the date of the deduction<sup>6</sup>.

<sup>1</sup> See under the Social Security Administration Act 1992 s 71(1) (see PARA 385 ante) or regulations under s 71(4) (see PARA 390 ante) or s 71(7) (see PARA 389 ante), or under s 74 (see PARA 395 post).

<sup>2</sup> Ibid s 71(8); and see the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 15(1) (amended by SI 1988/688). Amounts recoverable under any corresponding enactment or instrument having effect in Northern Ireland are also recoverable by deduction from the prescribed benefits: see the Social Security Administration Act 1992 s 79(a).

The prescribed benefits are (1) any benefit under the Social Security Act 1975 (repealed: see now the Social Security Contributions and Benefits Act 1992 Pts II-V (ss 20-111) (as amended); and PARA 54 et seq ante); (2) child benefit (see PARA 237 et seq ante); (3) family credit (see PARAS 202-217 ante); (4) income support (see PARAS 176-201 ante); (5) jobseeker's allowance (see PARA 258 et seq ante); (6) disability working allowance (see PARAS 218-227 ante); and (7) incapacity benefit (see PARA 59 et seq ante): Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 15(2) (amended by SI 1991/2742; SI 1995/829; SI 1996/1345; SI 1996/2519).

Where a person is subject to a bankruptcy order or his estate is sequestrated, a sum deducted from his jobseeker's allowance under the Social Security Administration Act 1992 s 71(8) must not be treated as income for the purposes of the Insolvency Act 1986 or the Bankruptcy (Scotland) Act 1985: see the Social Security Administration Act 1992 s 71(10A), (10B) (both added by the Jobseekers Act 1995 s 32(1)). As to bankruptcy generally see BANKRUPTCY AND INDIVIDUAL INSOLVENCY.

The power of recovery may be exercised when the intended recipient of the benefits from which recovery is to be made has become bankrupt: *R v Secretary of State for Social Security, ex p Taylor* [1996] TLR 54.

Deductions may only be made from guardian's allowance (see PARAS 117-120 ante) or child benefit in respect of an overpayment of that benefit: Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 16(1), (2) (amended by SI 1988/688; SI 1991/2742).

<sup>3</sup> Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 16(3).

<sup>4</sup> See ibid reg 16(4)-(8) (amended by SI 1996/672; SI 1996/1345; SI 1996/2519; SI 1996/3195). A higher amount may be deducted where a person responsible for the misrepresentation of or failure to disclose a material fact has been found guilty of an offence, or has made a written statement after caution in admission of deception or fraud for the purpose of obtaining benefit: see the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 16(5).

<sup>5</sup> As to the meaning of 'unmarried couple' see PARAS 83, 175 note 1, 262 note 6 ante.

<sup>6</sup> See the Social Security Administration Act 1992 s 71(9); and the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 17 (amended by SI 1991/2747; SI 1996/1345).

### **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **385-396 Overpayment of benefit ... Payment of benefit where maintenance payments are collected by the Secretary of State**

Overpayments of benefit may be recovered out of the discretionary social fund (see PARA 228): see Social Security Administration Act 1992 s 71ZA (added by Social Security Act 1998 s 75; and amended by Welfare Reform Act 2007 Sch 8), applying the Social Security Administration Act 1992 s 71 with modifications.

Certain overpayments of benefit are not recoverable: see PARA 388A.

SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494 (amended by SI 2006/203).

### **391 Recovery of overpayments by deductions from benefit**

TEXT AND NOTES--For provisions where the overpayment was made in respect of tax credit, see the Social Security Administration Act 1992 s 71(8)-(9) (as modified by the Tax Credits Act 1999 Sch 2 para 10(1)) (subject to savings (SI 2003/962) Tax Credits Act repealed: Tax Credits Act 2002 Sch 6).

Social Security Administration Act 1992 s 71(8) amended: Tax Credits Act 2002 Sch 4 para 2.

NOTE 2--Heads (3) and (6) omitted in relation to tax credit; and additional heads (7) state pension credit and (8) employment and support allowance: SI 1988/664 reg 15(2) (amended by SI 1999/2571, SI 2002/3019, SI 2008/1554).

NOTE 4--SI 1988/664 reg 16(5) substituted, reg 16(8) amended: SI 2000/2336, SI 2002/2441. SI 1988/664 reg 16(6), (8) amended: SI 2002/3019, SI 2008/1554. SI 1988/664 reg 16(4A) further amended: SI 2008/1554.

TEXT AND NOTE 5--Words 'family credit or disability working allowance' omitted: SI 1988/664 reg 17 (amended by SI 1999/2571).

In Social Security Administration Act 1992 s 71(9) for 'married or unmarried couple' read 'couple': Civil Partnership Act 2004 Sch 24 para 58(2). In the Social Security Administration Act 1992 s 71 'couple' has the meaning given by the Social Security Contributions and Benefits Act 1992 s 137(1) (see PARA 175): Social Security Administration Act 1992 s 71(12) (added by Civil Partnership Act 2004 Sch 24 para 58(3)).

NOTE 6--SI 1988/664 reg 17 amended by SI 2002/3019, SI 2005/2877, SI 2008/1544.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(5) OVERPAYMENTS AND ADJUSTMENTS OF BENEFIT/392. Recovery of jobseeker's allowance in severe hardship cases.

### **392. Recovery of jobseeker's allowance in severe hardship cases.**

Where a severe hardship direction<sup>1</sup> is revoked and it is determined by an adjudication officer that, whether fraudulently or otherwise, any person has misrepresented<sup>2</sup> or failed to disclose<sup>3</sup> any material fact and in consequence payment of a jobseeker's allowance has been made during the relevant period<sup>4</sup> to the person to whom the direction related, then an adjudication officer may determine that the Secretary of State is entitled to recover the amount of the payment<sup>5</sup>. The Secretary of State has the power to certify (1) that there has been a misrepresentation of, or failure to disclose, a material fact<sup>6</sup>; (2) who made the misrepresentation or failed to make the disclosure<sup>7</sup>; (3) whether or not an allowance has been paid in consequence of the misrepresentation or failure<sup>8</sup>; and (4) the period during which the allowance would not have been paid but for the misrepresentation or failure to disclose<sup>9</sup>. Any such certificate is conclusive as to any matter certified<sup>10</sup>.

1 'Severe hardship direction' means a direction given under the Jobseekers Act 1995 s 16 (see PARA 318 ante); Social Security Administration Act 1992 s 71A(2) (s 71A added by the Jobseekers Act 1995 s 18).

2 As to misrepresentation in the case of overpayments generally see PARA 386 ante.

3 As to failure to disclose in the case of overpayments generally see PARA 387 ante.

4 'The relevant period' means the period during which the direction was in force or, if the revocation is due to a change in circumstance, the period beginning with the date of the change of circumstance and ending with the date of the revocation: see the Social Security Administration Act 1992 s 71A(2) (as added: see note 1 supra).

5 Ibid s 71A(1) (as added: see note 1 supra). The provisions of s 71(3) (see PARA 388 ante), s 71(6) (see PARA 385 ante), s 71(7) (see PARA 389 ante), s 71(8), (9) (see PARA 391 ante), s 71(10) (see PARA 388 ante) apply to this form of recovery: s 71A(7) (as so added). The other provisions of s 71 (as amended) do not apply: s 71A(8) (as so added).

6 Ibid s 71A(3) (as added: see note 1 supra).

7 Ibid s 71A(4)(a) (as added: see note 1 supra).

8 Ibid s 71A(4)(b) (as added: see note 1 supra).

9 Ibid s 71A(5) (as added: see note 1 supra).

10 Ibid s 71A(6) (as added: see note 1 supra).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

**385-396 Overpayment of benefit ... Payment of benefit where maintenance payments are collected by the Secretary of State**

Overpayments of benefit may be recovered out of the discretionary social fund (see PARA 228): see Social Security Administration Act 1992 s 71ZA (added by Social Security Act 1998 s 75; and amended by Welfare Reform Act 2007 Sch 8), applying the Social Security Administration Act 1992 s 71 with modifications.

Certain overpayments of benefit are not recoverable: see PARA 388A.

SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494 (amended by SI 2006/203).

**392 Recovery of jobseeker's allowance in severe hardship cases**

TEXT AND NOTES 2-5--References to an adjudication officer are now to the Secretary of State: Social Security Administration Act 1992 s 71A(1) (amended by the Social Security Act 1998 Sch 7 para 82).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(5) OVERPAYMENTS AND ADJUSTMENTS OF BENEFIT/393. Adjustment of overlapping benefits.

### **393. Adjustment of overlapping benefits.**

In order to prevent an overlap, regulations<sup>1</sup> may provide for adjusting certain benefit<sup>2</sup> payable to or in respect of any person, or the conditions for receipt of that benefit<sup>3</sup>, where a specified pension or allowance<sup>4</sup> is payable in his case<sup>5</sup> or the person is undergoing medical or other treatment as an in-patient in a hospital or similar institution<sup>6</sup>.

Regulations may also provide for adjusting such benefit where any benefit is payable in his case under the legislation of any member state<sup>7</sup> other than the United Kingdom<sup>8</sup>.

1 As to the regulations made see the Social Security (Overlapping Benefits) Regulations 1979, SI 1979/597 (as amended); and the Social Security (Hospital In-Patients) Regulations 1975, SI 1975/555 (as amended).

2 I.e. benefit as defined in the Social Security Contributions and Benefits Act 1992 s 122 (as amended) (see PARA 13 note 8 ante) or a contribution-based jobseeker's allowance (see PARA 266 et seq ante).

3 Social Security Administration Act 1992 s 73(1) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 49).

4 I.e. any pension, allowance or benefit payable out of public funds which is payable to or in respect of (1) that person; (2) that person's wife or husband; (3) any child or adult dependant of that person; or (4) the wife or husband of any adult dependant of that person: *ibid* s 73(2).

5 *Ibid* s 73(1)(a). Where, but for regulations made by virtue of this provision, two persons would both be entitled to an increase of benefit in respect of a third person, regulations may make provision as to their priority: s 73(3).

6 *Ibid* s 73(1)(b).

7 I.e. a state which is a member of the European Union: see EUROPEAN COMMUNITIES.

8 See the Social Security Administration Act 1992 s 73(4), (5) (s 73(4) substituted by the Jobseekers Act 1995 Sch 2 para 49). For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **385-396 Overpayment of benefit ... Payment of benefit where maintenance payments are collected by the Secretary of State**

Overpayments of benefit may be recovered out of the discretionary social fund (see PARA 228): see Social Security Administration Act 1992 s 71ZA (added by Social Security Act 1998 s 75; and amended by Welfare Reform Act 2007 Sch 8), applying the Social Security Administration Act 1992 s 71 with modifications.

Certain overpayments of benefit are not recoverable: see PARA 388A.

SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494 (amended by SI 2006/203).

### **393 Adjustment of overlapping benefits**

NOTE 1--SI 1979/597 further amended: SI 2000/799, SI 2000/1483, SI 2003/937, SI 2004/565, SI 2005/1551, SI 2005/2877, SI 2006/2379, SI 2008/1554. SI 1975/555 replaced: Social Security (Hospital In-Patients) Regulations 2005, SI 2005/3360 (amended by SI 2006/588). With regard to SI 1979/597 see also the New Deal (Lone Parents) (Miscellaneous Provisions) Order 2001, SI 2001/2915.

NOTES 3, 8--Social Security Administration Act 1992 s 73(1), (4) amended so as to include reference to a contributory employment and support allowance: Welfare Reform Act 2007 Sch 3 para 10(7), Sch 8.

NOTES 4, 8--Social Security Administration Act 1992 s 73(2), (5) amended: Civil Partnership Act 2004 Sch 24 para 59; Child Benefit Act 2005 Sch 1 para 21, Sch 2 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(5) OVERPAYMENTS AND ADJUSTMENTS OF BENEFIT/394. Offsetting prior payments against subsequent award.

### **394. Offsetting prior payments against subsequent award.**

Any sum paid in respect of a period covered by a subsequent determination in any of the following specified cases must (1) be offset against any arrears of entitlement under the subsequent determination; and (2) except to the extent that the sum exceeds the arrears, be treated as properly paid on account of them<sup>1</sup>. The specified cases are:

- 1153 (a) where a person has been paid a sum by way of benefit under an award which is subsequently varied on appeal or revised on a review;
- 1154 (b) where a person has been paid a sum by way of benefit under the original award and it is subsequently determined, on review or appeal, that another benefit should be awarded or is payable in lieu of the first;
- 1155 (c) where either (i) a person has been awarded and paid child benefit for a period in respect of which severe disablement allowance<sup>2</sup> is subsequently determined to be payable to the child<sup>3</sup> concerned; or (ii) severe disablement allowance is awarded and paid for a period in respect of which child benefit is subsequently awarded to someone else, the child concerned in the subsequent determination being the beneficiary of the original award;
- 1156 (d) where a person has been paid a sum by way of an increase in respect of a dependent person under the original award and it is subsequently determined that that other person is entitled to benefit for that period, or that a third person is entitled to the increase for that period in priority to the beneficiary of the original award;
- 1157 (e) where a person has been paid a sum by way of an increase in respect of a partner<sup>4</sup> and it is subsequently determined that that other person is entitled to benefit for that period<sup>5</sup>.

1 Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 5(1). No amount may be offset under reg 5(1) which has been determined to be a recoverable overpayment for the purposes of the Social Security Administration Act 1992 s 71(1) (see PARA 385 ante): Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 6.

Where an amount has been deducted in calculating recoverable amounts under reg 13(b) (see PARA 388 ante), an equivalent sum must be offset against any arrears of entitlement of that person under a subsequent award of income support for the period to which the deducted amount relates: reg 5(3). As to income support see PARAS 176-201 ante.

As to the deduction of an amount from child benefit paid to a beneficiary under a subsequent award in respect of an amount properly paid to a previous beneficiary see reg 5(4), (5). As to child benefit see PARA 237 et seq ante.

2 As to severe disablement allowance see PARAS 92-99 ante.

3 For the meaning of 'child' see PARA 19 note 11 ante.

4 For the meaning of 'partner' see PARAS 182 note 5, 262 note 6 ante.

5 Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 5(2).

### **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **385-396 Overpayment of benefit ... Payment of benefit where maintenance payments are collected by the Secretary of State**

Overpayments of benefit may be recovered out of the discretionary social fund (see PARA 228): see Social Security Administration Act 1992 s 71ZA (added by Social Security Act 1998 s 75; and amended by Welfare Reform Act 2007 Sch 8), applying the Social Security Administration Act 1992 s 71 with modifications.

Certain overpayments of benefit are not recoverable: see PARA 388A.

SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494 (amended by SI 2006/203).

### **394 Offsetting prior payments against subsequent award**

NOTE 1--Refers also to state pension credit and income-related employment and support allowance: SI 1988/664 reg 5(3) (amended by SI 2002/3019, SI 2008/1554). SI 1988/664 reg 5(1) is subject to reg 5(1A), (2A), (6): reg 5(1) amended by SI 1999/2571, SI 2006/516).

Subject to SI 1988/664 reg 6, any sums under the Social Security Contributions and Benefits Act 1992 Sch 5 or Sch 5A (pension increases or lump sum where entitlement to retirement pension or shared additional pension is deferred), or under the Social Security (Graduated Retirement Benefit) Regulations 2005, SI 2005/454 (increases or lump sum where entitlement to graduated retirement benefit is deferred), paid pursuant to a decision which is subsequently revised under the Social Security Act 1998 s 9, superseded under s 10 or overturned on appeal, must be offset against any sums due under the subsequent determination and, except to the extent that the sum exceeds the amount now due, treated as properly paid on account of it: SI 1988/664 reg 5(6) (added by SI 2000/516).

TEXT AND NOTES 2-4--In head (a) after 'benefit' read 'or be way of a shared additional pension under the Social Security Contributions and Benefits Act 1992 s 55A'; and in head (c)(i), (ii) for 'severe disablement allowance' read 'severe disablement allowance or incapacity benefit for persons incapacitated in youth in accordance with the 1992 Act s 30A(1)(b), (2A)': SI 1988/664 reg 5(2) (amended by SI 2000/3120, SI 2005/1551).

As to the circumstances when head (b) does not apply, see SI 1988/664 reg 5(2A) (as added: see PARA 354).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(5) OVERPAYMENTS AND ADJUSTMENTS OF BENEFIT/395. Recovery of excess income support or income-based jobseeker's allowance by abatement or otherwise.

**395. Recovery of excess income support or income-based jobseeker's allowance by abatement or otherwise.**

Where a payment by way of prescribed income<sup>1</sup> is made after the prescribed date<sup>2</sup> and it is determined that an amount which has been paid by way of income support or an income-based jobseeker's allowance<sup>3</sup> would not have been paid if the payment had been made on the prescribed date, then the Secretary of State<sup>4</sup> is entitled to recover that amount from the person to whom it was paid<sup>5</sup>.

Where a prescribed payment<sup>6</sup> which falls to be made from public funds in the United Kingdom<sup>7</sup> or under the law of another member state<sup>8</sup> is not made on or before the prescribed date<sup>9</sup> and it is determined that an amount ('the relevant amount') has been paid as income support or income-based jobseeker's allowance that would not have been paid if the payment had been made on time, then (1) in the case of a payment from public funds in the United Kingdom, the authority responsible for making it may abate it by the relevant amount; and (2) in the case of any other payment, the Secretary of State is entitled to receive the relevant amount out of the payment<sup>10</sup>.

Where (a) a person is entitled to any prescribed benefit<sup>11</sup> for any period in respect of another person who has received, or was during that period a member of the same family as some other third person who received, income support or income-based jobseeker's allowance for that period; and (b) the amount of income support or income-based jobseeker's allowance has been determined on the basis that the first person has not made maintenance payments at a rate equal to or exceeding the amount, then the amount of the prescribed benefit may be abated at the discretion of the authority administering it<sup>12</sup>.

Where an amount could have been recovered under this power of abatement but has not been, the Secretary of State may recover it otherwise than by abatement<sup>13</sup>.

1 For these purposes, a person's prescribed income is income required to be taken into account for income support (see PARAS 176-201 ante) or jobseeker's allowance purposes (see PARA 258 et seq ante): see the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 7(1) (substituted by SI 1993/650; and amended by SI 1996/1345).

As to the value of a payment in a currency other than sterling see the Social Security Administration Act 1992 s 74(5); and the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 10.

2 As to the prescribed date see *ibid* reg 7(2), (3), (4) (reg 7(2) amended, and reg 7(3), (4) both added, by SI 1993/650).

3 As to income-based jobseeker's allowance see PARA 271 et seq ante.

4 As to the Secretary of State see PARA 1 ante.

5 Social Security Administration Act 1992 s 74(1) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 50).

6 As to the payments which have been prescribed see the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 8(1) (amended by SI 1991/2742).

7 For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

8 ie a state which is a member of the European Union: see EUROPEAN COMMUNITIES.

9 The prescribed date, in relation to a prescribed payment, is the date by which receipt of or entitlement to that benefit would have to be notified to the Secretary of State if it were to be taken into account in determining (whether on review or otherwise) the amount of or entitlement to income support or income-based jobseeker's allowance: Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 8(2) (amended by SI 1996/1345).

10 Social Security Administration Act 1992 s 74(2) (amended by the Jobseekers Act 1995 Sch 2 para 50).

11 For these purposes, the prescribed benefits are: (1) child benefit (see PARA 237 et seq ante); (2) increases for dependants of any benefit under the Social Security Contributions and Benefits Act 1992 (see PARAS 122-125 ante); (3) child's special allowance under s 56 (see PARA 54 ante); and (4) guardian's allowance (see PARAS 117-120 ante): see the Social Security (Payments on account, Overpayments and Recovery) Regulations 1988, SI 1988/664, reg 9.

12 See the Social Security Administration Act 1992 s 74(3) (amended by the Jobseekers Act 1995 Sch 2 para 50). The benefit may be abated by the amount by which the income support or income-based jobseeker's allowance exceeds what it would have been had he been making maintenance payments at a rate equal to the amount of the prescribed benefit: see the Social Security Administration Act 1992 s 74(3) (as so amended). For the meaning of 'family' see PARAS 175 note 1, 265 note 6 ante.

13 Ibid s 74(4).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **385-396 Overpayment of benefit ... Payment of benefit where maintenance payments are collected by the Secretary of State**

Overpayments of benefit may be recovered out of the discretionary social fund (see PARA 228): see Social Security Administration Act 1992 s 71ZA (added by Social Security Act 1998 s 75; and amended by Welfare Reform Act 2007 Sch 8), applying the Social Security Administration Act 1992 s 71 with modifications.

Certain overpayments of benefit are not recoverable: see PARA 388A.

SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494 (amended by SI 2006/203).

### **395 Recovery of excess income support or income-based jobseeker's allowance by abatement or otherwise**

TEXT AND NOTES 1-5--Refers also to an amount which has been paid by way of state pension credit: 1992 Act s 74(1) (amended by State Pension Credit Act 2002 Sch 2 para 11).

NOTE 1--Now also state pension credit and employment and support allowance: see SI 1988/664, reg 7 (amended by SI 2001/3649, SI 2008/1554).

TEXT AND NOTES 5, 10, 12--1992 Act s 74(1)-(3) further refers also to an income-related employment and support allowance (see PARA 75A): Welfare Reform Act 2007 Sch 3 para 10(8).

NOTE 6--SI 1988/664 reg 8(1) further amended: SI 1999/2571, SI 2000/1483, SI 2005/337, SI 2005/3476, SI 2008/1554.

NOTE 9--Refers also to entitlement to state pension credit and employment and support allowance: SI 1988/664 reg 8(2) (amended by SI 2002/3019, SI 2008/1554).

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### **396. Payment of benefit where maintenance payments are collected by the Secretary of State.**

Where (1) a person ('the claimant') is entitled to a benefit to which this provision applies<sup>1</sup>; (2) the Secretary of State<sup>2</sup> is collecting periodical payments of child or spousal maintenance<sup>3</sup> made in respect of the claimant or a member of the claimant's family<sup>4</sup>; and (3) the inclusion of any such periodical payment in the claimant's relevant income<sup>5</sup> would otherwise have the effect of reducing the amount of the benefit to which the claimant is entitled<sup>6</sup>, the Secretary of State may (to such extent as he considers appropriate) treat any such periodical payment as not being relevant income for the purposes of calculating the amount of benefit to which the claimant is entitled<sup>7</sup>. The Secretary of State may also, to the extent that any periodical payment collected by him is treated as not being relevant income for those purposes, retain the whole or any part of that payment<sup>8</sup>.

1. Income support, income-based jobseeker's allowance and such other benefits (if any) as may be prescribed: Social Security Administration Act 1992 s 74A(7) (s 74A added by the Child Support Act 1995 s 25).

2. As to the Secretary of State see PARA 1 ante.

3. 'Child maintenance' and 'spousal maintenance' have such meanings as may be prescribed: Social Security Administration Act 1992 s 74A(5) (as added: see note 1 supra). As to the meanings prescribed see the Social Security Benefits (Maintenance Payments and Consequential Amendments) Regulations 1996, SI 1996/940, reg 2. 'Child' means a person under the age of 16: Social Security Administration Act 1992 s 74A(5) (as so added).

4. For these purposes, 'family' means (1) a married or unmarried couple; (2) a married or unmarried couple and a member of the same household for whom one of them is, or both are, responsible and who is a child or a person of a prescribed description; (3) except in prescribed circumstances, a person who is not a member of a married or unmarried couple and a member of the same household for whom that person is responsible and who is a child or a person of a prescribed description: *ibid* s 74A(5) (as added: see note 1 supra). 'Married couple' means a man and a woman who are married to each other and are members of the same household; and 'unmarried couple' means a man and a woman who are not married to each other but are living together as husband and wife (as to which see generally para 83 ante) otherwise than in prescribed circumstances: s 74A(5) (as so added). A person of a prescribed description is any person who is referred to as a young person for income support or jobseeker's allowance purposes (see PARA 176 et seq, 258 et seq ante): see the Social Security Benefits (Maintenance Payments and Consequential Amendments) Regulations 1996, SI 1996/940, reg 3. For these purposes, the Secretary of State may by regulations make provision as to the circumstances in which (a) persons are to be treated as being or not being members of the same household; (b) one person is to be treated as responsible or not responsible for another: Social Security Administration Act 1992 s 74A(6) (as so added). As to the regulations made see the Social Security Benefits (Maintenance Payments and Consequential Amendments) Regulations 1996, SI 1996/940, regs 4, 5.

5. 'Relevant income' means any income which is taken into account for the purpose of calculating the amount of income support or jobseeker's allowance to which the claimant is entitled: see the Social Security Administration Act 1992 s 74A(5) (as added: see note 1 supra); and the Social Security Benefits (Maintenance Payments and Consequential Amendments) Regulations 1996, SI 1996/940, reg 2.

6. *Ibid* s 74A(1) (as added: see note 1 supra).

7. *Ibid* s 74A(2) (as added: see note 1 supra).

8. *Ibid* s 74A(3) (as added: see note 1 supra). Any sum retained under this provision by the Secretary of State must be paid by him into the Consolidated Fund: s 74A(4) (as so added). As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711.

### **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **385-396 Overpayment of benefit ... Payment of benefit where maintenance payments are collected by the Secretary of State**

Overpayments of benefit may be recovered out of the discretionary social fund (see PARA 228): see Social Security Administration Act 1992 s 71ZA (added by Social Security Act 1998 s 75; and amended by Welfare Reform Act 2007 Sch 8), applying the Social Security Administration Act 1992 s 71 with modifications.

Certain overpayments of benefit are not recoverable: see PARA 388A.

SI 1988/664 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also Child Benefit and Guardian's Allowance (Administrative Arrangements) Regulations 2003, SI 2003/494 (amended by SI 2006/203).

### **396 Payment of benefit where maintenance payments are collected by the Secretary of State**

NOTE 1--Refers also to an income-related employment and support allowance: 1992 Act s 74A(7) (amended by Welfare Reform Act 2007 Sch 3 para 10(9)).

NOTE 3--Definition of 'child maintenance' in SI 1996/940 reg 2 amended: SI 2001/158. Definition of 'spousal maintenance' in SI 1996/940 reg 2 amended: SI 2005/2877.

NOTE 4--In the definition of 'family' in the Social Security Administration Act 1992 s 74A(5) references to married or unmarried couple now to couple: Civil Partnership Act 2004 Sch 24 para 60(b). 'Couple' has the meaning given by the Social Security Contributions and Benefits Act 1992 s 137(1) (see PARA 175): Social Security Administration Act 1992 s 74A(5) (amended by Civil Partnership Act 2004 Sch 24 para 60(a)). Definitions of 'married couple' and 'unmarried couple' repealed: Civil Partnership Act 2004 Sch 24 para 60(c), Sch 30. SI 1996/940 regs 3, 5 amended: SI 2008/1554.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(6) ENFORCEMENT OF THE DUTY TO MAINTAIN/397. Criminal liability.

## **(6) ENFORCEMENT OF THE DUTY TO MAINTAIN**

### **397. Criminal liability.**

If a person persistently refuses or neglects to maintain himself or any other person whom he is liable to maintain<sup>1</sup>, and in consequence of his refusal or neglect income support or an income-based jobseeker's allowance is paid to or in respect of him or such a person, he is guilty of an offence<sup>2</sup>. For these purposes, a person is not to be taken to refuse or neglect to maintain himself or any other person by reason only of anything done or omitted in furtherance of a trade dispute<sup>3</sup>.

1 For these purposes (1) a man is liable to maintain his wife and any children of whom he is the father; (2) a woman is liable to maintain her husband and any children of whom she is the mother; and (3) a person is liable to maintain another person throughout any period in respect of which the first person has given an undertaking in writing in pursuance of immigration rules to be responsible for the maintenance and accommodation of the other person: see the Social Security Administration Act 1992 s 78(6) (applied by s 105(3)). 'Child' includes a person who has attained the age of 16 but not the age of 19 and in respect of whom either parent, or some other person acting in the place of either parent, is receiving income support or an income-based jobseeker's allowance: s 78(6) (as so applied; and amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 51). Any reference in this provision to children of whom the man or the woman is the father or the mother must be construed in accordance with the Family Law Reform Act 1987 s 1 (see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 125); Social Security Administration Act 1992 s 78(7) (as so applied). A document bearing a certificate, which is signed by a person authorised in that behalf by the Secretary of State and states that the document apart from the certificate is, or is a copy of, such an undertaking as is mentioned in head (3) supra, is conclusive of the undertaking in question for these purposes; and a certificate purporting to be so signed must be deemed to be so signed until the contrary is proved: s 78(9) (as so applied). As to the Secretary of State see PARA 1 ante.

In the application s 105 to an income-based jobseeker's allowance, a person is liable to maintain another if that other person is his or her spouse: s 105(4) (added by the Jobseekers Act 1995 Sch 2 para 53).

2 Social Security Administration Act 1992 s 105(1) (amended by the Jobseekers Act 1995 Sch 2 para 53). Such a person is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale, or to both: Social Security Administration Act 1992 s 105(1) (as so amended). As to the standard scale see PARA 172 note 3 ante.

3 Ibid s 105(2).

### **UPDATE**

#### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **397 Criminal liability**

TEXT AND NOTES 1, 2--Refers also to an income-related employment and support allowance: Social Security Administration Act 1992 s 105(1), (4) (amended by Welfare

Reform Act 2007 Sch 3 para 10(10)). Social Security Administration Act 1992 s 105(3) substituted, s 105(4) further amended: Child Maintenance and Other Payments Act 2008 s 45.

NOTE 1--Social Security Administration Act 1992 ss 78(6), 105(4) amended: Civil Partnership Act 2004 Sch 24 paras 61(4), 62.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(6) ENFORCEMENT OF THE DUTY TO MAINTAIN/398. Recovery of expenditure on benefit from the person liable for maintenance.

### **398. Recovery of expenditure on benefit from the person liable for maintenance.**

If income support is claimed by or in respect of a person whom another person is liable to maintain<sup>1</sup>, or paid to or in respect of such a person, the Secretary of State<sup>2</sup> may make a complaint against the liable person to a magistrates' court for an order to pay such sum (weekly or otherwise) as the court may consider appropriate<sup>3</sup>. Any such payments are to be made to the Secretary of State in so far as they are attributable to any income support (whether paid before or after the making of the order); and otherwise to the person claiming income support or, if different, the dependant or to such other person as appears to the court expedient in the interests of the dependant<sup>4</sup>.

In any case where the claim for income support is or was made by the parent of one or more children<sup>5</sup> in respect of both himself and those children, and the other parent is liable to maintain those children but, by virtue of not being the claimant's husband or wife, is not liable to maintain the claimant, then the sum which the court may order that other parent to pay<sup>6</sup> may include an amount in respect of any income support paid to or for the claimant<sup>7</sup>.

In any case where (1) there is an order<sup>8</sup> in force against a person ('the liable parent') who is the parent of one or more children, in respect of the other parent or the children; and (2) payments under the order fall to be made to the Secretary of State<sup>9</sup>; and (3) that other parent ('the dependent parent') ceases to claim income support, then the Secretary of State may transfer to the dependent parent the right to receive the payments under the order (exclusive of the personal allowance element) and to exercise the relevant rights in relation to the order<sup>10</sup>. The Secretary of State makes the transfer by giving notice in writing to the court which made the order and to the liable parent<sup>11</sup> and the dependent parent<sup>12</sup>. Such notice may not be given and, if purportedly given is of no effect, at a time when there is a maintenance order<sup>13</sup> in force against the liable parent in favour of the dependent parent or one or more of the children or in favour of some other person for the benefit of the dependent parent or one or more of the children<sup>14</sup>. Where the Secretary of State gives notice under these provisions, he ceases to be entitled to receive any payment under the order in respect of any personal allowance element or to exercise the relevant rights, so far as relating to any such element; and this is so notwithstanding that the dependent parent does not become entitled to receive any payment in respect of that element or to exercise the rights<sup>15</sup>.

If, in a case where the Secretary of State has given notice, the dependent parent makes a further claim for income support, then the Secretary of State may, by giving a further notice in writing, transfer back from the dependent parent to himself the right to receive the payments and to exercise the relevant rights; and that transfer revives the right of the Secretary of State to receive payment under the order in respect of any personal allowance element<sup>16</sup>.

A transfer<sup>17</sup> does not transfer or otherwise affect the right of any person to receive a payment which fell due to him at a time before the transfer took effect or to exercise the rights in relation to any such payment<sup>18</sup>.

Regulations may make provision for the court<sup>19</sup> to have power to make a recovery order<sup>20</sup> against any person where an award of income-based jobseeker's allowance<sup>21</sup> has been made to that person's spouse<sup>22</sup>. Such regulations may make provision for the transfer by the Secretary of State of the right to receive payments under, and to exercise rights in relation to, a recovery order<sup>23</sup>. In particular, regulations may include provision as to the matters to which the court is,

or is not, to have regard in determining any application under the regulations and as to the enforcement of recovery orders<sup>24</sup>.

1 As to liability to maintain see PARA 397 note 1 ante.

2 As to the Secretary of State see PARA 1 ante.

3 Social Security Administration Act 1992 s 106(1), (2). On the hearing of a complaint the court must have regard to all the circumstances and, in particular, to the income of the liable person; in relation to a person liable to maintain and accommodate an immigrant (see PARA 397 note 1 head (3) ante) the sum ordered must not include any amount which is not attributable to income support: see s 106(2). In determining whether to order any payments to be made in respect of income support for any period before the complaint was made, or the amount of any such payments, the court must disregard any amount by which the liable person's income exceeds the income that was his during that period: s 106(3).

An order made under these provisions is enforceable as a magistrates' court maintenance order within the meaning of the Magistrates' Courts Act 1980 s 150(1) (definition as added) (see MAGISTRATES): Social Security Administration Act 1992 s 106(5).

4 Ibid s 106(4). As to financial support for children see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 528 et seq.

5 For these purposes, notwithstanding the definition in PARA 397 note 1 ante, 'child' means a person under the age of 16: ibid s 107(15).

6 Ie under ibid s 106(2) (see the text and note 3 supra).

7 See ibid s 107(1). Where, by virtue of this provision, the sum which a court orders a person to pay under s 106 includes a personal allowance element (ie an amount allowed for income support purposes in respect of the personal allowance for a lone parent: see the Income Support (General) Regulations 1987, SI 1987/1967, reg 17 (as amended), Sch 2 para 1(2) (as amended); and PARA 184 ante), the order must separately identify the amount of the personal allowance element: Social Security Administration Act 1992 s 107(2).

8 Ie under ibid s 106(2) (see the text and note 3 supra).

9 See the text and note 4 supra.

10 See the Social Security Administration Act 1992 s 107(3). 'Relevant rights', in relation to an order under s 106(2), means the right to bring any proceedings, take any steps or do any other thing under or in relation to the order which the Secretary of State could have brought, taken or done apart from the transfer under these provisions: s 107(15).

11 Any notice required to be given to the liable parent must be taken to have been given if it has been sent to his last known address: ibid s 107(14).

12 See ibid s 107(3). For these purposes, a transfer takes effect on the day on which the dependent parent ceases to be in receipt of income support in consequence of the cessation referred to in head (3) in the text, irrespective of the day on which notice is given: see s 107(13)(a).

If a payment under the order is or has been made to the Secretary of State wholly or partly in respect of the whole or any part of the period beginning with the day on which the transfer takes effect and ending with the day on which the notice is given to the liable parent, the Secretary of State must (1) repay to or for the liable parent so much of the payment as is referable to any personal allowance element in respect of that period or the part of it in question; and (2) pay to or for the dependent parent so much of any remaining balance of the payment as is referable to that period or part, and such a payment must be taken to discharge (to that extent) the liability of the liable parent to the dependent parent under the order in respect of that period or part: s 107(7).

In any case where (a) notice is given to a magistrates' court; (b) payments under the order are required to be made by any method of payment falling within the Magistrates' Courts Act 1980 s 59(6) (as substituted) (see MAGISTRATES); and (c) the clerk to the justices decides that payment by that method is no longer possible, then the clerk must amend the order to provide that payments under the order are to be made by the liable parent to the clerk: see the Social Security Administration Act 1992 s 107(5).

13 'Maintenance order' means (1) any order for the making of periodical payments or for the payment of a lump sum which is, or has at any time been, a maintenance order within the meaning of the Attachment of Earnings Act 1971; (2) any order under the Matrimonial and Family Proceedings Act 1984 Pt III (ss 12-27) (as

amended) for the making of periodical payments or for the payment of a lump sum: Social Security Administration Act 1992 s 107(15).

14 Ibid s 107(4). If such a maintenance order is made at any time after such notice has been given, the order under s 106(2) ceases to have effect: s 107(4).

15 Ibid s 107(6). This does not deprive the Secretary of State of his right to receive a payment in respect of any personal allowance element which fell due to him at a time before the transfer took effect or to exercise the relevant rights in relation to such a payment: see s 107(12).

16 Ibid s 107(8). For these purposes, a transfer takes effect on the first day in respect of which the dependent parent receives income support after the transfer under s 107(3) took effect or such later day as may be specified for the purpose in the notice under s 107(8), irrespective of the day on which notice is given: s 107(13)(b).

Where such further notice is given, and the method of payment under the order which subsists immediately before the day on which the transfer back takes effect differs from the method of payment which subsisted immediately before the day on which the transfer or, if more than one, the last transfer under s 107(3) took effect, then the clerk to the justices must amend the order by reinstating the method of payment under the order which subsisted immediately before the day on which the transfer or the last transfer under s 107(3) took effect: s 107(9). The clerk must not, however, amend the order if the Secretary of State gives notice in writing to the clerk, on or before the day on which the notice under s 107(8) is given, that the method of payment under the order which subsists immediately before the day on which the transfer takes effect is to continue: s 107(10).

In any case where (1) notice is given to a magistrates' court under s 107(8); (2) the method of payment under the order which subsisted immediately before the day on which the transfer or, if there has been more than one, the last transfer under s 107(3) took effect was any method of payment falling within the Magistrates' Courts Act 1980 s 59(6) (as substituted) (see MAGISTRATES); and (3) the clerk decides that payment by that method is no longer possible, then the clerk must amend the order to provide that payments under the order are to be made by the liable parent to the clerk: s 107(11).

17 le under ibid s 107(3) or s 107(8).

18 See ibid s 107(12).

19 For these purposes, 'the court' means, in relation to England and Wales, a magistrates' court: Jobseekers Act 1995 s 23(5).

20 'Recovery order' means an order requiring the person against whom it is made to make payments to the Secretary of State or to such other person or persons as the court may determine: ibid s 23(2).

21 As to jobseeker's allowance see PARA 258 et seq ante.

22 Jobseekers Act 1995 s 23(1). As to the regulations made see the Jobseeker's Allowance Regulations 1996, SI 1996/207 (as amended).

23 Ibid s 23(3).

24 Ibid s 23(4).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **398 Recovery of expenditure on benefit from the person liable for maintenance**

TEXT AND NOTES 5-18--Social Security Administration Act 1992 s 107 repealed: Child Maintenance and Other Payments Act 2008 Sch 8.

TEXT AND NOTE 22--In Jobseekers Act 1995 s 23(1) after 'spouse' add 'or civil partner': Civil Partnership Act 2004 Sch 24 para 122.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(6) ENFORCEMENT OF THE DUTY TO MAINTAIN/399. Enforcement of maintenance orders by the Secretary of State.

### **399. Enforcement of maintenance orders by the Secretary of State.**

Where a person ('the claimant') who is the parent of one or more children<sup>1</sup> is in receipt of income support, either in respect of those children or in respect of both himself and the children, and there is in force a maintenance order<sup>2</sup> made against the other parent ('the liable person')<sup>3</sup>, then if the liable person fails to comply with any of the terms of the maintenance order:

- 1158 (1) the Secretary of State<sup>4</sup> may bring any proceedings or take any other steps to enforce the order that could have been brought or taken by or on behalf of the primary recipient<sup>5</sup>; and
- 1159 (2) any court before which such proceedings are brought by the Secretary of State has the same powers in connection with those proceedings as it would have had if they had been brought by the primary recipient<sup>6</sup>.

These powers of the Secretary of State are exercisable at his discretion and whether or not the primary recipient or any other person consents to their exercise; but any sums recovered by virtue of these provisions are payable to or for the primary recipient, as if the proceedings or steps in question had been brought or taken by him or on his behalf<sup>7</sup>.

Notice must be given to the Secretary of State of any application to alter, vary, suspend, discharge, revoke, revive or enforce the maintenance order in question, or to remit arrears under it; and the Secretary of State is entitled to appear and be heard on the application<sup>8</sup>.

Where, by virtue of these provisions, the Secretary of State commences any proceedings to enforce a maintenance order, he must, in relation to those proceedings, be treated<sup>9</sup> as if he were a person entitled to payment under the maintenance order in question but he does not thereby become entitled to any such payment<sup>10</sup>.

1 'Child' is not statutorily defined for these purposes; but see PARA 398 note 5 ante.

2 In favour of the claimant or one or more of the children, or in favour of some other person for the benefit of the claimant or one or more of the children: see the Social Security Administration Act 1992 s 108(1). For the meaning of 'maintenance order' see PARA 398 note 13 ante; but note that, for these purposes, it does not include any such order for the payment of a lump sum: see s 108(8).

3 See *ibid* s 108(1).

4 As to the Secretary of State see PARA 1 ante.

5 Social Security Administration Act 1992 s 108(2)(a). 'The primary recipient' means the person in whose favour the maintenance order was made: see s 108(1).

The powers conferred on the Secretary of State by this provision include power to apply for the registration of the maintenance order (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 73 (2009) PARA 664 et seq) and to make an application for enforcement in a reciprocating country (see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 310 et seq): see s 108(4).

6 *Ibid* s 108(2)(b).

7 *Ibid* s 108(3). The Secretary of State must inform the Legal Aid Board of any order for arrears due under the maintenance order to be paid as a lump sum if he knows that the primary recipient received legal aid in connection with the order and that contributions towards that legal aid remain unpaid: see s 108(7).

8 See *ibid* s 108(5).

9 le for the purposes of any enactment or instrument relating to maintenance orders: see *ibid* s 108(6).

10 *Ibid* s 108(6).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see *RATING AND COUNCIL TAX* vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **399 Enforcement of maintenance orders by the Secretary of State**

NOTE 2--1992 Act s 108(8) substituted: Child Maintenance and Other Payments Act 2008 Sch 7 para 2.

NOTE 5--1992 Act s 108(4) amended: Civil Jurisdiction and Judgments Order 2001, SI 2001/3929; and the Civil Jurisdiction and Judgments Order 2007, SI 2007/1655.

NOTE 7--For 'Legal Aid Board' read 'Legal Services Commission'; reference is now made also to the primary recipient having received services funded by the Legal Services Commission as part of the Community Legal Service and to contributions towards services so funded by virtue of the Access to Justice Act 1999 s 10 (see *LEGAL AID* vol 65 (2008) PARA 97) remaining unpaid: Social Security Administration Act 1992 s 108(7) (amended by the Access to Justice Act 1999 Sch 4 para 48).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(7) OTHER ENFORCEMENT PROVISIONS/400. Redirection of post.

## **(7) OTHER ENFORCEMENT PROVISIONS**

### **400. Redirection of post.**

As from a day to be appointed<sup>1</sup>, a social security authority<sup>2</sup> may require the Post Office or any other person who conveys postal packets<sup>3</sup> to return to the sender social security post<sup>4</sup> sent by or on behalf of the authority which would otherwise be redirected<sup>5</sup>.

As from a day to be appointed<sup>6</sup>, for use in (1) the prevention, detection, investigation or prosecution of offences relating to social security; or (2) in checking the accuracy of information relating to benefits, contributions or national insurance numbers or to any other matter relating to social security and, where appropriate, amending or supplementing such information, the Secretary of State or the Northern Ireland department may require the Post Office or any other person who conveys postal packets to supply to the Secretary of State or the department (or to a person supplying services to the Secretary of State or the department) information relating to arrangements for the redirection of postal packets<sup>7</sup>. Information supplied under this provision must not be supplied by the recipient to any other person or body unless it could be supplied to that person or body under this provision or it is supplied for the purposes of certain civil or criminal proceedings<sup>8</sup>. However, where information has been used in amending or supplementing other information, it is lawful for it to be supplied to any person or body to whom that other information could be supplied or for it to be used for any purpose for which that other information could be used<sup>9</sup>.

1 At the date at which this volume states the law no such day had been appointed, except that the Social Security Administration Act 1992 s 182A (prospectively added by the Social Security Administration (Fraud) Act 1997 s 20(1)) came into force in relation to the area falling within the London borough of Richmond and the area falling within the London borough of Hounslow on 25 August 1997: see the Social Security Administration (Fraud) Act 1997 (Commencement No 2) Order 1997, SI 1997/2056.

2 'Social security authority' means (1) the Secretary of State; (2) the Northern Ireland department; or (3) any local or other authority administering housing benefit or council tax benefit (see generally HOUSING vol 22 (2006 Reissue) PARA 140 et seq; RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq): Social Security Administration Act 1992 s 182A(3) (as prospectively added: see note 1 supra). As to the Secretary of State see PARA 1 ante. As to the Northern Ireland Office see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 67-86, 518.

3 'Postal packet' has the same meaning as in the Post Office Act 1953 (see POST OFFICE): Social Security Administration Act 1992 s 182A(5)(b) (as prospectively added: see note 1 supra), s 182B(8) (as prospectively added: see note 6 infra).

4 'Social security post' means postal packets (1) the contents of which relate to any benefit, contributions or national insurance number or to any other matter relating to social security; and (2) which are marked, in a manner approved by the Post Office or other person conveying them, with the name and address of the sender and with an indication that they are to be returned rather than redirected: *ibid* s 182A(4) (as prospectively added: see note 1 supra). 'Redirected', in relation to any postal packet, means delivered to an address other than that indicated by the sender on the packet: s 182A(5)(a) (as so prospectively added).

5 *Ibid* s 182A(1) (as prospectively added: see note 1 supra). A social security authority must make payments of such amount as the Secretary of State considers reasonable in respect of the return of social security post in compliance with a requirement imposed by the authority under these provisions: s 182A(2) (as so prospectively added).

Any requirement imposed under s 182A(1) (as prospectively added) has effect subject to any order under (a) the Insolvency Act 1986 s 371 or the equivalent Northern Ireland provision (redirection of bankrupt's letters to trustee in bankruptcy: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 264); (b) the

Solicitors Act 1974 s 35, Sch 1 para 10 or the equivalent Northern Ireland provision (redirection of letters following intervention by the Law Society: see LEGAL PROFESSIONS vol 66 (2009) PARA 893); or (c) the Administration of Justice Act 1985 s 31, Sch 5 para 10 (redirection of letters following intervention by the Council for Licensed Conveyancers: see LEGAL PROFESSIONS vol 66 (2009) PARA 1387); Social Security Administration Act 1992 s 182A(6) (as so prospectively added).

6 At the date at which this volume states the law no such day had been appointed.

7 Social Security Administration Act 1992 s 182B(1) (s 182B prospectively added by the Social Security Administration (Fraud) Act 1997 s 21(1)). 'Arrangements for the redirection of postal packets' means arrangements made with the Post Office or other person conveying postal packets for the delivery of postal packets to addresses other than those indicated by senders on the packets: s 182B(7) (as so prospectively added).

Information must be supplied in such manner and form, and in accordance with such requirements, as may be prescribed: s 182B(3) (as so prospectively added).

Payments of such amount as the Secretary of State considers reasonable must be made by a person or authority imposing a requirement under these provisions in respect of the supply of information in compliance with the requirement: s 182B(4) (as so prospectively added).

8 In any civil or criminal proceedings relating to the Social Security Contributions and Benefits Act 1992, the Jobseekers Act 1995 or the Social Security Administration Act 1992 (or to any Northern Ireland provision corresponding to any of them): see s 182B(5) (as prospectively added: see note 7 supra).

9 Ibid s 182B(6) (as prospectively added: see note 7 supra).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **400 Redirection of post**

TEXT AND NOTE 1--Day now appointed in relation to all remaining areas: SI 1998/2779.

TEXT AND NOTE 6--Day now appointed: SI 1998/2779.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(7) OTHER ENFORCEMENT PROVISIONS/401. Appointment and powers of inspectors.

#### **401. Appointment and powers of inspectors.**

For certain purposes<sup>1</sup>, the Secretary of State<sup>2</sup> may appoint such inspectors, and pay to them such salaries or remuneration, as he may determine with the consent of the Treasury<sup>3</sup>. Such an inspector has power of entry at all reasonable times on to premises liable to inspection<sup>4</sup>, to make such examination and inquiry as may be necessary for certain purposes<sup>5</sup>, to examine persons and to exercise such other powers as may be necessary for carrying the statutory provisions into effect<sup>6</sup>. Certain persons<sup>7</sup> must furnish to an inspector all such information, and produce for his inspection all such documents, as he may reasonably require<sup>8</sup>.

An inspector appointed under these provisions also has power, for the purposes of the Jobseekers Act 1995<sup>9</sup> (1) to enter at all reasonable times any premises liable to inspection<sup>10</sup>; (2) to make such examination and inquiry there as may be necessary for ascertaining whether the provisions of the Act are being, or have been, complied with; (3) to examine, in relation to any matters arising under the Act on which he may reasonably require information, any person whom he finds there; (4) to exercise such other powers as may be necessary for carrying the Act into effect<sup>11</sup>. Certain persons<sup>12</sup> must furnish to an inspector all such information, and produce for his inspection all such documents, as the inspector may reasonably require for these purposes<sup>13</sup>.

1    le for the purposes of the Social Security Act 1973 (largely repealed), the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992, the Social Security Pensions Act 1975 (largely repealed), the Pension Schemes Act 1993 and the Social Security (Recovery of Benefits) Act 1997: Social Security Administration Act 1992 s 110(8) (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 26; and the Social Security (Recovery of Benefits) Act 1997 s 33(1), Sch 3 paras 2, 4(5)).

2    As to the Secretary of State see PARA 1 ante.

3    Social Security Administration Act 1992 s 110(1).

4    The premises liable to inspection are any where an inspector has reasonable grounds for supposing that (1) any persons are employed; (2) there is being carried on any employment agency or other such business; (3) a personal or occupational pension scheme is being administered; or (4) any person who makes a compensation payment in consequence of any such accident, injury or disease as is referred to in note 5 infra (or on whose behalf such a compensation payment has been, may have been, or may be, made) is carrying on business or is to be found: see the Social Security Administration Act 1992 s 110(3) (amended by the Social Security (Recovery of Benefits) Act 1997 Sch 3 paras 2, 4(4)). The power of entry does not extend to any private dwelling house not used by, or by permission of, the occupier for the purposes of a trade or business: Social Security Administration Act 1992 s 110(3) (as so amended). 'Compensation payment' is a payment made to or in respect of a person in consequence of any accident, injury or disease suffered by him: see the Social Security (Recovery of Benefits) Act 1997 s 1; applied by the Social Security Administration Act 1992 s 110(9) (substituted by the Social Security (Recovery of Benefits) Act 1997 Sch 3 paras 2, 4(6)).

5    The purposes are ascertaining whether the provisions of the Acts referred to in note 1 supra are being, or have been, complied in with any such premises; or investigating the circumstances of any accident, injury or disease which has given or may give rise to a claim for industrial injuries benefit or for any listed benefit: *ibid* s 110(2)(b) (amended by the Social Security (Recovery of Benefits) Act 1997 Sch 3 paras 2, 4(2)). As to the meaning of 'listed benefit' see the Social Security (Recovery of Benefits) Act 1997 ss 8, 29, Sch 2 col 2; applied by the Social Security Administration Act 1992 s 110(9) (substituted by the Social Security (Recovery of Benefits) Act 1997 Sch 3 paras 2, 4(6)).

6    le the provisions of the Acts referred to in note 1 supra: Social Security Administration Act 1992 s 110(2) (amended by the Pensions Act 1995 s 151, Sch 5 para 15; the Social Security (Recovery of Benefits) Act 1997 Sch 3 paras 2, 4(2), (3); and the Social Security Administration (Fraud) Act 1997 s 22, Sch 2).

Every inspector must be furnished with a certificate of appointment, and on applying for admission to any premises for these purposes must, if so required, produce the certificate: Social Security Administration Act 1992 s 110(4).

Where any premises are liable to be inspected by an inspector or officer appointed or employed by, or are under the control of, some other government department, the Secretary of State may make arrangements with that department for any of the powers or duties of inspectors under these provisions to be carried out by an inspector or officer employed by that department: s 110(5).

7 le (1) the occupier of any premises liable to inspection under these provisions; (2) any person who is or has been an employer or employee within the meaning of the Social Security Contributions and Benefits Act 1992 (see PARA 32 ante); (3) any person carrying on an employment agency or similar business; (4) any person who is or has at any time been a trustee or manager of a personal or occupational pension scheme; (5) any person who is or has been liable to pay contributions (see PARA 31 et seq ante) or contributions-equivalent premiums or to make a compensation payment or a payment to the Secretary of State under the Social Security (Recovery of Benefits) Act 1997 s 6 (see PARA 6 ante; and DAMAGES); (6) the servants or agents of any person mentioned in heads (1)-(5) supra: see the Social Security Administration Act 1992 s 110(7) (amended by the Pensions Act 1995 Sch 5 para 15; and the Social Security (Recovery of Benefits) Act 1997 Sch 3 paras 2, 4(3)). However, no one is required under these provisions to answer any questions or to give evidence tending to incriminate himself or, in the case of a person who is married, his or her spouse: Social Security Administration Act 1992 s 110(7) (as so amended). As to personal pension schemes see PARA 710 et seq post; as to occupational pension schemes see PARA 741 et seq post; and as to contributions-equivalent premiums see PARA 922 post.

8 le for the purpose of ascertaining (1) whether any national insurance contributions or any contributions-equivalent premium or any compensation payment or payment to the Secretary of State under the Social Security (Recovery of Benefits) Act 1997 s 6 (see PARA 6 ante; and DAMAGES) is or has been payable or has been duly paid; or (2) whether benefit is or was payable to or in respect of any person: see the Social Security Administration Act 1992 s 110(6) (amended by the Pensions Act 1995 Sch 5 para 15; the Social Security (Recovery of Benefits) Act 1997 Sch 3 paras 2, 4(3); and the Social Security Administration (Fraud) Act 1997 Sch 2). Except where the Jobseekers Act 1995 s 33(5) applies (see the text and note 13 infra), the provisions of the Social Security Administration Act 1992 s 110(6), (7) (as amended) have effect as if the Jobseekers Act 1995 were among those mentioned in note 1 supra: see s 33(7). In the application of the Social Security Administration Act 1992 s 110(7) (as amended) in relation to the Jobseekers Act 1995, the reference in note 7 head (1) supra must be read as a reference to the provisions of s 33: s 33(8).

9 As to the Jobseekers Act 1995 see PARA 258 et seq ante.

10 The premises liable to inspection are any premises where an inspector has reasonable grounds for supposing that (1) one or more persons are employed; (2) a trade or business is being carried on; (3) a personal or occupational pension scheme is being administered; or (4) information relating to the carrying on of any trade or business is kept by the person carrying on that trade or business: *ibid* s 33(2). However, a private dwelling house is not included unless the inspector has reasonable grounds for supposing that it is being used for the purposes of a trade or business: s 33(2).

For these purposes, and in the Social Security Administration Act 1992 s 110(7) (as amended) as it applies in relation to the Jobseekers Act 1995, 'premises' includes any (a) place; (b) movable structure; (c) vehicle, vessel, aircraft or hovercraft; (d) installation which is an offshore installation for the purposes of the Mineral Workings (Offshore Installations) Act 1971: Jobseekers Act 1995 s 33(11).

11 *Ibid* s 33(1). An inspector applying for admission to any premises, in the exercise of his powers under these provisions, must produce his certificate of appointment if asked to do so: s 33(3).

Where any premises are liable to be inspected by an inspector or officer appointed or employed by another government department, or are under the control of another government department, the Secretary of State may make arrangements with that department for any of the powers or duties of inspectors under these provisions to be exercised or discharged by an inspector or officer employed by that department: s 33(4).

12 le any licensing authority or any person carrying on an employment agency: see *ibid* s 33(6). 'Licensing authority' means a local authority acting in its capacity as an authority responsible for granting any licence: s 33(10). 'Local authority' means any of the following: (1) a county council; (2) any county borough council; (3) any district council; (4) any London borough council; (5) the Common Council of the City of London; (6) the Council of the Isles of Scilly: s 33(10). See generally LOCAL GOVERNMENT vol 69 (2009) PARA 1 et seq.

13 *Ibid* s 33(5). No person is required under these provisions to answer any questions or to give evidence tending to incriminate himself, or in the case of a person who is married, his or her spouse: s 33(9).

## UPDATE

### 330-450 Administration

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

#### **401 Appointment and powers of inspectors**

TEXT AND NOTES--Replaced.

An individual who for the time being has the Secretary of State's authorisation<sup>1</sup> is entitled, for any one or more specified purposes, to exercise any of the powers which are conferred on an authorised officer<sup>2</sup> in relation to the requiring of information<sup>3</sup> and entry on premises<sup>4</sup>. The specified purposes are (1) ascertaining in relation to any case whether a benefit<sup>5</sup> is or was payable in that case in accordance with any provision of the relevant social security legislation<sup>6</sup>; (2) investigating the circumstances in which any accident, injury or disease which has given rise, or may give rise, to a claim for (a) industrial injuries benefit; or (b) any benefit under any provision of the relevant social security legislation, occurred or may have occurred, or was or may have been received or contracted; (3) ascertaining whether provisions of the relevant social security legislation are being, have been or are likely to be contravened (whether by particular persons or more generally); (4) preventing, detecting and securing evidence of the commission (whether by particular persons or more generally) of benefit offences<sup>7</sup>.

An authorised officer who has reasonable grounds for suspecting that a person is a person falling within specified categories of person, and has or may have possession of or access to any information about any matter that is relevant for any one or more of the purposes mentioned in heads (1)-(4) above, may, by written notice<sup>8</sup>, require that person to provide all such information described in the notice as is information of which he has possession, or to which he has access, and which it is reasonable for the authorised officer to require for a purpose so mentioned<sup>9</sup>. The specified categories of person are (a) any person who is or has been an employer or employee<sup>10</sup>; (b) any person who is or has been a self-employed earner<sup>11</sup>; (c) any person who falls, or has fallen, to be treated as a person within head (a) or (b) above<sup>12</sup>; (d) any person who is carrying on, or has carried on, any business involving the supply of goods for sale to the ultimate consumers by individuals not carrying on retail businesses from retail premises; (e) any person who is carrying on, or has carried on, any business involving the supply of goods or services by the use of work done or services performed by persons other than employees of his; (f) any person who is carrying on, or has carried on, an agency or other business for the introduction or supply, to persons requiring them, of persons available to do work or to perform services; (g) any local authority acting in its capacity as an authority responsible for the granting of any licence; (h) any person who is or has been a trustee or manager of a personal or occupational pension scheme; (i) any person who is or has been liable to make a compensation payment or a payment to the Secretary of State in respect of recoverable benefits<sup>13</sup>; (j) the servants and agents of any such person specified in heads (a)-(i) above<sup>14</sup>; (k) any bank<sup>15</sup>; (l) any person carrying on a business the whole or a significant part of which consists in the provision of credit<sup>16</sup>, whether secured or unsecured, to members of the public; (m) any insurance company<sup>17</sup>; (n) any credit reference agency<sup>18</sup>; (o) any body the principal activity of which is to facilitate the exchange of information for the purpose of preventing or detecting fraud; (p) any person carrying on a business the whole or a significant part of which consists in the provision to members of the public of a service for transferring money from place to place; (q) any water undertaker or

sewerage undertaker; (r) any person who supplies gas conveyed through pipes<sup>19</sup>; (s) any person who supplies electricity conveyed by distribution systems<sup>20</sup>; (t) any person who provides a telecommunications service<sup>21</sup>; (u) any person conducting any educational establishment or institution; (v) any body the principal activity of which is to provide services in connection with admissions to educational establishments or institutions; (w) the Student Loans Company; (x) any servant or agent of any person mentioned in heads (k)-(w) above<sup>22</sup>. The powers so conferred on an authorised officer to require information from any person by virtue of his falling under heads (k)-(x) above are exercisable for the purpose only of obtaining information relating to a particular person identified, by name or description, by the officer<sup>23</sup>. An authorised officer must not, in exercise of those powers, require any information from any person by virtue of his falling under heads (k)-(x) above unless it appears to that officer that there are reasonable grounds for believing that the identified person to whom it relates is a person who has committed, is committing or intends to commit a benefit offence, or is a person who is a member of the family of such a person<sup>24</sup>. Nothing prevents an authorised officer who is an official of a government department and who is duly authorised from exercising the above powers for obtaining from a water undertaker, any person who supplies gas conveyed through pipes, any person who supplies electricity conveyed by distribution systems, or any servant or agent of such persons, any information which relates exclusively to whether and in what quantities water, gas or electricity are being or have been supplied to residential premises<sup>25</sup> specified or described in the notice by which the information is required<sup>26</sup>. The obligation of a person to provide information in accordance with a notice is discharged only by the provision of that information, at such reasonable time and in such form as may be specified in the notice, to the authorised officer who is identified by or in accordance with the terms of the notice, or has been identified, since the giving of the notice, by a further written notice given by the authorised officer who imposed the original requirement or another authorised officer<sup>27</sup>. The power of an authorised officer to require the provision of information includes a power to require the production and delivery up and (if necessary) creation of, or of copies of or extracts from, any such documents<sup>28</sup> containing the information as may be specified or described in the notice imposing the requirement<sup>29</sup>. No one is required under these provisions to provide any information (whether in documentary form or otherwise) that tends to incriminate either himself or, in the case of a person who is married or is a civil partner, his spouse or civil partner<sup>30</sup>. Where it appears to the Secretary of State that a person falling within heads (k)-(x) above keeps any electronic records, that the records contain or are likely, from time to time, to contain information about any matter that is relevant for any one or more of the purposes mentioned in heads (1)-(4) above, and that facilities exist under which electronic access to those records is being provided, or is capable of being provided, by that person to other persons, the Secretary of State may require that person to enter into arrangements under which authorised officers are allowed such access to those records<sup>31</sup>. An authorised officer is entitled to obtain information in accordance with such arrangements only if his authorisation states that his authorisation applies for such purposes, and he must not seek to obtain any information in accordance with any such arrangements other than information which relates to a particular person and could be the subject of a requirement to provide information<sup>32</sup>. The matters that may be included in such arrangements may include requirements as to the electronic access to records that is to be made available to authorised officers, requirements as to the keeping of records of the use that is made of the arrangements, requirements restricting the disclosure of information about the use that is made of the arrangements, and such other incidental requirements as the Secretary of State considers appropriate in connection with allowing access to records to authorised officers<sup>33</sup>. An authorised officer who is allowed access in accordance with any such arrangements is entitled to make copies of, and to take extracts from, any records containing information which he is entitled to require<sup>34</sup>.

An authorised officer is entitled, at any reasonable time and either alone or accompanied by such other persons as he thinks fit, to enter any premises which (i) are liable to inspection<sup>35</sup>; and (ii) are premises to which it is reasonable for him to require entry in order to exercise the powers conferred<sup>36</sup>. An authorised officer who has entered any premises liable to inspection may make such an examination of those premises, and conduct any such inquiry there, as appears to him appropriate for any one or more of the purposes mentioned in heads (1)-(4) above<sup>37</sup>. An authorised officer who has entered any premises liable to inspection may (A) question any person whom he finds there; (B) require any person whom he finds there to do any one or more of the following (aa) to provide him with such information; (bb) to produce and deliver up and, if necessary, create such documents or such copies of, or extracts from, documents, as he may reasonably require for any one or more of the said purposes; and (C) take possession of and either remove or make his own copies of any such documents as appear to him to contain information that is relevant for any of those purposes<sup>38</sup>. An authorised officer applying for admission to any premises in accordance with these provisions must, if required to do so, produce the certificate containing his authorisation<sup>39</sup>.

Specified powers of the Inland Revenue to obtain information in relation to a person's tax liability<sup>40</sup> apply, subject to modifications, in relation to a person's liability to pay relevant contributions<sup>41</sup>.

1     Ie for the purposes of the Social Security Administration Act 1992 Pt VI (ss 109A-121DA). An individual has the Secretary of State's authorisation for the purposes of Pt VI if, and only if, the Secretary of State has granted him an authorisation for those purposes and he is (1) an official of a government department; (2) an individual employed by an authority administering housing benefit or council tax benefit; (3) an individual employed by an authority or joint committee that carries out functions relating to housing benefit or council tax benefit on behalf of the authority administering that benefit; or (4) an individual employed by a person authorised by or on behalf of any such authority or joint committee as is mentioned in head (2) or (3) to carry out functions relating to housing benefit or council tax benefit for that authority or committee: s 109A(3) (ss 109A-109C substituted by Child Support, Pensions and Social Security Act 2000 Sch 6 para 2). An authorisation granted for the purposes of the Social Security Administration Act 1992 Pt VI to an individual of any of the descriptions mentioned in s 109A(3) (a) must be contained in a certificate provided to that individual as evidence of his entitlement to exercise powers conferred by Pt VI; (b) may contain provision as to the period for which the authorisation is to have effect; and (c) may restrict the powers exercisable by virtue of the authorisation so as to prohibit their exercise except for particular purposes, in particular circumstances or in relation to particular benefits or particular provisions of the relevant social security legislation: s 109A(4). An authorisation granted under s 109A may be withdrawn at any time by the Secretary of State: s 109A(5). Where the Secretary of State grants an authorisation for the purposes of Pt VI to an individual employed by a local authority, or to an individual employed by a person who carries out functions relating to housing benefit or council tax benefit on behalf of a local authority (i) the Secretary of State and the local authority must enter into such arrangements (if any) as they consider appropriate with respect to the carrying out of functions conferred on that individual by or in connection with the authorisation granted to him; and (ii) the Secretary of State may make to the local authority such payments (if any) as he thinks fit in respect of the carrying out by that individual of any such functions: s 109A(6). Any reference to a person authorised to carry out any function relating to housing benefit or council tax benefit includes a reference to a person providing services relating to the benefit directly or indirectly to an authority administering it; and any reference to the carrying out of a function relating to such a benefit includes a reference to the provision of any services relating to it: s 121DA(6) (s 121DA added by 2000 Act Sch 6 para 8).

2     'Authorised officer' means a person acting in accordance with any authorisation for the purposes of the Social Security Administration Act 1992 Pt VI which is for the time being in force in relation to him: s 121DA(2).

3     Ie by *ibid* s 109B: see TEXT AND NOTES 8-30. See also NOTE 3.

4     Ie by *ibid* s 109C: see TEXT AND NOTES 35-39): s 109A(1). 'Premises' includes (1) movable structures and vehicles, vessels, aircraft and hovercraft; (2) installations that are offshore installations for the purposes of the Mineral Workings (Offshore Installations) Act 1971; and (3) places

of all other descriptions whether or not occupied as land or otherwise; and references in the Social Security Administration Act 1992 Pt VI to the occupier of any premises are to be construed, in relation to premises that are not occupied as land, as references to any person for the time being present at the place in question: s 121DA(4). The powers conferred by ss 109B, 109C are exercisable in relation to persons holding office under the Crown and persons in the service of the Crown, and in relation to premises owned or occupied by the Crown, as they are exercisable in relation to other persons and premises: s 109A(8).

5 'Benefit' includes any allowance, payment, credit or loan: *ibid* s 121DA(5)

6 For these purposes, 'the relevant social security legislation' means the provisions of any of the following, except so far as relating to contributions, statutory sick pay or statutory maternity pay, that is to say (1) the Social Security Contributions and Benefits Act 1992; (2) the Social Security Administration Act 1992; (3) the Pension Schemes Act 1993, except Pt III (ss 7-68); (4) the Social Security (Incapacity for Work) Act 1994 s 4; (5) the Jobseekers Act 1995; (6) the Social Security (Recovery of Benefits) Act 1997; (7) the Social Security Act 1998 Pt I (ss 1-47), Pt IV (ss 77-87); (8) the Welfare Reform and Pensions Act 1999 Pt V (ss 52-80); (9) the State Pension Credit Act 2002; (10) the Welfare Reform Act 2007 Pt 1 (ss 1-29); (11) the Social Security Pensions Act 1975; (12) the Social Security Act 1973; and (13) any subordinate legislation made, or having effect as if made, under any enactment specified in heads (1)-(12): Social Security Administration Act 1992 s 121DA(1) (amended by Tax Credits Act 2002 Sch 6; State Pension Credit Act 2002 Sch 2 para 12); and Welfare Reform Act 2007 Sch 3 para 10(12)). 'Subordinate legislation' has the same meaning as in the Interpretation Act 1978 (see STATUTES vol 44(1) (Reissue) PARA 1232): Social Security Administration Act 1992 s 121DA(7).

7 *Ibid* s 109A(2). 'Benefit offence' means a criminal offence committed in connection with a claim for benefit under a provision of the relevant social security legislation, or in connection with the receipt or payment of such a benefit: s 121DA(5). As to the loss of benefits for commission of benefit offences see PARA 404A. An authority must not proceed for a purpose mentioned in heads (1), (3), (4) in the text unless the authorisation concerns (1) one or more of the benefits listed below; (2) relevant social security legislation relating to one or more of the benefits listed below; or (3) a benefit offence relating to one or more of the benefits listed below: Social Security (Local Authority Investigations and Prosecutions) Regulations 2008, SI 2008/463, reg 2(1)-(3). An authorisation made for one of those purposes has effect in relation to a particular case only if in relation to that case an authorised officer has commenced an investigation for a purpose mentioned in the Social Security Administration Act 1992 s 110A(2): SI 2008/463 reg 2(3). The benefits are (a) income support; (b) a jobseeker's allowance; (c) incapacity benefit; (d) state pension credit; (e) an employment and support allowance: reg 2(5).

8 The requirement that a notice given by an authorised officer be in writing is taken to be satisfied in any case where the contents of the notice (1) are transmitted to the recipient of the notice by electronic means; and (2) are received by him in a form that is legible and capable of being recorded for future reference: Social Security Administration Act 1992 s 121DA(3)(b).

9 *Ibid* s 109B(1).

10 *Ie* within the meaning of any provision made by or under the Social Security Contributions and Benefits Act 1992.

11 See NOTE 10.

12 *Ie* any person who by virtue of any provision made by or under the Social Security Contributions and Benefits Act 1992 falls, or has fallen, to be treated for the purposes of any such provision as a person within head (a) or (b) of the text.

13 *Ie* under the Social Security (Recovery of Benefits) Act 1997 s 6.

14 Social Security Administration Act 1992 s 109B(2).

15 'Bank' means any institution for the time being authorised under a provision of the Banking Act 1987, any person for the time being specified in Sch 2 paras 2-10, or any person for the time being entitled by virtue of the Banking Co-ordination (Second Council Directive) Regulations 1992, SI 1992/3218, to accept deposits in the United Kingdom: Social Security Administration Act 1992 s 109B(7) (added by Social Security Fraud Act 2001 s 1(4)).

16 'Credit' includes a cash loan or any form of financial accommodation, including the cashing of a cheque: Social Security Administration Act 1992 s 109B(7) (added by Social Security Fraud Act 2001 s 1(4)).

17 le within the meaning of the Insurance Companies Act 1982.

18 le within the meaning of the Consumer Credit Act 1974 s 145(8).

19 le within the meaning the Gas Act 1986.

20 le within the meaning of the Electricity Act 1989.

21 The powers so conferred are not exercisable for obtaining from any person providing a telecommunications service any information other than information which, within the meaning of the Regulation of Investigatory Powers Act 2000 s 21, is communications data but not traffic data: Social Security Administration Act 1992 s 109B(2E) (added by 2001 Act s 1(2)). Nothing prevents an authorised officer from exercising the powers conferred for requiring information, from a person who provides a telecommunications service, about the identity and postal address of a person identified by the authorised officer solely by reference to a telephone number or electronic address used in connection with the provision of such a service: Social Security Administration Act 1992 s 109B(2F) (added by 2001 Act s 1(2)).

22 Social Security Administration Act 1992 s 109B(2A) (added by 2001 Act s 1(2)). Provision may be made by order adding any person to the list of persons falling within the Social Security Administration Act 1992 s 109B(2A), removing any person from that list, or modifying s 109B(2A) for the purpose of taking account of any change to the name of any person for the time being included in the list: s 109B(6) (added by 2001 Act s 1(4)).

The Secretary of State must issue a code of practice relating to the exercise of the powers that are exercisable by an authorised officer under the Social Security Administration Act 1992 s 109B(2A), and the powers conferred on an authorised officer by ss 109BA (see PARA 401), 110AA (see HOUSING vol 22 (2006 Reissue) PARA 166): 2001 Act s 3.

It is the duty of the Secretary of State to ensure that such arrangements (if any) are in force as he thinks appropriate for requiring or authorising, in such cases as he thinks fit, the making of such payments as he considers appropriate in respect of compliance with relevant obligations by any of the persons in heads (n), (t), (q)-(s) in the TEXT, or any servant or agent of such persons: s 4(1). 'Relevant obligation', in relation to a person under head (n) or (t) in the TEXT, means an obligation to provide information in pursuance of a requirement imposed on that person under the Social Security Administration Act 1992 s 109B(2A), or any obligation to comply, for the purpose of enabling an authorised officer to obtain information which might otherwise be obtained by the imposition of such a requirement, with any requirements imposed on that person under ss 109BA, 110AA; and, in relation to a person under heads (q)-(s) in the text, means any obligation to provide information in pursuance of a requirement imposed by such an exercise of the powers conferred by s 109B(2D) (see TEXT AND NOTE 26): 2001 Act s 4(2).

23 Social Security Administration Act 1992 s 109B(2B) (added by 2001 Act s 1(2)).

24 Social Security Administration Act 1992 s 109B(2C) (added by 2001 Act s 1(2)).

25 'Residential premises', in relation to a supply of water, gas or electricity, means any premises which at the time of the supply were premises occupied wholly or partly for residential purposes, or are premises to which that supply was provided as if they were so occupied: Social Security Administration Act 1992 s 109B(7) (added by 2001 Act s 1(4)).

26 Social Security Administration Act 1992 s 109B(2D) (added by 2001 Act s 1(2)).

27 Social Security Administration Act 1992 s 109B(3).

28 References to a 'document' include references to anything in which information is recorded in electronic or any other form: *ibid* s 121DA(3)(a).

29 *Ibid* s 109B(4).

30 *Ibid* s 109B(5) (amended by Civil Partnership Act 2004 Sch 24 para 64).

31 Social Security Administration Act 1992 s 109BA(1) (s 109BA added by 2001 Act s 2(1)).

32 Social Security Administration Act 1992 s 109BA(2).

33 *Ibid* s 109BA(3).

34 Ibid s 109BA(4).

35 The premises liable to inspection are any premises (including premises consisting in the whole or a part of a dwelling house) which an authorised officer has reasonable grounds for suspecting are (1) premises which are a person's place of employment; (2) premises from which a trade or business is being carried on or where documents relating to a trade or business are kept by the person carrying it on or by another person on his behalf; (3) premises from which a personal or occupational pension scheme is being administered or where documents relating to the administration of such a scheme are kept by the person administering the scheme or by another person on his behalf; (4) premises where a person who is the compensator in relation to any such accident, injury or disease as is referred to in head (2) in the text is to be found; (5) premises where a person on whose behalf any such compensator has made, may have made or may make a compensation payment is to be found: *ibid* 109C(4). Section 109B(5) applies for the purposes of s 109C as it applies for the purposes of s 109B: s 109C(6).

36 Ibid s 109C(1), referring to the powers conferred by s 109C.

37 Ibid s 109C(2).

38 Ibid s 109C(3).

39 Ibid s 109C(5), referring to his authorisation for the purposes of Pt VI.

40 *Ie* the Taxes Management Act ss 20, 20B, 20BB: see INCOME TAXATION vol 23(2) (Reissue) PARA 1698 *et seq.*

41 Social Security Administration Act 1992 s 110ZA(1) (s 110ZA added by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 5 para 3; and substituted by the National Insurance Contributions and Statutory Payments Act 2004 s 7). 'Relevant contributions' means Class 1, Class 1A, Class 1B or Class 2 contributions: Social Security Administration Act 1992 s 110ZA(3). The modifications are as follows: (1) references to the taxpayer, a taxpayer or a class of taxpayers are to the person, a person or a class of persons required to pay relevant contributions; (2) references to an inspector are to an officer of the Inland Revenue; (3) references to any provision of the Taxes Acts are to any provision of the Social Security Administration Act 1992 or the Social Security Contributions and Benefits Act 1992 relating to relevant contributions; (4) references to the assessment or collection of tax are to the assessment of liability for, and payment of, relevant contributions; (5) reference to an appeal relating to tax is to an appeal relating to relevant contributions; and (6) reference to believing that tax has been, or may have been, lost to the Crown is to believing that the Crown has, or may have, incurred a loss: Social Security Administration Act 1992 s 110ZA(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(7) OTHER ENFORCEMENT PROVISIONS/402. Provision of information.

#### **402. Provision of information.**

For use in the prevention, detection, investigation or prosecution of offences relating to social security<sup>1</sup> or in checking the accuracy of information relating to benefits, contributions or national insurance numbers or to any other matter relating to social security and (where appropriate) amending or supplementing such information, certain information<sup>2</sup> may, with the authority of the commissioners concerned<sup>3</sup>, be supplied to (or to a person providing services to) the Secretary of State<sup>4</sup> or the Northern Ireland department<sup>5</sup>.

For use for any purpose relating to contributions, certain information<sup>6</sup> may, with the authority of the commissioners, be supplied to (or to a person providing services to) the Secretary of State or the Northern Ireland department<sup>7</sup>.

For use in the prevention, detection, investigation or prosecution of offences relating to social security or in checking the accuracy of information relating to benefits, contributions or national insurance numbers or to any other matter relating to social security and (where appropriate) amending or supplementing such information, certain information<sup>8</sup> may be supplied to (or to a person providing services to) the Secretary of State or the Northern Ireland department<sup>9</sup>.

The personal representatives of a person who was in receipt of income support, income-based jobseeker's allowance or supplementary benefit at any time before his death<sup>2</sup> must provide the Secretary of State with such information as he may require relating to the assets and liabilities of that person's estate<sup>10</sup>.

Regulations may make provision requiring an employer in certain cases<sup>11</sup> to furnish information in connection with the making by a person who is, or has been, an employee of that employer of a claim for (1) short-term incapacity benefit<sup>12</sup>; (2) a maternity allowance<sup>13</sup>; (3) long-term incapacity benefit<sup>14</sup>; (4) industrial injuries benefit<sup>15</sup>; or (5) a severe disablement allowance<sup>16</sup>. Regulations may also make provision requiring an employer in prescribed circumstance to furnish information in connection with the making of a claim by a woman who is or has been his employee for (a) a maternity allowance; (b) short-term incapacity benefit; (c) long-term incapacity benefit<sup>17</sup>; or (d) a severe disablement allowance<sup>18</sup>. Such regulations must prescribe the kind of information to be furnished in accordance with the regulations, the person to whom information of the prescribed kind is to be furnished, and the manner in which and period within which it is to be furnished<sup>19</sup>. Regulations may (i) require employers to maintain such records in connection with statutory sick pay or statutory maternity pay as may be prescribed; (ii) provide for any person claiming to be entitled to statutory sick pay or statutory maternity pay, or any other person who is a party to proceedings arising under the statutory sick pay or statutory maternity pay provisions, to furnish to the Secretary of State, within a prescribed period, any information required for the determination of any question arising in connection therewith; and (iii) require employers who have made payments of statutory sick pay or persons who have made payments of statutory maternity pay to furnish to the Secretary of State such documents and information, at such time or times, as may be prescribed<sup>20</sup>.

The Secretary of State may incur expenses for the purpose of furnishing the address at which a man or woman is residing, where the address is required for the purpose of taking or carrying on legal proceedings to obtain or enforce an order for the making by the man or woman of payments (A) for the maintenance of the man's wife or former wife, or the woman's husband or former husband; or (B) for the maintenance or education of any person as being the son or

daughter of the man or his wife or former wife, or of the woman or her husband or former husband<sup>21</sup>.

1 As to offences see PARA 404 post.

2 The information which is held by the Commissioners of Inland Revenue or the Commissioners of Customs and Excise, or by a person providing services to the Commissioners of Inland Revenue or the Commissioners of Customs and Excise in connection with the provision of those services: Social Security Administration Act 1992 s 122(1) (s 122 substituted by the Social Security Administration (Fraud) Act 1997 s 1(1)).

3 The Commissioners of Inland Revenue (see INCOME TAXATION vol 23(1) (Reissue) PARA 31 et seq) or the Commissioners of Customs and Excise (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 900 et seq).

4 As to the Secretary of State see PARA 1 ante.

5 Social Security Administration Act 1992 s 122(2) (as substituted: see note 2 supra). As to the Northern Ireland Office see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 67-86, 518.

Information supplied under this provision must not be supplied by the recipient to any other person or body unless (1) it could be supplied to that person or body under s 122(2) (as substituted); (2) it is supplied for the purposes of any civil or criminal proceedings relating to the Social Security Contributions and Benefits Act 1992, the Jobseekers Act 1995 or the Social Security Administration Act 1992, or to any provision of Northern Ireland legislation corresponding to any of them; or (3) it is supplied under the Social Security Administration Act 1992 s 122C (as added) (housing benefit and council tax benefit: see HOUSING vol 22 (2006 Reissue) PARA 167; RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 391), and even in those circumstances must not be supplied without the authority of the commissioners concerned: s 122(3) (as so substituted). However, where information supplied under s 122(2) (as substituted) has been used in amending or supplementing other information, it is lawful for it to be supplied to any person or body to whom that other information could be supplied or used for any purpose for which that other information could be used: s 122(4) (as so substituted).

These provisions do not limit the circumstances in which information may otherwise be supplied: see s 122(5) (as so substituted).

6 The information which is held by the Commissioners of Inland Revenue or by a person providing services to the Commissioners of Inland Revenue in connection with the provision of those services: *ibid* s 122A(1) (s 122A added by the Social Security Administration (Fraud) Act 1997 s 1(1)).

7 Social Security Administration Act 1992 s 122A(2) (as added: see note 6 supra). Information supplied under this provision must not be supplied by the recipient to any other person or body unless (1) it could be supplied to that person or body under s 122A(2) (as added); or (2) it is supplied for the purposes of any civil or criminal proceedings relating to the Social Security Contributions and Benefits Act 1992, the Jobseekers Act 1995 or the Social Security Administration Act 1992, or to any provision of Northern Ireland legislation corresponding to any of them, and even in those circumstances must not be so supplied without the authority of the commissioners: Social Security Administration Act 1992 s 122A(3) (as so added). However, where information supplied under s 122A(2) (as added) has been used in amending or supplementing other information, it is lawful for it to be supplied to any person or body to whom that other information could be supplied or used for any purpose for which that other information could be used: s 122A(4) (as so added).

These provisions do not limit the circumstances in which information may otherwise be supplied: see s 122A(5) (as so added).

8 The information which is held by, or by a person providing services to, a Minister of the Crown or a government department and which relates to passports, immigration and emigration, nationality or prisoners, or any other matter which is prescribed: *ibid* s 122B(1) (s 122B added by the Social Security Administration (Fraud) Act 1997 s 2(1)).

9 Social Security Administration Act 1992 s 122B(2) (as added: see note 8 supra). Information supplied under this provision must not be supplied by the recipient to any other person or body unless (1) it could be supplied to that person or body under s 122B(2) (as added); (2) it is supplied for the purposes of any civil or criminal proceedings relating to the Social Security Contributions and Benefits Act 1992, the Jobseekers Act 1995 or the Social Security Administration Act 1992, or to any provision of Northern Ireland legislation corresponding to any of them; or (3) it is supplied under the Social Security Administration Act 1992 s 122C (as added) (housing benefit and council tax benefit: see HOUSING vol 22 (2006 Reissue) PARA 167; RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 391): s 122B(3) (as so added). However, where information supplied under s 122B(2) (as added) has been used in amending or supplementing other information, it is lawful for it to be supplied to any person or body to whom that other information could be supplied or used for any purpose for which that other information could be used: s 122B(4) (as so added).

These provisions do not limit the circumstances in which information may otherwise be supplied: see s 122B(5) (as so added).

10 Ibid s 126(1) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 61). If they fail to supply any information within 28 days of being required to do so, then the county court may, on the application of the Secretary of State, make an order directing them to supply that information within such time as may be specified in the order; and any such order may provide that all costs of and incidental to the application are to be borne personally by any of the personal representatives: Social Security Administration Act 1992 s 126(2), (3).

As to the furnishing of information by registrars see ss 124, 125 (both as amended); and REGISTRATION CONCERNING THE INDIVIDUAL.

11 The cases are: (1) where, by virtue of the Social Security Contributions and Benefits Act 1992 s 153(3), Sch 11 para 2 (as amended) or of regulations made under Sch 11 para 1 (statutory sick pay, as to which see generally EMPLOYMENT vol 39 (2009) PARA 498 et seq), a period of entitlement does not arise in relation to a period of incapacity for work; (2) where a period of entitlement has come to an end but the period of incapacity for work which was running immediately before the period of entitlement came to an end continues; (3) where a period of entitlement has not come to an end but, on the assumption that the period of incapacity for work in question continues to run for a prescribed period and that there is no material change in circumstances, the period of entitlement will have ended on or before the end of the prescribed period: Social Security Administration Act 1992 s 130(3).

12 As to short-term incapacity benefit see PARA 60 et seq ante.

13 As to maternity allowance see PARAS 76-79 ante.

14 As to long-term incapacity benefit see PARA 60 et seq ante.

15 As to industrial injuries benefit see PARA 126 et seq ante.

16 Social Security Administration Act 1992 s 130(1) (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 Pt II para 49). As to severe disablement allowance see PARAS 92-99 ante.

17 Ie under the Social Security Contributions and Benefits Act 1992 s 30A (as added), s 40 (as substituted) or s 41 (as substituted and amended) (see PARAS 60, 88-89 ante).

18 Social Security Administration Act 1992 s 132(1) (amended by the Social Security (Incapacity for Work) Act 1994 Sch 1 Pt II para 50).

19 Social Security Administration Act 1992 ss 130(2), 132(2).

20 See ibid ss 130(4), 132(3). As to the disclosure of information by the Secretary of State for the purpose of determining entitlement to statutory sick pay and maternity pay see ss 129, 131; and EMPLOYMENT vol 39 (2009) PARAS 528, 399 respectively.

21 Ibid s 133.

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **402-403 Provision of information, Unauthorised disclosure of information**

Information relating to social security which is held by the Secretary of State or by a person providing services to him in connection with the provision of those services may be used and supplied to them for the purposes of, or for any purposes connected with,

the exercise of functions in relation to social security: Social Security Act 1998 s 3 (amended by the Employment Act 2002 Sch 6 paras 1(c), 4, Sch 8(1); the Pensions Act 2004 Sch 10 para 1; the Pensions Act 2008 s 63(5), (6); and the Child Maintenance and Other Payments Act 2008 Sch 7 para 3(2)).

#### **402 Provision of information**

TEXT AND NOTES--Information which is held by (or by a person providing services to) the Inland Revenue for the purposes of functions relating to contributions, health in pregnancy grant, statutory sick pay, statutory maternity pay or functions under the Pensions Schemes Act 1993 Pt III (ss 7-68) may, and subject to the 1992 Act s 121E(2A), must if an authorised officer so requires, be supplied to (or to a person providing services to) the Secretary of State for use for the purposes of functions relating to social security, war pensions or employment or training: see Social Security Administration Act 1992 s 121E(1), (2) (s 121E added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 6 para 1; Social Security Administration Act 1992 s 121E(1) amended by Welfare Reform and Pensions Act 1999 Sch 11 para 7; and Health and Social Care Act 2008 s 132(6); Social Security Administration Act 1992 s 121E(2) substituted by Child Maintenance and Other Payments Act 2008 Sch 7 para 2(3)). An authorised officer may not require the supply under the Social Security Administration Act 1992 s 121E(2) or (2ZA) of information for use for the purposes of functions relating to employment or training: s 121E(2A) (added by the Employment Act 2002 s 50, Sch 6 para 11(b); and amended by the Child Maintenance and Other Payments Act 2008 Sch 7 para 2(4)). 'Authorised officer' means an officer of the Secretary of State authorised by him: Social Security Administration Act 1992 s 121E(3).

Information which is held for the purposes of functions relating to social security, war pensions or employment or training by (or by a person providing services to) the Secretary of State may, and must if an authorised officer of the Inland Revenue so requires, be supplied to (or to a person providing services to) Her Majesty's Revenue and Customs for use for the purposes of functions relating to contributions, health in pregnancy grant, statutory sick pay, statutory maternity pay or functions under the Pensions Schemes Act 1993 Pt III: Social Security Administration Act 1992 s 121F (added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 6 para 1; amended by Welfare Reform and Pensions Act 1999 Sch 11 para 8; Health and Social Care Act 2008 s 132(7); and Child Maintenance and Other Payments Act 2008 Sch 7 para 2(5)).

No obligation as to secrecy imposed by statute or otherwise on Revenue and Customs officials (within the meaning of the Commissioners for Revenue and Customs Act 2005 s 18) (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 919) prevents information held for the purposes of the functions of Her Majesty's Revenue and Customs in relation to contributions, statutory sick pay, statutory maternity pay, ordinary statutory paternity pay, additional statutory paternity pay or statutory adoption pay from being disclosed to any of the applicable authorities, or any person authorised to exercise any function of that authority, for the purposes of the functions of that authority, or in a case where the disclosure is necessary for the purpose of giving effect to any agreement to which an order under the Social Security Administration Act 1992 s 179(1) relates: s 122AA(1) (s 122AA added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 6 para 3); Social Security Administration Act 1992 s 122AA(1) amended by Employment Act 2002 Sch 7 para 13; 2005 Act Sch 4 para 46; and Work and Families Act 2006 Sch 1 para 25). The 'applicable authorities' are the Health and Safety Executive, the Government Actuary's Department, the Statistics Board, and the Pensions Regulator: Social Security Administration Act 1992 s 122AA(2)

(amended by Pensions Act 2004 Sch 12 para 7; and Statistics and Registration Service Act 2007 Sch 2 para 4).

No obligation as to secrecy imposed by statute or otherwise on a Revenue and Customs official (within the meaning of the 2005 Act s 18) prevents any information which relates to the commencement or cessation of employment or self-employment of persons who have participated in any designated employment or training scheme, and which is required by the Secretary of State or the Northern Ireland Department in order to assess policy relating to such schemes, obtained or held in connection with the assessment or collection of income tax from being disclosed to the Secretary of State, the Northern Ireland Department, or an officer of either of them authorised to receive such information: Social Security Administration Act 1992 s 122ZA(1), (4) (s 122ZA added by Employment Act 2002 Sch 6 para 6; and amended by 2005 Act Sch 4 para 45(a)). Information which is the subject of disclosure to any person under the Social Security Administration Act 1992 s 122ZA must not be further disclosed to any person except where the further disclosure is made to a person to whom disclosure could be made under s 122ZA(4) or for the purposes of any civil or criminal proceedings relating to the Social Security Contributions and Benefits Act 1992, the Jobseekers Act 1995, the Social Security Administration Act 1992 or Welfare Reform Act 2007 Pt 1 (ss 1-29): Social Security Administration Act 1992 s 122ZA(6) (amended by Welfare Reform Act 2007 Sch 3 para 10(13)). The Social Security Administration Act 1992 122ZA extends only to disclosure by or under the authority of the Commissioners for Her Majesty's Revenue and Customs: s 122ZA(5) (amended by 2005 Act Sch 4 para 45(b)). 'Designated employment or training scheme' means any scheme which is operated by the Secretary of State (whether under arrangements with any other person or not) for any purposes connected with employment or training and is designated by the Secretary of State for the purposes of the Social Security Administration Act 1992 s 122ZA: s 122ZA(2). The reference to the commencement or cessation of the self-employment of any person is a reference to the commencement or cessation of any trade, profession or vocation carried on by him: s 122ZA(3).

The Treasury may by regulations make provision requiring the disclosure of contributions avoidance arrangements: see s 132A; and PARA 402A.

TEXT AND NOTES 1-5--Information for use in the prevention, detection, investigation or prosecution of offences relating to payments under the Employment and Training Act 1973 s 2 (see EMPLOYMENT vol 40 (2009) PARA 563) or other payments by or to the Secretary of State for any purposes connected with employment or training, or for use in checking the accuracy of information relating to employment or training and (where appropriate) amending or supplementing such information, may be supplied under the Social Security Administration Act 1992 s 122: s 122(2) (amended by Employment Act 2002 Sch 6 para 5(a), (b), Sch 8(1)).

NOTE 1--Information to which the Social Security Administration Act 1992 s 121E or the Tax Credits Act 2002 Sch 5 para 4 applies is excluded: Social Security Administration Act 1992 Act s 122(1) (substituted by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 6 para 2(2); and amended by the Tax Credits Act 1999 Sch 5 paras 6(1), 12(a). As to the information to which the Tax Credits Act 2002 Sch 5 para 4 (amended by the Child Maintenance and Other Payments Act 2008 Sch 7 para 4) applies, see the Tax Credits (Provision of Information) (Evaluation and Statistical Studies) Regulations 2003, SI 2003/3308.

TEXT AND NOTES 2, 9--Reference to contributions omitted: Social Security Administration Act 1992 ss 122(1), 122B(2) (s 122B(2) amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 6 para 5). As to the provision of information for contributions see now the Social Security Administration Act 1992 ss 121E, 121F.

NOTE 2--Certain information is now information which is held (1) by (or by a person providing services to) the Inland Revenue, but is not information to which *ibid* s 121E applies; and (2) by (or by a person providing services to) the Commissioners of Customs and Excise in connection with the provision of those services: s 122(1).

NOTE 5--*Ibid* s 122(3) amended: Child Maintenance and Other Payments Act 2008 Sch 7 para 2(6), Sch 8. Social Security Administration Act 1992 s 122(4) further amended: Employment Act 2002 Sch 6 para 5(c).

TEXT AND NOTES 6, 7--Social Security Administration Act 1992 s 122A repealed: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 6 para 4.

NOTE 9--Social Security Administration Act 1992 s 122B(3) amended to include reference to Welfare Reform Act 2007 Pt 1 (ss 1-29): 2007 Act Sch 3 para 10(14).

TEXT AND NOTE 10--Refers also to a person in receipt of state pension credit or an income-related employment and support allowance: 1992 Act s 126(1) (amended by State Pension Credit Act 2002 Sch 2 para 15; and 2007 Act Sch 3 para 10(18)).

TEXT AND NOTES 11-16--Heads (1), (3) prospectively omitted, head (5) omitted; and further head (6) an employment and support allowance: Social Security Administration Act 1992 s 130(1) (amended by Welfare Reform and Pensions Act 1999 Sch 13 Pt IV; and Welfare Reform Act 2007 Sch 3 para 10(19), Sch 8).

NOTE 11--Social Security Contributions and Benefits Act 1992 Sch 11 para 2 amended: Social Security Act 1998 Sch 8.

TEXT AND NOTE 18--Head (d) omitted: Social Security Administration Act 1992 s 132(1) (amended by Welfare Reform and Pensions Act 1999 Sch 13 Pt IV).

As from a day to be appointed 1992 Act s 132(1) further amended to include reference to an employment and support allowance and to remove references to short-term incapacity benefit and long-term incapacity benefit: Welfare Reform Act 2007 Sch 3 para 10(20), Sch 8.

TEXT AND NOTE 20--Regulations under Social Security Administration Act 1992 ss 130(4) and 132(3) may now only be made with the concurrence of the Inland Revenue; heads (ii) and (iii) now refer to the Secretary of State or the Inland Revenue (as the regulations may require): ss 130(4), 132(3) (s 130(4) amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 26; Social Security Administration Act 1992 s 132(3) amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 27).

For further regulation-making powers under the Social Security Administration Act 1992 ss 130, 132, see ss 130(5) (see EMPLOYMENT vol 39 (2009) PARA 528), 132(4) (see EMPLOYMENT vol 39 (2009) PARA 400).

TEXT AND NOTE 21--Social Security Administration Act 1992 s 133 amended: SI 2005/2053.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(7) OTHER ENFORCEMENT PROVISIONS/402A. Disclosure of contributions avoidance arrangements.

#### **402A. Disclosure of contributions avoidance arrangements.**

The Treasury may by regulations make provision requiring, or relating to, the disclosure of information in relation to any notifiable contribution arrangements<sup>1</sup> or notifiable contribution proposal<sup>2</sup>. The only provision which may be so made is provision applying, with or without modification, or corresponding to, any of the specified provisions<sup>3</sup>. Where, at any time after 30 March 2006<sup>4</sup>, a relevant tax provision<sup>5</sup> which changes the notifiable tax matters<sup>6</sup> is passed or made the Treasury may, by regulations, amend the definitions of 'notifiable contribution arrangements' and 'notifiable contribution proposal' so as to make an analogous change to the matters in respect of which information may be required to be disclosed<sup>7</sup>.

No provision made by regulations in accordance with the above may require any person to disclose to the Commissioners for Her Majesty's Revenue and Customs, or any other person, any information with respect to which a claim to legal professional privilege could be maintained in legal proceedings<sup>8</sup>.

1 'Contribution' means a contribution under the Social Security Contributions and Benefits Act 1992 Pt I (ss 1-19A) (see PARAS 31-53); 'arrangements' includes any scheme, transaction or series of transactions; and 'notifiable contribution arrangements' means any arrangements which enable, or might be expected to enable, any person to obtain an advantage in relation to a contribution, and are such that the main benefit, or one of the main benefits, that might be expected to arise from the arrangements is the obtaining of that advantage: Social Security Administration Act 1992 s 132A(3), (7) (s 132A added by National Insurance Contributions Act 2006 s 7(1), (2)). 'Advantage', in relation to any contribution, means the avoidance or reduction of a liability for that contribution or the deferral of the payment of that contribution: Social Security Administration Act 1992 s 132A(7).

See the National Insurance Contributions (Application of Part 7 of the Finance Act 2004) Regulations 2007, SI 2007/785 (amended by SI 2008/2678, SI 2009/208, SI 2009/612).

2 Social Security Administration Act 1992 s 132A(1). 'Notifiable contribution proposal' means a proposal for arrangements which, if entered into, would be notifiable contribution arrangements, whether the proposal relates to a particular person or to any person who may seek to take advantage of it: s 132A(3).

3 Ibid s 132A(2). The specified provisions are (1) any provision of, or made under, the Finance Act 2004 Pt 7 (ss 306-319) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1569A), so far as that provision relates to income tax; (2) the Taxes Management Act 1970 s 98C (see INCOME TAXATION vol 23(2) (Reissue) PARA 1711) and any other provision of the 1970 Act so far as it relates to a penalty under s 98C; (3) any provision made under the Finance Act 1999 s 132 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1745) or the Finance Act 2002 s 135 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1699A); and (4) any provision of any other enactment or instrument, including any enactment or instrument passed or made on or after 30 March 2006, which requires, or relates to, the disclosure of information in relation to tax avoidance arrangements which relate in whole or in part to income tax: Social Security Administration Act 1992 s 132A(2)(a)-(d). 'Tax avoidance arrangements' includes arrangements which enable, or might be expected to enable, a person to obtain an advantage in relation to any tax within the meaning of the 2004 Act Pt 7: Social Security Administration Act 1992 s 132A(7).

4 Ie the day on which the 2006 Act was passed.

5 'Relevant tax provision' means a provision mentioned in the Social Security Administration Act 1992 s 132A(2) (see NOTE 3): s 132A(5).

6 'The notifiable tax matters' means the arrangements, proposals or other matters in respect of which information is or may be required to be disclosed under a relevant tax provision: ibid s 132A(5).

7 Ie required to be disclosed by virtue of ibid s 132A: s 132A(4).

8 Ibid s 132A(6).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **402-403 Provision of information, Unauthorised disclosure of information**

Information relating to social security which is held by the Secretary of State or by a person providing services to him in connection with the provision of those services may be used and supplied to them for the purposes of, or for any purposes connected with, the exercise of functions in relation to social security: Social Security Act 1998 s 3 (amended by the Employment Act 2002 Sch 6 paras 1(c), 4, Sch 8(1); the Pensions Act 2004 Sch 10 para 1; the Pensions Act 2008 s 63(5), (6); and the Child Maintenance and Other Payments Act 2008 Sch 7 para 3(2)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(7) OTHER ENFORCEMENT PROVISIONS/403. Unauthorised disclosure of information.

### **403. Unauthorised disclosure of information.**

A person who is or has been employed in social security administration or adjudication<sup>1</sup> is guilty of an offence<sup>2</sup> if he discloses without lawful authority<sup>3</sup> any information which he acquired in the course of his employment and which relates to a particular person<sup>4</sup>. Similarly, a person who is or has been employed in the audit of expenditure or the investigation of complaints<sup>5</sup> is guilty of an offence<sup>6</sup> if he discloses without lawful authority any information (1) which he acquired in the course of his employment; (2) which is, or is derived from, information acquired or held by or for the purposes of any of the specified government departments or other bodies or persons<sup>7</sup>; and (3) which relates to a particular person<sup>8</sup>.

It is not an offence under these provisions to disclose information in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it, or to disclose information which has previously been disclosed to the public with lawful authority<sup>9</sup>.

It is a defence for a person charged with an offence under these provisions to prove that at the time of the alleged offence (a) he believed that he was making the disclosure in question with lawful authority and had no reasonable cause to believe otherwise; or (b) he believed that the information in question had previously been disclosed to the public with lawful authority and had no reasonable cause to believe otherwise<sup>10</sup>.

1 For these purposes, the persons who are employed in social security administration or adjudication are: (1) any person specified in the Social Security Administration Act 1992 s 123 (as amended), Sch 4 Pt I (as amended) or in any corresponding enactment having effect in Northern Ireland; (2) any other person who carries out the administrative work of any of the government departments or other bodies or persons referred to in Sch 4 Pt I (as amended); and (3) any person who provides, or is employed in the provision of, services to any of those departments, persons or bodies: s 123(6). In relation to any such person, 'employment' is to be construed accordingly: see s 123(6). This provision has effect as if any medical practitioner who, for the purposes of s 54 (as amended) (see PARA 375 ante), is provided by any person in pursuance of a contract entered into with the Secretary of State were specified in Sch 4 Pt I (as amended): s 123(6A) (added by the Deregulation and Contracting Out Act 1994 s 76, Sch 16 para 21). As to the Secretary of State see PARA 1 ante.

For the purposes of the Social Security Administration Act 1992 s 123(2) (as amended) (see the text and notes 7-8 infra) and s 123(6), any reference in Sch 4 Pt I (as amended) or any corresponding enactment having effect in Northern Ireland to a government department must be construed in accordance with Sch 4 Pt II (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 74; and the Social Security Administration (Fraud) Act 1997 s 22, Sch 2) or any corresponding enactment having effect in Northern Ireland; and for this purpose 'government department' must be taken to include the Commissioners of Inland Revenue and the Scottish Courts Administration: Social Security Administration Act 1992 s 123(7).

The persons specified are: a civil servant in the Department of Social Security, the Department of Employment or the Lord Chancellor's Department; a member or officer of the Commissioners of Inland Revenue; a civil servant in the Scottish Courts Administration; a member, officer or employee of an authority administering housing benefit or council tax benefit, or a person authorised to exercise any function of such an authority relating to such a benefit or any employee of such a person; a person authorised under s 139A(1) (as added) to consider and report to the Secretary of State on the administration of housing benefit or council tax benefit; the Chief Adjudication Officer; an adjudication officer; the clerk to, or other officer or member of the staff of, a social security appeal tribunal, a disability appeal tribunal, a medical appeal tribunal, a vaccine damage tribunal or a pensions appeal tribunal constituted under the Pensions Appeal Tribunals Act 1943; a member or an officer or servant of the Disability Living Allowance Advisory Board; the Social Fund Commissioner; a social fund officer; a social fund inspector; a member of any staff employed in connection with the Social Fund; an officer or other member of the staff of the former Supplementary Benefits Commission, the former National Assistance Board, or the former Attendance Allowance Board; a benefit officer; an insurance officer; a supplement officer: Social Security Administration Act 1992 Sch 4 Pt I (amended by the Pensions Act 1995 ss 151, 177, Sch 5 para 15, Sch 7 Pt III; and the Social Security Administration (Fraud) Act 1997 s 4(1)).

2 A person guilty of such an offence is liable, on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both; or, on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both: Social Security Administration Act 1992 s 123(5). The 'statutory maximum' is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32 (as amended) and, as from 1 October 1992, is £5,000: s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)).

As to offences generally see PARA 404 post.

3 For these purposes, a disclosure is to be regarded as made with lawful authority if, and only if, it is made (1) in accordance with his official duty by (a) a civil servant, or (b) a person employed in the audit of expenditure or the investigation of complaints who does not fall within note 5 head (12) infra; (2) by any other person either (a) for the purposes of the function in the exercise of which he holds the information and without contravening any restriction duly imposed by the person responsible, or (b) to, or in accordance with an authorisation given by, the person responsible; (3) in accordance with any enactment or order of a court; (4) for the purpose of instituting, or otherwise for the purposes of, any proceedings before a court or before any tribunal or other body or person referred to in *ibid* Sch 4 Pt I (as amended) (see note 1 supra) or the corresponding Northern Ireland provisions; or (5) with the consent of the appropriate person: Social Security Administration Act 1992 s 123(9) (amended by the Social Security Administration (Fraud) Act 1997 s 22, Sch 1 para 6).

'The person responsible' means the Secretary of State, the Lord Chancellor or any person authorised by the Secretary of State or the Lord Chancellor for these purposes, and includes a reference to the person responsible within the meaning of any corresponding enactment having effect in Northern Ireland: Social Security Administration Act 1992 s 123(9) (as so amended). 'The appropriate person' means the person to whom the information in question relates, except that if the affairs of that person are being dealt with under a power of attorney, or by a mental health receiver or controller or a Scottish mental health custodian, or by a mental health appointee, then the appropriate person is the attorney, receiver, controller, custodian or appointee: see s 123(10).

4 *Ibid* s 123(1).

5 For these purposes, the persons who are employed in the audit of expenditure or the investigation of complaints are: (1) the Comptroller and Auditor General; (2) the Comptroller and Auditor General for Northern Ireland; (3) the Parliamentary Commissioner for Administration; (4) the Northern Ireland Parliamentary Commissioner for Administration; (5) the Health Service Commissioner for England; (6) the Health Service Commissioner for Wales; (7) the Health Commissioner for Scotland; (8) the Northern Ireland Commissioner for Complaints; (9) a member of the Local Commission for England; (10) a member of the Local Commission for Wales; (11) any member of the staff of the National Audit Office or the Northern Ireland Audit Office; (12) any other person who carries out the administrative work of either of those offices or who provides, or is employed in the provision of, services to either of them; (13) a member of the Audit Commission for Local Authorities and the National Health Service in England and Wales, and any auditor appointed by that commission; (14) a Northern Ireland local government auditor; (15) any officer of any of the commissioners or commissions referred to supra, and any person assisting an auditor referred to supra: *ibid* s 123(8) (amended by the Social Security Administration (Fraud) Act 1997 ss 4(2), 22, Sch 2). In relation to any such person, 'employment' is to be construed accordingly: Social Security Administration Act 1992 s 123(8) (as so amended).

6 See note 2 supra.

7 In any of the government departments or other bodies or persons referred to in the Social Security Administration Act 1992 Sch 4 Pt I (as amended) or the corresponding Northern Ireland provisions: see note 1 supra.

8 Social Security Administration Act 1992 s 123(2) (amended by the Social Security Administration (Fraud) Act 1997 s 22, Sch 1 para 6).

9 Social Security Administration Act 1992 s 123(3).

10 *Ibid* s 123(4).

## UPDATE

### 330-450 Administration

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

#### **402-403 Provision of information, Unauthorised disclosure of information**

Information relating to social security which is held by the Secretary of State or by a person providing services to him in connection with the provision of those services may be used and supplied to them for the purposes of, or for any purposes connected with, the exercise of functions in relation to social security: Social Security Act 1998 s 3 (amended by the Employment Act 2002 Sch 6 paras 1(c), 4, Sch 8(1); the Pensions Act 2004 Sch 10 para 1; the Pensions Act 2008 s 63(5), (6); and the Child Maintenance and Other Payments Act 2008 Sch 7 para 3(2)).

#### **403 Unauthorised disclosure of information**

NOTE 1--Social Security Administration Act 1992 Sch 4 Pt II further amended: Tribunals, Courts and Enforcement Act 2007 Sch 8 para 18; Transfer of Functions (War Pensions etc) Order 2001, SI 2001/3506.

'A member or officer of the Commissioners of Inland Revenue' is omitted from and 'the Ministry of Defence' is added to the list of persons specified: Social Security Administration Act 1992 Sch 4 Pt I (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 6 para 6; and SI 2001/3506). Reference to the Social Security Administration Act 1992 s 54 is now to the Social Security Act 1998 s 19 (see PARA 356A.13); Social Security Administration Act 1992 s 123(6A) (amended by the Social Security Act 1998 Sch 7 para 88). Reference to medical practitioner is now to health care professional: Social Security Administration Act 1992 s 123(6A) (amended by Welfare Reform Act 2007 Sch 7 para 3(3)). Jobseekers Act 1995 Sch 2 para 74 repealed: Secretaries of State for Education and Skills and for Work and Pensions Order 2002, SI 2002/1397.

In the Social Security Administration Act 1992 Sch 4, any reference to a person authorised to exercise any function of an authority administering housing benefit or council tax benefit includes a reference to a person providing services to such an authority which relate to such a benefit, and any reference to the exercise of any function relating to such a benefit includes a reference to the provision of any services so relating: Welfare Reform and Pensions Act 1999 Sch 8 para 34(1), (2)(e), (3).

Also, a member, officer or employee of a county council in England who exercises (1) any function conferred on the county council by regulations made under the 1992 Act s 7A; (2) any function in connection with a relevant purpose within the meaning of the 1992 Act 7B(3); A person authorised to exercise any such function of such a county council or an employee of such a person: Sch 4 Pt I (amended by Welfare Reform Act 2007 s 41(3)).

Social Security Administration Act 1992 Sch 4 Pt I amended by SI 2008/2833.

NOTE 3--1992 Act s 123(10) amended: Mental Capacity Act 2005 Sch 6 para 37(a), Sch 7.

Where the person to whom the information relates lacks capacity (within the meaning of the Mental Capacity Act 2005) to consent to its disclosure, the appropriate person is (1) a donee of an enduring power of attorney or lasting power of attorney (within the

meaning of the 2005 Act), or (2) a deputy appointed for him, or any other person authorised, by the Court of Protection, with power in that respect: 1992 Act s 123(11) (added by 2005 Act Sch 6 para 37(b)).

NOTE 5--Head (13) amended: 1992 Act s 123(8) (amended by the Local Government and Public Involvement in Health Act 2007 Sch 9 para 1(2)(h), Sch 18 Pt 9).

Also, heads (16) Auditor General for Wales (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 45) and any member of his staff: 1992 Act s 123(8) (amended by the Government of Wales Act 1998 Sch 12 para 32).

1992 Act s 123(8) further amended: Public Services Ombudsman (Wales) Act 2005 Sch 6 para 26, Sch 7.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(7) OTHER ENFORCEMENT PROVISIONS/404. Offences.

#### **404. Offences.**

Regulations and schemes under the legislation<sup>1</sup> may provide for contravention of, or failure to comply with, any provision contained in the regulations to be an offence<sup>2</sup>.

A person who (1) intentionally delays or obstructs an inspector in the exercise of any of his powers<sup>3</sup>; or (2) refuses or neglects to answer any question or to furnish any information or to produce any document when required to do so, is guilty of an offence<sup>4</sup>.

If a person, with a view to obtaining (whether for himself or for some other person) any benefit or other payment or advantage under the social security legislation<sup>5</sup>, dishonestly (a) makes a false statement or representation; (b) produces or furnishes, or causes or allows to be produced or furnished, any document or information which is false in a material particular; (c) fails to notify a change of circumstances which he is required to notify<sup>6</sup>; or (d) causes or allows another person to fail to notify a change of circumstances which the other person is required to notify, then he is guilty of an offence<sup>7</sup>.

If a person, for the purpose of obtaining (whether for himself or some other person) any benefit or other payment under the social security legislation or for any other purpose connected with the legislation, makes a statement or representation which he knows to be false, or produces or furnishes or knowingly causes or knowingly allows to be produced or furnished any document or information which he knows to be false in a material particular, he is guilty of an offence<sup>8</sup>. If a person, without reasonable excuse, fails to notify a change of circumstances which he is required to notify or knowingly causes or knowingly allows another person to fail to notify a change of circumstances which the other person is required to notify, and he knows that he or the other person is required to notify the change of circumstances, then he is guilty of an offence<sup>9</sup>.

A person who fails to pay, at or within the prescribed time, any contribution which he is liable to pay<sup>10</sup> is guilty of an offence<sup>11</sup>. It is still an offence for a person to buy, sell or offer for sale, take or give in exchange, pawn or take in pawn a contribution card or used contribution stamp, or to affix a used contribution stamp to a contribution card, although in practice such stamps and cards are no longer used<sup>12</sup>.

If any person, with intent to deceive, falsely represents himself to be a person authorised by the Secretary of State for Social Security<sup>13</sup> to act in any capacity, he is guilty of an offence<sup>14</sup>.

If any person (as a pledge or a security for a debt or with a view to obtaining payment from the person entitled to it of a debt due either to himself or to any other person) receives, detains or has in his possession any document issued by or on behalf of the Secretary of State for Social Security in connection with any benefit, pension or allowance he is guilty of an offence<sup>15</sup>. Any person who has such a document in his possession without lawful authority or excuse is guilty of an offence<sup>16</sup>.

Where an offence<sup>17</sup> which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and is liable to be proceeded against accordingly<sup>18</sup>.

<sup>1</sup> ie the Acts mentioned in PARA 401 note 1 ante and the Jobseekers Act 1995 s 27 (see PARAS 314-316 ante).

2 See the Social Security Administration Act 1992 s 113; the Jobseekers Act 1995 s 34(3). The regulations may provide for the recovery, on summary conviction of any such offence, of a fine not exceeding level 3 on the standard scale; and may provide, if the offence is continued after conviction, for a penalty of £40 for each day on which the contravention or failure is continued: see the Social Security Administration Act 1992 s 113; and the Jobseekers Act 1995 s 34(5), (7). As to the standard scale see PARA 172 note 3 ante.

3 See PARA 401 ante.

4 Social Security Administration Act 1992 s 111(1); Jobseekers Act 1995 s 34(2). Such a person is liable on summary conviction to a fine not exceeding level 3 on the standard scale: Social Security Administration Act 1992 s 111(1); Jobseekers Act 1995 s 34(5). Where a person is convicted under head (2) in the text and the refusal or neglect is continued by him after his conviction, he is guilty of a further offence and liable on summary conviction to a fine not exceeding £40 for each day on which it is continued: Social Security Administration Act 1992 s 111(2); Jobseekers Act 1995 s 34(6).

5 For these purposes, 'the social security legislation' means the Acts mentioned in PARA 401 note 1 ante and the Jobseekers Act 1995: Social Security Administration Act 1992 s 111A(2) (as added: see note 7 infra), s 112(3) (added by the Social Security Administration (Fraud) Act 1997 s 22, Sch 1 para 4).

6 In which he is required to notify by regulations under the Social Security Administration Act 1992: see s 111A(1) (as added: see note 7 infra).

7 Ibid s 111A(1) (s 111A added by the Social Security Administration (Fraud) Act 1997 s 13). Such a person is liable, on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum or to both; or, on conviction on indictment, to imprisonment not exceeding seven years or to a fine or to both: Social Security Administration Act 1992 s 111A(3) (as so added). For the meaning of 'statutory maximum' see PARA 403 note 2 ante.

8 Ibid s 112(1) (amended by the Social Security Administration (Fraud) Act 1997 Sch 1 para 4). It is not necessary for the prosecution to show an intent to deceive or defraud: *Department of Social Security v Bavi* [1996] COD 260, DC, applying *Clear v Smith* [1981] 1 WLR 399, DC; *Barrass v Reeve* [1980] 3 All ER 705, [1981] 1 WLR 408, DC.

A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding three months, or to both: Social Security Administration Act 1992 s 112(2) (as so amended).

9 Ibid s 112(1A) (added by the Social Security Administration (Fraud) Act 1997 s 14). Such a person is liable on summary conviction to a fine not exceeding level 5 on the standard scale, or to imprisonment for a term not exceeding three months, or to both: Social Security Administration Act 1992 s 112(2) (as amended: see note 8 supra).

10 As to liability to pay national insurance contributions see PARA 31 et seq ante.

11 Social Security Administration Act 1992 s 114(1) (amended by the Social Security Administration (Fraud) Act 1997 s 22, Sch 2). Such a person is liable on summary conviction to a fine not exceeding level 3 on the standard scale: Social Security Administration Act 1992 s 114(1) (as so amended). Section 114(1) (as amended) does not apply to Class 4 contributions recoverable by the Inland Revenue: s 114(3). As to such contributions see PARA 43 ante.

If a person fails to pay at or within the prescribed time any sums which he is required to pay by regulations made by virtue of the Social Security Contributions and Benefits Act 1992 s 1 (as amended), Sch 1 para 6 (as amended) (see PARA 49 ante), he is liable to be proceeded against and punished under the Social Security Administration Act 1992 s 114(1) (as amended) without proof of his failure so to pay any particular contribution: s 114(2).

12 Ibid s 114(4). A person guilty of such an offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale or to imprisonment for a term not exceeding three months or to both: s 114(4).

'Contribution card' means any card issued under regulations for the purpose of payment of contributions by affixing stamps to it: s 114(6). In any proceedings under s 114(4) with respect to used stamps, a stamp is deemed to have been used if it has been affixed to a contribution card or cancelled or defaced in any way whatsoever and whether or not it has actually been used for the payment of a contribution: s 114(5). In practice, contributions are no longer paid in this manner.

13 As to the Secretary of State see PARA 1 ante.

14 Social Security Administration Act 1992 s 181. Such a person is liable on summary conviction to a fine not exceeding level 4 on the standard scale: s 181.

15 Ibid s 182(1). A person guilty of an offence under s 182 is liable on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding level 4 on the standard scale or to both: s 182(3).

16 Ibid s 182(2). The proof of lawful authority or excuse lies on the person having the document in his possession: see s 182(2). As to the penalty for such an offence see note 15 supra.

17 Ie under the Social Security Administration Act 1992 or the Jobseekers Act 1995.

18 Social Security Administration Act 1992 s 115(1) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 55). Where the affairs of a body corporate are managed by its members, this provision applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: Social Security Administration Act 1992 s 115(2).

## UPDATE

### 330-450 Administration

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see *RATING AND COUNCIL TAX* vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### 404 Offences

TEXT AND NOTES--Jobseekers Act 1995 s 34 repealed: Child Support, Pensions and Social Security Act 2000 Sch 9 Pt VI.

TEXT AND NOTES 1, 2--Social Security Administration Act 1992 s 113 now as substituted by the Social Security Act 1998 s 60; and amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 5 para 5; the 2000 Act Sch 6 para 7; and by the National Insurance Contributions and Statutory Payments Act 2004 s 9(4). The legislation referred to in the Social Security Administration Act 1992 s 113 is now the relevant social security legislation and the enactments specified in s 121DA(1) so far as relating to contributions, statutory sick pay or statutory maternity pay: s 113(1A) (added by the 2000 Act Sch 6 paras 1, 7(2)). Reference to statutory sick pay and statutory maternity pay in the Social Security Administration Act 1992 s 113(1A) omitted: s 113(1A) (amended by the 2004 Act s 9(4), Sch 2 Pt 1). As to provision for offences in relation to statutory sick pay and statutory maternity pay see the Social Security Administration Act 1992 ss 113A, 113B. 'The relevant social security legislation' means the provisions of any of the following, except so far as relating to contributions, statutory sick pay or statutory maternity pay, that is to say (1) the Social Security Contributions and Benefits Act 1992; (2) the Social Security Administration Act 1992; (3) the Pensions Act 1995, except Pt III (ss 135-151); (4) the Social Security (Incapacity for Work) Act 1994 s 4; (5) the Jobseekers Act 1995; (6) the Social Security (Recovery of Benefits) Act 1997; (7) the 1998 Act Pts I (ss 1-47), IV (ss 77-87); (8) the Welfare Reform and Pensions Act 1999 Pt V (ss 52-80); (9) the Welfare Reform Act 2007 Pt 1 (ss 1-29); (10) the Social Security Pensions Act 1975; (11) the Social Security Act 1973; and (12) any subordinate legislation made, or having effect as if made, under any enactment specified in heads (1)-(11): Social Security Administration Act 1992 s 121DA(1) (s 121DA added by the 2000 Act Sch 6 paras 1, 8; s 121DA(1) amended by Tax Credits Act 2002 Sch 6; and the Welfare Reform Act 2007 Sch 3 para 10(12)). 'Subordinate legislation' in this context has the same meaning as in the Interpretation Act 1978: Social Security Administration Act 1992 s 121DA(7).

Where a person fails to produce any document or record, or provide any information, in accordance with (a) regulations under the Social Security Administration Act 1992 s 5(1)(i), (5) (see PARA 330); (b) regulations under s 130 or 132 (see PARA 402); or (c) regulations under the Social Security Contributions and Benefits Act 1992 s 153(5)(b) (see PARA 353 NOTE 7), that person is liable to specified penalties: Social Security Administration Act 1992 s 113A(1) (ss 113A, 113B added by the 2004 Act s 9(5)). The specified penalties are (i) a penalty not exceeding £50 and; (ii) if the failure continues after a penalty under head (i) is imposed, a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which the penalty under head (i) was imposed (but excluding any day for which a penalty under this head has already been imposed): Social Security Administration Act 1992 s 113A(2). Where a person fails to maintain a record in accordance with regulations under s 130 or 132, he is liable to a penalty not exceeding £3,000: s 113A(3). No penalty may be imposed under s 113A(1) at any time after the failure concerned has been remedied: s 113A(4). Section 113A(4) does not apply to the imposition of a penalty under head (i) in respect of a failure to produce any document or record in accordance with regulations under s 130(5) (see EMPLOYMENT vol 39 (2009) PARA 528) or 132(4) (see EMPLOYMENT vol 39 (2009) PARA 400): s 113A(5). Where, in the case of any employee, an employer refuses or repeatedly fails to make payments of statutory sick pay or statutory maternity pay in accordance with any regulations under s 5, the employer is liable to a penalty not exceeding £3,000: s 113A(6). The Taxes Management Act 1970 s 118(2) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1690) applies for the purpose of the Social Security Administration Act 1992 s 113A(1), (3), (6) as it applies for the purposes of the Taxes Management Act 1970: Social Security Administration Act 1992 s 113A(7). The Employment Act 2002 Sch 1 applies, subject to specified modifications, in relation to penalties imposed under the Social Security Administration Act 1992 s 113A: see 113A(8), (9).

Where a person fraudulently or negligently makes any incorrect statement or declaration in connection with establishing entitlement to statutory sick pay or statutory maternity pay, or produces any incorrect document or record or provides any incorrect information of a kind mentioned in (A) regulations under the Social Security Administration Act 1992 s 5(1)(i), (5), so far as relating to statutory sick pay or statutory maternity pay; (B) regulations under s 130 or 132; or (C) regulations under the Social Security Contributions and Benefits Act 1992 s 153(5)(b), he is liable to a penalty not exceeding £3,000: Social Security Administration Act 1992 s 113B(1). Where an employer fraudulently or negligently makes an incorrect payment of statutory sick pay or statutory maternity pay, he is liable to a penalty not exceeding £3,000: s 113B(2). Where an employer fraudulently or negligently receives an overpayment in pursuance of a regulations under the Social Security Contributions and Benefits Act 1992 s 167 (see EMPLOYMENT vol 39 (2009) PARA 403), he is liable to a penalty not exceeding £3,000: Social Security Administration Act 1992 s 113B(3). The Employment Act 2002 Sch 1 applies, subject to specified modifications, in relation to penalties imposed under the Social Security Administration Act 1992 s 113B: see s 113B(4), (5).

Where a person fraudulently or negligently makes an incorrect statement or declaration in or in connection with a claim for health in pregnancy grant (see PARA 236A), or gives incorrect information or evidence in response to a requirement imposed on the person by virtue of the Social Security Administration Act 1992 s 5, the Commissioners for Her Majesty's Revenue and Customs may make a determination imposing a penalty on the person, the amount of which is to be determined by the Commissioners, but may not exceed the amount of the grant: see the Social Security Administration Act 1992 s 113C, Sch 3A para 1 (s 113C, Sch 3A added by the Health and Social Care Act 2008 s 133). As to the right of appeal and the time limits in which a

penalty may be imposed and recovered, see the Social Security Administration Act 1992 Sch 3A paras 2-5.

TEXT AND NOTES 3, 4--Also, head (3) refuses or neglects to comply with any requirement to provide electronic access to information or with the requirements of any arrangements to provide such access: 1992 Act s 111(1) (amended by the Social Security Fraud Act 2001 s 2(3)). As to the requirement to provide electronic access to information see the 1992 Act ss 109BA (PARA 401), 110AA (see HOUSING vol 22 (2006 Reissue) PARA 166).

TEXT AND NOTE 3--In head (1) for 'inspector' read 'authorised officer' and for 'his powers' read 'his powers under the Social Security Administration Act 1992 other than an Inland Revenue power': 1992 Act s 111(1) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 5 para 4; and the 2001 Act s 1(6), 2(3). 'Inland Revenue power' means any power conferred on an officer of the Inland Revenue by the Social Security Administration Act 1992 s 110ZA (see PARA 401) or by virtue of an authorisation granted under s 109A (see PARA 401) or s 110A (see HOUSING vol 22 (2006 Reissue) PARA 166): s 111(3) (added by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 5 para 4(1), (3); and amended by the 2000 Act Sch 6 paras 1, 4(a); and the 2004 Act Sch 1 para 3(2)(a)).

TEXT AND NOTE 5--Now refers to relevant social security legislation: Social Security Administration Act 1992 s 111A(1) (amended by the 2000 Act Sch 6 para 5). For the meaning of 'relevant social security legislation' see PARA 401. Social Security Administration Act 1992 s 111A(2) repealed: 2000 Act Sch 9 Pt VI.

TEXT AND NOTES 6, 7--Heads (c), (d) omitted: Social Security Administration Act 1992 s 111A(1) (amended by the 2001 Act s 16(1)(a), Schedule). A person is guilty of an offence if there has been a change of circumstances affecting any entitlement of his to any benefit or other payment or advantage under any provision of the relevant social security legislation, the change is not a change that is excluded by regulations from the changes that are required to be notified, he knows that the change affects an entitlement of his to such a benefit or other payment or advantage, and he dishonestly fails to give a prompt notification of that change in the prescribed manner to the prescribed person: Social Security Administration Act 1992 s 111A(1A) (s 111A(1A)-(1G) added by the 2001 Act s 16(2)). The change must affect the computation of the person's entitlement: *R v Passmore* [2007] EWCA Crim 2053, (2007) 171 JP 519 (formation of non-profit-making company was not such a change). A person is guilty of an offence if there has been a change of circumstances affecting any entitlement of another person to any benefit or other payment or advantage under any provision of the relevant social security legislation, the change is not a change that is excluded by regulations from the changes that are required to be notified, he knows that the change affects an entitlement of that other person to such a benefit or other payment or advantage, and he dishonestly causes or allows (see *R v Tilley* [2009] EWCA Crim 1426, [2010] 1 WLR 605, (2009) 173 JP 393) that other person to fail to give a prompt notification of that change in the prescribed manner to the prescribed person: Social Security Administration Act 1992 s 111A(1B). Where there has been a change of circumstances affecting any entitlement of a person ('the claimant') to any benefit or other payment or advantage under any provision of the relevant social security legislation, the benefit, payment or advantage is one in respect of which there is another person ('the recipient') who for the time being has a right to receive payments to which the claimant has, or, but for the arrangements under which they are payable to the recipient, would have, an entitlement, and the change is not a change that is excluded by regulations from the changes that are required to be notified, then the recipient is guilty of an offence if he knows that the change affects an entitlement of the claimant to a benefit or other payment or advantage under a provision of the

relevant social security legislation, the entitlement is one in respect of which he has a right to receive payments to which the claimant has, or, but for the arrangements under which they are payable to the recipient, would have, an entitlement, and he dishonestly fails to give a prompt notification of that change in the prescribed manner to the prescribed person: s 111A(1C), (1D). A person other than the recipient is guilty of an offence if he knows that the change affects an entitlement of the claimant to a benefit or other payment or advantage under a provision of the relevant social security legislation, the entitlement is one in respect of which the recipient has a right to receive payments to which the claimant has, or, but for the arrangements under which they are payable to the recipient, would have, an entitlement, and he dishonestly causes or allows the recipient to fail to give a prompt notification of that change in the prescribed manner to the prescribed person: s 111A(1E). In any case where s 111A(1C) applies but the right of the recipient is confined to a right, by reason of his being a person to whom the claimant is required to make payments in respect of a dwelling, to receive payments of housing benefit, a person is not guilty of an offence under s 111A(1D), (1E) unless the change is one relating to the claimant's occupation of that dwelling and/or the claimant's liability to make payments in respect of that dwelling: s 111A(1F). A notification of a change is prompt if, and only if, it is given as soon as reasonably practicable after the change occurs: s 111A(1G).

As to the person to whom, and manner in which, a change of circumstances must be notified where the benefit affected by the change of circumstances is (1) jobseeker's allowance, see the Social Security (Notification of Change of Circumstances) Regulations 2001, SI 2001/3252, reg 3 (amended by SI 2006/832); (2) housing benefit or council tax benefit, see SI 2001/3252 reg 4; or (3) any other benefit, see reg 5 (amended by SI 2002/1789, SI 2003/2800; SI 2003/3209 and revoked, in so far as it relates to child benefit or guardian's allowance, now replaced by the Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257). See also *Durham CC v Dickinson* [2009] EWHC 2758 (Admin), [2009] All ER (D) 108 (Nov).

NOTE 7--As to sentencing for benefit fraud see *R v Nwoga* [1997] 2 Cr App Rep (S) 1, CA.

TEXT AND NOTE 8--Now refers to relevant social security legislation: Social Security Administration Act 1992 s 112(1) (amended by the 2000 Act Sch 6 para 6).

TEXT AND NOTE 9--Replaced. A person is now guilty of an offence if there has been a change of circumstances affecting any entitlement of his to any benefit or other payment or advantage under any provision of the relevant social security legislation, the change is not a change that is excluded by regulations from the changes that are required to be notified, he knows that the change affects an entitlement of his to such a benefit or other payment or advantage, and he fails to give a prompt notification of that change in the prescribed manner to the prescribed person: Social Security Administration Act 1992 s 112(1A) (substituted by the 2001 Act s 16(3)). A person is guilty of an offence under the Social Security Administration Act 1992 s 112 if there has been a change of circumstances affecting any entitlement of another person to any benefit or other payment or advantage under any provision of the relevant social security legislation, the change is not a change that is excluded by regulations from the changes that are required to be notified, he knows that the change affects an entitlement of that other person to such a benefit or other payment or advantage, and he causes or allows that other person to fail to give a prompt notification of that change in the prescribed manner to the prescribed person: s 112(1B) (s 112(1B)-(1F) added by the 2001 Act s 16(3)). In a case where the Social Security Administration Act 1992 s 111A(1C) (see TEXT AND NOTE 7) applies, the recipient is guilty of an offence if he knows that the change affects an entitlement of the claimant to a benefit or other payment or advantage under a provision of the relevant social security legislation, the

entitlement is one in respect of which he has a right to receive payments to which the claimant has, or, but for the arrangements under which they are payable to the recipient, would have, an entitlement, and he fails to give a prompt notification of that change in the prescribed manner to the prescribed person: s 112A(1C). In a case where s 111A(1C) applies, a person other than the recipient is guilty of an offence if he knows that the change affects an entitlement of the claimant to a benefit or other payment or advantage under a provision of the relevant social security legislation, the entitlement is one in respect of which the recipient has a right to receive payments to which the claimant has, or, but for the arrangements under which they are payable to the recipient, would have, an entitlement, and he causes or allows the recipient to fail to give a prompt notification of that change in the prescribed manner to the prescribed person: s 112(1D). Section 111A(1F) applies in relation to s 112(1C), (1D) as it applies in relation to s 111A(1D), (1E) (see TEXT AND NOTE 7): s 112(1E). A notification of a change is prompt if, and only if, it is given as soon as reasonably practicable after the change occurs: s 112(1F).

As to the person to whom, and manner in which, a change of circumstances must be notified see SI 2001/3252 (see TEXT AND NOTES 6, 7).

TEXT AND NOTES 10-12--Replaced. Any person who is knowingly concerned in the fraudulent evasion of any contributions which he or any other person is liable to pay is guilty of an offence and liable, on conviction on indictment, to imprisonment for a term not exceeding seven years or to a fine or to both or, on summary conviction, to a fine not exceeding the statutory maximum: Social Security Administration Act 1992 s 114 (substituted by the 1998 Act s 61). As to the statutory maximum see PARA 403 NOTE 2.

TEXT AND NOTES 13-15--Reference to Secretary of State for Social Security is now to Secretary of State for Work and Pensions: Social Security Administration Act 1992 ss 181, 182 (amended by the Secretaries of State for Education and Skills and for Work and Pensions Order 2002, SI 2002/1397).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(7) OTHER ENFORCEMENT PROVISIONS/404A. Benefit offences: loss of benefits.

#### **404A. Benefit offences: loss of benefits.**

The following provision<sup>1</sup> applies where a person ('the offender') (1) is convicted of one or more benefit offences<sup>2</sup> in any proceedings; (2) after being given a notice<sup>3</sup> of the appropriate penalty provision by an appropriate authority<sup>4</sup>, agrees in the manner specified by the appropriate authority to pay a penalty under the appropriate penalty provision to the appropriate authority by reference to an overpayment, in a case where the offence mentioned in the appropriate penalty provision<sup>5</sup> is a benefit offence; or (3) is cautioned in respect of one or more benefit offences<sup>6</sup>. If this provision applies and the offender is a person with respect to whom the conditions for an entitlement to a sanctionable benefit<sup>7</sup> are or become satisfied at any time within the disqualification period<sup>8</sup>, then, even though those conditions are satisfied, the following restrictions apply in relation to the payment of that benefit in the offender's case<sup>9</sup>. Subject as follows<sup>10</sup>, the sanctionable benefit is not payable in the offender's case for any period comprised in the disqualification period<sup>11</sup>. Where the sanctionable benefit is income support, the benefit is payable in the offender's case for any period comprised in the disqualification period as if the applicable amount used for the determination of the amount<sup>12</sup> of the offender's entitlement for that period were reduced in such manner as may be prescribed<sup>13</sup>. The Secretary of State may by regulations provide that, where the sanctionable benefit is jobseeker's allowance, any income-based jobseeker's allowance is payable, during the whole or a part of any period comprised in the disqualification period, as if one or more of the following applied (a) the rate of the allowance were such reduced rate as may be prescribed; (b) the allowance were payable only if there is compliance by the offender with such obligations with respect to the provision of information as may be imposed by the regulations; (c) the allowance were payable only if the circumstances are otherwise such as may be prescribed<sup>14</sup>. The Secretary of State may by regulations provide that, where the sanctionable benefit is state pension credit, the benefit is payable in the offender's case for any period comprised in the disqualification period as if the rate of the benefit were reduced in such manner as may be prescribed<sup>15</sup>. The Secretary of State may by regulations provide that, where the sanctionable benefit is employment and support allowance, any income-related allowance is payable, during the whole or a part of any period comprised in the disqualification period, as if one or more of the following applied (i) the rate of the allowance were such reduced rate as may be prescribed; (ii) the allowance were payable only if there is compliance by the offender with such obligations with respect to the provision of information as may be imposed by the regulations; (iii) the allowance were payable only if the circumstances are otherwise such as may be prescribed<sup>16</sup>. The Secretary of State may by regulations provide that, where the sanctionable benefit is housing benefit or council tax benefit, the benefit is payable, during the whole or a part of any period comprised in the disqualification period, as if the rate of the benefit were reduced in such manner as may be prescribed, or the benefit were payable only if the circumstances are such as may be prescribed (or both)<sup>17</sup>.

If (A) a person ('the offender') is convicted<sup>18</sup> of one or more benefit offences<sup>19</sup> in each of two separate sets of proceedings; (B) the benefit offence, or one of the benefit offences, of which he is convicted in the later proceedings is one committed within the period of five years after the date, or any of the dates, on which he was convicted of a benefit offence in the earlier proceedings; (C) the later set of proceedings has not been taken into account for the purposes of any previous application of these provisions<sup>20</sup> in relation to the offender or any person who was then a member of his family; (D) the earlier set of proceedings has not been taken into account as the earlier set of proceedings for the purposes of any previous application of these

provisions in relation to the offender or any person who was then a member of his family; and (E) the offender is a person with respect to whom the conditions for an entitlement to a sanctionable benefit<sup>21</sup> are or become satisfied at any time within the disqualification period<sup>22</sup>, then, even though those conditions are satisfied, the following restrictions apply in relation to the payment of that benefit in the offender's case<sup>23</sup>. The sanctionable benefit is not payable in the offender's case for any period comprised in the disqualification period<sup>24</sup> except that (I) where the sanctionable benefit is income support, the benefit is payable in the offender's case for any period comprised in the disqualification period as if the applicable amount used for the determination<sup>25</sup> of the amount of the offender's entitlement for that period were reduced in the manner prescribed<sup>26</sup>; (II) where the sanctionable benefit is jobseeker's allowance, any income-based jobseeker's allowance is payable, during the whole or a part of any period comprised in the disqualification period, as if one or more of the following applied (a) the rate of the allowance were such reduced rate as may be prescribed; (b) the allowance were payable only if there is compliance by the offender with such obligations with respect to the provision of information as may be imposed by regulations; (c) the allowance were payable only if the circumstances are otherwise such as may be prescribed<sup>27</sup>; (III) where the sanctionable benefit is housing benefit or council tax benefit, the benefit is payable, during the whole or a part of any period comprised in the disqualification period, as if the rate of the benefit were reduced in the manner prescribed<sup>28</sup>, or if the circumstances are as prescribed<sup>29</sup>; (IV) an income-based jobseeker's allowance is payable to a person in hardship<sup>30</sup>, but the allowance is payable only if and so long as the claimant satisfies the conditions for entitlement to an income-based jobseeker's allowance<sup>31</sup>; (V) an income-based jobseeker's allowance is payable to a person in hardship<sup>32</sup>, but the allowance is not so payable where the offender is the claimant, in respect of the first 14 days of the disqualification period, or where the offender's family member is the claimant, in respect of the first 14 days of the relevant period, and is payable thereafter only if and so long as the claimant satisfies the conditions for entitlement to an income-based jobseeker's allowance<sup>33</sup>. An income-based jobseeker's allowance is not payable under head (IV) or (V) above except where the claimant has furnished on a form approved for the purpose by the Secretary of State or in such other form as he may in any particular case approve, a signed statement of the circumstances he relies on to establish entitlement<sup>34</sup>.

Where the conditions for the entitlement of any joint-claim couple to a joint-claim jobseeker's allowance are or become satisfied at any time, and an offence-related restriction would apply in the case of at least one of the members of the couple if the entitlement were an entitlement of that member to a sanctionable benefit<sup>35</sup>, then the allowance is not payable in the couple's case for so much of any period comprised in the relevant period as is a period for which, in the case of each of the members of the couple, an offence-related restriction would apply if the entitlement were an entitlement of that member to a sanctionable benefit, or an offence-related restriction would so apply in the case of one of the members of the couple and the other member of the couple is (or is treated as being) subject to sanctions<sup>36</sup>. For any part of any period comprised in the relevant period for which the foregoing provision does not apply, the allowance is payable in the couple's case as if the amount of the allowance were reduced to an amount calculated using the method prescribed<sup>37</sup>, but is payable only to the member of the couple who is not the person by reference to whose convictions the above provisions would apply<sup>38</sup>. A joint-claim jobseeker's allowance is payable to a couple in hardship<sup>39</sup>, but only if and for so long as the joint-claim couple satisfy the other conditions of entitlement to a joint-claim jobseeker's allowance, or one member satisfies those conditions and the other member comes within categories of members not required to satisfy certain conditions<sup>40</sup>. A joint-claim jobseeker's allowance is also payable to a couple in hardship<sup>41</sup>, but not in respect of the first 14 days of the prescribed period, and thereafter only where the conditions of entitlement to a joint-claim jobseeker's allowance are satisfied or where one member satisfies those conditions and the other member comes within categories of members not required to satisfy certain conditions<sup>42</sup>. A joint-claim jobseeker's allowance is not payable under either of the preceding provisions unless one member of the couple has furnished on a form approved for the purpose

by the Secretary of State or in such other form as he may in any particular case approve, a signed statement of the circumstances he relies upon to establish entitlement<sup>43</sup>.

The Secretary of State may by regulations make provision in accordance with the following provisions in relation to any case in which the conditions for entitlement to income support<sup>44</sup>, jobseeker's allowance<sup>45</sup>, employment and support allowance, housing benefit or council tax benefit<sup>46</sup> are or become satisfied in the case of any person ('the offender's family member'), in relation to any case in which that benefit falls to be paid in that person's case for the whole or any part of a period comprised in a period ('the relevant period') which is the disqualification period in relation to restrictions imposed<sup>47</sup> in the case of a member of that person's family, or in relation to any case in which that member of that family ('the offender') is a person by reference to whom the conditions for the entitlement of the offender's family member to the benefit in question are satisfied, or the amount of benefit payable in the case of the offender's family member would fall to be determined<sup>48</sup>.

The Secretary of State may by regulations provide for any social security benefit<sup>49</sup> to be treated for the purposes of the above provisions as a disqualifying benefit but not a sanctionable benefit, or as neither a sanctionable benefit nor a disqualifying benefit<sup>50</sup>. The Secretary of State may by regulations provide for any of the above restrictions not to apply in relation to payments of benefit to the extent of any deduction that, if any payment were made, would fall, in pursuance of provision made by or under any enactment, to be made from the payments and paid to a person other than the offender or, as the case may be, a member of his family<sup>51</sup>.

1    Ie the Social Security Fraud Act 2001 s 6B(4) below.

2    'Benefit offence' means (1) any post-commencement offence in connection with a claim for a disqualifying benefit; (2) any post-commencement offence in connection with the receipt or payment of any amount by way of such a benefit; (3) any post-commencement offence committed for the purpose of facilitating the commission (whether or not by the same person) of a benefit offence; (4) any post-commencement offence consisting in an attempt or conspiracy to commit a benefit offence: Social Security Fraud Act 2001 s 6B(13) (ss 6A-6C added by the Welfare Reform Act 2009 s 24). 'Post-commencement offence' means any criminal offence committed after the commencement of the Social Security Fraud Act 2001 s 6B (ie after 1 April 2010: SI 2010/45): Social Security Fraud Act 2001 s 6B(13) (s 6B as added). For the purposes of s 6B and s 7 below, 'disqualifying benefit' means (subject to any regulations under s 10(1) below): (a) any benefit under the Jobseekers Act 1995; (b) any benefit under the State Pension Credit Act 2002; (c) any benefit under the Welfare Reform Act 2007 Pt 1 (ss 1-29) (employment and support allowance); (d) any benefit under the Social Security Contributions and Benefits Act 1992 other than maternity allowance, statutory sick pay and statutory maternity pay; (e) any war pension: Social Security Fraud Act 2001 s 6A(1) (s 6A as added).

3    Ie under the Social Security Fraud Act 2001 s 6B(2) below.

4    For these purposes 'the appropriate penalty provision' means the Social Security Administration Act 1992 s 115A (penalty as alternative to prosecution) (see PARA 405); and 'appropriate authority' means, in relation to s 115A, the Secretary of State or an authority which administers housing benefit or council tax benefit: Social Security Fraud Act 2001 s 6B(2) (s 6B as added: see NOTE 2).

5    Ie mentioned in the Social Security Administration Act 1992 s 115A(1)(b).

6    Social Security Fraud Act 2001 s 6B(1) (s 6B as added: see NOTE 2).

7    For the purposes of the Social Security Fraud Act 2001 s 6B and s 7 below, 'sanctionable benefit' means (subject to any regulations under s 10(1)) any disqualifying benefit other than joint-claim jobseeker's allowance, any retirement pension, graduated retirement benefit, disability living allowance, attendance allowance, child benefit, guardian's allowance, a payment out of the social fund in accordance with the Social Security Contributions and Benefits Act 1992 Pt VIII (ss 138-140) or Pt X (ss 148-150): Social Security Fraud Act 2001 s 6A(1) (s 6A as added: see NOTE 2).

8    For these purposes the disqualification period, in relation to any disqualifying event, means the period of four weeks beginning with such date, falling after the date of the disqualifying event, as may be determined by or in accordance with regulations made by the Secretary of State: Social Security Fraud Act 2001 s 6B(11) (s 6B as added: see NOTE 2). 'Disqualifying event' means the conviction falling within s 6B(1)(a) (see TEXT head (1)), the agreement falling within s 6B(1)(b) (see TEXT head (2)) or the caution falling within s 6B(1)(c) (see TEXT head (3)): s 6B(13) (s 6B as added).

9 Social Security Fraud Act 2001 s 6B(4) (s 6B as added: see NOTE 2). Section 6B(4) does not apply by virtue of s 6B(1)(a) (see TEXT head (1)) if, because the proceedings in which the offender was convicted constitute the later set of proceedings for the purposes of s 7 below, the restriction in s 7(2) applies in the offender's case: s 6B(3) (s 6B as added).

10 Ie subject to the Social Security Fraud Act 2001 s 6B(6)-(10) below.

11 Social Security Fraud Act 2001 s 6B(5) (s 6B as added: see NOTE 2).

12 Ie under the Social Security Contributions and Benefits Act 1992 s 124(4) (see REGISTRATION CONCERNING THE INDIVIDUAL vol 39(2) (Reissue) PARA 526).

13 Social Security Fraud Act 2001 s 6B(6) (s 6B as added: see NOTE 2).

14 Social Security Fraud Act 2001 s 6B(7) (s 6B as added: see NOTE 2).

15 Social Security Fraud Act 2001 s 6B(8) (s 6B as added: see NOTE 2).

16 Social Security Fraud Act 2001 s 6B(9) (s 6B as added: see NOTE 2).

17 Social Security Fraud Act 2001 s 6B(10) (s 6B as added: see NOTE 2). Section 6B has effect subject to s 6C: s 6B(12) (s 6B as added). See further s 6C which makes provisions supplementary to those set out in s 6B.

18 Where the conviction of any person of any offence is taken into account for the purposes of the application of the Social Security Fraud Act 2001 s 7 (see TEXT AND NOTES 22-27) in relation to that person, and that conviction is subsequently quashed, all such payments and other adjustments must be made as would be necessary if no restriction had been imposed by or under s 7 that could not have been imposed if the conviction had not taken place: s 7(7). Like provision is made by s 8(6) in relation to joint-claim couples, and by s 9(6) in relation to the members of an offender's family. For further provision in relation to joint-claim couples and family members see ss 8(7)-(9), 9(7)-(9) respectively (both added by the Welfare Reform Act 2009 Sch 4 paras 3(7), 4(3)).

19 'Benefit offence' means any offence committed after the commencement of these provisions (1) in connection with a claim for a disqualifying benefit; (2) in connection with the receipt or payment of any amount by way of such a benefit; (3) for the purpose of facilitating the commission, whether or not by the same person, of a benefit offence; (4) consisting in an attempt or conspiracy to commit a benefit offence: Social Security Fraud Act 2001 s 7(8). For the meaning of 'disqualifying benefit' see NOTE 2. See also NOTE 35.

20 Ie Social Security Fraud Act 2001 ss 7-9.

21 For the meaning of 'sanctionable benefit' see NOTE 7. See also NOTE 35.

22 The disqualification period, in relation to the conviction of a person of one or more benefit offences in each of two separate sets of proceedings, means the period of 13 weeks beginning with such date, falling after the date of the conviction in the later set of proceedings, as may be determined by or in accordance with regulations made by the Secretary of State: *ibid* s 7(6). The first day of the disqualification period is (1) where, on the determination day the offender is in receipt of a sanctionable benefit, the offender is a member of a joint-claim couple which is in receipt of a joint-claim jobseeker's allowance, or the offender's family member is in receipt of income support, jobseeker's allowance, state pension credit, employment and support allowance, housing benefit or council tax benefit, the day which is 28 days after the determination day; (2) where head (1) does not apply, the day which is 28 days after the first day after the determination day on which the Secretary of State decides to award a sanctionable benefit to the offender, a joint-claim jobseeker's allowance to a joint-claim couple of which the offender is a member, or income support or jobseeker's allowance, state pension credit or employment and support allowance; (3) where the only sanctionable benefits which the offender or, as the case may be, the offender's family member, is in receipt of are housing benefit or council tax benefit or both of them, the day which is 28 days after the first day after the determination day on which the Secretary of State is notified by the relevant authority (ie, the relevant authority administering the offender's or the offender's family member's housing benefit or council tax benefit) that the offender or an offender's family member is in receipt of either or both of those benefits or, as the case may be, has been awarded either or both of those benefits: Social Security (Loss of Benefit) Regulations 2001, SI 2001/4022, reg 2(1) (amended by SI 2002/486, SI 2002/1792, SI 2007/2202, SI 2008/1554). The first day of the disqualification period must be no later than 5 years and 28 days after the date of the conviction of the offender for the benefit offence in the later proceedings: SI 2001/4022 reg 2(2) (amended by SI 2002/486, SI 2008/787). The date of a person's conviction in any proceedings of a benefit offence is taken to be the date on which he was found guilty of that offence in those proceedings, whenever he was sentenced, or in the case mentioned in head (b) below the date of the order for absolute discharge; and references to a conviction include references to (a) a conviction in relation to which the court makes an order for absolute or conditional discharge or a court in Scotland makes a probation

order; (b) an order for absolute discharge made by a court of summary jurisdiction in Scotland under the Criminal Procedure (Scotland) Act 1995 s 246(3) without proceeding to a conviction; and (c) a conviction in Northern Ireland: Social Security Fraud Act 2001 s 7(9) (amended by the Welfare Reform Act 2009 Sch 4 para 2(3)). 'The determination day' means the day on which the Secretary of State determines that a restriction under s 7 would be applicable to the offender were he in receipt of a sanctionable benefit, under s 8 would be applicable to the offender were he a member of a joint-claim couple which is in receipt of a joint-claim jobseeker's allowance, or under s 9 would be applicable to the offender's family member were that member in receipt of income support, jobseeker's allowance, state pension credit, employment and support allowance, housing benefit or council tax benefit: SI 2001/4022 reg 2(3) (amended by SI 2002/1792, SI 2008/1554).

23 Social Security Fraud Act 2001 s 7(1) (amended by Welfare Reform Act 2007 s 49(1)).

24 Social Security Fraud Act 2001 s 7(2).

25 Ie under the Social Security Contributions and Benefits Act 1992 s 124(4): see PARA 183.

26 Social Security Fraud Act 2001 s 7(3). 'Prescribed' means prescribed by or determined in accordance with regulations made by the Secretary of State: s 11(1) (amended by the Welfare Reform Act 2009 Sch 4 para 6).

Any payment of income support or an income-related employment and support allowance which falls to be made to an offender in respect of any week in the disqualification period, or to an offender's family member in respect of any week in the relevant period, must be reduced (1) where the claimant or a member of his family is pregnant or seriously ill, by a sum equivalent to 20 per cent; (2) where the applicable amount of the offender used to calculate that payment of income support has been reduced pursuant to the Income Support (General) Regulations 1987, SI 1987/1967, reg 22A, whether or not the appeal referred to in reg 22 is successful, by a sum equivalent to 20 per cent; (3) in any other case, by a sum equivalent to 40 per cent, of the applicable amount of the offender in respect of a single claimant for income support on the first day of the disqualification period or, as the case may be, on the first day of the relevant period, and specified in Sch 2 para 1(1): SI 2001/4022 reg 3(1) (amended by SI 2008/1554, SI 2010/424). Payment must not be reduced to below 10p per week: reg 3(2). A reduction must, if it is not a multiple of 5p, be rounded to the nearest such multiple or, if it is a multiple of 2.5p but not of 5p, to the next lower multiple of 5p: reg 3(3). Where the rate of income support or an income-related employment and support allowance payable to an offender or an offender's family member changes, the above provisions apply to the new rate and any adjustment to the reduction takes effect from the first day of the first benefit week to start after the date of the change: reg 3(5) (amended by SI 2008/1554).

27 Social Security Fraud Act 2001 s 7(4). The Secretary of State may by regulations provide that, where the sanctionable benefit is employment and support allowance, any income-related allowance will be payable, during the whole or a part of any period comprised in the disqualification period, as if one or more of the following applied (1) the rate of the allowance were such reduced rate as may be prescribed; (2) the allowance were payable only if there is compliance by the offender with such obligations with respect to the provision of information as may be imposed by the regulations; (3) the allowance were payable only if the circumstances are otherwise such as may be prescribed: s 7(4B) (added by the Welfare Reform Act 2007 Sch 3 para 23(2)). 'Income-related allowance' has the same meaning as in the Welfare Reform Act 2007 Pt 1: Social Security Fraud Act 2001 s 13 (amended by 2007 Act Sch 3 para 23(8)).

28 Any payment of housing benefit or, as the case may be, council tax benefit which falls to be made to an offender in respect of any week in the disqualification period or to an offender's family member in respect of any week in the relevant period is reduced (1) where the claimant or a member of his family is pregnant or seriously ill, by a sum equivalent to 20 per cent; (2) in any other case, by a sum equivalent to 40 per cent, of the amount which is or, where he is not the claimant or is not single, would be applicable to the offender in respect of a single claimant for those benefits on the first day of the disqualification period or, where the payment falls to be made to an offender's family member, on the first day of the relevant period and specified in the Housing Benefit Regulations 2006, SI 2006/213, Sch 3 para 1, the Housing Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006, SI 2006/214, Sch 3 para 1(1), the Council Tax Benefit Regulations 2006, SI 2006/215, Sch 1 para 1(1) or the Council Tax Benefit (Persons who have attained the qualifying age for state pension credit) Regulations 2006, SI 2006/216, Sch 1 para 1(1): SI 2001/4022 reg 17(1) (amended by SI 2006/217). A reduction, if it is not a multiple of 5p, is rounded to the nearest such multiple or, if it is a multiple of 2.5p but not of 5p, to the next lower multiple of 5p: reg 17(2). Where the rate of housing benefit or council tax benefit payable to a claimant changes, the above provisions must be applied to the new rates and any adjustment to the reduction take effect from the beginning of the first benefit week to commence for the claimant following the change: reg 17(3).

29 Social Security Fraud Act 2001 s 7(5). Housing benefit or, as the case may be, council tax benefit is payable to an offender or to an offender's family member (1) where the offender is the claimant, he is entitled to either of those benefits during the disqualification period; (2) where the offender's family member is the claimant, he is entitled to either of those benefits during the relevant period, and the claimant is, at the same time, also entitled to income support or to an income-based jobseeker's allowance: SI 2001/4022 reg 18.

30 'Person in hardship' means a person where (1) she is a single woman who is pregnant and in respect of whom the Secretary of State is satisfied that, unless a jobseeker's allowance is paid, she will suffer hardship; (2) he is a single person who is responsible for a young person and the Secretary of State is satisfied that, unless a jobseeker's allowance is paid, the young person will suffer hardship; (3) he is a member of a couple where at least one member of the couple is a woman who is pregnant; and, and the Secretary of State is satisfied that, unless a jobseeker's allowance is paid, the woman will suffer hardship; (4) he is a member of a polygamous marriage and one member of the marriage is pregnant, and the Secretary of State is satisfied that, unless a jobseeker's allowance is paid, that woman will suffer hardship; (5) he is a member of a couple or of a polygamous marriage where one or both members of the couple, or one or more members of the polygamous marriage, are responsible for a child or young person, and the Secretary of State is satisfied that, unless a jobseeker's allowance is paid, the child or young person will suffer hardship; (6) he has an award of a jobseeker's allowance which includes or would, if a claim for a jobseeker's allowance from him were to succeed, have included in his applicable amount a disability premium and the Secretary of State is satisfied that, unless a jobseeker's allowance is paid, the person who would satisfy the conditions of entitlement to that premium would suffer hardship; (7) he suffers, or his partner suffers, from a chronic medical condition which results in functional capacity being limited or restricted by physical impairment and the Secretary of State is satisfied that the suffering has already lasted, or is likely to last, for not less than 26 weeks, and unless a jobseeker's allowance is paid to that person, the probability is that the health of the person suffering would, within two weeks of the Secretary of State making his decision, decline further than that of a normally healthy adult and that person would suffer hardship; (8) he does, or his partner does, or in the case of a person who is married to more than one person under a law which permits polygamy, at least one of those persons does, devote a considerable portion of each week to caring for another person who is in receipt of an attendance allowance or the care component of disability living allowance at one of the two higher rates prescribed under the Social Security Contributions and Benefits Act 1992 s 72(4) (see PARA 90), has claimed either attendance allowance or disability living allowance, but only for so long as the claim has not been determined, or for 26 weeks from the date of claiming, whichever is the earlier, or has claimed either attendance allowance or disability living allowance and has an award of either attendance allowance or the care component of disability living allowance at one of the two higher rates prescribed under s 72(4) for a period commencing after the date on which that claim was made, and the Secretary of State is satisfied, after taking account of certain factors (see SI 2001/4022 reg 5(5); and NOTE 32), in so far as they are appropriate to the particular circumstances of the case, that the person providing the care will not be able to continue doing so unless a jobseeker's allowance is paid to the offender; (9) he is a person or is the partner of a person to whom the Jobseekers Act 1995 s 16 (see PARA 318) applies by virtue of a direction issued by the Secretary of State, except where the person to whom the direction applies does not satisfy the requirements of s 1(2)(a)-(c); (10) he is a person to whom s 3(1)(f)(iii) (see PARA 271) applies, or is the partner of such a person, and in respect of whom the Secretary of State is satisfied that the person will, unless a jobseeker's allowance is paid, suffer hardship; or (11) he is a person who, pursuant to the Children Act 1989, was being looked after by a local authority, or with whom the local authority had a duty, pursuant to the 1989 Act, to take reasonable steps to keep in touch, or who, pursuant to the 1989 Act, qualified for advice and assistance from a local authority, but in respect of whom had not applied for a period of 3 years or less as at the date on which he complies with the requirements of SI 2001/4022 reg 9 *infra*, and who, as at the date on which he complies with the requirements of reg 9, is under the age of 21: reg 5(1) (amended by SI 2005/2877). Head (8) does not apply in a case where the person being cared for resides in a care home, an Abbeyfield Home or an independent hospital: SI 2001/4022 reg 5(4) (amended by SI 2005/2687).

The offender or, as the case may be, any member of his family, must provide to the Secretary of State information as to the circumstances of the person alleged to be in hardship: SI 2001/4022 reg 9.

31 Ibid reg 6(2).

32 A person is deemed to be a person in hardship where, after taking account of certain factors (see *ibid* reg 5(5) *infra*) in so far as they are appropriate to the particular circumstances of the case, the Secretary of State is satisfied that he or his partner will suffer hardship unless a jobseeker's allowance is paid to him: reg 5(2). Factors which the Secretary of State must take into account in determining whether the person is a person in hardship are (1) the presence in that person's family of a person who satisfies the requirements for a disability premium or for a disabled child premium; (2) the resources which, without a jobseeker's allowance, are likely to be available to the offender's family, the amount by which these resources fall short of the amount applicable in his case, the amount of any resources which may be available to members of the offender's family from any person in the offender's household who is not a member of his family and the length of time for which those factors are likely to persist; (3) whether there is a substantial risk that essential items, including food, clothing, heating and accommodation, will cease to be available to that person or a member of his family, or will be available at considerably reduced levels and the length of time those factors are likely to persist: reg 5(5). In determining the resources available to that person's family under head (2), any training premium or top-up payment paid pursuant to the Employment and Training Act 1973 must be disregarded: SI 2001/4022 reg 5(6).

The weekly applicable amount (as referred to in head (2)) of a person to whom an income-based jobseeker's allowance is payable in accordance with regs 5-10 must be reduced by a sum equivalent to 40 per cent or, in a case where the claimant or any other member of his family is either pregnant or seriously ill, 20 per cent of the following amount: (a) where the claimant is a single claimant aged not less than 18 but less than 25 or a member of a couple or polygamous marriage where one member is aged not less than 18 but less than 25 and

the other member or, in the case of a polygamous marriage each other member, is a person under 18 who is not eligible for an income-based jobseeker's allowance or is not subject to a direction, the amount specified in the Jobseeker's Allowance Regulations 1996, SI 1996/207, Sch 1 para 1(1)(d); (b) where the claimant is a single claimant aged not less than 25 or a member of a couple or a polygamous marriage (other than a member of a couple or polygamous marriage to whom head (a) applies) at least one of whom is aged not less than 18, the amount specified in Sch 1 para 1(1)(e): SI 2001/4022 reg 10.

33 Ibid reg 7(2). For the purposes of heads (IV) and (V) of the text a person is not deemed to be a person in hardship where he is entitled, or his partner is entitled, to income support or where he or his partner fall within a category of persons prescribed for the purpose of the Social Security Contributions and Benefits Act 1992 s 124(1)(e) (see PARA 177), or during any period in respect of which it has been determined that a jobseeker's allowance is not payable to him pursuant to the Jobseekers Act 1995 s 19 (see PARAS 304-306): SI 2001/4022 reg 5(3) (amended by SI 2010/424).

34 SI 2001/4022 reg 8(1). The completed and signed form must be delivered by the claimant to such office as the Secretary of State may specify: reg 8(2).

35 Social Security Fraud Act 2001 s 8(1) (amended by the Welfare Reform Act 2009 Sch 4 para 3(2)). For these purposes 'an offence-related restriction' means the restriction in the Social Security Fraud Act 1991 s 6B(5) (see TEXT AND NOTES 10, 11) or the restriction in s 7(2) (see TEXT AND NOTE 24); and in relation to an offence-related restriction, any reference to the relevant period is a reference to a period which is the disqualification period for the purposes of s 6B or 7, as the case requires: s 8(1A) (added by the Welfare Reform Act 2009 Sch 4 para 3(3)).

36 Social Security Fraud Act 2001 s 8(2) (amended by Welfare Reform Act 2009 s 1(5), Sch 4 para 3(4), Sch 7 Pt 3). The Secretary of State may by regulations provide in relation to such cases that joint-claim jobseeker's allowance is payable in a couple's case, during the whole or a part of so much of any period comprised in the relevant period, as if the rate of the allowance were such reduced rate as may be prescribed (see NOTE 39), and/or the allowance were payable only if there is compliance by each of the members of the couple with such obligations with respect to the provision of information as may be imposed by the regulations, and/or the allowance were payable only if the circumstances are otherwise such as may be prescribed: 2001 Act s 8(4) (amended by Welfare Reform Act 2009 Sch 4 para 3(6)).

For the meaning of 'relevant benefit' see PARA 176A.1 NOTE 3.

37 In respect of any part of the disqualification period when ibid s 8(2) does not apply, the reduced rate of joint-claim jobseeker's allowance payable to the member of that couple who is not the offender is (1) in any case in which the member of the couple who is not the offender satisfies the conditions set out in the Jobseekers Act 1995 s 2, a rate equal to the amount calculated in accordance with s 4(1); (2) in any case where the couple are a couple in hardship for the purposes of SI 2001/4022 reg 11 (see NOTE 41), a rate equal to the amount calculated in accordance with reg 16 (see NOTE 43); (3) in any other case, a rate calculated in accordance with the Jobseekers Act 1995 s 4(3A) save that the applicable amount must be the amount determined by reference to the Jobseeker's Allowance Regulations 1996, SI 1996/207, Sch 1 para 1(1) as if the member of the couple who is not the offender were a single claimant: SI 2001/4022 reg 4.

38 Social Security Fraud Act 2001 s 8(3) (amended by the Welfare Reform Act 2009 Sch 4 para 3(5)). The Jobseekers Act 1995 s 20A(6) (see PARA 304A) applies for the purposes of the 2001 Act s 8(3) as it applies for the purposes of the Jobseekers Act 1995 s 20A(5): 2001 Act s 8(5).

39 A 'couple in hardship' means a joint-claim couple who are claiming a joint-claim jobseeker's allowance jointly where at least one member of that couple is an offender and where (1) at least one member of the joint-claim couple is a woman who is pregnant and the Secretary of State is satisfied that, unless a joint-claim jobseeker's allowance is paid, she will suffer hardship; (2) one or both members of the couple are members of a polygamous marriage, one member of the marriage is pregnant and the Secretary of State is satisfied that, unless a joint-claim jobseeker's allowance is paid, she will suffer hardship; (3) the award of a joint-claim jobseeker's allowance includes, or would, if a claim for a jobseeker's allowance from the couple were to succeed, have included in their applicable amount a disability premium and the Secretary of State is satisfied that, unless a joint-claim jobseeker's allowance is paid, the member of the couple who would have caused the disability premium to be applicable to the couple would suffer hardship; (4) either member of the couple suffers from a chronic medical condition which results in functional capacity being limited or restricted by physical impairment and the Secretary of State is satisfied that the suffering has already lasted or is likely to last, for not less than 26 weeks, and, unless a joint-claim jobseeker's allowance is paid, the probability is that the health of the person suffering would, within two weeks of the Secretary of State making his decision, decline further than that of a normally healthy adult and the member of the couple who suffers from that condition would suffer hardship; (5) either member of the couple, or where a member of that couple is married to more than one person under a law which permits polygamy, one member of that marriage, devotes a considerable portion of each week to caring for another person who is in receipt of an attendance allowance or the care component of disability living allowance at one of the two higher rates prescribed under the Social Security Contributions and Benefits Act 1992 s 72(4), has claimed either attendance allowance or disability living allowance, but only for so

long as the claim has not been determined, or for 26 weeks from the date of claiming, whichever is the earlier, or has claimed either attendance allowance or disability living allowance and has an award of either attendance allowance or the care component of disability living allowance at one of the two aforementioned higher rates for a period commencing after the date on which that claim was made, and the Secretary of State is satisfied, after taking account certain factors (see SI 2001/4022 reg 11(6); and NOTE 43) in so far as they are appropriate to the particular circumstances of the case, that the person providing the care will not be able to continue doing so unless a joint-claim jobseeker's allowance is paid; or (6) the Jobseekers Act 1995 s 16 applies to either member of the couple by virtue of a direction issued by the Secretary of State, except where the member of the joint-claim couple to whom the direction applies does not satisfy the requirements of s 1(2)(a)-(c); (7) s 3A(1)(e)(ii) applies to either member of the couple and the Secretary of State is satisfied that unless a joint-claim jobseeker's allowance is paid, the couple will suffer hardship; or (8) one or both members of the couple is a person who, pursuant to the Children Act 1989, was being looked after by a local authority, or with whom the local authority had a duty, pursuant to the 1989 Act, to take reasonable steps to keep in touch, or who, pursuant to the 1989 Act, qualified for advice or assistance from a local authority, but had not applied for a period of 3 years or less as at the date on which the requirements of SI 2001/4022 reg 15 (see NOTE 43) are complied with, and who, as at the date on which the requirements of reg 15 are complied with, is under the age of 21: reg 11(2) (amended by SI 2005/2877). Head (5) does not apply in a case where the person being cared for resides in a care home, an Abbeyfield Home or an independent hospital: SI 2001/4022 reg 11(5) (amended by SI 2005/2687).

40 SI 2001/4022 reg 12(2). As to the categories see SI 1996/207 Sch A1.

41 If a joint-claim couple deemed to be a couple in hardship where the Secretary of State is satisfied, after taking account of certain factors in so far as they are appropriate to the particular circumstances of the case, that the couple will suffer hardship unless a joint-claim jobseeker's allowance is paid: SI 2001/4022 reg 13(2). Those factors are (1) the presence in the joint-claim couple of a person who satisfies the requirements for a disability premium; (2) the resources which, without a joint-claim jobseeker's allowance, are likely to be available to the joint-claim couple, the amount by which these resources fall short of the amount applicable in their case, the amount of any resources which may be available to the joint-claim couple from any person in the couple's household who is not a member of the family and the length of time for which those factors are likely to persist; (3) whether there is a substantial risk that essential items, including food, clothing, heating and accommodation, will cease to be available to the joint-claim couple, or will be available at considerably reduced levels, the hardship that will result and the length of time those factors are likely to persist: reg 11(6). In determining the resources available to that person's family under head (2), any training premium or top-up payment paid pursuant to the Employment and Training Act 1973 is to be disregarded: SI 2001/4022 reg 11(7).

The weekly applicable amount (as referred to in head (2)) of a couple to whom an joint-claim jobseeker's allowance is payable in accordance with regs 11-16 must be reduced by a sum equivalent to 40 per cent or, in a case where a member of the joint-claim couple is either pregnant or seriously ill or where a member of the joint-claim couple is a member of a polygamous marriage and one of those members is either pregnant or seriously ill, 20 per cent of the following amount: (a) where one member of the joint-claim couple or of the polygamous marriage is aged not less than 18 but less than 25 and the other member or, in the case of a polygamous marriage, each other member, is a person under 18 or is not subject to a direction, the amount specified in SI 1996/207 Sch 1 para 1(1)(d); (b) where one member of the joint-claim couple or at least one member of the polygamous marriage (other than a member of a couple or polygamous marriage to whom head (a) applies) is aged not less than 18, the amount specified in Sch 1 para 1(1)(e): SI 2001/4022 reg 16.

42 Ibid reg 13(2). See NOTE 44.

43 Ibid reg 14(1). The completed and signed form must be delivered by a member of the couple to such office as the Secretary of State may specify: reg 14(2). A member of the couple must also provide to the Secretary of State information as to the circumstances of the alleged hardship of the couple: reg 15.

44 In relation to cases in which the benefit is income support, the provision that may be made is provision that, in the case of the offender's family member, the benefit is payable for the whole or any part of any period comprised in the relevant period as if the applicable amount used for the determination under the Social Security Contributions and Benefits Act 1992 s 124(4) (see PARA 183) of the amount of the offender's entitlement for that period were reduced in such manner as may be prescribed: Social Security Fraud Act 2001 s 9(3).

45 In relation to cases in which the benefit is jobseeker's allowance, the provision that may be made is provision that, in the case of the offender's family member, any income-based jobseeker's allowance is payable, during the whole or a part of any period comprised in the relevant period, as if the rate of the allowance were such reduced rate as may be prescribed, and/or the allowance were payable only if there is compliance by the offender or the offender's family member, or both of them, with such obligations with respect to the provision of information as may be imposed by the regulations (see NOTE 27), and/or the allowance were payable only if the circumstances are otherwise such as may be prescribed: Social Security Fraud Act 2001 s 9(4).

46 In relation to cases in which the benefit is housing benefit or council tax benefit, the provision that may be made provision that, in the case of the offender's family member, the benefit is payable, during the whole or a part of any period comprised in the relevant period, as if the rate of the benefit were reduced in such manner as may be prescribed, and/or the benefit were payable only if the circumstances are such as may be prescribed: Social Security Fraud Act 2001 s 9(5).

47 Ie under Social Security Fraud Act 2001 s 6B or 7.

48 Social Security Fraud Act 2001 s 9(1), (2) (s 9(1) amended by 2007 Act Sch 3 para 23(4); 2001 Act s 9(2) amended by Welfare Reform Act 2006 Sch 4 para 4(2)). In relation to cases in which the benefit is employment and support allowance, the provision that may be made by virtue of the 2001 Act s 9(2) is provision that, in the case of the offender's family member, any income-related allowance is to be payable, during the whole or a part of any period comprised in the relevant period, as if one or more of the following applied (1) the rate of the allowance were such reduced rate as may be prescribed; (2) the allowance were payable only if there is compliance by the offender or the offender's family member, or both of them, with such obligations with respect to the provision of information as may be imposed by the regulations; (3) the allowance were payable only if circumstances are otherwise such as may be prescribed: s 9(4B) (added by 2007 Act Sch 3 para 23(5)).

49 'Social security benefit' means any benefit under the Social Security Contributions and Benefits Act 1992, any benefit under the Jobseekers Act 1995, or any war pension: Social Security Fraud Act 2001 s 10(3). Definition of 'social security benefit' amended to include any benefit under the Welfare Reform Act 2007 Pt 1 (employment and support allowance) or under any provision having effect in Northern Ireland corresponding to the 2007 Act Pt 1: Social Security Fraud Act 2001 s 10(3) (amended by 2007 Act Sch 3 para 23(6)).

50 Social Security Fraud Act 2001 s 10(1) (amended by the Welfare Reform Act 2009 Sch 4 para 5(2)). The following social security benefits are to be treated as a disqualifying benefit but not a sanctionable benefit: (1) constant attendance allowance payable under the Naval, Military and Air Forces Etc (Disablement and Death) Service Pensions Order 1983, SI 1983/883, art 14 or under the Personal Injuries (Civilians) Scheme 1983, SI 1983/686, art 14 or 43; (2) exceptionally severe disablement allowance payable under SI 1983/883 art 15 or SI 1983/686 art 15 or 44; (3) mobility supplement payable under SI 1983/883 art 26A or SI 1983/686 art 25A or 48A; (4) constant attendance allowance and exceptionally severe disablement allowance, payable under the Social Security Contributions and Benefits Act 1992 ss 104 and 105 respectively where a disablement pension is payable under s 103; and (5) a bereavement payment payable under s 36 of the Benefits Act: SI 2001/4022 reg 19.

51 Social Security Fraud Act 2001 s 10(2) (amended by the Welfare Reform Act 2009 Sch 4 para 5(2)). SI 2001/4022 reg 20 (amended by SI 2010/1160) accordingly provides that any restriction in the 2001 Act s 6B, 7, 8 or 9 does not apply in relation to payments of benefit to the extent of any deduction from the payments which falls to be made under regulations made under the Social Security Administration Act 1992 s 5(1)(p), or in place of child support maintenance (ie such maintenance which is payable under the Child Support Act 1991).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(7) OTHER ENFORCEMENT PROVISIONS/405. Legal proceedings.

#### **405. Legal proceedings.**

Any person authorised by the Secretary of State<sup>1</sup> may conduct any proceedings under the Social Security Administration Act 1992 or the Jobseekers Act 1995 before a magistrates' court although not a barrister or solicitor<sup>2</sup>.

Proceedings for an offence<sup>3</sup> may be begun at any time within the period of three months from the date on which evidence, sufficient in the opinion of the Secretary of State to justify a prosecution for the offence, comes to his knowledge or within a period of 12 months from the commission of the offence, whichever period last expires<sup>4</sup>.

Any proceedings in respect of any act or omission of an adjudication officer which would otherwise fall to be brought against a person who is resident in Northern Ireland<sup>5</sup>, other than proceedings for an offence, may instead be brought against the Chief Adjudication Officer; and, for the purposes of any proceedings so brought, the acts or omissions of the adjudication officer must be treated as the acts or omissions of the Chief Adjudication Officer<sup>6</sup>.

Where certain questions<sup>7</sup> arise in any proceedings (1) for an offence under the Social Security Administration Act 1992 or the Jobseekers Act 1995; or (2) involving any question as to the payment of contributions<sup>8</sup>; or (3) for the recovery of any sums due to the Secretary of State or the National Insurance Fund, the decision of the Secretary of State is conclusive for the purposes of the proceedings<sup>9</sup>. If a decision of any such question is necessary for the determination of the proceedings and the decision of the Secretary of State has not been obtained, or a question has been raised with a view to the review of the decision obtained, the question must be referred to the Secretary of State for determination or review<sup>10</sup>.

As from a day to be appointed<sup>11</sup>, where an overpayment<sup>12</sup> is recoverable from a person by the Secretary of State or an authority (or is due from a person to him or to an authority) and it appears to the Secretary of State or the authority that (a) the making of the overpayment was attributable to an act or omission on the part of that person; and (b) there are grounds for instituting proceedings against him for an offence relating to the overpayment, then the Secretary of State or the authority may give to the person a written notice stating that he may be invited to agree to pay a penalty<sup>13</sup> and that, if he does so in the manner specified by the Secretary of State or authority, no such proceedings will be instituted against him<sup>14</sup>. If the person agrees in the specified manner to pay the penalty, the amount of the penalty is recoverable by the same methods as those by which the overpayment is recoverable<sup>15</sup> and no proceedings will be instituted against him for an offence relating to the overpayment<sup>16</sup>. The person may withdraw his agreement to pay the penalty by notifying the Secretary of State or authority, in the manner specified by the Secretary of State or authority, at any time during the period of 28 days beginning with the day on which he agrees to pay it<sup>17</sup>. If he does withdraw his agreement, so much of the penalty as has already been recovered must be repaid and the exemption from liability to prosecution<sup>18</sup> will not apply<sup>19</sup>. Where, after a person has agreed to pay the penalty, it is decided on a review or appeal or in accordance with regulations that the overpayment is not recoverable or due, so much of the penalty as has already been recovered must be repaid<sup>20</sup>. Where, after the person has agreed to pay the penalty, the amount of the overpayment is revised on a review or appeal or in accordance with regulations, so much of the penalty as has already been recovered must be repaid and the exemption from liability to prosecution will no longer apply by reason of that agreement; but if a new agreement is made in relation to the revised overpayment, the amount already recovered by way of penalty (to the extent that it does not exceed the amount of the new penalty) may be treated as recovered under the new agreement instead of being repaid<sup>21</sup>.

- 1 As to the Secretary of State see PARA 1 ante.
- 2 Social Security Administration Act 1992 s 116(1) (amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 56). References to the Social Security Administration Act 1992 in s 116 (as amended) include references to certain provisions of the Pension Schemes Act 1993: see s 167(1), (2).
- 3 Is an offence under the Social Security Administration Act 1992 other than an offence relating to housing benefit or council tax benefit (see HOUSING vol 22 (2006 Reissue) PARA 140 et seq; RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 371 et seq) or an offence under the Jobseekers Act 1995.
- 4 Social Security Administration Act 1992 s 116(2)(a) (amended by the Local Government Finance Act 1992 s 103, Sch 9 para 17; and the Jobseekers Act 1995 Sch 2 para 56). For these purposes, a certificate purporting to be signed by or on behalf of the Secretary of State as to the date on which sufficient evidence came to his knowledge is conclusive evidence of that date: Social Security Administration Act 1992 s 116(3)(a).  
Section 116(2) (as amended) must not be taken to impose any restriction on the time when proceedings may be begun for an offence under s 111A (as added) (see PARA 404 ante): s 116(2A) (added by the Social Security Administration (Fraud) Act 1997 s 22, Sch 1 para 5).
- 5 Is a person who is appointed by virtue of the Social Security Administration Act 1992 s 38(1)(b): see PARA 359 ante.
- 6 Ibid s 116(6).
- 7 Is any such question as is mentioned in ibid s 17(1) (as amended): see PARA 357 ante.
- 8 Is other than a Class 4 contribution recoverable by the Inland Revenue: see PARA 43 ante. As to unpaid contributions see PARA 406 post.
- 9 Social Security Administration Act 1992 s 117(1) (amended by the Jobseekers Act 1995 Sch 2 para 57). As to the National Insurance Fund see PARA 8 ante.  
This provision does not apply if an appeal under the Social Security Administration Act 1992 s 18 (see PARA 358 ante) is pending, or the time for appealing has not expired, or a question has been raised with a view to a review of the Secretary of State's decision under s 19 (see PARA 358 ante); and the court dealing with the case must adjourn the proceedings until such time as a final decision on the question has been obtained: s 117(3).
- 10 See ibid s 117(2).
- 11 At the date at which this volume states the law no such day had been appointed.
- 12 For these purposes, 'overpayment' means (1) a payment which should not have been made; (2) a sum which the Secretary of State should have received; (3) an amount of benefit paid in excess of entitlement; or (4) an amount equal to an excess of benefit allowed: Social Security Administration Act 1992 s 115A(8) (s 115A prospectively added by the Social Security Administration (Fraud) Act 1997 s 15).
- 13 The amount of the penalty must be 30% of the amount of the overpayment, rounded down to the nearest whole penny: Social Security Administration Act 1992 s 115A(3) (as prospectively added: see note 12 supra).
- 14 Ibid s 115A(2)(a) (as prospectively added: see note 12 supra). The notice must also contain such information relating to the operation of these provisions as may be prescribed: s 115A(2)(b) (as so added).
- 15 Ibid s 115A(4)(a) (as prospectively added: see note 12 supra). As to recovery see PARA 388 et seq ante.
- 16 Ibid s 115A(4)(b) (as prospectively added: see note 12 supra).
- 17 Ibid s 115A(5) (as prospectively added: see note 12 supra).
- 18 See the text and note 16 supra.
- 19 Social Security Administration Act 1992 s 115A(5) (as prospectively added: see note 12 supra).
- 20 Ibid s 115A(6) (as prospectively added: see note 12 supra).
- 21 Ibid s 115A(7) (as prospectively added: see note 12 supra).

## UPDATE

### 330-450 Administration

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### 405 Legal proceedings

TEXT AND NOTES--The Secretary of State and an authority which administers housing benefit or council tax benefit may agree that, to the extent determined by the agreement, one may carry out on the other's behalf, or may join in the carrying out of, any of the other's functions under the 1992 Act s 115A, but the function of the person by whom any overpayment is recoverable, or to whom it is due, of determining whether or not a notice should be given under s 115A(2) in respect of that overpayment, or the Secretary of State's power to make regulations for the purposes of s 115A(2)(b) are not so delegable: s 115A(7A), (7B) (added by the Social Security Fraud Act 2001 s 14).

In relation to proceedings before a court for an offence under the Social Security Administration Act 1992 or the Jobseekers Act 1995, or involving any question as to the payment of contributions (other than a Class 4 contribution recoverable in accordance with the Social Security Contributions and Benefits Act 1992 s 15), or for the recovery of any sums due to the Inland Revenue or the National Insurance Fund, a decision of an officer of the Inland Revenue which falls within the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 8(1), and relates to or affects an issue arising in the proceedings, is to be conclusive for the purposes of the proceedings: Social Security Administration Act 1992 s 117A(1), (2) (s 117A added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 13). If any such decision is necessary for the determination of the proceedings, and the decision of an officer of the Inland Revenue has not been obtained under the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 8, the decision must be referred to such an officer to be made in accordance (subject to any necessary modifications) with Pt II (ss 8-19): Social Security Administration Act 1992 s 117A(3) (s 117A as added). A decision under s 117A(2) is not to be deemed conclusive where, in relation to the decision, an appeal has been brought but not determined, or an appeal has not been brought (or, as the case may be, an application for leave to appeal has not been made) but the time for doing so has not yet expired, or an application for variation of the decision has been made under regulations made under the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 10: Social Security Administration Act 1992 s 117A(4) (s 117A as added). In such a case the court must adjourn the proceedings until such time as the final decision is known; and that decision is to be conclusive for the purposes of the proceedings: s 117A(5) (s 117A as added). Under s 117A, while the court is entitled to strike out proceedings, it must consider whether the administration of justice requires that: *Revenue and Customs Comrs v Hyde Industrial Holdings Ltd* [2006] EWCA Civ 502, [2006] All ER (D) 281 (Apr).

As to local authority powers to prosecute benefit fraud see PARA 405B.

TEXT AND NOTES 1, 2--For 'under the Social Security Administration Act 1992 or' read 'under any provision of the Social Security Administration Act 1992 other than s 114 (see PARA 404) or under any provision of': s 116(1) (amended by the Social Security

Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 21). Any person authorised by the Inland Revenue may conduct any proceedings under the 1992 Act s 114 before a magistrates' court although not a barrister or solicitor: s 116(5A) (added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 21).

TEXT AND NOTE 4--In relation to proceedings for an offence under the Social Security Administration Act 1992 s 114 (see PARA 404), the references in s 116(2)(a), (3)(a) to the Secretary of State have effect as references to the Inland Revenue: s 116(5A) (amended by Welfare Reform and Pensions Act 1999 Sch 11 para 5). See *Eyeson v Milton Keynes CC* [2005] EWHC 1160, [2005] HLR 626, DC (authority could not delay commencement of proceedings because it needed more information before deciding whether prosecution would be in the public interest).

NOTE 4--There are a number of principles which can be distilled from the relevant authorities as to the limited circumstances in which a court can go behind a certificate as to the date on which there is sufficient evidence to justify a prosecution; as to such principles see *Azam v Epping Forest DC* [2009] All ER (D) 146 (Oct), DC.

TEXT AND NOTES 5, 6--Repealed: Social Security Act 1998 Sch 7 para 83, Sch 8 (in force except for certain purposes: SI 1999/3178).

TEXT AND NOTES 7-10--Social Security Administration Act 1992 s 117 now as substituted by the Social Security Act 1998 Sch 7 para 84. A decision of the Secretary of State which falls within Sch 3 Pt II (paras 16, 17) and relates to or affects an issue arising in the proceedings, is conclusive for the purposes of the proceedings: Social Security Administration Act 1992 s 117(2).

TEXT AND NOTE 8--Class 4 contributions recoverable by the Inland Revenue are excluded: Social Security Administration Act 1992 s 117(1) (see TEXT AND NOTES 7-10).

TEXT AND NOTE 9--Head (3) now includes the Inland Revenue: Social Security Administration Act 1992 s 117(1)(b) (see TEXT AND NOTES 7-10).

TEXT AND NOTES 11-21--The Social Security Administration Act 1992 s 115A does not apply in any case where the overpayment is in respect of tax credit: Tax Credits Act 1999 Sch 2 para 15(a) (repealed subject to savings (SI 2003/962): Tax Credits Act 2002 Sch 6).

NOTE 11--Day now appointed are: SI 1997/2766.

NOTE 14--As to regulations made under the Social Security Administration Act 1992 s 115A(2)(b), see Social Security (Penalty Notice) Regulations 1997, SI 1997/2813.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(7) OTHER ENFORCEMENT PROVISIONS/405A. Proceedings in respect of benefit fraud: colluding employers.

#### **405A. Proceedings in respect of benefit fraud: colluding employers.**

Where it appears to the Secretary of State or an authority that administers housing benefit or council tax benefit that there are grounds for instituting proceedings against any person ('the responsible person') for an offence, whether or not under the Social Security Administration Act 1992, in respect of any conduct<sup>1</sup>, and that the conduct in respect of which there are grounds for instituting the proceedings is (1) conduct in connection with an inquiry relating to the employment of relevant employees<sup>2</sup> or of any one or more particular relevant employees; or (2) it is conduct which was such as to facilitate the commission of a benefit offence<sup>3</sup> by a relevant employee, whether or not such an offence was in fact committed, the Secretary of State or authority may give to the responsible person a written notice specifying or describing the conduct in question, stating that he may be invited to agree to pay a penalty in respect of that conduct, stating that, if he does so in the manner specified by the Secretary of State or authority, no criminal proceedings will be instituted against him in respect of that conduct, and containing such information as may be prescribed<sup>4</sup>. If the recipient of such a notice agrees, in the specified manner, to pay the penalty the amount of the penalty will be recoverable as a civil debt, and will be capable of being set off against an amount of relevant benefit payable to the recipient of the notice, and no criminal proceedings will be instituted against him in respect of the conduct to which the notice relates<sup>5</sup>. The amount of the penalty is, in a case in which the conduct in question falls within head (1) above but not within head (2) above, £1,000; in a case in which that conduct falls within head (2) above and the number of relevant employees is five or more, £5,000; and, in any other case, the amount obtained by multiplying £1,000 by the number of relevant employees<sup>6</sup>.

The responsible person may withdraw his agreement to pay a penalty by notifying the Secretary of State or authority, in the manner specified by the Secretary of State or authority, at any time during the period of 28 days beginning with the day on which he agrees to pay it<sup>7</sup>. Where the responsible person so withdraws his agreement, so much of the penalty as has already been recovered must be repaid, and the restriction on the institution of criminal proceedings is lifted<sup>8</sup>.

1 'Conduct' includes acts, omissions and statements: Social Security Administration Act 1992 s 115B(9) (s 115B added by the Social Security Fraud Act 2001 s 15(1)).

2 An individual is a relevant employee in relation to any conduct of the responsible person if (1) that conduct was at or in relation to a time when that individual was an employee of the responsible person; (2) that conduct was at or in relation to a time when that individual was an employee of a body corporate of which the responsible person is or has been a director; or (3) the responsible person, in engaging in that conduct, was acting or purporting to act on behalf of, in the interests of or otherwise by reason of his connection with, any person by whom that individual is or has been employed: Social Security Administration Act 1992 s 115B(8). 'Employee' means any person who is employed under a contract of service or apprenticeship, or in an office, including an elective office, or carries out any work under any contract under which he has undertaken to provide his work, and 'employment' is to be construed accordingly; 'director', in relation to a company, includes a shadow director, in relation to any such company that is a subsidiary of another, includes any director or shadow director of the other company, and, in relation to a body corporate whose affairs are managed by its members, means a member of that body corporate; and 'shadow director' means a shadow director as defined in the Companies Act 2006 s 251: 1992 Act s 115B(9) (s 115B(9) amended by the Companies Act 2006 (Commencement No 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007, SI 2007/2194; SI 2009/1941).

3 For the meaning of 'benefit offence' see PARA 401 NOTE 7.

4 Social Security Administration Act 1992 s 115B(1)-(3).

5 Ibid s 115B(4). Section 71(10) (see PARA 388) applies in relation to an amount recoverable as a civil debt as it applies in relation to an amount recoverable under the provisions mentioned in s 71(8) (see PARA 391): s 115B(4).

6 Ibid s 115B(5).

7 Ibid s 115B(6).

8 Ibid s 115B(7).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(7) OTHER ENFORCEMENT PROVISIONS/405B. Local authority powers to prosecute benefit fraud.

#### **405B. Local authority powers to prosecute benefit fraud.**

The following provisions<sup>1</sup> apply if an authority administering housing benefit or council tax benefit has power to bring proceedings for a benefit offence relating to that benefit<sup>2</sup>. The authority may bring proceedings for a benefit offence relating to any other relevant social security benefit<sup>3</sup> unless (1) the proceedings relate to any benefit or circumstances or any description of benefit or circumstances which the Secretary of State prescribes for the purposes of this provision, or (2) the Secretary of State has directed that the authority must not bring the proceedings, and a direction under head (2) above may relate to a particular authority or description of authority or to particular proceedings or any description of proceedings<sup>4</sup>. If the Secretary of State prescribes conditions for the purposes of these provisions, an authority must not bring proceedings under these provisions unless any such condition is satisfied<sup>5</sup>. The Secretary of State may continue proceedings which have been brought by an authority under these provisions as if the proceedings had been brought in his name or he may discontinue the proceedings if (a) he makes provision under head (1) above, such that the authority would no longer be entitled to bring the proceedings under these provisions, (b) he gives a direction under head (2) above in relation to the proceedings, or (c) a condition prescribed<sup>6</sup> ceases to be satisfied in relation to the proceedings<sup>7</sup>. An authority must not bring proceedings for a benefit offence which does not relate to housing benefit or council tax benefit otherwise than in accordance with the above provisions<sup>8</sup>.

1    Ie the Social Security Administration Act 1992 s 116A.

2    Ibid s 116A(1) (added by Welfare Reform Act 2007 s 47).

3    In the 1992 Act s 116A(2), 'relevant social security benefit' has the same meaning as in s 121DA (see PARA 404): s 116A(7).

4    Ibid s 116A(2). In the exercise of its power under s 116A(2), a local authority must have regard to the Code for Crown Prosecutors issued by the Director of Public Prosecutions under the Prosecution of Offences Act 1985 s 10 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 359) (1) in determining whether the proceedings should be instituted; (2) in determining what charges should be preferred; (3) in considering what representations to make to a magistrates' court about mode of trial; (4) in determining whether to discontinue proceedings: 1992 Act s 116A(5). For the purposes of text head (1), the benefits prescribed are all relevant social security benefits except for (a) income support; (b) a jobseeker's allowance; (c) incapacity benefit; (d) state pension credit; (e) an employment and support allowance: Social Security (Local Authority Investigations and Prosecutions) Regulations 2008, SI 2008/463, reg 3.

5    1992 Act s 116A(3).

6    Ie under ibid s 116A(3).

7    Ibid s 116A(4).

8    Ibid s 116A(6).

#### **UPDATE**

#### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(7) OTHER ENFORCEMENT PROVISIONS/406. Proceedings for unpaid contributions.

#### **406. Proceedings for unpaid contributions.**

A certificate of a collector of taxes that any amount by way of contributions<sup>1</sup> which a person is liable to pay to that collector for any period<sup>2</sup> has not been paid to him, or to the best of his knowledge and belief to any other person to whom it might lawfully be paid, is until the contrary is proved sufficient evidence in any proceedings before any court that the sum mentioned in the certificate is unpaid and due<sup>3</sup>.

A statutory declaration by an officer of the Secretary of State<sup>4</sup> that the searches specified in the declaration for a particular contribution card<sup>5</sup> or for a record of the payment of a particular contribution have been made, and that the card in question or a record of the payment of the contribution in question has not been found, is admissible in any proceedings for an offence as evidence of the facts stated in the declaration<sup>6</sup>. However, nothing in this provision makes a statutory declaration admissible as evidence in proceedings for an offence except in a case where, and to the extent to which, oral evidence to the like effect would have been admissible in those proceedings<sup>7</sup>. A statutory declaration is not admissible as evidence in proceedings for an offence unless a copy of it has, not less than seven days before the hearing or trial, been served on the person charged with the offence in any manner in which a summons may be served; nor is it admissible if that person, not later than three days before the hearing or trial or within such further time as the court may in special circumstances allow, gives notice to the prosecutor requiring the attendance at the trial of the person by whom the declaration was made<sup>8</sup>.

Where a person has been convicted of an offence<sup>9</sup> of failing to pay a contribution at or within the time prescribed for the purpose, and the contribution remains unpaid at the date of the conviction, he is liable to pay to the Secretary of State a sum equal to the amount which he failed to pay<sup>10</sup>. Where a person is convicted of certain offences in relation to contribution stamps<sup>11</sup> and (1) the evidence on which he is convicted shows that he, for the purposes of paying any contribution which he was liable or entitled to pay, has affixed to any contribution card any used contribution stamp<sup>12</sup>; and (2) the contribution<sup>13</sup> in respect of which the stamp was affixed remains unpaid at the date of the conviction<sup>14</sup>, he is liable to pay to the Secretary of State a sum equal to the amount of the contribution<sup>15</sup>.

Where a person is convicted of an offence<sup>16</sup>, evidence may be given of any previous failure by him to pay contributions within the time prescribed for the purpose<sup>17</sup>. Such evidence may be given only if notice of intention to give it is served with the summons or the warrant on which the person appeared before the court which convicted him<sup>18</sup>. On proof of any matter of which evidence may be given under these provisions, the person convicted is liable to pay to the Secretary of State a sum equal to the total of all the amounts which he is so proved to have failed to pay and which remain unpaid at the date of the conviction<sup>19</sup>. Where in England and Wales a person charged with an offence<sup>20</sup> is convicted of that offence in his absence<sup>21</sup>, then if (a) it is proved to the satisfaction of the court<sup>22</sup> that notice has been duly served specifying the other contributions in respect of which the prosecutor intends to give evidence; and (b) the clerk of the court has received a statement in writing, purporting to be made by the accused or by a solicitor acting on his behalf, to the effect that if the accused is convicted in his absence of the offence charged he desires to admit failing to pay the other contributions so specified or any of them, these provisions<sup>23</sup> have effect as if the evidence had been given and the failure so admitted had been proved, and the court must proceed accordingly<sup>24</sup>. In England and Wales, where a person is convicted of an offence<sup>25</sup> and an order is made<sup>26</sup> placing the offender on

probation or discharging him absolutely or conditionally, these provisions<sup>27</sup> apply as if it were a conviction for all purposes<sup>28</sup>.

In England and Wales, any sum which a person is liable to pay<sup>29</sup> is recoverable from him as a penalty<sup>30</sup>. Sums recovered by the Secretary of State under these provisions<sup>31</sup>, so far as representing contributions of any class, are to be treated for all purposes of the Social Security Contributions and Benefits Act 1992 and the Social Security Administration Act 1992 as contributions of that class received by the Secretary of State<sup>32</sup>.

1 As to contributions see PARA 31 et seq ante.

2 Ie any period during which, under regulations made by virtue of the Social Security Contributions and Benefits Act 1992 s 1(4), Sch 1 para 6(1) (see PARA 49 ante), contributions fall to be paid in like manner as income tax: see the Social Security Administration Act 1992 s 118(1). Section 118(1) refers to the Social Security Contributions and Benefits Act 1992 Sch 1 para 5(1), but it seems that it should be read as a reference to Sch 1 para 6(1). As to income tax see generally INCOME TAXATION.

3 Social Security Administration Act 1992 s 118(2). A document purporting to be such a certificate must be deemed to be such a certificate until the contrary is proved: s 118(3).

4 As to the Secretary of State see PARA 1 ante.

5 For the meaning of 'contribution card' see PARA 404 note 12 ante. In practice, contributions are no longer paid in this manner.

6 Social Security Administration Act 1992 s 118(4).

7 Ibid s 118(5). As to admissibility of oral evidence see generally CIVIL PROCEDURE VOL 11 (2009) PARA 749 et seq.

8 Ibid s 118(6).

9 Ie an offence under ibid s 114(1) (as amended): see PARA 404 ante.

10 Ibid s 119(1).

11 Ie (1) an offence under ibid s 114(4)(b) (see PARA 404 ante); or (2) an offence under the Stamp Duties Management Act 1891 s 13 (as amended) (as applied by regulations made under the Social Security Contributions and Benefits Act 1992 s 8 (as amended), Sch 1 para 8(3)); or (3) an offence of contravening or failing to comply with regulations: see the Social Security Administration Act 1992 s 119(2)(a). Section 119(2)(a) refers to s 114(3)(b) and the Social Security Contributions and Benefits Act 1992 Sch 1 para 7(3), but it is submitted that it should be read as referring to the Social Security Administration Act 1992 s 114(4)(b) and the Social Security Contributions and Benefits Act 1992 Sch 1 para 8(3) respectively.

12 Ibid s 119(2)(b).

13 Ie a contribution not being a Class 3 contribution: see PARA 42 ante.

14 Social Security Administration Act 1992 s 119(2)(c).

15 Ibid s 119(2).

16 See notes 9, 11 supra.

17 See the Social Security Administration Act 1992 s 120(1).

If the offence is one of failure to pay a Class 1 contribution, evidence may be given of failure on his part to pay, whether or not in respect of the same person, such contributions or any Class 1A contributions or contributions equivalent premiums on the date of the offence or during the two years preceding that date: s 120(3) (amended by the Pensions Act 1995 s 151, Sch 5 para 15).

If the offence is one of failure to pay Class 1A contribution, evidence may be given of failure on his part to pay, whether or not in respect of the same person or the same car, such contributions or any Class 1 contributions or contributions equivalent premiums on the date of the offence or during the two years preceding that date: Social Security Administration Act 1992 s 120(4) (amended by the Pensions Act 1995 Sch 5 para 15).

If the offence is one of failure to pay Class 2 contributions or is one of those mentioned in note 11 *supra*, evidence may be given of his failure to pay such contributions during those two years: Social Security Administration Act 1992 s 120(5).

18 Ibid s 120(2).

19 Ibid s 120(6).

20 See notes 9, 11 *supra*.

21 Ie under the Magistrates' Courts Act 1980 s 12(2) (as substituted): see MAGISTRATES.

22 Ie on oath or in the manner prescribed by rules under ibid s 144 (as amended): see MAGISTRATES.

23 Ie the Social Security Administration Act 1992 s 120 (as amended).

24 Ibid s 121(1).

25 See notes 9, 11 *supra*.

26 Ie under the Powers of Criminal Courts Act 1973 Pt I (ss 1-46) (as amended).

27 Ie the Social Security Administration Act 1992 ss 119, 120 (as amended), s 121(1).

28 Ibid s 121(2).

29 Ie under the provisions mentioned in note 27 *supra*.

30 Social Security Administration Act 1992 s 121(4).

31 Ie under the provisions mentioned in note 27 *supra*.

32 Social Security Administration Act 1992 s 121(5). In so far as such sums represent primary Class 1 or Class 2 contributions, they are to be treated as contributions paid in respect of the person in respect of whom they were originally payable; and enactments relating to earnings factors apply accordingly: s 121(6).

## **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### **406 Proceedings for unpaid contributions**

TEXT AND NOTES--As to the liability of directors for contributions which a body corporate has failed to pay within the prescribed time see the Social Security Administration Act 1992 s 121C (added by Social Security Act 1998 s 64; and amended by National Insurance Contributions and Statutory Payments Act 2004 s 5(3)). As to appeals against personal liability notices served under the Social Security Administration Act 1992 s 121C, see s 121D (added by Social Security Act 1998 s 64). The Social Security Administration Act 1992 ss 121C, 121D apply in relation to amounts which the Commissioners of Inland Revenue have paid or credited to a body corporate for the purpose of funding tax credit, and which the body is liable, and has failed, to repay, as they apply in relation to national insurance contributions which a body corporate is liable, and has failed, to pay: Tax Credits Act 1999 s 11 (repealed subject to savings (SI 2003/962): Tax Credits Act 2002 Sch 6).

TEXT AND NOTES 1-3--Replaced. A certificate of an authorised officer that any amount by way of contributions, or by way of interest or penalty in respect of contributions, which a person is liable to pay to the Inland Revenue for any period has not been paid to the officer; or to the best of his knowledge and belief, to any other person to whom it might lawfully be paid, is until the contrary is proved sufficient evidence in any proceedings before any court that the sum mentioned in the certificate is unpaid and due: Social Security Administration Act 1992 s 118(1) (substituted by Social Security Act 1998 s 62(1); and amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 5 para 7). Social Security Administration Act 1992 s 118(2) repealed: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 5 para 7, Sch 10. 'Authorised officer' means any officer of the Inland Revenue authorised by it for the purposes of the 1992 Act s 118: s 118(7) (substituted by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 5 para 7).

NOTE 1--The goods and chattels of a person who neglects or refuses to pay the contributions, interest or penalty to which a certificate under the Social Security Administration Act 1992 s 118(1) relates within 7 days of being served with the certificate may be distrained by an officer of the Secretary of State authorised for the purpose: see s 121A (added by the 1998 Act s 63; and amended by the Welfare Reform and Pensions Act 1999 Sch 11 para 6; and the 2004 Act s 5(1)). As to the fees chargeable, and the costs and charges recoverable, see the Distraint by Authorised Officers (Fees, Costs and Charges) Regulations 1999, SI 1999/980.

NOTE 3--Social Security Administration Act 1992 s 118(3) amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 5 para 7.

TEXT AND NOTE 4--For 'Secretary of State' read 'Inland Revenue': Social Security Administration Act 1992 s 118(4) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 5 para 7).

TEXT AND NOTES 5, 6--Words 'for a particular contribution card or' and 'the card in question or' repealed: Social Security Administration Act 1992 s 118(4) (amended by Social Security Act 1998 Sch 8).

TEXT AND NOTE 10--For 'Secretary of State' read 'Inland Revenue': Social Security Administration Act 1992 s 119(1) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 22).

TEXT AND NOTES 11-15--Social Security Administration Act 1992 s 119(2) repealed: Social Security Act 1998 Sch 7 para 85, Sch 8.

TEXT AND NOTES 16-19--Social Security Administration Act 1992 s 120 amended: Social Security Act 1998 Sch 7 para 86, Sch 8.

NOTE 16--Reference to offences mentioned in NOTE 11 (ie mentioned in Social Security Administration Act 1992 s 119(2)(a)) omitted: s 120(1) (amended by Social Security Act 1998 Sch 7 para 86(2)(a), Sch 8).

NOTE 17--Social Security Administration Act 1992 s 120(1) amended: Social Security Act 1998 Sch 8. In the Social Security Administration Act 1992 s 120(4) (amended by Social Security Act 1998 Sch 7 para 86(3)(a); and Child Support, Pensions and Social Security Act 2000 s 74(6)), for 'Class 1A' read 'Class 1A or Class 1B', and for 'car' read 'amount'. In the Social Security Administration Act 1992 s 120(5) (amended by Social Security Act 1998 Sch 8) words 'or is one of those mentioned in NOTE 11 omitted.

If the offence is one of failure to pay a Class 1B contribution (see PARA 39A), evidence may be given of failure on his part to pay such contributions, or any Class 1 or Class 1A contributions or contributions equivalent premiums, on the date of the offence, or

during the six years preceding that date: Social Security Administration Act 1992 s 120(4A) (added by Social Security Act 1998 Sch 7 para 86(4)).

TEXT AND NOTE 19--For 'Secretary of State' read 'Inland Revenue': s 120(6) (amended by Social Security Act 1998 Sch 7 para 86(6); and Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 23).

TEXT AND NOTES 21-28--Social Security Administration Act 1992 121(1), (2) amended: Social Security Act 1998 Sch 7 para 87, Sch 8.

NOTE 21--Now under the Magistrates' Courts Act 1980 Act s 12(5) (see MAGISTRATES vol 29(2) (Reissue) PARA 706): Social Security Administration Act 1992 s 121(1) (amended by Magistrates' Courts (Procedure) Act 1998 s 4(2)(a)).

NOTE 22--Now, in the manner prescribed by Criminal Procedure Rules: 1992 Act s 121(1)(a) (amended by Courts Act 2003 Sch 8 para 355(a)).

NOTE 26--1973 Act consolidated in Powers of Criminal Courts (Sentencing) Act 2000. See generally CRIMINAL LAW, EVIDENCE AND PROCEDURE.

TEXT AND NOTES 31, 32--References to the Secretary of State are now to the Inland Revenue: 1992 Act s 121(5) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 24).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(8) ADVISORY BODIES AND CONSULTATION/407. The Social Security Advisory Committee.

## **(8) ADVISORY BODIES AND CONSULTATION**

### **407. The Social Security Advisory Committee.**

The Social Security Advisory Committee<sup>1</sup> is to give advice and assistance to the Secretary of State<sup>2</sup> or the Northern Ireland department<sup>3</sup> in connection with the discharge of his or its functions under the relevant enactments<sup>4</sup> and to perform such other duties as may be assigned to the committee under any enactment<sup>5</sup>. The Secretary of State may from time to time refer to the committee for consideration and advice such questions relating to the operation of any of the relevant enactments as he thinks fit, including questions as to the advisability of amending any of them<sup>6</sup>. The Secretary of State must furnish the committee with such information as it may reasonably require for the proper discharge of its functions<sup>7</sup>.

Where the Secretary of State proposes to make regulations under any of the relevant enactments, he must refer the proposals in the form of draft regulations or otherwise to the committee<sup>8</sup>. The committee must consider any proposals referred to it and must make a report to the Secretary of State containing such recommendations with regard to the subject matter of the proposals as it thinks appropriate<sup>9</sup>. If, after receiving a report of the committee, the Secretary of State lays before Parliament any regulations or draft regulations which comprise the whole or any part of the subject matter of the proposals referred to the committee, he must lay with them a copy of the report, accompanied by a statement showing the extent (if any) to which he has, in framing the regulations, given effect to the committee's recommendations and, in so far as effect has not been given to them, his reasons why not<sup>10</sup>.

1 The Social Security Advisory Committee was constituted under the Social Security Act 1980 s 9 (mainly repealed), and is continued in being by the Social Security Administration Act 1992 s 170(1). As to the constitution of the committee see s 170(2), Sch 5.

2 As to the Secretary of State see PARA 1 ante.

3 As to the Northern Ireland Office see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 67-86, 518.

4 'The relevant enactments' means (1) the provisions of the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992 and the Social Security (Incapacity for Work) Act 1994, except as they apply to industrial injuries benefit and Old Cases payments (see PARA 126 et seq ante); (2) the provisions of the Jobseekers Act 1995; (3) the Child Support Act 1995 s 10; (4) the provisions of the Social Security (Recovery of Benefits) Act 1997; and (5) the provisions of the Social Security (Consequential Provisions) Act 1992, except as they apply to industrial injuries benefit: s 170(5) (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 Pt II para 51; the Jobseekers Act 1995 s 41(4), Sch 2 para 67; the Child Support Act 1995 s 30(5), Sch 3 para 20; and the Social Security (Recovery of Benefits) Act 1997 s 33(1), Sch 3 paras 2, 8). As to the relevant enactments in relation to Northern Ireland see the Social Security Administration Act 1992 s 170(5) (as amended).

5 Social Security Administration Act 1992 s 170(1).

6 Ibid s 170(3).

7 Ibid s 170(4).

8 Ibid s 172(1). In relation to regulations required or authorised to be made by the Secretary of State in conjunction with the Treasury, the reference in this provision to the Secretary of State must be construed as a reference to the Secretary of State and the Treasury: ss 172(5), 174(4).

Certain regulations are exempted from the requirements of s 172(1): see s 172(3), Sch 7 Pt I (as amended). There are also certain cases where consultation is not required: see PARA 409 post.

9 Ibid s 174(1).

10 See *ibid* s 174(2). If regulations are laid at a time when Parliament is not sitting, these requirements are satisfied as respects either House of Parliament if a copy of the report and statement are laid before that house not later than the second day on which the House sits after the laying of the regulations: s 174(3).

For examples of the operation of s 174 see the *Report on the Social Security (Social Fund and Claims and Payments) (Miscellaneous Amendments) Regulations 1997 (SI 1997/792)* (Cm 3585); and the *Report on the Social Security (Miscellaneous Amendments) (No 2) Regulations 1997 (SI 1997/793)* (Cm 3586).

## UPDATE

### 330-450 Administration

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

### 407 The Social Security Advisory Committee

NOTE 4--'The relevant enactments' also means (6) the Social Security Act 1998 Pt I Ch II (ss 8-39); (7) the Welfare Reform and Pensions Act 1999 ss 60, 72, 79; (8) the Child Support, Pensions and Social Security Act 2000 ss 42, 68-70, Sch 7; (9) the Social Security Fraud Act 2001 ss 6A-11; (10) the State Pension Credit Act 2002; (11) the Age-Related Payments Act 2004 s 7; (12) the provisions of the Welfare Reform Act 2007 Pt 1 (ss 1-29); and (13) ss 32, 33: Social Security Administration Act 1992 s 170(5) (amended by the 1998 Act Sch 7 para 104; the 1999 Act Sch 12 para 81(a); the 2000 Act s 73(1), (2); the 2001 Act s 12(3)(a); the 2002 Act Sch 2 para 20; the 2004 Act s 7(5); the 2007 Act Sch 3 para 10(28); and the Welfare Reform Act 2009 Sch 4 para 9, Sch 7 Pt 3).

NOTE 7--See *Howker v Secretary of State for Work and Pensions* [2002] EWCA Civ 1623, [2003] ICR 405 (provision, by Secretary of State, of incorrect information to committee led to invalidity of amended regulations).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(8) ADVISORY BODIES AND CONSULTATION/408. The Industrial Injuries Advisory Council.

#### **408. The Industrial Injuries Advisory Council.**

There is an Industrial Injuries Advisory Council<sup>1</sup>, to which the Secretary of State<sup>2</sup> may from time to time refer for consideration and advice such questions as he thinks fit relating to industrial injuries benefit or its administration<sup>3</sup>. The council may also give advice to the Secretary of State on any other matter relating to such benefit or its administration<sup>4</sup>.

Where the Secretary of State proposes to make regulations relating only to industrial injuries benefit or its administration, he must refer the proposals in the form of draft regulations or otherwise to the council for consideration and advice<sup>5</sup>.

1 The Industrial Injuries Advisory Council was constituted under the National Insurance (Industrial Injuries) Act 1965 s 62 (repealed), and is continued in being by the Social Security Administration Act 1992 s 171(1). As to the constitution of the council see s 171(2), Sch 6.

2 As to the Secretary of State see PARA 1 ante.

3 Social Security Administration Act 1992 s 171(3). As to industrial injuries benefit see PARA 126 et seq ante.

4 Ibid s 171(4).

5 Ibid s 172(2). Certain regulations are exempted from the requirements of s 172(2): see s 172(4), Sch 7 Pt II (as amended). There are also certain cases where consultation is not required: see PARA 409 post.

#### **UPDATE**

#### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(8) ADVISORY BODIES AND CONSULTATION/409. Cases in which consultation is not required.

#### **409. Cases in which consultation is not required.**

Nothing in any enactment requires any proposals in respect of regulations<sup>1</sup> to be referred to the Social Security Advisory Committee<sup>2</sup> or the Industrial Injuries Advisory Council<sup>3</sup> if (1) it appears to the Secretary of State<sup>4</sup> that by reason of the urgency of the matter it is inexpedient so to refer them<sup>5</sup>; or (2) the relevant advisory body has agreed that they are not to be referred<sup>6</sup>.

Where the Secretary of State has referred proposals to the committee or council, he may make the proposed regulations before the committee has made its report or, as the case may be, the council has given its advice only if after the reference it appears to him that by reason of the urgency of the matter it is expedient to do so<sup>7</sup>.

Nothing in any enactment<sup>8</sup> is to require the reference to the committee or the council of any regulations contained in either:

- 1160 (a) a statutory instrument made before the end of the period of six months beginning with the coming into force of the enactment under which those regulations are made; or
- 1161 (b) a statutory instrument which states that it contains only regulations made by virtue of, or consequential upon, a specified enactment and which is made before the end of the period of six months beginning with the coming into force of that specified enactment<sup>9</sup>.

1 'Regulations' means regulations under any enactment, whenever passed: Social Security Administration Act 1992 s 173(7).

2 As to the Social Security Advisory Committee see PARA 407 ante.

3 As to the Industrial Injuries Advisory Council see PARA 408 ante.

4 As to the Secretary of State see PARA 1 ante. In relation to regulations required or authorised to be made by the Secretary of State in conjunction with the Treasury, any reference in these provisions to the Secretary of State must be construed as a reference to the Secretary of State and the Treasury: Social Security Administration Act 1992 s 173(6).

5 Ibid s 173(1)(a). Where the Secretary of State by virtue of this provision makes regulations without referring the proposals, then, unless the relevant advisory body agrees to the contrary, he must refer the regulations to that body as soon as practicable after making them: s 173(2).

6 Ibid s 173(1)(b).

7 Ibid s 173(3). Where, by virtue of these provisions, regulations are made before a report of the committee has been made, the committee must consider them and make a report to the Secretary of State containing such recommendations with regard to the regulations as it thinks appropriate: s 173(4). A copy of any such report is to be laid before each House of Parliament together, if the report contains recommendations, with a statement of the extent (if any) to which the Secretary of State proposes to give effect to the recommendations and, in so far as he does not propose to give effect to them, of his reasons why not: s 173(4).

8 Ie except to the extent that ibid s 173(5) is excluded by an enactment passed after 25 July 1986: see s 173(5).

9 Ibid s 173(5).

#### **UPDATE**

### **330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/11. ADMINISTRATION/(8) ADVISORY BODIES AND CONSULTATION/410-450. The Disability Living Allowance Advisory Board.

#### **410-450. The Disability Living Allowance Advisory Board.**

There is also a Disability Living Allowance Advisory Board<sup>1</sup>. Regulations confer on the board such functions relating to disability living allowance or attendance allowance<sup>2</sup> as the Secretary of State<sup>3</sup> thinks fit, and make provision for (1) the board's constitution; (2) the qualifications of its members; (3) the method of their appointment; (4) the term of office and other terms of appointment of its members; (5) their removal<sup>4</sup>. Regulations may also make provision (a) enabling the board to appoint persons as advisers to it on matters on which in its opinion they are specially qualified; (b) for the appointment of officers and servants of the board; (c) enabling the board to act notwithstanding any vacancy among its members; (d) enabling the board to make rules for regulating its procedure, including its quorum<sup>5</sup>.

The expenses of the board to such an amount as may be approved by the Treasury must be paid by the Secretary of State out of money provided by Parliament<sup>6</sup>.

The Secretary of State may furnish the board with such information as he considers that it may need to enable it to discharge its functions<sup>7</sup>.

The board has the following functions in relation to disability living allowance and attendance allowance, namely:

- 1162 (i) to give advice to the Secretary of State on such matters as he may refer to it for consideration;
- 1163 (ii) to give advice to a medical practitioner who is an officer of the Secretary of State on any case or question which is referred to the board<sup>8</sup>;
- 1164 (iii) to present an annual report on its activities over the year to the Secretary of State<sup>9</sup>.

1 The Disability Living Allowance Advisory Board was constituted under the Disability Living Allowance and Disability Working Allowance Act 1991 s 3(1) (repealed), and is continued in being by the Social Security Administration Act 1992 s 175(1). See also the Disability Living Allowance Advisory Board Regulations 1991, SI 1991/1746, which came into force on 12 August 1991: see reg 1.

2 As to disability living allowance and attendance allowance see PARAS 102-116 ante.

3 As to the Secretary of State see PARA 1 ante.

4 Social Security Administration Act 1992 s 175(2). As to the regulations made see the Disability Living Allowance Advisory Board Regulations 1991, SI 1991/1746, regs 3-5.

5 Social Security Administration Act 1992 s 175(3). As to the regulations made see the Disability Living Allowance Advisory Board Regulations 1991, SI 1991/1746, regs 2(2), 6, 8.

6 Social Security Administration Act 1992 s 175(4). There may be paid as part of the expenses of the board (1) to all or any of the members of the board, such salaries or other remuneration and travelling and other allowances; (2) to advisers of the board, such fees; and (3) to such other persons as may be specified in regulations, such travelling and other allowances (including compensation for loss of remunerative time), as the Secretary of State may with the consent of the Treasury determine: s 175(5). See also the Disability Living Allowance Advisory Board Regulations 1991, SI 1991/1746, reg 7.

7 Social Security Administration Act 1992 s 175(6).

8 As to referral to a medical practitioner, and referral by such a medical practitioner to the board, see *ibid* s 54 (as amended); and PARA 375 ante.

- 9 Disability Living Allowance Advisory Board Regulations 1991, SI 1991/1746, reg 2(1).

**UPDATE**

**330-450 Administration**

As to the sharing of functions as regards claims for social security benefits, and information relating to such claims, see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 384.

As to the supply and use of social security information between ministers, local authorities and certain other bodies, see PARA 330A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/12. EUROPEAN COMMUNITY LAW/(1) INTRODUCTION/451. Nature of European Community Law.

## 12. EUROPEAN COMMUNITY LAW

### (1) INTRODUCTION

#### 451. Nature of European Community Law.

The principles of European Community law form a distinct 'European Community legal order' which is an integral part of the legal systems of the member states and takes precedence over all national law, including legislation<sup>1</sup>. In the context of social security, the relevant legislative provisions of European Community law are to be found principally in the following: (1) the EC Council Directive on equal treatment for men and women<sup>2</sup>, which requires member states to eliminate discrimination between men and women in matters of social security<sup>3</sup>; (2) the EC Council Regulation on freedom of movement for workers<sup>4</sup>, which prohibits discrimination against workers in relation to social advantages on the ground of nationality<sup>5</sup>; and (3) the EC Council Regulation on social security for migrant persons<sup>6</sup>, which promotes freedom of movement of employed and self-employed persons by eliminating the disadvantages which would be suffered by migrant workers from the application of national social security provisions alone<sup>7</sup>. Other European Community legislative provisions, not dealing with social security as such, may occasionally affect particular benefits<sup>8</sup>.

Without prejudice to other provisions of the EC Treaty<sup>9</sup> and in conformity with its general objectives, the Commission of the European Communities (the 'EC Commission') has the task of promoting close co-operation between member states in the social field, including, among other things, matters relating to social security<sup>10</sup>. To this end the EC Commission is required to act in close contact with member states by making studies, delivering opinions and arranging consultations both in problems arising at national level and those of concern to international organisations<sup>11</sup>.

The Council of the European Communities (the 'EC Council') may, acting unanimously and after consulting the Economic and Social Committee<sup>12</sup>, assign to the EC Commission tasks in connection with the implementation of common measures, particularly as regards social security for migrant workers<sup>13</sup>.

If action by the Community proves necessary to attain, in the course of the operation of the common market, one of the objectives of the European Community<sup>14</sup> and the EC Treaty has not provided the necessary powers, the EC Council must, acting unanimously on a proposal from the EC Commission and after consulting the European Parliament<sup>15</sup>, take the appropriate measures<sup>16</sup>.

1 See eg Case 26/62 *NV Algemene Transport-en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, [1963] CMLR 105, ECJ; Case 6/64 *Costa v ENEL* [1964] ECR 585, [1964] CMLR 425, ECJ; and Joined Cases C-6, 9/90 *Francovich v Italian Republic* [1991] ECR I-5357, [1993] 2 CMLR 66. See also Case C-165/91 *Van Munster v Rijksdienst voor Pensioenen* [1994] ECR I-4661, [1995] 2 CMLR 513, ECJ (where a national court has to characterise a social security benefit awarded by another member state, it should interpret its own legislation in the light of the aims of the EC Treaty (see note 9 *infra*) arts 48, 51 and, as far as possible, avoid an interpretation which would discourage a migrant worker from actually exercising his right to freedom of movement). As to European Community law generally see EUROPEAN COMMUNITIES.

2 ie EC Council Directive 79/7 (OJ L6, 10.1.79, p 24).

3 See PARA 452 *post*.

4    le EC Council Regulation 1612/68 (OJ L257, 19.10.68, p 2).

5    See PARA 453 post.

6    le EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p1). As to citation of this regulation see PARA 454 note 4 post.

7    See PARA 454 et seq post. EC regulations have general application and are binding in their entirety and directly applicable in all member states: see the EC Treaty art 189 (substituted by the Treaty on European Union art G(60)). This means that they must be applied in the same way as an Act of Parliament. A directive is binding as to the result to be achieved upon each member state to which it is addressed but leaves to the national authorities the choice of form and methods: see the EC Treaty art 189 (as so substituted). Although not directly applicable, directives may have 'direct effect', thus creating legally enforceable rights once the period allowed for their implementation has expired: see Case 9/70 *Franz Grad v Finanzamt Traunstein* [1970] 2 ECR 825, [1971] CMLR 1, ECJ.

8    See eg Case C-116/94 *Meyers v Adjudication Officer* [1995] All ER (EC) 705, [1995] ECR I-2131, ECJ (family credit falls within EC Council Directive 76/207 (L39, 14.2.76, p 40) (equal treatment relating to employment) as regards access to employment, vocational training and promotion and working conditions). As to family credit see PARA 202 et seq ante.

9    le the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179). As to the EC Treaty generally see EUROPEAN COMMUNITIES.

10   See ibid art 118 para 1. In relation to social security, however, as a matter of practice the EC Commission has preferred to act in exercise of its powers under arts 51, 235 (as amended) (see PARA 454 post). As to the general exercise of the EC Commission's powers under art 118 see EUROPEAN COMMUNITIES.

11   Ibid art 118 para 2.

12   As to the Economic and Social Committee generally see EUROPEAN COMMUNITIES.

13   See the EC Treaty art 121.

14   As to the objectives of the European Communities and the operation of the common market see generally EUROPEAN COMMUNITIES.

15   As to the European Parliament see EUROPEAN COMMUNITIES.

16   EC Treaty art 235 (amended by the Single European Act 1986 art 3(1)). As to the exercise of powers under this provision generally see EUROPEAN COMMUNITIES. In the field of social security the powers under this provision have been exercised in order to secure equal treatment for men and women (see PARA 452 post) and to extend the application of European Community legislation to self-employed persons (see PARAS 456-457 post).

## UPDATE

### 451 Nature of European Community Law

NOTE 1--See also Case C-262/97 *Rijksdienst Voor Pensioenen v Engelbrecht* [2002] 3 CMLR 857, ECJ.

NOTE 8--EC Council Directive 76/207 repealed (from 15 August 2009) and replaced (member state implementation measures to be in place by 15 August 2008) by European Parliament and EC Council Directive 2006/54 (OJ L204 26.7.2006 p 23): see DISCRIMINATION vol 13 (2007 Reissue) PARA 305.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/12. EUROPEAN COMMUNITY LAW/(2) EQUAL TREATMENT OF MEN AND WOMEN IN SOCIAL SECURITY/452. EC Council Directive on equal treatment for men and women.

## **(2) EQUAL TREATMENT OF MEN AND WOMEN IN SOCIAL SECURITY**

### **452. EC Council Directive on equal treatment for men and women.**

The purpose of the EC Directive on equal treatment for men and women<sup>1</sup> is the progressive implementation, in the field of social security and other elements of social protection, of the principle of equal treatment for men and women in matters of social security (the 'principle of equal treatment')<sup>2</sup>. Member states are required to take the measures necessary to ensure that any laws, regulations and administrative provisions contrary to the principle of equal treatment in matters of social security are abolished<sup>3</sup>. The principle of equal treatment, which is expressed to be without prejudice to provisions relating to the protection of women on the grounds of maternity<sup>4</sup>, means that there must be no discrimination whatsoever on the grounds of sex either directly, or indirectly by reference in particular to marital or family status, in relation to the scope of the relevant schemes<sup>5</sup> and the conditions of access to them, the obligation to contribute and the calculation of contributions, the calculation of benefits including increases due in respect of a spouse and for dependants, and the conditions governing the duration and retention of entitlement to benefits<sup>6</sup>. However, member states are entitled to exclude from the principle of equal treatment<sup>7</sup> measures relating to (1) the determination of pensionable age for the purposes of granting old age and retirement pensions and the possible consequences thereof for other benefits<sup>8</sup>; (2) advantages and benefits for persons who have brought up children<sup>9</sup>; (3) the granting of old age or invalidity benefits by virtue of derived entitlements of a wife<sup>10</sup>; (4) the granting of increases of long-term invalidity, old age, accidents at work and occupational disease benefits for a dependent wife<sup>11</sup>; and (5) the consequences of the exercise of an option not to acquire rights or incur obligations under a statutory scheme<sup>12</sup>.

The directive applies to (a) statutory schemes which provide protection against sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment; and (b) social assistance, in so far as it is intended to supplement or replace such schemes<sup>13</sup>.

The directive does not apply to measures based on objective factors unrelated to discrimination on grounds of sex, where the measure chosen reflects a legitimate social policy of the member state, is appropriate to achieve that aim and is necessary in order to do so<sup>14</sup>.

Member states are also required to introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply the principle of equal treatment to pursue their claims by judicial process, although there may be prior recourse to other competent authorities<sup>15</sup>.

It is well settled that the EC Directive on equal treatment for men and women has direct effect<sup>16</sup> and that the person discriminated against may claim the rights accorded to persons of the opposite sex<sup>17</sup>. Such claims must be exercised under the conditions determined by the national law, provided that those conditions are no less favourable than those relating to similar domestic actions and that they are not framed in such a way as to render virtually impossible the exercise of rights conferred by European Community law<sup>18</sup>. Accordingly, the directive does not invalidate the application to such claims of the limits on backdating applied to claims generally in the national law.

- 1 le EC Council Directive 79/7 (OJ L6, 10.1.79, p 24). As to the implementation of the principle of equal treatment for men and women in occupational social security schemes to which this directive does not apply see EC Council Directive 86/378 (OJ L225, 12.8.86, p 40); and PARA 771 post.
- 2 EC Council Directive 79/7 (OJ L6, 10.1.79, p 24) art 1. The principle enshrined in this directive applies to the working population (including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment, and persons seeking employment) and to retired or invalided workers and self-employed persons: art 2. 'Working population' does not include an unremunerated carer: see Case C-77/95 *Züchner v Handelskrankenkasse (Ersatzkasse) Bremen* [1997] All ER (EC) 359, [1997] 3 CMLR 263, ECJ.
- 3 EC Council Directive 79/7 (OJ L6, 10.1.79, p 24) art 5. EC Council Directive 79/7 (OJ L6, 10.1.79, p 24) was adopted by the EC Council in exercise of its powers under the EC Treaty art 235 (as amended). Member states were required to implement the directive within six years of its notification, ie by 23 December 1984: see art 8.
- 4 Ibid art 4(2).
- 5 See note 13 infra.
- 6 EC Council Directive 79/7 (OJ L6, 10.1.79, p 24) art 4(1). However, the directive does not apply to provisions concerning survivors' or family benefits, except in the case of family benefits granted by way of increases of benefits due under the schemes referred to in art 3(1)(a) (see head (a) in the text): art 3(2).
- 7 Member states are required to periodically examine the exclusions in order to ascertain, in the light of social developments in the matter concerned, whether there is justification for maintaining them: see ibid art 7(2).
- 8 See ibid art 7(1)(a). The provision of different contribution periods for men and women was upheld in Case C-9/91 *R v Secretary of State for Social Security, ex p Equal Opportunities Commission* [1992] ECR I-4297, [1992] 3 CMLR 233, ECJ, upon the basis that they were necessary to maintain the financial equilibrium of the system. Discrimination in relation to other benefits by reason of the differing pensionable ages is unlawful unless it is necessarily and objectively linked to the difference in pensionable age: Case C-328/91 *Secretary of State for Social Security v Thomas* [1993] ECR I-1247, [1993] 3 CMLR 880, ECJ (differing upper age limits for first claims for severe disablement allowance (see PARA 92 et seq ante) and invalid care allowance (see PARA 100 et seq ante) not so linked); Case C-92/94 *Secretary of State for Social Security and Chief Adjudication Officer v Graham* [1995] All ER (EC) 736, [1995] ECR I-2521, ECJ (downrating of invalidity benefit to claimant's actual pension rate on reaching pensionable age upheld).
- 9 See EC Council Directive 79/7 (OJ L6, 10.1.79, p 24) art 7(1)(b).
- 10 See ibid art 7(1)(c).
- 11 See ibid art 7(1)(d).
- 12 See ibid art 7(1)(e). This exclusion applies only to options exercised before 19 December 1978: see art 7(1)(e).
- 13 Ibid art 3(1). The directive does not apply (1) to persons who have never made themselves available for employment or have ceased to be so available for a reason other than those set out in art 3(1)(a) (see head (a) in the text) (see Joined Cases 48, 106, 107/88 *Achterberg-te Riele v Sociale Verzekeringsbank Amsterdam* [1989] ECR 1963, [1990] 3 CMLR 323, ECJ); (2) income support (see Joined Cases C-63, 64/91 *Jackson v Chief Adjudication Officer* [1992] ECR I-4737, [1992] 3 CMLR 389, ECJ); (3) housing benefit (see Case C-243/90 *R v Secretary of State for Social Security, ex p Smithson* [1992] ECR I-467, [1992] 1 CMLR 1061, ECJ); or (4) a child-raising allowance (see Joined Cases C-245, 312/94 *Hoever v Land Nordrhein Westfalen* [1996] ECR I-4895, 3 CMLR 611, ECJ). As to income support see PARA 176 et seq ante; and as to housing benefit see HOUSING vol 22 (2006 Reissue) PARA 140 et seq. As to child benefit see PARA 237 et seq ante.
- 14 See Case C-317/93 *Nolte v Landesversicherungsanstalt Hannover*; Case C-444/93 *Megner v Innungskrankenkasse Vorderpfalz* [1996] All ER (EC) 212, ECJ, where the exclusion from benefit schemes of persons working for fewer than 15 hours a week was upheld, although far more women were affected by this than men; the court recognised that social policy is a matter for member states and that they have a broad margin of discretion in choosing the measures capable of achieving the aims of their social policy. In these cases, the exclusion reflected a structural principle of the German social security scheme: the demand for such part-time employment could only be satisfied within the law if it were excluded from compulsory insurance and this aim was objectively unrelated to discrimination on grounds of sex. No such justification was established in Case C-102/88 *Ruzius-Wilbrink v Bestuur van de Bedrijfsvereniging voor Overheidsdiensten* [1989] ECR 4311, [1989] CMLR 202, ECJ.

15 See EC Council Directive 79/7 (OJ L6, 10.1.79, p 24) art 6.

16 See Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53, [1982] 1 CMLR 499, ECJ; Case 150/85 *Drake v Chief Adjudication Officer* [1986] ECR 1995, [1986] 3 CMLR 43, ECJ; Case 286/85 *McDermott and Cotter v Minister for Social Welfare and A-G* [1987] ECR 1453, [1987] 2 CMLR 607, ECJ; and Case 384/85 *Clarke v Chief Adjudication Officer* [1987] ECR 2865, [1987] 3 CMLR 277, ECJ.

17 See Case 71/85 *The State (the Netherlands) v Federatie Nederlandse Vakbeweging* [1986] ECR 3855, [1987] 3 CMLR 767 (where the Dutch term for 'family breadwinner' is mistranslated throughout as 'wage-earner'); Case C-102/88 *Ruzius-Wilbrink v Bestuur van de Bedrijfsvereniging voor Overheidsdiensten* [1989] ECR 4311, [1991] 2 CMLR 202, ECJ; and Case C-377/89 *Cotter and McDermott v Minister for Social Welfare and A-G* [1991] ECR I-1155, [1991] 3 CMLR 507, ECJ. It is immaterial that the offending measure is contained in transitional provisions intended to implement the directive: see Case C-377/89 *Cotter and McDermott v Minister for Social Welfare and A-G* supra.

18 See Case C-338/91 *Steenhorst-Neerings v Bestuur van de Bedrijfsvereniging voor Detailhandel, Ambachten en Huisvrouwen* [1993] ECR I-5475, [1995] 3 CMLR 323, ECJ (Case C-208/90 *Emmott v Minister for Social Welfare and A-G* [1991] ECR I-4269, [1991] 3 CMLR 894, ECJ, distinguished on the facts); Case C-410/92 *Johnson v Chief Adjudication Officer (No 2)* [1995] All ER (EC) 258, [1994] ECR I-5483, ECJ (12-month limit on backdating); and Case C-394/93 *Alonso-Pérez v Bundesanstalt für Arbeit* (unreported), ECJ (national limit of six months upheld).

## UPDATE

### 452 EC Council Directive on equal treatment for men and women

NOTE 1--EC Council Directive 86/378 repealed (from 15 August 2009) and replaced (member state implementation measures to be in place by 15 August 2008) by European Parliament and EC Council Directive 2006/54 (OJ L204 26.7.2006 p 23): see PARA 771.

NOTE 8--See Case C-104/98 *Buchner v Sozialversicherungsanstalt Der Bauern* [2002] 1 CMLR 1126, ECJ (differing age of entitlement for early payment of old age pension on ground of incapacity for work not objectively linked to difference in pensionable age).

NOTE 9--See also Case C-537/07 *Gómez-Limón Sánchez-Camacho v Instituto Nacional de la Seguridad Social (INSS)* [2009] All ER (D) 208 (Aug), [2009] 3 CMLR 1414, ECJ.

NOTE 16--See also *Blaik v Department of Health and Social Security* [1991] 1 CMLR 539, CA; C-31/90 *Johnson v Chief Adjudication Officer* [1992] 2 All ER 705, ECJ.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/12. EUROPEAN COMMUNITY LAW/(3) NON-DISCRIMINATION ON GROUNDS OF NATIONALITY/453. EC Council Regulation on freedom of movement.

### (3) NON-DISCRIMINATION ON GROUNDS OF NATIONALITY

#### 453. EC Council Regulation on freedom of movement.

A person who is a national<sup>1</sup> of a member state may not, in the territory of another member state, be treated differently from nationals by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal and, should he become unemployed, reinstatement or re-employment<sup>2</sup>. He must also enjoy the same social and tax advantages as nationals<sup>3</sup>. In addition, he must, by virtue of the same right and under the same conditions as nationals, have access to training in vocational schools and retraining centres<sup>4</sup>.

1 For the meaning of 'national' see PARA 454 note 5 post.

2 EC Council Regulation 1612/68 (OJ L257, 19.10.68, p 2) art 7(1). See further EUROPEAN COMMUNITIES. Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal is null and void in so far as it lays down or authorises discriminatory conditions in respect of workers who are nationals of the other member states: art 7(4).

The principal aim of EC Council Regulation 1612/68 (OJ L257, 19.10.68, p 2) is to ensure the non-discriminatory treatment of workers in a member state who are nationals of another member state, by applying all the national rules of the host member state in the same way as they are applied to its own national workers: see Case 110/79 *Coonan v Insurance Officer* [1980] ECR 1445, ECJ. In Case C-237/94 *O'Flynn v Adjudication Officer* [1996] All ER (EC) 541, [1996] ECR I-2617, ECJ, the condition in the Social Fund (Maternity and Funeral Expenses) (General) Regulations, SI 1987/481, reg 7(1)(c), that the funeral must have taken place within the United Kingdom, was held to discriminate unlawfully against nationals of other member states. See also Case C-278/94 *EC Commission v Belgium* [1996] ECR I-4307, [1997] 1 CMLR 1040, ECJ (indirect discrimination through link with attendance at Belgian state schools). Cf *R v Secretary of State for Social Security, ex p Sarwar and Getachew* [1997] 3 CMLR 648, CA.

3 EC Council Regulation 1612/68 (OJ L257, 19.10.68, p 2) art 7(2). This provision applies to every social and tax advantage, whether or not linked to a contract of employment, generally granted to claimants as a result of their objective status as workers or due to the fact that they reside in national territory: Case 63/76 *Inzirillo v Caisse d'Allocations Familiales de l'Arrondissement de Lyon* [1976] ECR 2057, [1978] 3 CMLR 596, ECJ. See also Case 187/73 *Callemeyn v Belgian State* [1974] ECR 553, ECJ; and Case 32/75 *Cristini v Société Nationale des Chemins de Fer Français* [1975] ECR 1085, [1976] 1 CMLR 573, ECJ. 'Social advantages' include not only benefits granted by right but also benefits of a discretionary nature: Case 65/81 *Reina v Landeskreditbank Baden-Württemberg* [1982] ECR 33, [1982] 1 CMLR 744, ECJ; Case 249/83 *Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn, Kalmhout* [1985] ECR 973, [1987] 3 CMLR 638, ECJ; and Case 122/84 *Scrivner and Cole v Centre Public d'aide Sociale de Chastre* [1985] ECR 1027, [1987] 3 CMLR 638, ECJ. See also Case C-310/91 *Schmid v Belgium* [1993] ECR I-3011, [1995] 2 CMLR 803, ECJ (the derived rights of members of a worker's family under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) are a social advantage to the worker and may not be taken away on the ground of nationality).

4 EC Council Regulation 1612/68 (OJ L257, 19.10.68, p 2) art 7(3).

#### UPDATE

#### 453 EC Council Regulation on freedom of movement

NOTE 2--SI 1987/481 replaced: Social Fund Maternity and Funeral Expenses (General) Regulations 2005, SI 2005/3061.

See Case C-224/98 *D'Hoop v Office national de l'emploi* [2004] ICR 137, ECJ (where EC Council Regulation 1612/68 did not apply, refusal of unemployment benefit to national educated in another member state breached citizenship provisions of EC Treaty (see EUROPEAN COMMUNITIES vol 52 PARA 16-31)). See also Case C-400/02 *Merida v Germany* [2004] 3 CMLR 1140, ECJ.

NOTE 3--A student residing in a member state other than his own is entitled to receive a non-contributory social benefit on the same conditions as a national of the host state: Case C-184/99 *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2002] ICR 566, ECJ. In so far as a measure is appropriate and proportionate, having regard to a member state's social policy, a member state is entitled to exclude a person who resides in and is a national of another member state from receipt of a social advantage where that person does not exceed a specified threshold of minor employment in the former state: Case C-213/05 *Geven v Land Nordrhein-Westfalen* [2007] 3 CMLR 1232, ECJ. See also *Secretary of State for Work and Pensions v Bobezes* [2005] EWCA Civ 111, [2005] All ER (D) 234 (Feb); and Case C-212/05 *Hartmann v Bayern* [2008] All ER (EC) 1166, ECJ.

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## **(4) SOCIAL SECURITY FOR MIGRANT PERSONS**

### **(i) Introduction**

#### **454. Background to EC Council Regulation on social security for migrant persons.**

The EC Treaty<sup>1</sup> requires the EC Council, acting unanimously on a proposal from the EC Commission<sup>2</sup>, to adopt such measures in the field of social security as are necessary to provide freedom of movement within the European Community<sup>3</sup>. This provision was implemented in 1972 by a comprehensive regulation on the application of social security schemes to employed persons and their families moving within the European Community, namely the EC Council Regulation on social security for migrant persons<sup>4</sup>. This regulation recognised the considerable differences existing between the national legislations of member states and aimed to guarantee within the European Community, first, equality of treatment for all nationals<sup>5</sup> of member states and, secondly, the right to social security benefits for workers and their dependants who move within the European Community, in particular by aggregation of insurance or equivalent periods under the various national legislations<sup>6</sup>. The regulation applies to all nationals of member states insured under social security schemes for employed persons<sup>7</sup>.

Although the relevant provisions of the EC Treaty<sup>8</sup> refer only to workers, in 1981 the EC Council exercised its residual powers thereunder<sup>9</sup> to extend the application of the basic regulations to include self-employed persons<sup>10</sup>.

The procedure for implementing these provisions was provided by a further regulation (the implementing regulation)<sup>11</sup> which, in particular, specified the competent institutions of member states, documents to be furnished, formalities and procedures, administrative checks and reimbursements<sup>12</sup>.

The objective of the regulations, which must be interpreted in the light of the principle of freedom of movement, is merely co-ordination of the social legislation of member states; there is no attempt to establish a European Community social security scheme or to harmonise the national systems<sup>13</sup>.

1 See PARA 451 note 9 ante. As to the law of the European Communities generally see EUROPEAN COMMUNITIES.

2 As to the EC Council and the EC Commission see PARA 451 ante; and EUROPEAN COMMUNITIES.

3 See the EC Treaty art 51. Article 51 is included in Pt III (Community Policies) (arts 9-130Y) (as amended), and its principal objective is therefore the establishment of as complete a freedom of movement for workers as possible: see Case 75/63 *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177, [1964] CMLR 319, ECJ. EC Treaty art 51 is not concerned solely with migrant workers or workers required to move for the purpose of their employment: Case 44/65 *Hessische Knappschaft v Maison Singer et Fils* [1965] ECR 965, [1966] CMLR 82, ECJ (application of implementing regulation to worker killed while on holiday in another member state). See also Case 31/64 *De Sociale Voorzorg Mutual Insurance Fund v Bertholet* [1965] 1 ECR 81, [1966] CMLR 191, ECJ. As to the relationship between the EC Treaty art 49 (as amended) and art 51 see Case 44/65 *Hessische Knappschaft v Maison Singer et Fils* supra.

4 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2), which came into force on 1 October 1972 for Belgium, France, Germany, Italy, the Netherlands and Luxembourg; and 1 April 1973 for Denmark, Ireland and the United Kingdom; and replaced EC Council Regulation No 3 (OJ No 30, 16.12.58, p 561/58) which had come into force on 1 January 1959. See also Case 83/87 *Viva v Fonds National de Retraite des Ouvriers Mineurs (FNROM)* [1988] ECR 2521, [1990] 1 CMLR 220, ECJ.

EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2) was published in consolidated and updated version in 1997: see EC Council Regulation 118/97 (OJ L28, 30.1.97, p 1) Annex A Pt I. In this title, the migrant persons regulation is cited as EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1), the citation thus encompassing all amendments in force as up to the 30 January 1997 (date of publication of the consolidated reprint); subsequent amendments only are noted.

The regulation creates no entitlement to benefits for a period prior to the date of its entry into force, although all contribution periods completed before that date are taken into consideration: see art 94; and Case 10/78 *Belbouab v Bundesknappschaft* [1978] ECR 1915, [1979] 2 CMLR 23, ECJ.

5 For the meaning of 'national' in the United Kingdom see the Act of Accession concerning the Conditions of the Accession, Declarations (as substituted and amended: see OJ C23, 28.1.83, p 1); and EUROPEAN COMMUNITIES.

6 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) preamble. As to provisions for aggregation see generally para 481 et seq post.

7 See Case 66/77 *Kuyken v Rijksdienst voor Arbeidsvoorziening* [1977] ECR 2311, [1978] 2 CMLR 304, ECJ.

8 In the EC Treaty arts 48-51 (as amended).

9 See *ibid* art 235 (amended by the Single European Act 1986 art 3(1)); and EUROPEAN COMMUNITIES.

10 See EC Council Regulation 1390/81 (OJ L143, 29.5.81, p 1). This regulation came into force on 1 July 1982: see art 4.

11 See EC Council Regulation EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96). This regulation was published in consolidated and updated version in 1992: see OJ C325, 10.12.92, p 96. In this title, the implementing regulation is cited as EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96), the citation thus encompassing all amendments in force up to 10 December 1992 (the date of publication of the consolidated reprint); subsequent amendments only are noted. This version is stated to have no legal force and does in fact contain a number of typographical and other errors.

12 See *ibid* preamble. As to administrative procedures generally see PARA 477 post.

13 See Case C-227/89 *Rönfeldt v Bundesversicherungsanstalt für Angestellte* [1991] ECR I-323, [1993] 1 CMLR 73, ECJ, following Case 21/87 *Borowitz v Bundesversicherungsanstalt für Angestellte* [1988] ECR 3715, [1990] 1 CMLR 34, ECJ (the substantive and procedural differences between the social security systems of individual member states are unaffected by the EC Treaty art 51). See also Case 41/84 *Pinna v Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1, [1988] 1 CMLR 350, ECJ; and Joined Cases C-88, 102, 103/95 *Losada, Balado and Paredes v Instituto Nacional de Empleo and Instituto Nacional de Seguridad Social* [1997] All ER (EC) 240, ECJ.

## UPDATE

### 454 Background to EC Council Regulation on social security for migrant persons

NOTES--See Case C-456/02 *Trojani v Centre Public D'aide Sociale De Bruxelles (CPAS)* [2004] All ER (EC) 1065, ECJ; Case C-406/04 *De Cuyper v Office National de L'Emploi* [2006] All ER (EC) 947, ECJ; *McCarthy v Secretary of State for the Home Department* [2008] EWC Civ 641, [2008] 3 CMLR 174; *Kaczmarek v Secretary State for Work and Pensions* [2008] EWCA Civ 1310, [2009] PTSR 897, [2008] All ER (D) 276 (Nov).

NOTE 3--As to the assessment of pension entitlement in accordance with arts 8a, 48, 51 (now arts 18, 39, 42), see Case C-135/99 *Elsen v Bundesversicherungsanstalt für Angestellte* [2002] 3 CMLR 919, ECJ. See also Case C-346/05 *Chateignier v Office National de L'Emploi (onem)* [2007] 1 CMLR 618, ECJ (unjustifiable difference between treatment of Belgian nationals and nationals of other member states claiming unemployment benefit).

NOTE 4--Regulation 1408/71 amended: EC Council Regulation 1290/97 (OJ L176, 4.7.97, p 1); EC Council Regulation 1223/98 (OJ L168, 1 13.6.98, p 1); EC Council Regulation 1606/98 (OJ L209, 25.7.1998, p 1); EC Council Regulation 307/1999 (OJ L38, 12.2.1999, p 1); EC Council Regulation 1399/1999 (OJ L164, 30.6.1999, p 1); European Parliament

and EC Council Regulation 1386/2001 (OJ L187, 10.7.2001, p 1); European Parliament and EC Council Regulation 631/2004 (OJ L100, 6.4.2004, p 1); European Parliament and EC Council Regulation 647/2005 (OJ L117, 4.5.2005, p 1); European Parliament and EC Council Regulation 629/2006 (OJ L114, 27.4.2006, p 1); EC Council Regulation 1791/2006 (OJ L363, 20.12.2006, p 1); European Parliament and EC Council Regulation 1992/2006 (OJ L392, 30.12.2006, p 1); European Parliament and EC Council Regulation 592/2008 (OJ L177, 4.7.2008, p 1); Fifth Act of Accession (OJ L236, 23.9.2003, p 33).

National legislation providing that time spent raising children in other member states only counts towards entitlement to old age pension where it took place after EC Council Regulation 1408/71 came into force is incompatible with the EC Treaty art 94: C-28/00 *Kauer v Pensionsversicherungsanstalt der Angestellten* [2002] 1 CMLR 1501, ECJ.

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#### **455. Authorities and institutions responsible for co-ordination.**

The 'competent authority' for the purposes of the EC Council Regulation on social security for migrant persons<sup>1</sup> means, in respect of each member state, the minister, ministers or other equivalent authority responsible for social security schemes throughout or in any part of the territory of the state in question<sup>2</sup>.

The 'competent institution' means (1) the institution<sup>3</sup> with which the person concerned is insured at the time of the application for benefit<sup>4</sup>; or (2) the institution from which he is entitled or would be entitled to benefits if he or a member or members of his family were resident<sup>5</sup> in the territory of the member state in which the institution is situated<sup>6</sup>; or (3) the institution designated by the competent authority of the member state concerned<sup>7</sup>; or (4) in the case of a scheme relating to an employer's liability<sup>8</sup>, either the employer or the insurer involved or, in default thereof, a body or authority designated by the competent authority of the member state concerned<sup>9</sup>.

The 'competent state' is the member state in whose territory the competent institution is situated<sup>10</sup>.

The 'institution of the place of residence' and the 'institution of the place of stay'<sup>11</sup> mean respectively the institution which is competent to provide benefits in the place where the person concerned resides and the institution which is competent to provide benefits in the place where the person concerned is staying, under the legislation<sup>12</sup> administered by that institution or, where no such institution exists, the institution designated by the competent authority of the member state in question<sup>13</sup>.

1    Ie EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

2    See *ibid* art 1(l). For a list of the competent authorities of each of the member states see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 4(1), Annex 1 (as amended). As to citation of this regulation see PARA 454 note 11 ante. The competent authorities for England and Wales are the Secretary of State for Social Security and the Secretary of State for Wales.

3    'Institution' means, in respect of each member state, the body or authority responsible for administering all or part of the legislation: EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(n). For a list of the competent institutions of each of the member states see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 4(2), Annex 2 (as amended). The competent institutions for England and Wales are, in the case of benefits in kind, the authorities which grant National Health Service benefits (see HEALTH SERVICES), and, in the case of cash benefits, the Department of Social Security.

4    EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(o)(i).

5    For the meaning of 'residence' see PARA 459 note 2 post.

6    EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(o)(ii).

7    *Ibid* art 1(o)(iii).

8    Ie in respect of the benefits set out in *ibid* art 4(1): see PARA 460 post.

9    *Ibid* art 1(o)(iv).

10   *Ibid* art 1(q).

11 'Stay' means temporary residence: *ibid* art 1(i).

12 For the meaning of 'legislation' see *PARA 461 post*.

13 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(p). For a list of the institutions of the place of residence and the institutions of the place of stay of each member state see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96).

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## **(ii) Scope and General Provisions of Relevant EC Council Regulation**

### **A. PERSONS COVERED**

#### **456. Introduction.**

The EC Council Regulation on social security for migrant persons<sup>1</sup> applies to the following:

- 1165 (1) Employed or self-employed persons<sup>2</sup> who (a) are or have been subject to the legislation of one or more member states; and (b) are nationals<sup>3</sup> of one of the member states or stateless persons<sup>4</sup> or refugees<sup>5</sup> residing<sup>6</sup> within the territory of one of the member states, as well as to members of the families<sup>7</sup> and the survivors<sup>8</sup> of the above<sup>9</sup>;
- 1166 (2) the survivors of employed or self-employed persons who have been subject to the legislation of one or more member states, irrespective of the nationality of such employed or self-employed persons, where their survivors are nationals of one of the member states, or stateless persons or refugees residing within the territory of one of the member states<sup>10</sup>;
- 1167 (3) civil servants and persons who, in accordance with the legislation applicable<sup>11</sup>, are treated as such, where they are or have been subject to the legislation of a member state to which this regulation applies, as well as to the members of their families and their survivors<sup>12</sup>.

1    Ie EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

2    For the meaning of 'employed person' and 'self-employed person' see PARA 457 post. Before 1 July 1982 (ie the date on which EC Council Regulation 1390/81 (OJ L143, 29.5.81, p 1) came into force: see generally para 454 text and note 10 ante), EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) referred to 'workers'. However, in several cases the European Court of Justice had given the definition of 'worker' an extended interpretation so as to include self-employed persons in certain situations: see in particular Case 17/76 *Brack v Insurance Officer* [1976] ECR 1429, [1976] 2 CMLR 592, ECJ; and Case 99/80 *Galinsky v Insurance Officer* [1981] ECR 941, [1981] 3 CMLR 361, ECJ.

For decisions on the interpretation of 'worker' see further Case 19/68 *De Cicco v Landesversicherungsanstalt Schwaben* [1968] ECR 473, [1969] CMLR 67, ECJ; Case 23/71 *Janssen v Alliance Nationale des Mutualités Chrétiennes* [1971] ECR 859, [1972] CMLR 13, ECJ; Case 63/76 *Inzirillo v Caisse d'Allocations Familiales de l'Arrondissement de Lyon* [1976] ECR 2057, [1978] 3 CMLR 596, ECJ.

3    The criterion of nationality must be examined in relation to the period of employment and the time during which insurance contributions relating to the relevant insurance periods were paid: see Case 10/78 *Belbouab v Bundesknappschaft* [1978] ECR 1915, [1979] 2 CMLR 23, ECJ. For the meaning of 'national' in the United Kingdom see PARA 454 note 5 ante.

4    'Stateless person' has the meaning assigned to it in the Convention relating to the Status of Stateless Persons (New York, 28 September 1954; TS 41 (1960); Cmd 1098), art 1 (as to which see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13): EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(e).

5    'Refugee' has the meaning assigned to it in the Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1954); Cmd 9171) art 1 (as to which see BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 239): EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(d).

- 6 For the meaning of 'residence' see PARA 459 note 2 post.
- 7 For the meaning of 'member of the family' see PARA 458 post.
- 8 For the meaning of 'survivor' see PARA 458 post.
- 9 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 2(1). The nationality of the member of the family of the person concerned is irrelevant: see Case 40/76 *Kermaschek v Bundesanstalt für Arbeit* [1976] ECR 1669, ECJ.
- 10 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 2(2).
- 11 For the meaning of 'legislation' see PARA 461 post; and as to the determination of the legislation applicable see PARA 469 et seq post.
- 12 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 2(3) (substituted by EC Council Regulation 1290/97 (OJ L176, 4.7.97, p 1)). Career diplomats and consular staff were expressly excluded from the application of EC Council Regulation No 3 (OJ No 30, 16.12.58, p 561) (as to which see generally para 454 ante).

## **UPDATE**

### **456 Introduction**

TEXT AND NOTES--The provisions of EC Council Regulation 1408/71 and EC Council Regulation 574/72 (the implementing regulation) have been extended to the nationals of third countries who are not already covered by the Regulation solely on the ground of their nationality: see EC Council Regulation 859/2003 (OJ L124, 20.5.2003, p 1).

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#### **457. Definition of 'employed person' and 'self-employed person'.**

For the purposes of the EC Council Regulation on social security for migrant persons<sup>1</sup>, an employed or self-employed person is a person who falls<sup>2</sup> within one of the following four categories:

- 1168 (1) any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons<sup>3</sup>;
- 1169 (2) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in the EC Council Regulation on social security for migrant workers, under a social security scheme for all residents or for the whole working population, if such person:
- 129 178. (a) can be identified as an employed or self-employed person by virtue of the manner in which such scheme is administered or financed; or
- 179. (b) failing such criteria, is insured for some other specified contingency<sup>4</sup> under a scheme for employed or self-employed persons or under a scheme referred to in head (3) below, either compulsorily or on an optional continued basis or, where no such scheme exists in the member state concerned, complies with the relevant definition<sup>5</sup>;
- 130 1170 (3) any person who is compulsorily insured for several of the contingencies covered by the branches dealt with in the EC Council Regulation on social security for migrant persons, under a standard social security scheme for the whole rural population in accordance with specified criteria<sup>6</sup>;
- 1171 (4) any person who is voluntarily insured for one or more of the contingencies covered by the branches dealt with in the EC Council Regulation on social security for migrant persons, under a social security scheme of a member state for employed or self-employed persons or for all residents or for certain categories of residents if such person (a) carries out an activity as an employed or self-employed person; or (b) has previously been compulsorily insured for the same contingency under a scheme for employed or self-employed persons of the same member state<sup>7</sup>.

The term 'a person who is employed' and the term 'a person who is self-employed' are to be understood as referring to activities so regarded by the national social security legislation of the member state in which they were pursued<sup>8</sup>.

A person's insurance does not cease to be compulsory merely by reason of the fact that during certain limited periods, such as a stay abroad, the payment of contributions by him is optional<sup>9</sup>.

<sup>1</sup> I.e. EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

<sup>2</sup> The question whether a person falls within one of the categories depends not on his formal classification but on his status under the relevant national social security legislation: Case 84/77 *Caisse Primaire d'Assurance*

*Maladie d'Eure-et-Loir v Tessier* [1978] ECR 7, [1979] 1 CMLR 249, ECJ. Prior to 1 July 1982 (ie the date on which EC Council Regulation 1390/81 (OJ L134, 29.5.81, p 1) came into force: see generally para 454 text and note 10 ante), EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) applied to 'workers', which the European Court of Justice held to be a concept related to European Community law, not national law: see Case 75/63 *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177, [1964] CMLR 319, ECJ. See further PARA 456 note 2 ante. As to the meaning of 'self-employed person' see also Case 300/84 *Van Roosmalen v Bestuur van de Bedrijfsvereniging voor de Gezondheid Geestelijke en Maatschappelijke Belangen* [1986] ECR 3097, [1988] 3 CMLR 471, ECJ ('self-employed person' applies to persons pursuing, otherwise than under a contract of employment or by way of self-employment in a trade or profession, an occupation from which income is derived allowing them to meet their needs, irrespective of whether income is supplied by third parties).

Under earlier legislation the European Court of Justice held that the status of 'worker' was acquired when the worker complied with the substantive conditions laid down by the social security scheme applicable to him, even if the steps necessary for affiliation to the scheme have not been completed: Case 39/76 *Bestuur der Bedrijfsvereniging voor de Metaalnijverheid v LJ Mouthaan* [1976] ECR 1901, ECJ. See also Case 266/78 *Brunori v Landesversicherungsanstalt Rheinprovinz* [1979] ECR 2705, [1980] 1 CMLR 660, ECJ; Case 110/79 *Coonan v Insurance Officer* [1980] ECR 1445, ECJ; Case 143/79 *Walsh v National Insurance Officer* [1980] ECR 1639, [1980] 3 CMLR 573, ECJ; Case 70/80 *Vigier v Bundesversicherungsanstalt für Angestellte* [1981] ECR 229, [1982] 2 CMLR 709, ECJ. See further Case 19/68 *De Cicco v Landesversicherungsanstalt Schwaben* [1968] ECR 473, [1969] CMLR 67, ECJ; Case 23/71 *Janssen v Alliance Nationale des Mutualités Chrétiennes* [1971] 2 ECR 859, [1972] CMLR 13, ECJ; Case 13/76 *Donà v Mantero* [1976] ECR 1333, [1976] 2 CMLR 578, ECJ (definition of 'worker' extended by reference to benefits granted under national legislation).

3 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(a)(i). This provision is subject to the restrictions set out in Annex V (as amended): see art 1(a)(i). As to the contingencies covered see PARA 460 post.

4 Ie a contingency specified in *ibid* Annex I (as amended).

5 See *ibid* art 1(a)(ii). The relevant definition is that set out in Annex I (as amended). As to the contingencies covered see PARA 460 post. In the United Kingdom any person who is an 'employed earner' or a 'self-employed earner' within the meaning of the legislation of Great Britain or of the legislation of Northern Ireland is regarded respectively as an employed person or a self-employed person within the meaning of art 1(a)(ii), Annex I (as amended).

6 *Ibid* art 1(a)(iii). The specified criteria are those laid down in Annex I (as amended).

7 *Ibid* art 1(a)(iv).

8 See Case C-221/95 *Institut National d'Assurances Sociales pour Travailleurs Indépendants (Inasti) v Hervein* [1997] 2 CMLR 723, ECJ. See also Case C-340/94 *EJM de Jaeck v Staatssecretaris van Financiën* [1997] 2 CMLR 779, ECJ.

9 See Case 17/76 *Brack v Insurance Officer* [1976] ECR 1429 at 1450, [1976] 2 CMLR 592 at 616, ECJ (resumed in Decision CS 2/77 *Re Medical Expenses Incurred in France* [1977] 2 CMLR 317, NIC).

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#### **458. Definition of 'member of the family' and 'survivor'.**

For the purposes of the EC Council Regulation on social security for migrant persons<sup>1</sup>, 'member of the family' means any person defined or recognised as a member of the family or designated as a member of the household either by the legislation<sup>2</sup> under which benefits are provided or, in specified cases<sup>3</sup>, by the legislation of the member state in whose territory such person resides<sup>4</sup>. However, where such legislation regards as a member of the family or a member of the household only a person living under the same roof as the employed or self-employed person<sup>5</sup>, this condition is deemed to be satisfied if the person in question is mainly dependent on the employed or self-employed person<sup>6</sup>.

Where, however, the benefits concerned are benefits for disabled persons granted under the legislation of a member state to all nationals of that state who fulfil the prescribed conditions, the term 'member of the family' means at least the spouse of an employed or self-employed person and the children of such person who are either minors or dependent upon him<sup>7</sup>.

'Survivor' means any person defined or recognised as such by the legislation under which the benefits are granted; however, where such legislation regards as a survivor only a person who was living under the same roof as the deceased, this condition is deemed to be satisfied if such person was mainly dependent on the deceased<sup>8</sup>.

The European Court of Justice has recently departed from its earlier doctrine that members of the family and survivors could claim only 'derived' rights, acquired through their status as a member of the family or survivor of an employed or self-employed person; the EC Council Regulation on social security for migrant persons is now held to apply to all rights, including personal rights<sup>9</sup>.

1    Ie EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

2    For the meaning of 'legislation' see PARA 461 post.

3    The cases so specified are those cases referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 22(1)(a), 31: see art 1(f)(i). For the meaning of 'residence' see PARA 459 note 2 post.

Article 22(1)(a) provides for entitlement to sickness and maternity benefits during a stay outside the competent state where the employed or self-employed person's condition necessitates immediate benefits; art 22(3) applies this provision by analogy to members of the family: see PARA 486 post. Article 31 provides for pensioners and members of their families to receive sickness and maternity benefits when staying in a member state other than the state in which they reside: see PARA 498 post.

4    See *ibid* art 1(f)(i).

5    For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

6    EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(f)(i). Where the legislation of a member state does not enable members of the family to be distinguished from the other persons to whom it applies, the term 'member of the family' has the meaning given to it in Annex I (as amended): art 1(f)(i) (final sentence) (substituted by EC Council Regulation 1290/97 (OJ L176, 4.7.97, p 1)).

7    EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(f)(ii).

8    See *ibid* art 1(g).

9 See Case C-308/93 *Bestuur van de Sociale Verzekeringsbank v Cabanis-Issarte* [1996] ECR I-2097, [1996] 2 CMLR 729, ECJ; and Joined Cases C-245, 312/94 *Hoefer v Land Nordrhein Westfalen* [1996] ECR I-4895, [1996] 3 CMLR 611, ECJ. Case 40/76 *Kermaschek v Bundesanstalt für Arbeit* [1976] ECR 1669, ECJ, is now confined to its own special facts.

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## **B. EQUALITY OF TREATMENT OF NATIONALS OF MEMBER STATES**

### **459. Equality of treatment for nationals and non-nationals.**

Except where otherwise provided by the EC Council Regulation on social security for migrant persons<sup>1</sup>, all persons resident<sup>2</sup> in a member state to whom that regulation applies<sup>3</sup> are subject to the same obligations and enjoy the same benefits<sup>4</sup> under the legislation<sup>5</sup> of any member state as the nationals<sup>6</sup> of that state<sup>7</sup>.

1 le EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

2 'Residence' means habitual residence: *ibid* art 1(h). See also Case 13/73 *Anciens Etablissements D'Angenieux fils aîné v Hakenberg* [1973] ECR 935, ECJ (residence must be understood as being the place where the person concerned has established the permanent centre of his interests and to which he returns between trips); Case 76/76 *Di Paolo v Office National de l'Emploi* [1977] ECR 315, [1977] 2 CMLR 59, ECJ, followed in Decision CS 622/78 *Re an Italian Worker* [1979] 2 CMLR 441, NIC (National Insurance Commissioner concluded that the concept of 'habitual residence' fell somewhere between the English concepts of residence and domicile (as to which see CONFLICT OF LAWS vol 8(3) (Reissue) PARA 35 et seq).

3 As to the persons to whom EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) applies see PARA 456 ante.

4 For the meaning of 'benefits' see PARA 460 post.

5 For the meaning of 'legislation' see PARA 461 post.

6 For the meaning of 'national' see PARA 454 note 5 ante.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 3(1). This provision applies to the right to elect members of the organs of social security institutions or to participate in their nomination, but does not affect the legislative provisions of any member state relating to eligibility or methods of nomination of persons concerned to those organs: art 3(2). For the purposes of art 3(1) it is sufficient that all persons subject to national legislation are treated in the same way, irrespective of nationality, and a member state is entitled, although not required, to treat facts occurring in another member state as if the same facts had occurred within its own territory: Case 1/78 *Kenny v Insurance Officer* [1978] ECR 1489, [1978] 3 CMLR 651, ECJ (claim by an Irish national for sickness and invalidity benefits under the legislation in respect of a period during which he was imprisoned in Ireland). See also Case 237/78 *Caisse Régionale d'Assurance Maladie (CRAM), Lille v Palermo* [1979] ECR 2645, [1980] 2 CMLR 31, ECJ; Case 810/79 *Übuschär v Bundesversicherungsanstalt für Angestellte* [1980] ECR 2747, ECJ; Case 150/79 *EC Commission v Belgium* [1980] ECR 2621, [1981] 1 CMLR 418, ECJ. Cf Case 79/76 *Fossi v Bundesknappschaft* [1977] ECR 667, ECJ.

Save as provided in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) Annex III, the provisions of social security conventions which remain in force pursuant to art 7(2)(c) and the provisions of conventions concluded pursuant to art 8(1), apply to all persons to whom this regulation applies: art 3(3).

## **UPDATE**

### **459 Equality of treatment for nationals and non-nationals**

TEXT AND NOTES--Except where otherwise provided by EC Council Regulation 1408/71, all persons to whom that regulation applies are now subject to the same obligations and enjoy the same benefits under the legislation of any member state as the nationals of

that state: Regulation 1408/71 art 3(1) (as amended by European Parliament and EC Council Regulation 647/2005 (OJ L117, 4.5.2005, p 1)).

NOTE 7--Where a person applies for an occupational disability pension, a member state may not refuse to take into account a period of insurance contributions completed in the territory of another member state for the sole reason that it was completed before the accession to the European Union of the state in which the person applies: Case C-290/00 *Duchon v Pensionsversicherungsanstalt der Angestellten* [2002] 2 CMLR 529, ECJ.

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### **C. BENEFITS COVERED**

#### **460. Summary.**

The EC Council Regulation on social security for migrant persons<sup>1</sup> applies to all legislation<sup>2</sup> concerning the following branches of social security<sup>3</sup>:

- 1172 (1) sickness and maternity benefits<sup>4</sup>;
- 1173 (2) invalidity benefits, including those intended for the maintenance or improvement of earning capacity<sup>5</sup>;
- 1174 (3) old age benefits<sup>6</sup>;
- 1175 (4) survivors' benefits<sup>7</sup>;
- 1176 (5) benefits in respect of accidents at work and occupational diseases<sup>8</sup>;
- 1177 (6) death grants<sup>9</sup>;
- 1178 (7) unemployment benefits<sup>10</sup>; and
- 1179 (8) family benefits<sup>11</sup>.

This regulation applies to all general and special social security schemes, whether contributory or non-contributory<sup>12</sup>; and also to special non-contributory benefits which are provided under legislation or schemes other than those referred to above, where such benefits are intended either (a) to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in heads (1) to (8) above; or (b) solely as specific protection for the disabled<sup>13</sup>.

The regulation does not apply to social or medical assistance<sup>14</sup>, to benefit schemes for victims of war or its consequences<sup>15</sup>, or to special schemes for civil servants and persons treated as such<sup>16</sup>.

For the purposes of the migrant persons regulation, 'benefits' and 'pensions' mean all benefits and pensions, including all elements of them payable out of public funds, revalorisation increases<sup>17</sup> and supplementary allowances, as also lump sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions<sup>18</sup>.

1 The EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

2 For the meaning of 'legislation', and as to the relevant national legislation, see PARA 461 post.

3 The European Court of Justice has no jurisdiction to give a preliminary ruling under the EC Treaty art 177 (as substituted) (see generally EUROPEAN COMMUNITIES), on the classification under the legislation of one member state of a benefit awarded under the legislation of another member state: Case 93/75 *Adlerblum v Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés* [1975] ECR 2147, [1976] 1 CMLR 236, ECJ.

4 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 4(1)(a). As to sickness and maternity benefits generally see EMPLOYMENT. For the EC provisions governing sickness and maternity benefits see PARA 481 et seq post.

5 Ibid art 4(1)(b). As to invalidity benefits generally see PARA 59 et seq, 92 et seq ante. For the EC provisions governing invalidity benefits see PARAS 502-507 post; and Case C-356/89 *Newton v Chief Adjudication Officer* [1991] ECR I-3017, [1992] 1 CMLR 149, ECJ (mobility allowance fell under this heading in the case of a person who was or had been insured as an employed or self-employed person; see now para 465 post). See also Joined

Cases 379-381/85, 93/86 *Caisse Régionale d'Assurance Maladie Rhône-Alpes v Giletti* [1987] ECR 955, [1988] 1 CMLR 740, ECJ. For the purposes of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 10, 27-31 (art 22 as amended), attendance allowance granted to an employed or self-employed person under United Kingdom legislation is considered as an invalidity benefit: see art 89, Annex VI (as amended).

6 Ibid art 4(1)(c). As to pensions generally see PARA 551 et seq post. For the EC provisions governing old age benefits see PARA 508 et seq post.

7 Ibid art 4(1)(d). For the meaning of 'survivor' see PARA 458 ante. As to widow's benefits etc see PARA 80 et seq ante. For the EC provisions governing survivors' benefits see PARA 508 et seq post.

8 Ibid art 4(1)(e). As to industrial injuries benefit see PARA 126 et seq ante. For the EC provisions governing industrial injuries benefits see PARA 517 et seq post.

9 Ibid art 4(1)(f). 'Death grants' means any once-for-all payment in the event of death, exclusive of the lump-sum benefits referred to in art 1(t) (see text and note 18 infra): art 1(v). See PARA 551 et seq ante. For the EC provisions governing death grants see PARAS 523-524 post.

10 Ibid art 4(1)(g). See also Joined Cases C-88, 102-103/95 *Martinez Losada v Instituto Nacional de Empleo (INEM)* [1997] All ER (EC) 240, [1997] 2 CMLR 691, ECJ. As to income support see PARA 176 et seq ante; and as to jobseeker's allowance see PARA 258 et seq ante. For the EC provisions governing unemployment benefits see PARAS 525-528 post.

11 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 4(1)(h). The term 'family benefits' means all benefits in kind or in cash intended to meet family expenses under the legislation provided for in art 4(1)(h), excluding the special childbirth or adoption allowances referred to in Annex II (as amended); and 'family allowances' means periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of the members of the family: art 1(u). For the EC provisions governing family benefits and family allowances see PARA 529 et seq post. See also Case C-78/91 *Hughes v Chief Adjudication Officer, Belfast* [1992] ECR I-4839, [1992] 3 CMLR 490, ECJ (family credit included). As to child benefit see PARA 237 et seq ante; and as to family credit see PARA 202 et seq ante.

12 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 4(2). See Joined Cases 379-381/85, 93/86 *Caisse Régionale d'Assurance Maladie Rhône-Alpes v Giletti* [1987] ECR 955, [1988] 1 CMLR 740, ECJ. See also Case 28/68 *Caisse Régionale de Sécurité Sociale du Nord de la France v Torrekens* [1969] ECR 125, [1969] CMLR 377, ECJ; Case 14/72 *Heinze v Landesversicherungsanstalt Rheinprovinz* [1972] ECR 1105, [1975] 2 CMLR 96, ECJ; Case 237/78 *Caisse Régionale d'Assurance Maladie, Lille v Palermo* [1979] ECR 2645, [1980] 2 CMLR 31, ECJ; and Case C-327/92 *Rheinhold & Mahla NV v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1995] ECR I-1223, [1995] 2 CMLR 786, ECJ.

The provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) also apply to schemes concerning the liability of an employer or shipowner in respect of the benefits referred to in art 4(1), but the legislative provisions of any member state concerning a shipowner's liability are not affected by Title III (ie arts 13-79) (as amended): see art 4(2), (3).

13 Ibid art 4(2a).

14 There may not always be a clear distinction between national legislative schemes within the field of social security and those dealing with assistance, and in certain cases a scheme may fall within both fields: see Case 1/72 *Frilli v Belgian State* [1972] ECR 457, [1973] CMLR 386, ECJ (the provision of guaranteed income for all old people, subject to the sole criterion of residence, constituted in relation to persons covered by the regulation, a social security benefit); and Case C-356/89 *Newton v Chief Adjudication Officer* [1991] ECR I-3017, [1992] 1 CMLR 149 (mobility allowance). See also Case 24/74 *Caisse Régionale d'Assurance Maladie de Paris v Bignon* [1974] ECR 999, [1975] 1 CMLR 59, ECJ (the court referred to the assessment of need in each individual case as a characteristic feature of assistance); Case C-78/91 *Hughes v Chief Adjudication Officer, Belfast* [1992] ECR I-4839, [1992] 3 CMLR 490; and Case 39/74 *Costa v Belgian State* [1974] ECR 1251, ECJ. The distinction between benefits within the scope of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) and those outside depends entirely on the factors relating to each individual benefit, particularly its purpose and the conditions for its grant: Case 9/78 *Directeur Régional de la Sécurité Sociale de Nancy v Gillard* [1978] ECR 1661, [1978] 3 CMLR 554, ECJ. Although the fact that national provisions relating to a particular benefit are not contained within the national social security legislation is not of itself decisive as to the nature of the benefit (see Case 9/78 *Directeur Régional de la Sécurité Sociale de Nancy v Gillard* supra; and Case C-327/92 *Rheinhold & Mahla NV v Bestuur van de Bedrijfsvereniging van de Metaalnijverheid* [1995] ECR I-1223, [1995] 2 CMLR 786), the fact that a member state has specified a law by declaration under the EC provisions (see PARA 461 post) must be accepted as proof that benefits granted on the basis of that law are social security benefits (see Case 35/77 *Beerens v Rijksdienst voor Arbeidsvoorziening* [1977] ECR 2249, [1978] 2 CMLR 320, ECJ). However, the absence of a declaration is not conclusive against the benefit having the character of a social security benefit (see Case C-327/92 *Rheinhold & Mahla NV v Bestuur van de Bedrijfsvereniging van de Metaalnijverheid* supra).

15 See Case 93/75 *Adlerblum v Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés* [1975] ECR 2147, [1976] 1 CMLR 236, ECJ; Case 9/78 *Directeur Régional de la Sécurité Sociale de Nancy v Gillard* [1978] ECR 1661, [1978] 3 CMLR 554, ECJ; Case 207/78 *Ministère Public v Even and Office National des Pensions pour Travailleurs Salariés* [1979] ECR 2019, [1980] 2 CMLR 71, ECJ.

16 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 4(4). As to the relationship between this provision and the meaning of 'legislation' (as to which see PARA 461 post) see Case 129/78 *Bestuur van de Sociale Verzekeringsbank, Amsterdam v Lohmann* [1979] ECR 853, [1979] 3 CMLR 618, ECJ.

This regulation does not apply to the provisions in the legislation of a member state concerning special non-contributory benefits, referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) Annex II, Section III, the validity of which is confined to part of its territory: art 4(2b).

17 Rules for revalorisation provided by the legislation of a member state apply to benefits due under that legislation taking into account the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): art 11.

18 *Ibid* art 1(t). This provision is subject to the provisions of Title III (arts 13-79) (as amended). 'Benefits' must be interpreted in the widest possible sense: Case 39/74 *Costa v Belgian State* [1974] ECR 1251, ECJ. See also Case 24/74 *Caisse Régionale d'Assurance Maladie de Paris v BIASON* [1974] ECR 999, [1975] 1 CMLR 59, ECJ; Case 130/73 *Vandeweghe v Berufsgenossenschaft für die chemische Industrie* [1973] ECR 1329, [1974] 1 CMLR 449, ECJ; and Case 104/76 *Jansen v Landesversicherungsanstalt Rheinprovinz* [1977] ECR 829, ECJ. Cf, however, Case C-25/95 *Otte v Germany* [1997] 2 CMLR 1061, ECJ (fifth chamber) (in order to come within the scope of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1), there must be a sufficient link between an allowance and one of the areas of social security listed in art 4(1); an adaptation allowance paid to miners in Germany who had been laid off following closure or rationalisation measures did not fall within its scope).

## UPDATE

### 460 Summary

NOTE 11--Advance maintenance payments are a family benefit within the meaning of EC Council Regulation 1408/71 art 4(1)(h): Case C-255/99 *Humer* [2004] 1 CMLR 1312, ECJ.

TEXT AND NOTE 13--The regulation now applies to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement has characteristics both of the social security legislation referred to in art 4(1) and of social assistance: EC Council Regulation 1408/71 art 4(2a) (as amended by European Parliament and EC Council Regulation 647/2005 (OJ L117, 4.5.2005, p 1)). 'Special non-contributory cash benefits' means those (1) which are intended to provide either (a) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in art 4(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the member state concerned, or (b) solely specific protection for the disabled, closely linked to the said person's social environment in the member state concerned, and (2) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary, and (3) which are listed in Regulation 1408/71 Annex IIa: Regulation 1408/71 art 4(2a). In relation to head (2), benefits provided to supplement a contributory benefit are not considered to be contributory benefits for this reason alone: Regulation 1408/71 art 4(2a).

NOTE 18--See *Viktor Movrin v Landesversicherungsanstalt Westfalen* [2000] 3 CMLR 689, ECJ (subsidy in respect of compulsory sickness insurance payments fell within EC Council 1408/71 as it resulted in net increase in recipient's pension).

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## **D. OTHER GENERAL PROVISIONS**

### **461. Definition of 'legislation'; declarations by member states.**

For the purposes of the EC Council Regulation on social security for migrant persons<sup>1</sup>, 'legislation' means, in respect of each member state, statutes, regulations and other provisions and all other implementing measures, present or future<sup>2</sup>, relating to certain branches and schemes of social security<sup>3</sup> as well as specific special non-contributory benefits<sup>4</sup>. The term excludes provisions of existing or future industrial agreements, whether or not they have been the subject of a decision by the authorities rendering them compulsory or extending their scope; however, in so far as such provisions serve to put into effect compulsory insurance imposed by the laws and regulations previously mentioned, or set up a scheme by the same institution as that which administers the schemes set up by those laws and regulations, the limitation on the term may at any time be lifted by a declaration of the member state concerned specifying the schemes of such a kind to which this regulation applies<sup>5</sup>.

'Legislation' also excludes provisions governing special schemes for self-employed persons<sup>6</sup> the creation of which is left to the initiatives of those concerned or which apply only to a part of the territory of the member state concerned, irrespective of whether or not the authorities decided to make them compulsory or extend their scope<sup>7</sup>.

Member states are required to specify in declarations, which must be duly notified and published, the legislation and schemes referred to above<sup>8</sup>, as well as special non-contributory benefits<sup>9</sup>, and certain other benefits<sup>10</sup> as specified<sup>11</sup>.

1    Ie EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

2    The words 'present or future' must not be interpreted in such a way as to exclude measures which were previously in force but which had ceased to be so when the relevant European Community provisions were adopted: see Case 109/76 *Blottner v Bestuur der Nieuwe Algemene Bedrijfsvereniging* [1977] ECR 1141, ECJ. The fact that national legislation adopted after the entry into force of the EC provisions has not been notified does not exclude it from the scope of the definition: see Case 100/63 *Kalsbeck v Bestuur der Sociale Verzekeringsbank* [1964] ECR 565, [1964] CMLR 548, ECJ; and Case 24/64 *Dingemans v Bestuur der Sociale Verzekeringsbank* [1964] ECR 647, [1965] CMLR 144, ECJ.

3    Ie those branches and schemes of social security covered by EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 4(1) or (2).

4    See *ibid* art 1(j) PARA 1. This provision has no practical application in the United Kingdom. The specified special non-contributory benefits are those covered by art 4(2a), as to which see PARA 460 ante.

5    See *ibid* art 1(j) PARA 2. This provision does not have the effect of exempting from the application of this regulation the schemes to which EC Council Regulation No 3 (OJ No 30, 16.12.58, p 561) applied: see EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(j) PARA 3.

Such a declaration must be notified and published in accordance with the provisions of art 97: see art 1(j) PARA 2. The notifications must be addressed to the president of the EC Council and indicate the date of entry into force of the laws and schemes in question or the date from which this regulation applies to the schemes mentioned in the declarations of the member states: art 97(1). Notification received in accordance with art 97(1) must be published in the Official Journal of the European Communities: art 97(2).

6    For the meaning of 'self-employed person' see PARA 457 ante.

7 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(j) PARA 4. The special schemes in question are specified in Annex II (as amended).

8 le the legislation and schemes referred to in ibid art 4(1), (2): see PARA 460 ante.

9 le those special non-contributory benefits referred to in art 4(2a): see PARA 460 ante.

10 le the minimum benefits referred to in ibid art 50 and the benefits referred to in arts 77, 78: see PARAS 533-534 post.

11 Ibid art 5. See Case C-327/92 *Rheinhold & Mahla NV v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1995] ECR I-1223, [1995] 2 CMLR 786, ECJ. For the declaration of the United Kingdom see OJ C241, 19.9.80, p 1.

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#### 462. International conventions.

As regards the persons and matters which it covers, the EC Council Regulation on social security for migrant persons<sup>1</sup> replaces the provisions of any social security convention<sup>2</sup> binding either (1) two or more member states exclusively; or (2) at least two member states and one or more other states, where settlement of the cases concerned does not involve any institution of one of the latter states<sup>3</sup>. However, the regulation may not have the effect of reducing the benefits awarded by virtue of the legislation of a single member state<sup>4</sup>.

The provisions of certain conventions are specifically saved<sup>5</sup> and, as the need arises, two or more member states may conclude conventions with each other based on the principles and in the spirit of the regulation<sup>6</sup>.

1 The EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante. As to the persons to whom this regulation applies see PARA 456 ante.

2 'Social security convention' means any bilateral or multilateral instrument which binds or will bind two or more member states exclusively, and any other multilateral instrument which binds or will bind at least two member states and one or more other states in the field of social security, for all or part of the branches and schemes set out in *ibid* art 4(1), (2) (see PARA 460 ante), together with agreements, of whatever kind, concluded pursuant to those instruments: art (1)(k).

3 *Ibid* art 6. Article 6 is subject to arts 7, 8, 46(4) (see text and notes 5-6 *infra*; and PARA 514 post): see art 6.

4 See Case C-227/89 *Rönfeldt v Bundesversicherungsanstalt für Angestellte* [1991] ECR I-323, [1993] 1 CMLR 73, ECJ ('benefits awarded by virtue of the legislation of a single member state' must mean not only benefits provided under national law alone, as formulated by national legislators, but also the benefits available under the provisions of the international social security conventions in force between two or more member states and incorporated in their national law, which have the effect of placing the worker concerned in a more favourable position than is accorded by the EC provisions), applying the principles of the decision in Case 24/75 *Petroni v Office National des Pensions pour Travailleurs Salariés* [1975] ECR 1149, distinguishing Case 82/72 *Walder v Bestuur der Sociale Verzekeringsbank* [1973] ECR 599, ECJ.

5 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 7. In particular, the regulation does not affect obligations arising from (1) any convention adopted by the International Labour Conference which, after ratification by one or more member states, have entered into force; or (2) from the European Interim Agreements on Social Security other than Schemes for Old Age, Invalidity and Survivors (Paris, 11 December 1953; TS 41 (1955); Cmd 9511): see EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 7(1). Article 7(2) contains savings for (a) the agreements concerning social security for Rhine boatmen; (b) the European Convention of 9 July 1956 concerning social security for workers in international transport (to which the United Kingdom is not a party); and (c) the social security conventions listed in Annex III. In Case 187/73 *Callemeyn v Belgian State* [1974] ECR 553, ECJ, the court held that, to the extent that the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) were more advantageous to the person concerned than those of the European Interim Agreement, the regulation prevailed. See also Case 58/87 *Rebmann v Bundesversicherungsanstalt für Angestellte* [1988] ECR 3467, [1990] 1 CMLR 17, ECJ.

The provisions of EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) (see generally para 454 ante) replace the implementing provisions of the conventions saved by EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) Annex III. Except as otherwise provided in Annex III, the provisions of the conventions which remain in force pursuant to art 7(2)(c) (see head (c) *supra*), art 8(1) (see text and note 6 *infra*), apply to all persons to whom the regulation applies: see art 3(3).

As to International Labour Conventions see INTERNATIONAL RELATIONS LAW vol 61 (2010) PARA 75.

6 Ibid art 8(1). Each member state must notify, in accordance with provisions of art 97(1), any convention concluded with another member state under the provisions of art 8(1): art 8(2).

## **UPDATE**

### **462 International conventions**

NOTE 5--The saving in head (3) now refers to certain provisions of social security conventions entered into by the member states before the date of application of EC Council Regulation 1408/71 provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their effect is limited in time if these provisions are listed in Annex III: Regulation 1408/71 art 7(2)(c) (as amended by European Parliament and EC Council Regulation 647/2005 (OJ L117, 4.5.2005, p 1)).

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#### **463. Admission to voluntary or optional continued insurance.**

The provisions of the legislation<sup>1</sup> of any member state which make admission to voluntary or optional continued insurance conditional upon residence<sup>2</sup> in the territory of that state do not apply to persons resident in the territory of another member state, provided that at some time in their past working life they were subject to the legislation of the first state as employed or as self-employed persons<sup>3</sup>.

Where, under the legislation of a member state, admission to voluntary or optional continued insurance<sup>4</sup> is conditional upon completion of periods of insurance<sup>5</sup>, the periods of insurance or residence<sup>6</sup> completed under the legislation of another member state are to be taken into account, to the extent required, as if they were completed under the legislation of the first state<sup>7</sup>.

1 For the meaning of 'legislation' see PARA 461 ante.

2 For the meaning of 'residence' see PARA 459 note 2 ante.

3 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 9(1). As to citation of this regulation see PARA 454 note 4 ante.

As to the implementation of art 9 see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 6. As to citation of this regulation see PARA 454 note 11 ante. For the meaning of 'employed' and 'self-employed' see PARA 457 ante.

4 The expression 'voluntary or optional continued insurance' covers assimilation to periods of employment for the purposes of insurance for periods of study whether or not there is any continuance of existing insurance: Case 93/76 *Liègeois v Office National des Pensions pour Travailleurs Salariés* [1977] ECR 543, [1977] 2 CMLR 757, ECJ.

5 'Periods of insurance' means periods of contribution or periods of employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by that legislation as equivalent to periods of insurance: EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(r).

'Periods of employment' and 'periods of self-employment' mean periods so defined or recognised by the legislation under which they were completed, and all periods treated as such, where they are regarded by that legislation as equivalent to periods of employment or of self-employment: art 1(s).

6 'Periods of residence' means periods of residence as defined or recognised as such by the legislation under which they were completed or considered as completed: *ibid* art 1(sa).

7 *Ibid* art 9(2). See Case 368/87 *Troiani v Landesversicherungsanstalt Rheinprovinz* [1989] ECR 1333, [1991] 1 CMLR 697, ECJ; Case 70/80 *Vigier v Bundesversicherungsanstalt für Angestellte* [1981] ECR 229, [1982] 2 CMLR 709, ECJ.

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#### **464. Prolongation of reference periods.**

Where under the legislation<sup>1</sup> of a member state recognition of entitlement to a benefit is conditional upon completion of a minimum period of insurance<sup>2</sup> during a specific period preceding the contingency insured against ('reference period') and the legislation provides that the periods during which the benefits have been granted under the legislation of that member state or periods devoted to the upbringing of children in the territory of that state are to give rise to prolongation of the reference period, periods during which invalidity pensions or old age pensions or sickness benefits, or unemployment benefits or benefits for accidents at work (except for pensions) have been awarded under the legislation of another member state and periods devoted to the upbringing of children in the territory of another member state are likewise to give rise to prolongation of the reference period<sup>3</sup>.

1 For the meaning of 'legislation' see PARA 461 ante.

2 For the meaning of 'period of insurance' see PARA 463 note 5 ante.

3 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 9a. As to citation of this regulation see PARA 454 note 4 ante.

#### **UPDATE**

#### **464 Prolongation of reference periods**

TEXT AND NOTES--EC Council Regulation 1408/71 art 9a replaced by European Parliament and EC Council Regulation 647/2005 (OJ L117, 4.5.2005, p 1). If the legislation of a member state subordinates recognition of entitlement to a benefit to the completion of a minimum period of insurance during a determined period preceding the contingency insured against (the reference period) and lays down that periods during which benefits were paid under the legislation of that member state or periods devoted to child-rearing in the territory of that member state extend the reference period, the periods during which invalidity or old age pensions or sickness, unemployment, industrial accidents at work or occupational disease benefits were paid under the legislation of another member state and periods devoted to child-rearing in the territory of another member state also extend the reference period: Regulation 1408/71 art 9a.

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#### **465. Prohibition of residence conditions in certain cases.**

Save as otherwise provided in the EC Council Regulation on social security for migrant persons<sup>1</sup>, invalidity<sup>2</sup>, old age<sup>3</sup> or survivors' cash benefits<sup>4</sup>, pensions<sup>5</sup> for accidents at work or occupational diseases<sup>6</sup>, death grants and lump-sum benefits granted in cases of remarriage of a surviving spouse who was entitled to a survivor's pension which are acquired<sup>7</sup> under the legislation<sup>8</sup> of one or more member states may not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides<sup>9</sup> in the territory of a member state other than that in which the institution<sup>10</sup> responsible for payment is situated<sup>11</sup>.

Where under the legislation of a member state reimbursement of contributions is conditional upon the person concerned having ceased to be subject to compulsory insurance, that condition is not considered satisfied as long as the person concerned is subject to compulsory insurance as an employed or self-employed person<sup>12</sup> under the legislation of another member state<sup>13</sup>.

By way of exception to the provisions set out above, persons to whom the EC Council Regulation on social security for migrant persons applies may be granted the special non-contributory cash benefits<sup>14</sup> exclusively in the territory of the member state in which they reside, in accordance with the legislation of that state, provided that such benefits are appropriately listed<sup>15</sup>; such benefits may be granted by and at the expense of the institution of the place of residence<sup>16</sup>. The institution of a member state under whose legislation entitlement to such benefits is subject to the completion of periods of employment, self-employment or residence must regard, to the extent necessary, periods of employment, self-employment or residence completed in the territory of any other member state as periods completed in the territory of the first member state<sup>17</sup>. Where entitlement to such benefits is granted in the form of a supplement and is subject, under the legislation of a member state, to receipt of certain benefits<sup>18</sup>, and no such benefit is due under that legislation, any corresponding benefit granted under the legislation of any other member state is to be treated as a benefit granted under the legislation of the first member state for the purposes of entitlement to the supplement<sup>19</sup>.

Where such a special non-contributory benefit is a disability or invalidity benefit, and is subject, under the legislation of a member state, to the condition that the disability or invalidity should be diagnosed for the first time in the territory of that member state, this condition is deemed to be fulfilled where the diagnosis is made for the first time in the territory of another member state<sup>20</sup>.

1    le EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

2    As to the application of *ibid* art 10(1) to invalidity benefits see Case 24/74 *Caisse Régionale d'Assurance Maladie de Paris v Biazon* [1974] ECR 999, [1975] 1 CMLR 59, ECJ; Case 17/75 *Anselmetti v Caisse de Compensation des Allocations Familiales de l'Industrie Charbonnière* [1975] ECR 781, [1976] 2 CMLR 350, ECJ; Case 87/76 *Bozzone v Office de Sécurité Sociale d'Outre-Mer* [1977] ECR 687, [1977] 2 CMLR 604, ECJ. As to invalidity benefits generally see PARA 59 et seq, 92 et seq ante, 502 et seq post.

3    As to old age benefits see PARA 508 et seq, 551 et seq post.

4    For the meaning of 'survivor' see PARA 458 ante. As to survivors' benefits see PARA 508 et seq post.

5 For the meaning of 'pensions' see PARA 460 ante.

6 See Case 79/76 *Fossi v Bundesknappschaft* [1977] ECR 667, ECJ. As to industrial injuries benefits see PARA 126 et seq ante, 517 et seq post.

7 'Acquired' in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 10(1) must be interpreted as meaning that the protection ensured by that provision extends to the benefits arising from particular schemes under national law which are given effect by increasing the value of the payment which would otherwise be made to the recipient: see Case 51/73 *Bestuur der Sociale Verzekeringsbank v Smieja* [1973] ECR 1213, [1974] 1 CMLR 620, ECJ. The provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 10(1) have no effect on the acquisition of rights to benefits: Case 32/77 *Giuliani v Landesversicherungsanstalt Schwaben* [1977] ECR 1857, [1978] 2 CMLR 416, ECJ.

8 For the meaning of 'legislation' see PARA 461 ante.

9 For the meaning of 'residence' see PARA 459 note 2 ante.

10 For the meaning of 'institution' see PARA 455 note 3 ante.

11 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 10(1).

12 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

13 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 10(2). See Case 104/76 *Jansen v Landesversicherungsanstalt Rheinprovinz* [1977] ECR 829, ECJ.

14 Ie the special non-contributory cash benefits referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 4(2a): see PARA 460 ante.

15 Ie listed in ibid Annex IIa (as amended).

16 Ibid art 10a(1).

17 Ibid art 10a(2).

18 Ie a benefit covered by ibid art 4(1)(a)-(h): see PARA 460 heads (1)-(8) ante.

19 Ibid art 10a(3).

20 Ibid art 10a(4).

## UPDATE

### 465 Prohibition of residence conditions in certain cases

TEXT AND NOTE 16--EC Council Regulation 1408/71 art 10a(1) replaced by European Parliament and EC Council Regulation 647/2005 (OJ L117, 4.5.2005, p 1). The provisions of Regulation 1408/71 art 10 and Title III (arts 18-79) do not apply to the special non-contributory cash benefits referred to in art 4(2a): art 10a(1). The persons to whom Regulation 1408/71 applies must receive these benefits exclusively in the territory of the member state in which they reside and under the legislation of that state, in so far as these benefits are mentioned in Annex IIa: art 10a(1). Benefits must be paid by, and at the expense of, the institution of the place of residence: art 10a(1).

Attendance allowance is a special non-contributory benefit which is governed exclusively by the system of co-ordination established by art 10a so that a person granted the allowance after the provisions came into force will no longer be entitled to the benefit if he emigrates to another member state: Case C-297/96 *Partridge v Adjudication Officer* (1998) Times, 2 July, ECJ. In the case of a worker returning from abroad, art 10a precludes a member state from making entitlement to the prescribed benefits conditional on habitual residence in that state: Case C-90/97 *Swaddling v Adjudication Officer* [1999] All ER (EC) 217, ECJ. However, in cases concerning persons

from outside the European Community, English courts may call for a period of residence in the United Kingdom as a condition of habitual residence under domestic law: *Gingi v Secretary of State for Work and Pensions* [2001] EWCA Civ 1685, [2002] 1 CMLR 587. See also *R (on the application of Couronne) v Crawley BC*; *R (on the application of Bontemps) v Secretary of State for Work and Pensions* [2007] EWCA Civ 1086, [2008] 1 WLR 2762, [2007] All ER (D) 50 (Nov). National legislation that applies arts 4(2a) and 10a and provides that a special non-contributory benefit may be granted only to persons who are resident in the national territory is not precluded by EC Treaty art 39: Case C-287/05 *Hendrix v Raad van Bestuur van het Uitvoeringsinstituut Werknemersverzekeringen* [2007] 3 CMLR 1251, [2007] All ER (D) 54 (Sep), ECJ.

NOTE 11--See *Viktor Movrin v Landesversicherungsanstalt Westfalen* [2000] 3 CMLR 689, ECJ (right to subsidy in respect of sickness insurance payments fully exportable). See also Case C-499/06 *Nerkowska v Zakład Ubezpieczeń Społecznych Oddziału Koszalinie* [2008] 3 CMLR 185, [2008] All ER (D) 308, ECJ (residence condition went beyond what was necessary to achieve objective of verifying that recipient of benefit continued to satisfy conditions for grant of benefit); Case C-228/07 *Petersen v Arbeitsmarktservice Niederösterreich* [2009] 1 CMLR 43, [2008] All ER (D) 67 (Sep), ECJ (member state precluded from making unemployment benefit subject to recipient being resident in national territory of that state); Case C-221/07 *Zablocka-Weyhermüller v Land Baden-Württemberg* [2009] 1 CMLR 1047, [2008] All ER (D) 77 (Dec), ECJ (member state precluded from refusing to pay benefits to surviving spouse of victim of war because they were domiciled in territory of certain specific member states).

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#### **466. Revalorisation of benefits.**

Rules for revalorisation provided by the legislation<sup>1</sup> of a member state are to apply to benefits due under that legislation, the provisions of the EC Council Regulation on social security for migrant persons<sup>2</sup> being taken into account<sup>3</sup>.

1 For the meaning of 'legislation' see PARA 461 ante.

2 I.e. EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

3 See *ibid* art 11.

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#### **467. Prevention of overlapping of benefit: general rules.**

The EC Council Regulation on social security for migrant persons<sup>1</sup> can neither confer nor maintain the right to several benefits<sup>2</sup> of the same kind for one and the same period of compulsory insurance<sup>3</sup>. This provision however does not apply to benefits in respect of invalidity<sup>4</sup>, old age<sup>5</sup>, death (pensions<sup>6</sup>) or occupational disease<sup>7</sup> which are awarded, pursuant to specified provisions<sup>8</sup>, by the institutions<sup>9</sup> of two or more member states<sup>10</sup>.

1    Ie EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

2    For the meaning of 'benefits' see PARA 460 ante.

3    See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 12(1). See also Case C-168/88 *Dammer v VZW Securex, Kinderbijslagfonds* [1989] ECR 4553, [1991] 2 CMLR 297. As to the application of corresponding national provisions see PARA 468 post.

4    As to invalidity benefits generally see PARA 59 et seq, 92 et seq ante, 502 et seq post.

5    As to old age benefits see PARA 508 et seq, 551 et seq post.

6    For the meaning of 'pensions' see PARA 460 ante.

7    As to benefits for occupational disease see PARA 150 et seq ante, 517 et seq post.

8    Ie in accordance with the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 41, 43(2), (3), 46, 50-51 or 60(1)(b).

9    For the meaning of 'institution' see PARA 455 note 3 ante.

10   EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 12(1).

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#### **468. Application of national overlapping benefits provisions.**

Save as otherwise provided by the EC Council Regulation on social security for migrant persons<sup>1</sup>, the provisions of the legislation<sup>2</sup> of a member state governing the reduction, suspension or withdrawal of benefits<sup>3</sup> in cases of overlapping with other social security benefits or any other form of income<sup>4</sup> may be invoked even where such benefits were acquired under the legislation of another member state or where such income was acquired in the territory of another member state<sup>5</sup>.

The provisions of the legislation of a member state for reduction, suspension or withdrawal of benefit in the case of a person in receipt of invalidity benefits or anticipatory old age benefits pursuing a professional or trade activity may be invoked against that person even if he is pursuing his activity in the territory of another member state<sup>6</sup>.

1 le EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 For the meaning of 'benefits' see PARA 460 ante.

4 As to the United Kingdom provisions relating to overlapping of benefits see PARA 511 post.

5 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 12(2). This provision only applies to benefits acquired through the application of this regulation: see Case 34/69 *Caisse d'assurance vieillesse des travailleurs salariés de Paris v Duffy* [1969] ECR 597, [1971] CMLR 391, ECJ. See also Case 184/73 *Bestuur van de Nieuwe Algemene Bedrijfsvereniging v Kaufmann* [1974] ECR 517, ECJ; Case 22/77 *Fonds National de Retraite des Ouvriers Mineurs v Mura* [1977] ECR 1699, [1978] 2 CMLR 416, ECJ; Case 37/77 *Greco v Fonds National de Retraite des Ouvriers Mineurs* [1977] ECR 1711, [1978] 2 CMLR 416, ECJ; Case 83/77 *Naselli v Caisse Auxiliaire d'Assurance Maladie-Invalidité* [1978] ECR 683, [1979] 1 CMLR 270, ECJ; Case 98/77 *Schaap v Bestuur van de Bedrijfsvereniging voor Banken Verzekeringswezen, Groothandel en Vrije Beroepen* [1978] ECR 707, [1979] 1 CMLR 270, ECJ; Case 105/77 *Bestuur van de Sociale Verzekeringsbank v Boerboom-Kersjes* [1978] ECR 717, [1979] 1 CMLR 270, ECJ; and Case 26/78 *Institut National d'Assurance Maladie-Invalidité and Union Nationale des Fédérations Mutualistes Neutres v Viola* [1978] ECR 1771, [1979] 1 CMLR 635, ECJ. In the case of benefits acquired solely by virtue of national legislation, national rules against overlapping may continue to apply: see Case 83/77 *Naselli v Caisse Auxiliaire d'Assurance Maladie-Invalidité* supra; Case 98/77 *Schaap v Bestuur van de Bedrijfsvereniging voor Banken Verzekeringswezen, Groothandel en Vrije Beroepen* supra; Case 105/77 *Bestuur van de Sociale Verzekeringsbank v Boerboom-Kersjes* supra; Case 26/78 *Institut National d'Assurance Maladie-Invalidité v Viola* supra; and Joined Cases 116, 117, 119-121/8 *Rijksdienst voor Werknemerspensionen v Celestre* [1981] ECR 1737, [1983] 1 CMLR 252, ECJ.

Where the benefits due under the legislation of two or more member states are conditional upon mutual reductions, suspensions or withdrawals, the amounts which would not be paid in strict application of the provisions concerning reduction, suspension or withdrawal provided for by the legislation of the member states concerned must be divided by the number of benefits subject to reduction, suspension or withdrawal: EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 7(1). As to the citation of this regulation see PARA 454 note 11 ante. For the purposes of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 12(2), (3), (4), 46a, 46b, 46c, the competent institutions (see PARA 455 ante) concerned must, on request, provide each other with all appropriate information: EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 7(2).

6 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 12(3).

Special provision is made for the reduction of invalidity pensions payable under Netherlands legislation in certain cases; an invalidity pension payable under Netherlands legislation, in a case where the Netherlands institution is bound under the provisions of art 57(5) or art 60(2)(b) to contribute also to the cost of benefits for

occupational disease granted under the legislation of another member state, must be reduced by the amount payable to the institution of the other member state which is responsible for granting the benefits for occupational disease: art 12(4).

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### (iii) Determination of the Legislation Applicable

#### 469. Legislation of single member state to apply.

Subject to one exception, persons to whom the EC Council Regulation on social security for migrant persons<sup>1</sup> applies<sup>2</sup> are subject to the legislation<sup>3</sup> of a single member state only, such legislation being determined in accordance with the provisions of Title II of that regulation<sup>4</sup>.

The exception to the above is that a person who is simultaneously employed<sup>5</sup> in the territory of one member state and self-employed<sup>6</sup> in the territory of another is subject to the legislation of the member state in the territory of which he is engaged in paid employment<sup>7</sup> unless he falls within certain specified instances<sup>8</sup>, in which case he is subject to (1) the legislation of the member state in the territory of which he is engaged in paid employment<sup>9</sup> where he pursues such an activity in the territory of two or more member states; and (2) the legislation of the member state in the territory of which he is self-employed<sup>10</sup> where he pursues such an activity in the territory of two or more member states<sup>11</sup>.

A person to whom the legislation of a member state ceases to be applicable, without the legislation of another member state becoming applicable to him, is subject to the legislation of the member state in whose territory he resides in accordance with the provisions of that legislation alone<sup>12</sup>.

1 The EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

2 As to the persons to whom EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) applies see PARA 456 ante.

3 For the meaning of 'legislation' see PARA 461 ante.

4 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 13(1). The purpose of this rule, which is a choice of law provision, is both to avoid any plurality or purposeless overlapping of contributions and liabilities which would result from the simultaneous or alternative application of several legislative systems, and to prevent those concerned, in the absence of legislation applying to them, from remaining without protection: Case 50/75 *Caisse de Pension des Employés Privés v Massonet* [1975] ECR 1473, ECJ. The rule does not prohibit a member state other than that in which the person concerned is employed from applying its social security legislation to him unless it requires him to contribute to the financing of an institution which would not accord him with any supplementary social security protection in respect of the same risk and for the same period: Case 92/63 *Nonnenmacher v Bestuur der Sociale Verzekeringsbank* [1964] ECR 281, [1964] CMLR 338, ECJ.

EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) Title II (arts 13-17a) (as amended) constitutes a complete and uniform system of choice of law rules and the substantive legal system to which it points has exclusive application. Since no other legal system may be applied (whether by renvoi or otherwise), coverage by the selected system may not be excluded on grounds which are improper in the eyes of European Community law: Case C-196/90 *Fonds voor Arbeidsongevallen v De Paep* [1991] ECR I-4815, [1993] 3 CMLR 593, ECJ. See also Case 302/84 *Ten Holder v Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821, [1987] 2 CMLR 208, ECJ.

EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 13 and the associated provisions of arts 14-14d do not apply to voluntary insurance or to optional continued insurance unless, in respect of one of the branches of social security referred to in art 4 (as to which see PARA 460 ante), there exists in any member state only a voluntary scheme of insurance: art 15(1).

As to the rules for determining the legislation applicable see PARA 470 et seq post.

5 For the meaning of 'employed person' see PARA 457 ante. See also Case C-340/94 *EJM de Jaeck v Staatssecretaris van Financiën* [1997] 2 CMLR 779, ECJ (for purposes of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 14a, 14c, 'employed' and 'self-employed' are to be interpreted in accordance with the legislation of the member state in whose territory activities are pursued).

6 For the meaning of 'self-employed person' see PARA 457 ante. See also note 5 supra.

7 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 14c(a). If a person is employed in two or more states, the provisions of art 14(2), (3) (as to which see PARA 470 post) apply: see art 14c(a).

8 In cases mentioned in *ibid* Annex VII: see art 14c(b). See also art 14d(2) dealing with the rates of contributions to be charged in such cases.

9 That legislation having been determined in accordance with the provisions of *ibid* art 14(2), (3) (as to which see PARA 470 post).

10 That legislation having been determined in accordance with *ibid* art 14a(2), (3) or (4) (as to which see PARA 471 post).

11 *Ibid* art 14c(b). The person referred to in art 14c(b) is treated for the purposes of determining the rates of contributions to be charged to self-employed workers under the legislation of the member state in whose territory he is self-employed, as if he pursued his paid employment in the territory of the member state concerned: art 14d(2). See also Case C-340/94 *EJM de Jaeck v Staatssecretaris van Financiën* [1997] 2 CMLR 779, ECJ (EC law does not preclude legislation of one of two member states from insuring claimant against some only of risks covered by scheme, subject to there being no discrimination).

12 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 13(1)(f). This provision reverses the European Court of Justice's ruling in Case 302/84 *Ten Holder v Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821, [1987] 2 CMLR 208, ECJ, applied eg in Case C-215/90 *Chief Adjudication Officer v Twomey* [1992] ECR I-1823, [1992] 2 CMLR 571, ECJ, under which the last applicable legislation continued to apply, irrespective of residence, until displaced by the legislation of another member state under the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) Title II (arts 13-17a).

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#### **470. The legislation applicable to employed persons.**

A person employed<sup>1</sup> in the territory of one member state is subject to the legislation<sup>2</sup> of that state even if he resides<sup>3</sup> in the territory of another member state or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another member state<sup>4</sup>. This provisions applies, however, subject to the following exceptions and circumstances:

- 1180 (1) a person employed in the territory of a member state by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another member state to perform work there for that undertaking continues to be subject to the legislation of the first member state, provided that the anticipated duration of that work does not exceed 12 months and that he is not sent to replace another person who has completed his term of posting<sup>5</sup>;
- 1181 (2) a person normally employed in the territory of two or more member states is subject to the legislation determined as follows:
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180. (a) a person who is a member of the travelling or flying personnel of an undertaking which, for hire or reward or on its own account, operates international transport services for passengers or goods by rail, road, air or inland waterway and has its registered office or place of business in the territory of a member state is subject to the legislation of the latter state with the following restrictions: (i) where the said undertaking has a branch or permanent representation in the territory of a member state other than that in which it has its registered office or place of business, a person employed by such branch, or permanent representation is subject to the legislation of the member state in whose territory such branch or permanent representation is situated; (ii) where a person is employed principally in the territory of the member state in which he resides, he is subject to the legislation of that state, even if the undertaking which employs him has no registered office or place of business or branch or permanent representation in that territory;
181. (b) a person other than one referred to in head (a) above is subject (i) to the legislation of the member state in whose territory he resides, if he pursues his activity partly in that territory or if he is attached to several undertakings or several employers who have their registered offices or places of business in the territory of different member states; (ii) to the legislation of the member state in whose territory is situated the registered office or place of business of the undertaking or individual employing him, if he does not reside in the territory of any member states where he is pursuing his activity<sup>6</sup>;
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- 1182 (3) where a person is employed in the territory of one member state by an undertaking which has its registered office or place of business in the territory of another member state and which straddles the common frontier of these states, he is subject to the legislation of the member state in whose territory the undertaking has its registered office or place of business<sup>7</sup>.

1 For the meaning of 'employed person' see PARA 457 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 For the meaning of 'residence' see PARA 459 note 2 ante.

4 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 13 (2)(a). As to citation of this regulation see PARA 454 note 4 ante. See also PARA 469 note 4 ante. The state of residence may not levy contributions under its own social legislation on a person's remuneration in respect of work performed in another member state which is thus subject to the legislation of that state: see Case 102/76 *HOAGM Perenboom v Inspecteur der Directe Belastingen of Nijmegen* [1977] ECR 815, ECJ. See also Case 19/67 *Bestuur der Sociale Verzekeringsbank v Van der Vecht* [1967] ECR 345, [1968] CMLR 151, ECJ.

EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 13(2)(a) also applies, subject to certain optional modifications, to persons employed by diplomatic missions and consular posts and to private domestic staff of agents of such missions or posts: see art 16.

5 Ibid art 14(1)(a). See Case 35/70 *Sàrl Manpower v Caisse primaire d'assurance maladie, Strasbourg* [1970] ECR 1251, [1971] CMLR 222, ECJ, where the court held that this provision applies to a person who is engaged by an undertaking pursuing its activity in a member state, is paid by that undertaking, is answerable to it for misconduct, is able to be dismissed by it and who, on behalf of that undertaking, performs work temporarily in another undertaking in another member state. See also Case 19/67 *Bestuur der Sociale Verzekeringsbank v Van der Vecht* [1967] ECR 345, [1968] CMLR 151, ECJ.

However, if the duration of the work to be done extends beyond the duration originally anticipated, owing to unforeseeable circumstances, and exceeds 12 months, the legislation of the first member state continues to apply until the completion of such work, provided that the competent authority of the member state in whose territory the person concerned is posted or the body designated by that authority gives its consent; such consent must be requested before the end of the initial 12-month period: EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 14(1)(b). Such consent cannot however be given for a period exceeding 12 months: art 14(1)(b). See also PARA 469 note 4 ante. As to the formalities in the case of a person posted to another member state see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 11. As to citation of this regulation see PARA 454 note 11 ante.

6 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 14(2). A person who is permanently resident in one member state but who occasionally pursues his activity in another is subject to the legislation of the first member state only in so far as he is affiliated to the social security scheme of that state; otherwise he is subject to the legislation of the state in which he occasionally pursues his activity: Case 8/75 *Caisse Primaire d'Assurance Maladie de Sélestat v Association du Foot-Ball Club d'Andlau* [1975] ECR 739, [1975] 2 CMLR 383, ECJ. See also Case C-425/93 *Calle Grenzshop Andresen GmbH & Co KG v Allgemeine Ortskrankenkasse für den Kreis Schleswig-Flensburg* [1996] 2 CMLR 89, ECJ; Case 73/72 *Bentzinger v Steinbruchs-Berufsgenossenschaft* [1973] ECR 283, ECJ; Case 13/73 *Anciens Etablissements D'Angenieux fils aîné v Hakenberg* [1973] ECR 935, ECJ; and Case CI 202/1977 *Re the Key Gibraltar Oil-Drilling Rig* [1979] 1 CMLR 362, NIC.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 14(3). A person referred to in art 14(2), (3) (see heads (2)-(3) in the text), art 14a(2), (3), (4) (see PARA 471 post), art 14c(a) (see PARA 469 ante) is treated, for the purposes of application of the legislation laid down in accordance with these provisions, as if he pursued all his professional activity or activities in the territory of the member state concerned: art 14d(1).

As to the implementing rules applicable to the persons referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 14(2)(b), (3) see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 12a.

## UPDATE

### 470 The legislation applicable to employed persons

NOTE 4--Where an employed person is transferred, as a prisoner, to his state of origin in order to serve the remainder of a prison sentence, the legislation of that member state is the applicable legislation: Case C-302/02 *Proceedings concerning Effing* [2005] 1 FCR 441, ECJ. A worker who is subject to the social security scheme of the member state in which he is employed, is not precluded from receiving child benefit pursuant to the national legislation of the member state in which he is resident: Case C-352/06 *Bosmann v Bundesagentur für Arbeit-Familienkasse Aachen* [2008] 3 CMLR 53, [2008] All ER (D) 250 (May), ECJ.

NOTE 5--See Case C-202/97 *Fitzwilliam Executive Search Ltd v Bestuur van het Landelijk Instituut Sociale Verzekeringen* [2000] QB 906n, [2000] All ER (EC) 144, ECJ; Case C-178/97 *Banks v Théâtre Royal de la Monnaie* [2000] QB 865, [2000] All ER (EC) 324, ECJ; and EUROPEAN COMMUNITIES vol 52 para 21.48.

NOTE 7--Regulation 574/72 art 12a amended: European Parliament and EC Council Regulation 647/2005 (OJ L117, 4.5.2005, p 1)).

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#### **471. Self-employed persons.**

A person who is self-employed<sup>1</sup> in the territory of one member state is subject to the legislation<sup>2</sup> of that state even if he resides<sup>3</sup> in the territory of another member state<sup>4</sup>. This provision applies, however, subject to the following exceptions and circumstances:

- 1183 (1) a person normally self-employed in the territory of a member state and who performs work in the territory of another member state continues to be subject to the legislation of the first member state, provided that the anticipated duration of the work does not exceed 12 months<sup>5</sup>;
- 1184 (2) a person normally self-employed in the territory of two or more member states is subject to the legislation of the member state in whose territory he resides if he pursues any part of his activity in the territory of that member state, but if he does not pursue any activity in the territory of the member state in which he resides, he is subject to the legislation of the member state in whose territory he pursues his main activity<sup>6</sup>;
- 1185 (3) a person who is self-employed in an undertaking which has its registered office or place of business in the territory of one member state and which straddles the common frontier of two member states is subject to the legislation of the member state in whose territory the undertaking has its registered office or place of business<sup>7</sup>.

Where, in the case of a person referred to in heads (2) or (3) above, the legislation to which he is thus subject does not enable him, even on a voluntary basis, to join a pension scheme, the person is subject to the legislation of the other member state which would apply apart from these particular provisions, or should the legislations of two or more member states apply in this way, he is subject to the legislation decided on by common agreement amongst the member states concerned or their competent authorities<sup>8</sup>.

1 For the meaning of 'self-employed person' see PARA 457 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 For the meaning of 'residence' see PARA 459 note 2 ante.

4 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 13(2)(b). As to citation of this regulation see PARA 454 note 4 ante. See also Case C-340/94 *EJM de Jaeck v Staatssecretaris van Financiën* [1997] 2 CMLR 779, ECJ (for purposes of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 14a, 14c, 'employed' and 'self-employed' to be interpreted in accordance with the legislation of the member state in whose territory activities are pursued).

5 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 14a(1)(a). If the duration of the work to be done extends beyond the duration originally anticipated, owing to unforeseeable circumstances, and exceeds 12 months, the legislation of the first member state continues to apply until the completion of such work, provided that the competent authority of the member state in whose territory the person concerned has entered to perform the work in question or the body appointed by that authority gives its consent; such consent must be requested before the end of the initial 12-month period: art 14a(1)(b). Such consent cannot, however, be given for a period exceeding 12 months: art 14a(1)(b).

The rules for determining the legislation applicable in this situation are analogous to those in respect of an employed person (see PARA 470 ante): see art 14a(1). See also PARA 469 note 4 ante. For the rules implementing

this provision see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 11a. As to citation of this regulation see PARA 454 note 11 ante.

6 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 14a(2). The rules for determining the legislation applicable in this situation are analogous to those in respect of an employed person (see PARA 470 ante): see art 14a(2). As to the rules implementing art 14a(2)-(4) see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 12a.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 14a(3).

8 Ibid art 14a(4). For the meaning of 'competent authority' see PARA 455 ante.

## UPDATE

### 471 Self-employed persons

NOTE 5--The term 'work' in Regulation 1408/71 art 14a(1)(a) covers any performance of work, whether in an employed or self-employed capacity: Case C-178/97 *Banks v Théâtre Royal de la Monnaie* [2000] QB 865, [2000] All ER (EC) 324, ECJ. See also Joined Cases C-393/99 and C-394/99 *Institut National d'Assurances Sociales pour Travailleurs Indépendants (INASTI) v Hervein; Institut National d'Assurances Sociales pour Travailleurs Indépendants (INASTI) v Lorthiois* [2002] 2 CMLR 333, ECJ.

NOTE 6--Regulation 574/72 art 12a amended: European Parliament and EC Council Regulation 647/2005 (OJ L117, 4.5.2005, p 1)).

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#### **472. Mariners.**

A person employed<sup>1</sup> on board a vessel flying the flag of a member state is subject to the legislation<sup>2</sup> of that state<sup>3</sup>. This provision applies subject to the following exceptions and circumstances:

- 1186 (1) a person who is employed by an undertaking to which he is normally attached, either in the territory of a member state or on board a vessel flying the flag of a member state, who is posted by that undertaking on board a vessel flying the flag of another member state to perform work there for that undertaking continues to be subject to the legislation of the first member state<sup>4</sup>;
- 1187 (2) a person normally self-employed<sup>5</sup>, either in the territory of a member state or on board a vessel flying the flag of a member state, who performs work on his own account on board a vessel flying the flag of another member state continues to be subject to the legislation of the first member state<sup>6</sup>;
- 1188 (3) a person who, while not being normally employed at sea, performs work in the territorial waters or in a port of a member state on a vessel flying the flag of another member state within those territorial waters or in that port, but is not a member of the crew of the vessel, is subject to the legislation of the first member state<sup>7</sup>;
- 1189 (4) a person employed on board a vessel flying the flag of a member state and remunerated for such employment by an undertaking or a person whose registered office or place of business is in the territory of another member state is subject to the legislation of the latter state if he is resident in the territory of that state<sup>8</sup>.

1 For the meaning of 'employed person' see PARA 457 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 13(2)(c). As to citation of this regulation see PARA 454 note 4 ante. See also PARA 469 note 4 ante.

4 See *ibid* art 14b(1). This provision is subject to the conditions provided in art 14(1) (as to which see PARA 470 ante): see art 14b(1). See also PARA 469 note 4 ante. As to the rules implementing this provision see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) arts 11(1)(a), 12. As to citation of this regulation see PARA 454 note 11 ante.

5 For the meaning of 'self-employed person' see PARA 457 ante.

6 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 14b(2). This provision is subject to the conditions provided in art 14a(1) (as to which see PARA 471 ante): see art 14b(2). As to the rules implementing this provision see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 11a(1)(a).

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 14b(3).

8 *Ibid* art 14b(4). See also Case C-196/90 *Fonds voor Arbeidsongevallen v De Paep* [1991] ECR I-4815, [1993] 3 CMLR 593, ECJ. The undertaking or person paying the remuneration is to be considered as the employer for the purpose of the said legislation: see EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 14b(4).

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#### **473. Civil servants, members of the armed forces and pensioners.**

Civil servants and persons treated as such are subject to the legislation<sup>1</sup> of the member state to which the administration employing them is subject<sup>2</sup>.

A person called up or recalled for service in the armed forces, or for civilian service, of a member state is subject to the legislation of that state and retains the status of employed or self-employed person<sup>3</sup>.

The provisions of the legislation of a member state under which a pensioner who is pursuing a professional or trade activity is not subject to compulsory insurance in respect of that activity also apply to a pensioner whose pension<sup>4</sup> was acquired under the legislation of another member state, unless the person concerned expressly asks to be so subject<sup>5</sup>.

1 For the meaning of 'legislation' see PARA 461 ante.

2 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 13(2)(d). As to citation of this regulation see PARA 454 note 4 ante. See also PARA 469 note 4 ante. As to persons employed by diplomatic missions and consular posts see PARA 470 note 4 ante.

3 See *ibid* art 13(2)(e). If entitlement under that legislation is subject to the completion of periods of insurance before entry into or after release from such military or civilian service, periods of insurance completed under the legislation of any other member state is taken into account, to the extent necessary, as if they were periods of insurance completed under the legislation of the first state: see art 13(2)(e). For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

A person to whom the legislation of a member state ceases to be applicable, without the legislation of another member state becoming applicable to him in accordance with one of the rules laid down in art 13(a)-(e) or in accordance with one of the exceptions or special provisions laid down in arts 14-17, is subject to the legislation of the member state in whose territory he resides in accordance with the provisions of that legislation alone: art 13(f). For the meaning of 'period of insurance' see PARA 463 note 5 ante.

4 For the meaning of 'pensions' see PARA 460 ante.

5 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 14d(3). As to the procedure to be followed for making such a request see art 14d(3); and EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 4(10)(a), Annex 10 (as amended). As to the citation of this regulation see PARA 454 note 11 ante.

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#### **474. Voluntary insurance or optional continued insurance.**

Where application of the legislation<sup>1</sup> of two or more member states<sup>2</sup> entails overlapping of insurance:

- 1190 (1) under a compulsory insurance scheme and one or more voluntary or optional continued insurance schemes, the person concerned is subject exclusively to the compulsory insurance scheme;
- 1191 (2) under two or more voluntary or optional continued insurance schemes, the person concerned may join only the voluntary or optional continued scheme for which he has opted<sup>3</sup>.

However, in respect of invalidity, old age and death (pensions<sup>4</sup>), the person concerned may join the voluntary or optional continued insurance scheme of a member state, even if he is compulsorily subject to the legislation of another member state, to the extent that such overlapping is explicitly or implicitly admitted in the first member state<sup>5</sup>.

1 For the meaning of 'legislation' see PARA 461 ante.

2 As to the rules for determining the legislation applicable see PARA 470 et seq ante.

3 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 15(2). As to citation of this regulation see PARA 454 note 4 ante.

4 For the meaning of 'pensions' see PARA 460 ante.

5 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 15(3).

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#### **475. Pensioners.**

The recipient of a pension<sup>1</sup> due under the legislation<sup>2</sup> of a member state or of pensions due under the legislation of several member states who resides<sup>3</sup> in the territory of another member state may at his request be exempted from the legislation of the latter state provided that he is not subject to that legislation because of the pursuit of an occupation<sup>4</sup>.

1 For the meaning of 'pensions' see PARA 460 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 For the meaning of 'residence' see PARA 459 note 2 ante.

4 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 17a. As to citation of this regulation see PARA 454 note 4 ante.

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#### **476. Modification by agreement between member states.**

Two or more member states, the competent authorities<sup>1</sup> of those states or the bodies designated by those authorities, may by common agreement provide for exceptions to the provisions for determining the legislation applicable<sup>2</sup> in the interests of certain categories of persons or of certain persons<sup>3</sup>.

1 For the meaning of 'competent authorities' see PARA 455 ante.

2 I.e. EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 13-16: see PARAS 469-474 ante. As to citation of this regulation see PARA 454 note 4 ante.

3 Ibid art 17. The agreements may apply to past as well as future situations: see Case 101/83 *Raad van Arbeid v Brusse* [1984] ECR 2223, [1985] 2 CMLR 424, ECJ. See also PARA 461 note 2 ante.

As to the implementation of this provision see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 11a(1)(b). As to citation of this regulation see PARA 454 note 11 ante.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/12. EUROPEAN COMMUNITY LAW/(4) SOCIAL SECURITY FOR MIGRANT PERSONS/(iv) Administrative Provisions/477. Administration.

## **(iv) Administrative Provisions**

### **477. Administration.**

The EC Council Regulation on social security for migrant persons<sup>1</sup> and on the procedure for implementation of the same<sup>2</sup> make extensive provision for their administration at both European Community and national level<sup>3</sup>. In particular, the competent authorities<sup>4</sup> of member states are required to communicate to each other all information regarding measures taken to implement the migrant persons regulation and changes in their legislation<sup>5</sup> which are likely to affect that implementation<sup>6</sup>. Further, for the purposes of implementing those provisions the authorities and institutions<sup>7</sup> of member states are required to lend their good offices and act as though implementing their own legislation<sup>8</sup>. The authorities and institutions of member states may, for the purpose of implementing the migrant persons regulation, communicate directly with one another and with the persons concerned or their representatives<sup>9</sup>.

Provision is also made in respect of the following matters: formalities in connection with relevant certificates and documents, the submission of claims, declarations and appeals<sup>10</sup>; medical examinations<sup>11</sup>; payments of cash benefits<sup>12</sup>; the conversion of currencies<sup>13</sup>; transfers of money from one member state to another<sup>14</sup>; special procedures for implementing certain national legislations<sup>15</sup>; the charge, collection and payment of contributions<sup>16</sup>; rights of institutions responsible for benefits against liable third parties<sup>17</sup>; administration costs and the refund of benefits as between the relevant competent institutions<sup>18</sup>; certain financial and accounting requirements<sup>19</sup>; provisional payments of benefits<sup>20</sup>; and the recovery of benefits not due<sup>21</sup>, including the reclaiming of payments made by way of social assistance<sup>22</sup>.

1    Ie EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

2    Ie EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96): see generally para 454 ante. As to citation of this regulation see PARA 454 note 11 ante.

3    As to the European Community bodies see PARA 478 et seq post.

4    For the meaning of 'competent authority' see PARA 455 ante.

5    For the meaning of 'legislation' see PARA 461 ante.

6    See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 84(1). As to liaison between competent authorities and liaison bodies for the benefit of claimants see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) arts 3, 4(4), Annex 4 (as amended).

7    For the meaning of 'institution' see PARA 455 note 3 ante.

8    See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 84(2). The administrative assistance furnished by the said authorities and institutions is, as a rule, free of charge; however, the competent authorities of the member states may agree to certain expenses being reimbursed: see art 84(2).

See also Case 55/77 *Maris (wife of Reboulet) v Rijksdienst voor Werknemerspensiões* [1977] ECR 2327, [1978] 2 CMLR 238, ECJ. Where, under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) or under EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96): the authorities or institutions of a member state communicate personal data to the authorities or institutions of another member state, that communication is subject to the legal provisions governing protection of data laid down by the member state providing the data. Any subsequent transmission as well as the storage, alteration and

destruction of the data is subject to the provisions of the legislation on data protection of the receiving member state. The use of personal data for purposes other than those of social security are subject to the approval of the person concerned or in accordance with the other guarantees provided for by national legislation: EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 84(5).

9 Ibid art 84(3). The authorities, institutions and tribunals of one member state may not reject claims or other documents submitted to them on the grounds that they are written in an official language of another member state; they must have recourse where appropriate to the provisions of art 81(b): art 84(4).

10 See ibid arts 85, 86 (art 85 as amended); and EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96); art 117 (as amended). See also Case 108/75 *Balsamo v Institut national d'assurance maladie-invalidité* [1976] ECR 375, ECJ; and Case 143/79 *Walsh v National Insurance Officer* [1980] ECR 1639, [1980] 3 CMLR 573, ECJ.

11 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 87; and EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 115. As to the costs of administrative checks and medical examinations see art 105.

12 See ibid art 106.

13 See ibid art 107 (as amended). See Case 98/80 *Romano v Institut National d'Assurance Malade-Invalidité* [1981] ECR 1241, [1983] 2 CMLR 698, ECJ.

14 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 88.

15 See ibid art 89, Annex VI (as amended).

16 See ibid arts 91, 92; and EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96): arts 109, 116.

17 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 93. See also Case 31/64 *De Sociale Voorzorg Mutual Insurance Fund v Bertholet* [1965] 1 ECR 81, [1966] CMLR 191, ECJ; Case 33/64 *Betriebskrankenkasse der Heseper Torfwerk GmbH v Koster* [1965] ECR 97, [1966] CMLR 191, ECJ; Case 44/65 *Hessische Knappschaft v Maison Singer et Fils* [1965] ECR 965, [1966] CMLR 82, ECJ; Case 27/69 *Caisse de Maladie des CFL Entráide médicale v Compagnie belge d'assurances générales sur la vie et contre les accidents* [1969] ECR 405, [1970] CMLR 243, ECJ; Case 78/72 *L'Etoile-Syndicat général v de Waal* [1973] ECR 499, ECJ; Case 72/76 *Landesversicherungsanstalt Rheinland-Platz v Töpfer* [1977] ECR 271, [1977] 2 CMLR 121, ECJ.

18 See EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) arts 99-101, 104.

19 See ibid arts 102, 103.

20 See ibid art 114.

21 See ibid arts 110-113. See Case 111/80 *Fanara v Institut National d'Assurance Maladie-Invalidité* [1981] ECR 1269, [1983] 1 CMLR 601, ECJ; Case C-199/88 *Cabras v Institut National d'Assurance Maladie-invalidité (INAMI)* [1990] ECR I-1023, [1991] 3 CMLR 182, ECJ.

22 See EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 111(3).

## UPDATE

### 477 Administration

NOTE 10--EC Council Regulation 574/72 art 117 further amended: European Parliament and EC Council Regulation 631/2004 (OJ L100, 6.4.2004, p 1).

See also EC Council Regulation 1408/71 art 84a (relations between the institutions and the persons covered by the migrant persons regulation) as added by European Parliament and EC Council Regulation 631/2004 (OJ L100, 6.4.2004, p 1). See further EC Commission Decisions 2002/154 (OJ L54, 25.2.2002, p 1) (model forms); 2003/751 (OJ L276, 27.10.2003, p 1) (introduction of a European health insurance card to replace forms for access to health care during a temporary stay in a member state other than the competent state or the state of residence); 2003/752 (OJ L276, 27.10.2003, p 4)

(technical specifications of the European health insurance card); 2003/753 (OJ L276, 27.10.2003, p 19) (replacement of forms E111 and E111B by the European health insurance card), 2006/613 (OJ L254 16.9.2006 p 1) (model forms).

NOTE 17--See also Case C-397/96 *Caisse de Pension des Employés Privés v Kordel* (1999) Times, 22 October, ECJ.

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#### **478. The Administrative Commission on Social Security for Migrant Workers.**

Attached to the EC Commission is the Administrative Commission on Social Security for Migrant Workers (the 'Administrative Commission') made up of a government representative of each member state, assisted, where necessary, by expert advisers<sup>1</sup>.

The Administrative Commission has the following duties:

- 1192 (1) to deal with all administrative questions and questions of interpretation arising from the provisions of the EC Council Regulation on social security for migrant persons<sup>2</sup> and subsequent regulations, or from any agreement or arrangement concluded thereunder, without prejudice to the right of the authorities, institutions<sup>3</sup> and persons concerned to have recourse to the procedures and tribunals provided for by the legislation<sup>4</sup> of member states, by the migrant persons regulation or by the EC Treaty<sup>5</sup>;
- 1193 (2) to carry out all translations of documents relating to the implementation of the migrant persons regulation at the request of the competent authorities<sup>6</sup>, institutions and tribunals of the member states, and in particular translations of claims submitted by persons who may be entitled to benefit under the provisions of that regulation<sup>7</sup>;
- 1194 (3) to foster and develop co-operation between member states in social security matters, particularly in respect of health and social measures of common interest<sup>8</sup>;
- 1195 (4) to foster and develop co-operation between member states by modernising procedures for exchange of information, in particular by adapting the information flow between institutions for the purpose of telematic exchange, taking account of the development of data processing in each member state, the main aim of such modernisation being to expedite the award of benefits<sup>9</sup>;
- 1196 (5) to assemble the factors to be taken into consideration for drawing up accounts relating to the costs to be borne by the institutions of the member states under the provisions of the migrant persons regulation and to adopt the annual accounts between the said institutions<sup>10</sup>;
- 1197 (6) to undertake any other function coming within its competence under the provisions of the migrant persons regulation and subsequent regulations or any agreement or arrangement made thereunder<sup>11</sup>;
- 1198 (7) to submit proposals to the European Commission for working out subsequent regulations and for the revision of the migrant persons and subsequent regulations<sup>12</sup>.

1 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 80(1). As to the citation of this regulation see PARA 454 note 4 ante.

A representative of the EC Commission must attend the meetings of the Administrative Commission in an advisory capacity: see art 80(1).

The Administrative Commission is assisted in technical matters by the International Labour Office under the terms of the agreements concluded to that end between the European Community and the International Labour Organisation: art 80(2). The rules of the Administrative Commission are drawn up by mutual agreement among its members: art 80(3) PARA 1. As to the rules of the Administrative Commission see OJ C68, 21.8.73, p 25.

2 I.e EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante.

3 For the meaning of 'institutions' see PARA 455 note 3 ante.

4 For the meaning of 'legislation' see PARA 461 ante.

5 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 81(a). Decisions on questions of interpretation referred to in art 81(a) must be unanimous and given the necessary publicity: art 80(3) PARA 2. These decisions are published in the Official Journal 'C' series. Such decisions are not binding on the European Court of Justice or on the courts and tribunals of member states: Case 19/67 *Bestuur der Sociale Verzekeringsbank v van der Vecht* [1967] ECR 345, [1968] CMLR 151, ECJ; Case 76/76 *Di Paolo v Office National de l'Emploi* [1977] ECR 315, [1977] 2 CMLR 59, ECJ; Case 98/80 *Romano v Institut National d'Assurance Maladie-Invalidité* [1981] ECR 1241, [1983] 2 CMLR 698, ECJ.

6 For the meaning of the 'competent authority' see PARA 455 ante.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 81(b). See also EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 2 (as amended). As to citation of this regulation see PARA 454 note 11 ante.

8 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 81(c).

9 Ibid art 81(d) (substituted by EC Council Regulation 1290/97 (OJ L176, 4.7.97, p 1)).

10 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 81(e).

11 Ibid art 81(f).

12 Ibid art 81(g).

## UPDATE

### 478 The Administrative Commission on Social Security for Migrant Workers

NOTE 7--EC Council Regulation 574/72 art 2 further amended: European Parliament and EC Council Regulation 631/2004 (OJ L100, 6.4.2004, p 1).

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#### **479. The Advisory Committee on Social Security for Migrant Workers.**

In addition to the Administrative Commission<sup>1</sup>, an Advisory Committee on Social Security for Migrant Workers (the 'Advisory Committee') was established, comprising 90 members, being two representatives of the government of each member state (of whom one at least must be a member of the Administrative Commission), two representatives of trade unions from each member state and two representatives of employer's organisations from each member state<sup>2</sup>.

The Advisory Committee is empowered, at the request of either the EC Commission or the Administrative Commission or on its own initiative:

- 1199 (1) to examine general questions or questions of principle and problems arising from the implementation of certain regulations<sup>3</sup>; and
- 1200 (2) to formulate opinions on the subject for the Administrative Commission and proposals for any revision of the regulations<sup>4</sup>.

1 See PARA 478 ante.

2 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 82. As to citation of this regulation see PARA 454 note 4 ante. For each of the categories of representatives, an alternate member must be appointed for each member state: see art 82(1). As to the appointment of representatives, the terms of office, the chairmanship, meetings, opinions and proposals, rules of procedure and secretarial services see art 82(2)-(5), (7), (8).

The Advisory Committee, acting on a proposal from its chairman, may decide in exceptional circumstances to take advice from persons or representatives of organisations with extensive experience in social security matters; and the Advisory Committee receives technical assistance from the International Labour Office under the same conditions as the Administrative Commission, under the terms of the agreement concluded between the European Community and the International Labour Organisation: art 82(6).

3 I.e the implementation of the regulations adopted within the framework of the provisions of the EC Treaty art 51.

4 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 83.

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## **(v) Particular Benefits**

### ***A. INTRODUCTION***

#### **480. Structure of Title III of the EC Council Regulation on social security for migrant persons.**

Title III of the EC Council Regulation on social security for migrant persons<sup>1</sup> is divided into eight chapters, dealing respectively with sickness and maternity benefits<sup>2</sup>, invalidity benefits<sup>3</sup>, old age and death (pensions) benefits<sup>4</sup>, benefits in respect of accidents at work and occupational diseases<sup>5</sup>, death grants<sup>6</sup>, unemployment benefits<sup>7</sup>, family benefits<sup>8</sup> and benefits for dependent children of pensioners and for orphans<sup>9</sup>. Each chapter contains those provisions which apply solely to the particular type of benefit concerned and the articles must be read in that context.

1     I.e. EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

2     See PARA 481 et seq post.

3     See PARA 502 et seq post.

4     See PARA 508 et seq post.

5     See PARA 517 et seq post.

6     See PARA 523 et seq post.

7     See PARA 525 et seq post.

8     See PARA 529 et seq post.

9     See PARA 533 et seq post.

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## **B. SICKNESS AND MATERNITY BENEFITS**

### **(A) COMMON PROVISIONS**

#### **481. Aggregation of contributions.**

The competent institution<sup>1</sup> of a member state whose legislation<sup>2</sup> makes the acquisition, retention or recovery of the right to benefits conditional upon the completion of periods of insurance<sup>3</sup>, employment<sup>4</sup> or residence<sup>5</sup> must, to the extent necessary, take account of periods of insurance, employment or residence completed under the legislation of any other member state as if they were periods completed under the legislation which it administers<sup>6</sup>. This provision applies to seasonal workers<sup>7</sup>, even in respect of periods prior to any break in insurance exceeding the period allowed by the legislation of the competent state<sup>8</sup>, provided, however, that the person concerned has not ceased to be insured for a period exceeding four months<sup>9</sup>.

If an employed or self-employed person<sup>10</sup> or a member of his family<sup>11</sup> is entitled to claim maternity benefits under the legislation of two or more member states, those benefits are granted exclusively under the legislation of the member state in whose territory the confinement took place or, if the confinement did not take place in the territory of one of these member states, exclusively under the legislation of the member state to which the person concerned was last subject<sup>12</sup>.

If an employed or self-employed person is entitled to claim sickness benefits under the legislation of Ireland and the United Kingdom for the same period of incapacity for work, those benefits are granted exclusively under the legislation of the member state to which the person concerned was last subject<sup>13</sup>.

1 For the meaning of 'competent institution' see PARA 455 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 For the meaning of 'periods of insurance' see PARA 463 note 5 ante.

4 For the meaning of 'periods of employment' see PARA 463 note 5 ante.

5 For the meaning of 'periods of residence' see PARA 463 note 6 ante.

6 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 18(1). In order to invoke the provisions of art 18, the claimant must submit to the competent institution a certified statement, issued at his request by the institution or institutions of the member state to whose legislation he was last subject, specifying the periods of insurance completed under the legislation to which he was last subject: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 16. As to citation of this regulation see PARA 454 note 11 ante. See also Case 110/79 *Coonan v Insurance Officer* [1980] ECR 1445, ECJ.

7 'Seasonal worker' means any employed person (see PARA 457 ante) who goes to the territory of a member state other than the one in which he is resident (see PARA 459 note 2 ante) to do work there of a seasonal nature for an undertaking or employer of that state for a period which may on no account exceed eight months, and who stays in the territory of that state for the duration of this work; work of a seasonal nature is taken to mean work which, being dependent on the succession of the seasons, automatically recurs each year: EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(c). As to the formalities for proving

the status of a seasonal worker see EC Council Regulation 574/72 (OJ L64, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 108.

8 For the meaning of 'competent state' see PARA 455 ante.

9 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 18(2).

10 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

11 For the meaning of 'member of the family' see PARA 458 ante.

12 EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 8(1).

13 Ibid art 8(2). As to cases of overlapping of rights to sickness benefits, benefits in respect of accidents at work or occupational disease under Greek legislation and the legislation of one or more other member states see art 8a.

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#### **482. Further provisions for aggregation of contributions.**

For the purposes of aggregating periods of insurance<sup>1</sup> and residence<sup>2</sup> in order to satisfy national conditions for entitlement to certain benefits<sup>3</sup>, the EC Council Regulation on the implementation of social security for migrant persons<sup>4</sup> lays down the following rules:

- 1201 (1) to periods of insurance or residence completed under the legislation<sup>5</sup> of one member state must be added periods of insurance or residence completed under the legislation of any other member state, to the extent that this is necessary to have recourse thereto in order to supplement periods of insurance or residence completed under the legislation of the first member state for the purpose of acquiring, retaining, or recovering the rights to benefits, provided that such periods of insurance or residence do not overlap<sup>6</sup>;
- 1202 (2) when a period of insurance or residence completed under compulsory insurance under the legislation of one member state coincides with a period of insurance completed under voluntary or optional continued insurance under the legislation of another member state, only the period completed under compulsory insurance is taken into account<sup>7</sup>;
- 1203 (3) when a period of insurance or residence, other than a period treated as such, completed under the legislation of one member state coincides with a period treated as such under the legislation of another member state, only the period other than a period treated as such is taken into account<sup>8</sup>;
- 1204 (4) any period treated as such under the legislation of two or more member states must be taken into account only by the institution of the member state under whose legislation the insured person was last compulsorily insured prior to that period<sup>9</sup>;
- 1205 (5) where it is not possible to determine accurately the period of time in which certain periods of insurance or residence were completed under the legislation of one member state, such periods must be presumed not to overlap with periods of insurance or residence completed under the legislation of another member state and, where advantageous, must be taken into account<sup>10</sup>;
- 1206 (6) where, under the legislation of one member state, certain periods of insurance or residence are taken into account only if they have been completed within a specified time limit, the institution which administers that legislation must:

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182. (a) only take into account periods of insurance or residence completed under the legislation of another member state if they were completed within the specified time limit; or
183. (b) Extend the time limit for the duration of periods of insurance or residence completed wholly or partly within that limit under the legislation of another member state, where the periods of insurance or residence involved under the legislation of the second member state give rise only to the suspension of the time limit within which the periods of insurance or residence must be completed<sup>11</sup>.

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Periods of insurance or residence completed under the legislation of a member state to which the EC Council Regulation on social security for migrant persons<sup>12</sup> does not apply but which are taken into account under the legislation of that member state to which that regulation does apply<sup>13</sup>, are considered as periods of insurance or residence to be taken into account for the purposes of aggregation<sup>14</sup>.

When periods of insurance completed under the legislation of one member state are expressed in units different from those used by the legislation of another member state, special provisions apply for making the conversion necessary for the purposes of aggregation<sup>15</sup>.

These provisions for aggregation prevent the institution of a member state from applying national rules for the aggregation and apportionment of periods of insurance which are less favourable to the person concerned than the relevant community provisions<sup>16</sup>.

1 For the meaning of 'periods of insurance' see PARA 463 note 5 ante.

2 For the meaning of 'periods of residence' see PARA 463 note 6 ante.

3 I.e. those benefits under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 18(1), 38, 45(1)-(3), 64, 67(1), (2). As to citation of this regulation see PARA 454 note 4 ante.

4 I.e. EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96). As to citation of this regulation see PARA 454 note 11 ante.

5 For the meaning of 'legislation' see PARA 461 ante.

6 See EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 15(1)(a). Where benefits in respect of invalidity, old age or death (pensions) are to be awarded by the institutions (as to which see PARA 455 note 3 ante) of two or more member states in accordance with the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 46(2) (as to which see PARA 512 post), each of the institutions concerned must effect a separate aggregation, by taking into account the whole of the periods of insurance or residence completed by the employed or self-employed person under the legislation of all the member states to which he has been subject, without prejudice, where appropriate, to the provisions of arts 45(2), (3), 47(1)(a); nevertheless, in the cases referred to in art 4c(b), the above mentioned institutions must likewise take account, for the award of benefits, of the periods of insurance or of residence completed under an obligatory insurance scheme under the legislation of the two member states in question which overlap each other: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 15(1)(a).

7 Ibid art 15(1)(b).

8 Ibid art 15(1)(c).

9 See ibid art 15(1)(d). Where the insured person has not been compulsorily insured under the legislation of a member state before the said period, the latter must be taken into account by the institution of the member state under whose legislation he was compulsorily insured for the first time after the said period: see art 15(1)(d).

10 Ibid art 15(1)(e).

11 Ibid art 15(1)(f).

12 I.e. EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see PARA 454 ante.

13 As to the national legislations to which EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) applies see PARA 461 ante.

14 EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 15(2).

15 See ibid art 15(3).

16 See Joined Cases 116, 117, 119-121/80 *Rijksdienst voor Werknemerspensioenen v Celestre; Nationaal Pensioenfonds voor Mijnwerkers v Strehl* [1981] ECR 1737, [1983] 1 CMLR 252, ECJ.

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## (B) RULES FOR PARTICULAR CLAIMANTS

### *(a) Employed or Self-employed Persons and Members of their Families*

#### **483. Effect of residence in a member state other than the competent state: general rules.**

An employed or self-employed person<sup>1</sup> residing<sup>2</sup> in the territory of a member state other than the competent state<sup>3</sup> who satisfies the conditions of the legislation<sup>4</sup> of that state for entitlement to benefits<sup>5</sup> is entitled to receive in the state in which he is resident:

- 1207 (1) benefits in kind<sup>6</sup> provided on behalf of the competent institution<sup>7</sup> by the institution of the place of residence<sup>8</sup> in accordance with the provisions of the legislation administered by that institution as though he were insured with it<sup>9</sup>;
- 1208 (2) cash benefits provided by the competent institution in accordance with the legislation which it administers.

However, by agreement between the competent institution and the institution of the place of residence, benefits under head (2) above may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent state<sup>10</sup>.

These provisions apply by analogy to members of the family<sup>11</sup> who reside in the territory of a member state other than the competent state in so far as they are not entitled to such benefits under the legislation of the state in whose territory they reside<sup>12</sup>. Where the members of the family reside in the territory of a member state under whose legislation the right to receive benefits in kind is not subject to conditions of insurance or employment, benefits in kind which they receive are considered as being on behalf of the institution with which the employed or self-employed person is insured, unless the spouse or the person looking after the children pursues a professional or trade activity in the territory of that member state<sup>13</sup>.

1 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

2 For the meaning of 'residence' see PARA 459 note 2 ante.

3 For the meaning of 'competent state' see PARA 455 ante.

4 For the meaning of 'legislation' see PARA 461 ante.

5 In taking account, where appropriate of the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 18: see PARA 481 ante. As to citation of this regulation see PARA 454 note 4 ante.

6 Benefits in kind include benefits in the form of reimbursement of medical and pharmaceutical expenses (Case 61/65 *Vaassen v Beambtenfonds voor het Mijnbedrijf* [1966] ECR 261, [1966] CMLR 508, ECJ), but do not include supplementary pension payments intended as a contribution to the financing of the beneficiary's sickness insurance (Case 33/65 *Dekker v Bundesversicherungsanstalt für Angestellte* [1965] ECR 901, [1966] CMLR 503, ECJ). See also Case 14/72 *Heinze v Landesversicherungsanstalt Rheinprovinz* [1972] ECR 1105, [1975] 2 CMLR 96, ECJ; Case 15/72 *Land Niedersachsen v Landesversicherungsanstalt* [1972] 2 ECR 1127, [1975] 2 CMLR 96, ECJ; Case 16/72 *Allgemeine Ortskrankenkasse Hamburg v Landesversicherungsanstalt Schleswig-Holstein* [1972] ECR 1141, [1975] 2 CMLR 96, ECJ; Case 818/79 *Allgemeine Ortskrankenkasse*

*Mittelfranken v Landesversicherungsanstalt Ober-und Mittelfranken* [1980] ECR 2729, [1981] 3 CMLR 617, ECJ. As to the reimbursement of benefits in kind between institutions see EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 36.

7 For the meaning of 'competent institution' see PARA 455 ante.

8 For the meaning of 'institution of the place of residence' see PARA 455 ante.

9 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 19(1)(a). In order to receive benefits in kind under this provision, the claimant must register himself and the members of his family with the institution of the place of residence by submitting a certified statement, issued by the competent institution and valid until cancelled, testifying that he and the members of his family are entitled to those benefits: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 17(1). As to citation of this regulation see PARA 454 note 11 ante. As to benefits in kind in the case of residence in a member state other than the competent state generally see further art 17(2)-(4) (art 17(2) as amended). Upon each application for benefits in kind the claimant must submit the supporting documents required for the granting of those benefits under the legislation of the member state where he resides: art 17(5). As to the procedure in the event of hospitalisation, and decisions as to the grant of benefits, see art 17(6), (7), (9). The person concerned or the members of his family must inform the institution of the place of residence of a any relevant change in their situation: see art 17(8).

10 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 19(1)(b). In order to receive cash benefits under this provision an employed or self-employed person must, within three days of the commencement of incapacity for work, apply to the institution of the place of residence by submitting a notification of having ceased work or, if the legislation administered by the competent institution or by the institution of the place of residence so provides, a certificate of incapacity for work issued by the doctor providing treatment for the person concerned: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 18(1); and Case 22/86 *Rindone v Allgemeine Ortskrankenkasse Bad Urach-Münsingen* [1987] ECR 1339, ECJ. The competent institution must pay cash benefits by the appropriate method, in particular by international money order, and must inform the institution of the place of residence and the person concerned accordingly: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 17(8). As to cash benefits in the case of residence in a member state other than the competent state generally see art 18. See also Case C-215/90 *Chief Adjudication Officer v Twomey* [1992] ECR I-1823, [1992] 2 CMLR 571, ECJ.

11 For the meaning of 'member of the family' see PARA 458 ante.

12 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 19(2) PARA 1. See also Case C-451/93 *Delavant v Allgemeine Ortskrankenkasse für das Saarland* [1995] ECR I-1545, [1996] 1 CMLR 779, ECJ.

13 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 19(2) PARA 2.

## UPDATE

### **483 Effect of residence in a member state other than the competent state: general rules**

NOTE 6--Where legislation of member state of residence does not provide for provision of benefits in kind in order to cover the risk in respect of which entitlement to such benefits is claimed, EC Council Regulation 1408/71 does not require benefits be provided outside competent state by or on behalf of competent institution: Case C-208/07 *Von Chamier-Glisczinski v Deutsche Angestellten-Krankenkasse* [2009] 3 CMLR 1459, [2009] All ER (D) 20 (Sep), ECJ.

NOTE 9--EC Council Regulation 574/72 art 17(6), (7) deleted: European Parliament and EC Council Regulation 631/2004 (OJ L100, 6.4.2004, p 1).

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#### **484. Frontier workers.**

A frontier worker<sup>1</sup> may also obtain benefits in the territory of the competent state<sup>2</sup>. Such benefits are provided by the competent institution<sup>3</sup> in accordance with the provisions of the legislation<sup>4</sup> of that state, as though the person concerned were resident in that state. Members of his family<sup>5</sup> may also receive benefits under the same conditions; however, receipt of such benefits is, except in urgent cases, conditional upon an agreement between the competent authorities<sup>6</sup> of those states or, in its absence, on prior authorisation by the competent institution<sup>7</sup>.

1 'Frontier worker' means any employed or self-employed person (as to which see PARA 457 ante) who pursues his occupation in the territory of a member state and resides in the territory of another member state to which he returns as a rule daily or at least once a week; however, a frontier worker who is posted elsewhere in the territory of the same or another member state by the undertaking to which he is normally attached, or who engages in the provision of services elsewhere in the territory of the same or another member state, retains the status of frontier worker for a period not exceeding four months, even if he is prevented, during that period, from returning daily or at least once a week to the place where he resides: EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(b). As to citation of this regulation see PARA 454 note 4 ante. See Case 236/87 *Bergemann v Bundesanstalt für Arbeit* [1988] ECR 5125, [1990] 1 CMLR 525, ECJ. For the meaning of 'residence' see PARA 459 note 2 ante.

2 For the meaning of 'competent state' see PARA 455 ante.

3 For the meaning of 'competent institution' see PARA 455 ante.

4 For the meaning of 'legislation' see PARA 461 ante.

5 For the meaning of 'member of the family' see PARA 458 ante.

6 For the meaning of 'competent authority' see PARA 455 ante.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 20.

As to the implementation of this provision see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 19. As to citation of this regulation see PARA 454 note 11 ante.

#### **UPDATE**

#### **484 Frontier workers**

NOTE 7--See Case C-286/03 *Hosse v Land Salzburg* [2006] All ER (EC) 640, ECJ.

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#### **485. Stay in or transfer of residence to the competent state.**

An employed or self-employed person<sup>1</sup> residing<sup>2</sup> in the territory of a member state other than the competent state<sup>3</sup>, who satisfies the conditions of the legislation<sup>4</sup> of the competent state for entitlement to benefits<sup>5</sup>, and who is staying<sup>6</sup> in the territory of the competent state is entitled to receive benefits in accordance with the provisions of the legislation of that state as though he were resident there, even if he has already received benefits for the same case of sickness or maternity before his stay<sup>7</sup>.

This provision applies by analogy to members of the family who reside in the territory of a member state other than the competent state in so far as they are not entitled to such benefits under the legislation of the state in whose territory they reside<sup>8</sup>. However, where the latter reside in the territory of a member state other than the one in whose territory the employed or self-employed person resides, benefits in kind are provided by the institution of the place of stay on behalf of the institution of the place of residence of the persons concerned<sup>9</sup>.

An employed or self-employed person and members of his family residing in the territory of a member state other than the competent state who satisfy the conditions of the provisions of the legislation of the competent state for entitlement to benefits<sup>10</sup> and who transfer their residence to the territory of the competent state are entitled to receive benefits in accordance with the provisions of the legislation of that state, even if they have already received benefits for the same case of sickness or maternity before transferring their residence<sup>11</sup>.

1 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

2 For the meaning of 'residence' see PARA 459 note 2 ante.

3 For the meaning of 'competent state' see PARA 455 ante.

4 For the meaning of 'legislation' see PARA 461 ante.

5 I.e. taking into account, where appropriate, EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 18. As to citation of this regulation see PARA 454 note 4 ante.

6 For the meaning of 'stay' see PARA 455 note 11 ante.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 21(1). Article 21(1), (2) does not apply to frontier workers and members of their families (see PARA 484 ante): art 21(3).

8 See *ibid* art 21(2) PARA 1. As to implementation of this provision see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 19a (added by EC Council Regulation 3096/95 art 2(1)). As to citation of this regulation see PARA 454 note 11 ante.

9 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 21(2) PARA 2. For the meaning of 'institution of the place of stay' and 'institution of the place of residence' see PARA 455 ante.

10 I.e. taking into account, where appropriate, *ibid* art 18: see PARA 481 ante.

11 See *ibid* art 21(4).

#### **UPDATE**

**485 Stay in or transfer of residence to the competent state**

NOTE 8--EC Council Regulation 574/72 art 19a amended: European Parliament and EC Council Regulation 631/2004 (OJ L100, 6.4.2004, p 1).

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#### **486. Benefits during stay outside the competent state.**

An employed or self-employed person<sup>1</sup> who satisfies the conditions of the legislation<sup>2</sup> of the competent state<sup>3</sup> for entitlement to benefits<sup>4</sup> and (1) whose condition necessitates immediate benefits during a stay in the territory of another member state<sup>5</sup>; or (2) who, having become entitled to benefits chargeable to the competent institution<sup>6</sup>, is authorised by that institution to return to the territory of the member state where he resides<sup>7</sup>, or to transfer to the territory of another member state<sup>8</sup>; or (3) who is authorised by the competent institution to go to the territory of another member state to receive there the treatment appropriate to his condition<sup>9</sup>, is entitled:

- 1209 (a) to benefits in kind<sup>10</sup> provided on behalf of the competent institution by the institution of the place of stay or residence<sup>11</sup> in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided is governed, however, by the legislation of the competent state<sup>12</sup>;
- 1210 (b) to cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers. However, by agreement between the competent institution of the place of stay or residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the provisions of the legislation of the competent state<sup>13</sup>.

These provisions apply by analogy to members of the family<sup>14</sup> of an employed or self-employed person<sup>15</sup>, and the fact that they apply to an employed or self-employed person does not affect the right to benefit of members of his family<sup>16</sup>.

The right of a pensioner who is entitled to benefits in kind under the legislation of a member state and who does not pursue a professional or trade activity to be authorised by the competent institution to go to another member state to receive there the treatment appropriate to his condition is subject to the provisions of head (1) above<sup>17</sup>.

1 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 For the meaning of 'competent state' see PARA 455 ante.

4 I.e. taking account, where appropriate, of the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 18: see PARA 481 ante. As to citation of this regulation see PARA 454 note 4 ante.

5 Ibid art 22(1)(a). This provision also applies to persons who are nationals of a member state and are insured under the legislation of a member state and to the members of their families residing with them: see art 22a.

The reason why the person concerned is in another member state is irrelevant: Case 75/63 *Hoekstra v Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten* [1964] ECR 177, [1964] CMLR 319, ECJ.

An employed or self-employed person referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 13(2)(d), 14, 14a, 14b, 14c(a) or 17, and members of the family accompanying him also benefit from the provisions of art 22(1)(a) for any condition requiring benefits during a stay in the territory of

the member state in which the worker is employed or whose flag the vessel aboard which the worker is employed is flying: art 22b. A person, as referred to in arts 22(1), (3), 22a, who stays in a member state other than the competent state to study there or receive vocational training leading to a qualification officially recognised by the authorities of a member state, and the members of his family accompanying him during his stay, are covered by the provisions of art 22(1)(a) for any condition necessitating benefits during the stay in the territory of the member state where such person is studying or training: art 22c (added by EC Council Regulation 1290/97 (OJ L176, 4.7.97, p 1)).

6 For the meaning of 'competent institution' see PARA 455 ante.

7 For the meaning of 'residence' see PARA 459 note 2 ante.

8 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 22(1)(b). Such authorisation may be refused only if it is established that movement of the person concerned would be prejudicial to his state of health or the receipt of medical treatment: art 22(2) PARA 1.

9 Ibid art 22(1)(c). The authorisation required under art 22(1)(c) must be issued by the institution of the member state in whose territory the members of the family are residing: art 22(3)(b). This provision also applies to persons who are nationals of a member state and are insured under the legislation of a member state and to the members of their families residing with them: see art 22a.

The authorisation may not be refused where the treatment in question is among the benefits provided for by the legislation of the member state in whose territory the person concerned resides and where he cannot be given such treatment within the time normally necessary for obtaining the treatment in question in the member state of residence, taking account of his current state of health and the probable course of the disease: art 22(2) PARA 2. 'Treatment in question' in this provision refers to any appropriate treatment of the sickness or disease from which the person concerned suffers: Case 117/77 *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v Pierik* [1978] ECR 825, [1978] 3 CMLR 343, ECJ. The duty to grant the authorisation under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 22(1)(c) covers both cases where the treatment provided in another member state is more effective than that which the person concerned can receive in the member state where he resides and those in which the treatment in question cannot be provided in the territory of that state: see Case 117/77 *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v Pierik* supra. Where the institution acknowledges that the treatment in question constitutes a necessary and effective treatment affecting the person concerned, the conditions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 22(2) PARA 2 are fulfilled and the competent institution may not refuse the authorisation: Case 182/78 *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v Pierik* [1979] ECR 1977, [1980] 2 CMLR 88, ECJ.

10 As to the meaning of 'benefits in kind' see PARA 483 note 6 ante.

11 For the meaning of 'institution of the place of stay' and 'institution of the place of residence' see PARA 455 ante.

12 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 22(1)(i). This provision refers to any benefits which the institution of the member state to which the person concerned goes after obtaining the necessary authorisation has the power to grant, even if it is not required to provide them under the legislation which it administers: Case 182/78 *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v Pierik* [1979] ECR 1977, [1980] 2 CMLR 88, ECJ.

In order to receive benefits in kind under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 22(1)(a)(i) (head (1)(a) in the text), save in the case referred to in EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 20, an employed or self-employed person must submit to the institution of the place of stay a certified statement, issued at his request by the competent institution if possible before he leaves his state of residence, stating that he is entitled to benefits in kind and specifying in particular, where necessary, the maximum period during which, under the legislation of the competent state, those benefits may be granted and if the person concerned does not submit the said certified statement, the institution of the place of stay must obtain it from the competent institution: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 21(1). As to citation of this regulation see PARA 454 note 11 ante. For the corresponding provisions in the case of persons employed in international transport see art 20. In order to receive benefits in kind under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 22(1)(b)(i), (c)(i) (heads (2)(a), (3)(a) in the text), the claimant must submit a similar certified statement, under the same conditions, to the institution of the place of residence: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 22.

13 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 22(1)(ii). The procedure for claiming cash benefits is the same as that prescribed in art 18 (see PARA 483 ante): art 24.

14 For the meaning of 'members of the family' see PARA 458 ante.

15 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 22(3). However, for the purpose of applying art 22(1)(a), (c)(i) to the members of the family referred to in art 19(2) (as to which see PARA 483 ante) who reside in the territory of a member state other than the one in whose territory the employed or self-employed person resides, benefits in kind are provided on behalf of the institution of the member state in whose territory the members of the family are residing by the institution of the place of stay in accordance with the provisions of the legislation which it administers as if the employed or self-employed person were insured there. The period during which benefits are provided is, however, that laid down under the legislation of the member state in whose territory the members of the family are residing: art 22(3)(a). The provisions of EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) arts 21, 22 (see note 12 supra) apply by analogy, as appropriate, in respect of the granting of benefits in kind to members of the family as provided for in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 22(3). However, in the cases referred to in art 22(3) PARA 2, the institution of the place of residence and the legislation of the country of residence of the members of the family must be considered, respectively, as the competent institution and as the legislation of the competent state for the purposes of EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) arts 17(6), (7), (9), 21, 22: art 23.

16 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 22(4).

17 Case 182/78 *Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v Pierik* [1979] ECR 1977, [1980] 2 CMLR 88, ECJ.

## UPDATE

### 486 Benefits during stay outside the competent state

NOTE 5--As to the interpretation of EC Council Regulation 1408/71 art 22(1)(a) with regard to health care in conjunction with pregnancy and childbirth see EC Commission Decision 2002/155 (OJ L54, 25.2.2002, p 39).

Regulation 1408/71 arts 22(1)(a), 22a replaced, art 22(1a) inserted, art 22b deleted: European Parliament and EC Council Regulation 631/2004 (OJ L100, 6.4.2004, p 1). Head (1) now refers to a person whose condition requires benefits in kind which become necessary on medical grounds during a stay in the territory of another member state, taking into account the nature of the benefits and the expected length of the stay: art 22(1)(a). The Administrative Commission must establish a list of benefits in kind which, in order to be provided during a stay in another member state, require, for practical reasons, a prior agreement between the person concerned and the institution providing the care: art 22(1a).

NOTE 9--The competent institution may not refuse an authorisation under EC Council Regulation 1408/71 art 22(1)(c) unless it can establish that time the person will have to wait does not exceed a period which is acceptable on the basis of an objective medical assessment of his clinical needs: Case C-372/04 *R (on the application of Watts) v Bedford Primary Care Trust* [2006] QB 667, ECJ.

NOTES 12, 15--EC Council Regulation 574/72 art 20 deleted, art 21 replaced, arts 22, 23 amended: European Parliament and EC Council Regulation 631/2004 (OJ L100, 6.4.2004, p 1).

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#### **487. Calculation of cash benefits.**

The competent institution<sup>1</sup> of a member state whose legislation<sup>2</sup> provides that the calculation of cash benefits is to be based on average earnings or contributions, must determine those average earnings or contributions exclusively by reference to earnings or contributions completed under that legislation<sup>3</sup>.

The competent institution of a member state whose legislation provides that the calculation of cash benefits is to be based on standard earnings, must take account exclusively of the standard earnings or, where appropriate, of the average of standard earnings completed under that legislation<sup>4</sup>.

The competent institution of a member state under whose legislation the amount of cash benefits varies with the number of members of the family<sup>5</sup> must also take into account the members of the family of the person concerned who are resident<sup>6</sup> in the territory of another member state as if they were resident in the territory of the competent state<sup>7</sup>.

1 For the meaning of 'competent institution' see PARA 455 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 23(1). As to citation of this regulation see PARA 454 note 4 ante.

4 Ibid art 23(2).

5 For the meaning of 'member of the family' see PARA 458 ante.

6 For the meaning of 'residence' see PARA 459 note 2 ante.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 23(3). In order to receive benefits under this provision, an employed or self-employed person must submit to the competent institution a certified statement, issued by the institution of the place of residence of the members of the family, relating to the members of his family who are resident in the territory of a member state other than that wherein the said institution is situated: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 25(1), (2). As to citation of this regulation see PARA 454 note 11 ante. The statement is valid for 12 months following the date of its issue; but it may be renewed and in such a case it is valid from the date of its renewal: see art 25(2). The person concerned must immediately notify the competent institution of any occurrence necessitating an amendment to the certified statement; and the amendment takes effect from the date of such occurrence: see art 25(2). In place of the certified statement provided for in art 25(1), the competent institution may require the person concerned to produce recent civil status documents relating to the members of his family who are resident in the territory of a member state other than that wherein the said institution is situated: art 25(3). For the meaning of 'institution of the place of residence' see PARA 455 ante.

#### **UPDATE**

#### **487 Calculation of cash benefits**

NOTE 4--The provisions of Regulation 1408/71 art 23(1), (2) also apply where the legislation applied by the competent institution provides for a specific reference period and this period coincides, where appropriate, with the whole or part of the periods

completed by the person concerned under the legislation of one or more other member states: art 23(2a) (as added by European Parliament and EC Council Regulation 647/2005 (OJ L117, 4.5.2005, p 1)).

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#### **488. Substantial benefits in kind.**

Where the right of an employed or self-employed person<sup>1</sup> to a prosthesis, a major appliance or other substantial benefits in kind<sup>2</sup> has been recognised by the institution of a member state before he becomes insured with the institution of another member state, that employed or self-employed person continues to receive those benefits at the expense of the first institution, even if they are granted after he becomes insured with the second institution<sup>3</sup>.

1 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

2 As to the meaning of 'benefits in kind' see PARA 483 note 6 ante.

3 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 24(1). As to citation of this regulation see PARA 454 note 4 ante. This provision applies by analogy to pensioners: see art 30 (amended by EC Council Regulation 3095/95 (OJ L335, 30.12.95, p 1)). The Administrative Commission is obliged to draw up the list of benefits to which the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 24(1) apply: art 24(2).

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*(b) Unemployed Persons and Members of their Families*

**489. Unemployed persons who have gone to another member state in search of employment, and members of their families.**

An unemployed person who was formerly employed or self employed<sup>1</sup>, to whom specified provisions apply<sup>2</sup>, and who satisfies the conditions of the legislation of the competent state<sup>3</sup> for entitlement to benefits in kind and in cash<sup>4</sup> is entitled to receive the following for a maximum period of three months<sup>5</sup>:

1211 (1) benefits in kind<sup>6</sup> provided on behalf of the competent institution<sup>7</sup> by the institution<sup>8</sup> of the member state in which he seeks employment in accordance with the provisions of the legislation which the latter institution administers, as though he were insured with it<sup>9</sup>;

1212 (2) cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers<sup>10</sup>.

1 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

2 He to whom the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 69(1) or art 71(1)(b)(ii) (second sentence) apply. As to citation of this regulation see PARA 454 note 4 ante.

3 For the meaning of 'competent state' see PARA 455 ante.

4 He taking account where appropriate of the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 18; see PARA 481 ante.

5 He for the period provided under *ibid* art 69(1)(c): see PARA 527 post.

6 As to the meaning of 'benefits in kind' see PARA 483 note 6 ante.

7 For the meaning of 'competent institution' see PARA 455 ante.

8 For the meaning of 'institution' see PARA 455 note 3 ante.

9 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 25(1)(a).

10 *Ibid* art 25(1)(b). However, by agreement between the competent institution and the institution of the member state in which the unemployed person seeks employment, benefits may be provided by the latter institution on behalf of the former institution in accordance with the provisions of the legislation of the competent state. Unemployment benefits under art 69(1) must not be granted for the period during which cash benefits are received: see art 25(1)(b).

Without prejudice to any provisions of the legislation of a member state which permit an extension of the period during which sickness benefits may be granted, the period provided for in art 25(1) may, in cases of force majeure, be extended by the competent institution within the limit fixed by the legislation administered by that institution: art 25(4); and see Case C-391/93 *Perrotta v Allgemeine Ortskrankenkasse München* [1995] ECR I-2079, [1996] 1 CMLR 491, ECJ.

In order to receive benefits under this provision for himself and for the members of his family, the claimant must submit to the sickness insurance institution of the place to which he has gone a certified statement testifying the existence of the right to those benefits, indicating the duration of that right and, in certain cases, specifying the amount of cash benefits to be provided: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1;

OJ C325, 10.12.92, p 96) art 26(1)-(3). As to citation of this regulation see PARA 454 note 11 ante. In order to receive the cash benefits provided for by the legislation of the competent state the claimant, within three days, must send a certificate of incapacity for work, issued by his doctor, to the sickness insurance institution of the place to which he has gone, stating the date up to which he has received sickness insurance benefits and his address in the country where he is: see art 26(4)-(7).

## UPDATE

### **489 Unemployed persons who have gone to another member state in search of employment, and members of their families**

TEXT AND NOTES--EC Council Regulation 1408/71 art 25(1) amended, art 25(1a) added: European Parliament and EC Council Regulation 631/2004 (OJ L100, 6.4.2004, p 1). An unemployed person who was formerly employed or self-employed and to whom the provisions of Regulation 1408/71 art 69(1) (see PARA 527) or art 71(1)(b)(ii), second sentence (see PARA 528) apply and who satisfies the conditions laid down in the legislation of the competent state for entitlement to benefits in kind and cash benefits, taking account where necessary of the provisions of *ibid* art 18 (see PARA 481), is entitled to receive for the period of time referred to in art 69(1)(c):

- 1 (1) benefits in kind which become necessary on medical grounds for this person during his stay in the territory of the member state where he is seeking employment, taking account of the nature of the benefits and the expected length of the stay (art 25(1)(a)). These benefits in kind must be provided on behalf of the competent institution by the institution of the member state in which the person is seeking employment, in accordance with the provisions of the legislation which the latter institution administers, as if he were insured with it (art 25(1)(a));
- 2 (2) cash benefits provided by the competent institution in accordance with the provisions of the legislation which it administers (art 25(1)(b)). However, by agreement between the competent institution and the institution of the member state in which the unemployed person seeks employment, benefits may be provided by the latter institution on behalf of the former institution in accordance with the provisions of the legislation of the competent state (art 25(1)(b)). Unemployment benefits under art 69(1) must not be granted for the period during which cash benefits are received (art 25(1)(b)).

Article 22(1a) (see PARA 486) applies to these provisions by analogy: art 25(1a).

NOTE 10--EC Council Regulation 574/72 art 26 amended: European Parliament and EC Council Regulation 631/2004 (OJ L100, 6.4.2004, p 1).

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#### **490. Benefit for former employee in state of residence.**

A totally unemployed person who was formerly employed, to whom specified provisions apply<sup>1</sup> is entitled to receive benefits in kind<sup>2</sup> and in cash in accordance with the provisions of the legislation<sup>3</sup> of the member state in which he resides<sup>4</sup> as though he had been subject to that legislation during his last employment<sup>5</sup>.

1     le a person to whom EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 71(1)(a) (ii) or art 71(1)(b)(ii) applies: see PARA 528 post. As to citation of this regulation see PARA 454 note 4 ante.

2     As to the meaning of 'benefits in kind' see PARA 483 note 6 ante.

3     For the meaning of 'legislation' see PARA 461 ante.

4     For the meaning of 'residence' see PARA 459 note 2 ante.

5     See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 25(2). The provisions of art 18 (see PARA 481 ante) are taken into account where appropriate and the cost of such benefits is met by the institution of the country of residence: see art 25(2). The institution which is responsible for granting benefits in kind and cash benefits to the unemployed persons referred to in art 25(2) and which belongs to a member state whose legislation provides for deduction of contributions payable by unemployed persons to cover sickness and maternity benefits is authorised to make such deductions in accordance with the provisions of its legislation: art 25a.

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#### **491. Benefit for members of the families of unemployed persons.**

Where an unemployed person satisfies the conditions of the legislation<sup>1</sup> of the member state which is responsible for the cost of unemployment benefits<sup>2</sup> for entitlement to sickness and maternity benefits<sup>3</sup>, the members of his family<sup>4</sup> are entitled to receive such benefits, irrespective of the member state in whose territory they reside or are staying<sup>5</sup>.

Such benefits are to be provided:

1213 (1) with regard to the benefits in kind<sup>6</sup>, by the institution of the place of residence or stay<sup>7</sup> in accordance with the provisions of the legislation which it administers, on behalf of the competent institution<sup>8</sup> of the member state which is responsible for the cost of unemployment benefits;

1214 (2) with regard to cash benefits, by the competent institution of the member state which is responsible for the costs of unemployment benefit, in accordance with the legislation it administers<sup>9</sup>.

1 For the meaning of 'legislation' see PARA 461 ante.

2 As to the provision of unemployment benefits see PARA 525 et seq post.

3 In taking into account, where appropriate, the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 18: see PARA 481 ante. As to citation of this regulation see PARA 454 note 4 ante.

4 For the meaning of 'member of the family' see PARA 458 ante.

5 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 25(3). For the meaning of 'stay' see PARA 455 note 11 ante. For the meaning of 'residence' see PARA 459 note 2 ante.

For the provisions implementing art 25(3) see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 17; and PARA 483 note 9 ante. As to citation of this regulation see PARA 454 note 11 ante.

6 As to the meaning of 'benefits in kind' see PARA 483 note 6 ante.

7 For the meaning of the 'institution of the place of stay' and the 'institution of the place of residence' see PARA 455 ante.

8 For the meaning of 'competent institution' see PARA 455 ante.

9 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 25(3)(i), (ii).

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*(c) Pension Claimants and Members of their Families*

**492. Benefits in state of residence.**

An employed or self-employed person<sup>1</sup>, members of his family<sup>2</sup> or his survivors<sup>3</sup> who, during the investigation of a claim for pension<sup>4</sup> cease to be entitled to benefits in kind<sup>5</sup> under the legislation<sup>6</sup> of the member state last competent<sup>7</sup> are entitled to receive such benefits on the condition that benefits in kind are provided in accordance with the legislation of the member state in whose territory the person or persons concerned reside<sup>8</sup>, provided that they are entitled to such benefits under that legislation or would be entitled to them under the legislation of another member state if they were residing in the territory of that state<sup>9</sup>.

A pension claimant who is entitled to benefits in kind under the legislation of a member state which obliges the person concerned to pay sickness insurance contributions himself during the investigation of his pension claim ceases to be entitled to benefits in kind at the end of the second month for which he has not paid the contributions due<sup>10</sup>.

1 For the meaning of 'employed person', and 'self-employed person' see PARA 457 ante.

2 For the meaning of 'member of the family' see PARA 458 ante.

3 For the meaning of 'survivor' see PARA 458 ante.

4 For the meaning of 'pension' see PARA 460 ante.

5 As to the meaning of 'benefits in kind' see PARA 483 note 6 ante.

6 For the meaning of 'legislation' see PARA 461 ante.

7 For the meaning of 'competent state' see PARA 455 ante.

8 For the meaning of 'residence' see PARA 459 note 2 ante.

9 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 26(1). As to citation of this regulation see PARA 454 note 4 ante. The provisions of art 18 (as to which see PARA 481 ante) must be taken into account where appropriate: see art 26(1).

In order to receive benefits in kind under these provisions in the territory of the member state in which he resides, the claimant and the members of his family must register with the institution of the place of residence by submitting a certified statement, issued by the institution of the other member state which is responsible for the benefits, testifying that he is entitled under the legislation of another member state to those benefits for himself and for the members of his family: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 28(1). As to citation of this regulation see PARA 454 note 11 ante. The institution of the place of residence must inform the institution which has issued the certified statement of every registration effected in accordance with art 28(1): art 28(2). Benefits in kind provided under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 26(1) are chargeable to the institution (see PARA 455 note 3 ante) which has collected contributions under art 26(2) (see the text and note 10 infra); where no contributions are payable under art 26(2), the institution responsible for the cost of the benefits in kind after awarding the pension in accordance with the provisions of art 28 (see PARA 494 post) must refund the amount of the benefits provided to the institution of the place of residence (see PARA 455 ante): art 26(3).

10 Ibid art 26(2).

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*(d) Pensioners and Members of their Families*

**493. Effect of entitlement under the legislation both of the state of residence and of another member state.**

A pensioner who is entitled to draw pensions<sup>1</sup> under the legislation<sup>2</sup> of two or more member states, of which one is that of the member state in whose territory he resides<sup>3</sup>, and who is entitled to benefits under the legislation of the latter member state<sup>4</sup> is entitled, with the members of his family<sup>5</sup>, to receive such benefits from the institution of the place of residence<sup>6</sup> and at the expense of that institution as though the person concerned were a pensioner whose pension was payable solely under the legislation of the latter member state<sup>7</sup>.

1 For the meaning of 'pensions' see PARA 460 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 For the meaning of 'residence' see PARA 459 note 2 ante.

4 In taking account, where appropriate, of the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 18: see PARA 481 ante. As to citation of this regulation see PARA 454 note 4 ante.

5 For the meaning of 'member of the family' see PARA 458 ante.

6 For the meaning of 'institution of the place of residence' see PARA 455 ante.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 27. This provision cannot affect a pensioner's right to receive, under the legislation of another member state, a benefit of the type of the allowance towards the contribution to a voluntary sickness insurance scheme: Case 103/75 *Aulich v Bundesversicherungsanstalt für Angestellte* [1976] ECR 697, ECJ.

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#### **494. Effect where no entitlement in state of residence.**

A pensioner who is entitled to a pension<sup>1</sup> under the legislation<sup>2</sup> of one member state<sup>3</sup> or to pensions under the legislation of two or more member states and who is not entitled to benefits under the legislation of the member state in whose territory he resides<sup>4</sup> is, nevertheless, entitled to receive such benefits for himself and members of his family<sup>5</sup> in so far as he would be entitled<sup>6</sup> to them under the legislation of the member state or of at least one of the member states competent<sup>7</sup> in respect of pensions if he were resident in the territory of that state<sup>8</sup>. The benefits are provided under the following conditions:

- 1215 (1) benefits in kind<sup>9</sup> are provided by the institution of the place of residence as though the person concerned were a pensioner under the legislation of the state in whose territory he resides and were entitled to such benefits<sup>10</sup>;
- 1216 (2) cash benefits are provided where appropriate by the competent institution<sup>11</sup> in accordance with the legislation which it administers<sup>12</sup>.

1 For the meaning of 'pension' see PARA 460 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 For the purposes of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 28, 28a, 29, 31, a pensioner who is in receipt of two or more pensions under the legislation of a single member state is regarded as a pensioner entitled to draw a pension under the legislation of one member state, within the meaning of those provisions: art 34(1). As to citation of this regulation see PARA 454 note 4 ante.

4 For the meaning of 'residence' see PARA 459 note 2 ante.

5 For the meaning of 'member of the family' see PARA 458 ante.

6 I.e. taking into account, where appropriate, the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 18: see PARA 481 ante.

7 For the meaning of 'competent state' see PARA 455 ante.

8 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 28(1).

9 As to the meaning of 'benefits in kind' see PARA 483 note 6 ante. The cost of benefits in kind must be borne by the institution as determined in accordance with the following rules: (1) where the pensioner is entitled to those benefits under the legislation of a single member state, the cost is borne by the competent institution of that state; (2) where the pensioner is entitled to those benefits under the legislation of two or more member states, the cost thereof is borne by the competent institution of the member state to whose legislation the pensioner has been subject for the longest period of time, and should the application of this rule result in several institutions being responsible for the cost of benefits, the cost is borne by the institution administering the legislation to which the pensioner was last subject: EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 28(2).

10 Ibid art 28(1)(a). In order to receive benefits in kind in the territory of the member state in which he resides, under art 28(1) or art 28a (see PARA 495 post), a pensioner and members of his family must register with the institution of the place of residence by submitting a certified statement, issued at the pensioner's request by the institution responsible for the payment of the pension or, where appropriate, by the institution empowered to determine entitlement to benefits in kind, testifying that he is entitled to benefits for himself and for the members of his family under the legislation under which the pension is payable: see EC Council

Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 29(1), (2). As to citation of this regulation see PARA 454 note 11 ante.

11     Ie the competent institution as determined under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 28(2).

12     Ibid art 28(1)(b). However, upon agreement between the competent institution and the institution of the place of residence, cash benefits may be provided by the latter institution on behalf of the competent institution, in accordance with the legislation of the competent state: see art 28(1)(b).

Arts 27-33 do not apply to a pensioner or to members of his family who are entitled to benefits under the legislation of a member state as a result of pursuing a professional or trade activity; in such a case, the person concerned must, for the purposes of the implementation of these provisions, be considered as an employed or self-employed person or as a member of an employed or self-employed person's family: art 34(2).

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**495. Effect of residence in a state where entitlement is not subject to conditions of insurance or employment.**

Where the pensioner entitled to a pension<sup>1</sup> under the legislation<sup>2</sup> of one member state, or to pensions under the legislation of two or more member states, resides<sup>3</sup> in the territory of a member state under whose legislation the right to receive benefits in kind<sup>4</sup> is not subject to conditions of insurance or employment, nor is any pension payable, the cost of benefits in kind provided to him and to members of his family is borne by the institution of one of the member states competent in respect of pensions<sup>5</sup>, to the extent that the pensioner and members of his family would have been entitled to such benefits under the legislation administered by that institution if they resided in the territory of the member state where that institution is situated<sup>6</sup>.

1 For the meaning of 'pension' see PARA 460 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 For the meaning of 'residence' see PARA 459 note 2 ante.

4 As to the meaning of 'benefits in kind' see PARA 483 note 6 ante.

5 I.e. the competent institution as determined according to the rules laid down in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.77, p 1) art 28(2). As to citation of this regulation see PARA 454 note 4 ante.

6 See *ibid* art 28a. Cf Case 35/73 *Kunz v Bundesversicherungsanstalt für Angestellte* [1973] ECR 1025, ECJ.

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#### **496. Members of the families of pensioners.**

Members of the family<sup>1</sup> of a pensioner entitled to a pension<sup>2</sup> under the legislation of one member state or to pensions under the legislation<sup>3</sup> of two or more member states who reside<sup>4</sup> in the territory of a member state other than the one in which the pensioner resides are entitled, where the pensioner is entitled to benefits under the legislation of one member state, to receive benefits as though the pensioner were resident in the same territory as themselves<sup>5</sup>.

Benefits are provided under the following conditions:

1217 (1) benefits in kind<sup>6</sup> are provided by the institution of the place of residence<sup>7</sup> of the members of the family in accordance with the provisions of the legislation which that institution administers, the cost being borne by the institution of the pensioner's place of residence<sup>8</sup>;

1218 (2) cash benefits are provided, where appropriate, by the competent institution<sup>9</sup> in accordance with the provisions of the legislation which it administers<sup>10</sup>.

Members of the family covered by this provision who transfer their residence to the territory of the member state where the pensioner resides, are entitled to receive:

1219 (a) benefits in kind under the provisions of the legislation of that state, even if they have already received benefits for the same case of sickness or maternity before transferring their residence<sup>11</sup>;

1220 (b) cash benefits provided where appropriate by the competent<sup>12</sup> institution<sup>13</sup>.

1 For the meaning of 'member of the family' see PARA 458 ante.

2 For the meaning of 'pension' see PARA 460 ante.

3 For the meaning of 'legislation' see PARA 461 ante.

4 For the meaning of 'residence' see PARA 459 note 2 ante.

5 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 29(1). As to citation of this regulation see PARA 454 note 4 ante.

6 As to the meaning of 'benefits in kind' see PARA 483 note 6 ante.

7 For the meaning of 'institution of the place of residence' see PARA 455 ante.

8 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 29(1)(a). In order to receive benefits in kind under this provision the members of the family must register with the institution of their place of residence by submitting the relevant documentary evidence required by the legislation administered by that institution together with a certified statement of the pensioner's entitlement to benefits in kind for himself and the members of his family, issued by the institution of the pensioner's place of residence: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 30 (amended by EC Council Regulation 3095/95 (OJ L335, 30.12.95, p 1)). As to citation of this regulation see PARA 454 note 11 ante.

9 I.e. the competent institution as determined by the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 27 or art 28(2): see PARAS 493-494 ante.

10 See *ibid* art 29(1)(b). However, upon agreement between the competent institution and the institution of the place of residence of the members of the family, cash benefits may be provided by the latter institution on behalf of the former, in accordance with the provisions of the legislation of the competent state: see art 29(1)(b).

11 *Ibid* art 29(2)(a).

12 Is the competent institution determined by the provisions of *ibid* art 27 or art 28(2); see PARAS 493-494 *ante*.

13 See *ibid* art 29(2)(b). However, upon agreement between the competent institution and the institution of the place of residence, cash benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent state: see art 29(2)(b).

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**497. Substantial benefits in kind.**

The provisions as to substantial benefits in kind<sup>1</sup> are specifically applied by way of analogy to pensioners<sup>2</sup>.

1     I.e EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 24: see PARA 488 ante. As to citation of this regulation see PARA 454 note 4 ante.

2     See *ibid* art 30.

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#### **498. Benefits during stay in a member state other than the state of residence.**

A pensioner entitled to a pension<sup>1</sup> or pensions under the legislation<sup>2</sup> of one member state or to pensions under the legislation of two or more member states who is entitled to benefits under the legislation of one of those states is entitled, with members of his family<sup>3</sup> who are staying<sup>4</sup> in the territory of a member state other than the one in which they reside, to receive:

- 1221 (1) benefits in kind<sup>5</sup> provided by the institution of the place of stay<sup>6</sup> in accordance with the provisions of the legislation which it administers, the cost being borne by the institution of the pensioner's place of residence<sup>7</sup>;
- 1222 (2) cash benefits provided, where appropriate, by the competent institution<sup>8</sup> in accordance with the provisions of the legislation which it administers<sup>9</sup>.

These provisions do not apply to a pensioner or members of his family who are entitled to benefits under the legislation of a member state as a result of pursuing a professional or trade activity<sup>10</sup>.

1 For the meaning of 'pension' see PARA 460 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 For the meaning of 'member of the family' see PARA 458 ante.

4 For the meaning of 'stay' see PARA 455 note 11 ante.

5 As to the meaning of 'benefits in kind' see PARA 483 note 6 ante.

6 For the meaning of 'institution of the place of stay' see PARA 455 ante.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 31(a). As to citation of this regulation see PARA 454 note 4 ante. In order to receive benefits in kind under this provision, the pensioner must submit to the institution of the place of stay a certified statement, issued by the institution of his place of residence, testifying that he is entitled to the benefits: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 31(1). As to citation of this regulation see PARA 454 note 11 ante.

8 I.e. the competent institution as determined by the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 27 or art 28(2): see PARAS 493-494 ante.

9 See *ibid* art 31(b). However, upon agreement between the competent institution and the institution of the place of stay, cash benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent state: see art 31(b).

10 See *ibid* art 34(2). In such a case, the person concerned, for the purposes of the implementation of Title III Ch 1 (arts 18-36), is considered as an employed or self-employed person or as a member of the family of an employed or self-employed person: art 34(2).

#### **UPDATE**

#### **498 Benefits during stay in a member state other than the state of residence**

TEXT AND NOTES--EC Council Regulation 1408/71 art 31 replaced: European Parliament and EC Council Regulation 631/2004 (OJ L100, 6.4.2004, p 1). A pensioner entitled to a pension or pensions under the legislation of one member state or to pensions under the legislation of two or more member states who is entitled to benefits under the legislation of one of those states is entitled, with members of his family who are staying in the territory of a member state other than the state in which they reside, to receive:

- 3 (1) benefits in kind which become necessary on medical grounds during a stay in the territory of the member state other than the state of residence, taking into account the nature of the benefits and the expected length of the stay (art 31(1)(a)). These benefits in kind must be provided by the institution of the place of stay, in accordance with the provisions of the legislation which it administers, on behalf of the institution of the place of residence of the pensioner or of the members of his family (art 31(1)(a));
- 4 (2) cash benefits provided, where appropriate, by the competent institution as determined by Regulation 1408/71 arts 27 or 28(2) (see PARA 494 et seq), in accordance with the provisions of the legislation which it administers (art 31(1)(b)). However, on agreement between the competent institution and the institution of the place of stay, these benefits may be provided by the latter institution on behalf of the former, in accordance with the provisions of the legislation of the competent state (art 31(1)(b)).

Article 22(1a) (see PARA 486) applies to these provisions by analogy: art 31(2).

NOTE 7--A member state may not make provision of the benefits in kind guaranteed by Regulation 1408/71 art 31 to pensioners staying in a member state other than the state in which they reside subject to any authorisation procedure: Case C-326/00 *Idryma Koinonikon Asfaliseon v Ioannidis* [2003] All ER (EC) 548, ECJ.

EC Council Regulation 574/72 art 31 replaced: European Parliament and EC Council Regulation 631/2004 (OJ L100, 6.4.2004, p 1).

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#### **499. Pensioners' contributions.**

The institution<sup>1</sup> of a member state which is responsible for payment of a pension<sup>2</sup> and which administers legislation<sup>3</sup> providing for deductions from pensions in respect of contributions for sickness and maternity is authorised to make such deductions, calculated in accordance with the legislation concerned, from the pension payable by that institution, to the extent that the cost of the benefits<sup>4</sup> is to be borne by an institution of that member state<sup>5</sup>.

1 For the meaning of 'institution' see PARA 455 note 3 ante.

2 For the meaning of 'pension' see PARA 460 ante.

3 For the meaning of 'legislation' see PARA 461 ante.

4 I.e. the cost of benefits under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 27-29, 31. As to citation of this regulation see PARA 454 note 4 ante.

5 Ibid art 33(1). Where, in cases referred to in art 28a (as to which see PARA 495 ante), the acquisition of benefits in respect of sickness and maternity is subject to the payment of contributions or similar payments under the legislation of a member state in whose territory the pensioner in question resides, by virtue of such residence, these contributions are not payable: art 33(2). Article 33 does not apply to a pensioner or to members of his family who are entitled to benefits under the legislation of a member state as a result of pursuing a professional or trade activity: see art 34(2); and PARA 498 ante.

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## (C) MISCELLANEOUS PROVISIONS

### **500. Multiple and special insurance schemes.**

Where the legislation<sup>1</sup> of the country of stay<sup>2</sup> or residence<sup>3</sup> contains several sickness or maternity insurance schemes, the provisions applicable<sup>4</sup> are those of the scheme covering manual workers in the steel industry<sup>5</sup>.

Where the legislation of the country of stay or residence includes one or more special schemes, covering all or most occupational categories of self-employed persons<sup>6</sup>, which grant benefits in kind<sup>7</sup> less favourable than those granted to employed persons<sup>8</sup>, the provisions applicable to the person concerned and the members of his family<sup>9</sup> are those of the scheme or schemes determined by the EC Council Regulation on the implementation of social security for migrant persons<sup>10</sup> (1) where in the competent state<sup>11</sup> the person concerned is insured under a special scheme for self-employed persons which also grants less favourable benefits in kind than those granted to employed persons<sup>12</sup>; or (2) where a person in receipt of one or more pensions<sup>13</sup> is entitled, under the pensions legislation of the competent member state or member states, only to benefits in kind provided for by a special scheme for self-employed persons which also grants less favourable benefits in kind than those granted to employed persons<sup>14</sup>.

1 For the meaning of 'legislation' see PARA 461 ante.

2 For the meaning of 'stay' see PARA 455 note 11 ante.

3 For the meaning of 'residence' see PARA 459 note 2 ante.

4 I.e. the provisions applicable under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 19, 21(1), 22, 25, 26, 28(1), 29(1), 31 (art 22 as amended). As to citation of this regulation see PARA 454 note 4 ante.

5 See *ibid* art 35(1). Where, however, the legislation of the country of stay or residence includes a special scheme for workers in mines and similar undertakings, the provisions of that scheme apply to that category of workers and members of their families, provided that the institution of the place of stay or residence (see PARA 455 ante) to which application is made is competent to administer that scheme: see art 35(1). As to implementation of this provision see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 32. As to citation of this regulation see PARA 454 note 11 ante.

6 For the meaning of 'self-employed person' see PARA 457 ante.

7 As to the meaning of 'benefits in kind' see PARA 483 note 6 ante.

8 For the meaning of 'employed person' see PARA 457 ante.

9 I.e. those provisions applicable pursuant to EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 19(1)(a), (2), 22(1) (under (i)), (3), 28(1), 31(a).

10 I.e. EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) (as amended). As to citation of this regulation see PARA 454 note 11 ante.

11 For the meaning of 'competent state' see PARA 455 ante.

12 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 35(2)(a).

13 For the meaning of 'pension' see PARA 460 ante.

14 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 35(2)(b).

## **UPDATE**

### **500 Multiple and special insurance schemes**

TEXT AND NOTES 6-14--Regulation 1408/71 art 35(2) deleted: European Parliament and EC Council Regulation 647/2005 (OJ L117, 4.5.2005, p 1)).

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### **501. Benefits conditional upon origin of illness; maximum periods for granting of benefits.**

Where, under the legislation<sup>1</sup> of a member state, the granting of benefits<sup>2</sup> is conditional upon the origin of the illness, that condition does not apply to employed or self-employed persons<sup>3</sup> or to the members of their families<sup>4</sup> to whom the EC Council Regulation on social security for migrant persons<sup>5</sup> applies<sup>6</sup>, regardless of the member states in whose territory they reside<sup>7</sup>.

Where the legislation of a member state fixes a maximum period for the granting of benefits, the institution<sup>8</sup> which administers that legislation may, where appropriate, take account of the period during which the benefits have already been provided by the institution of another member state for the same case of sickness or maternity<sup>9</sup>.

If an employed or self-employed person or a member of his family is entitled to claim maternity benefits under the legislations of two or more member states, those benefits must be granted exclusively under the legislation of the member state in whose territory the confinement took place or, if the confinement did not take place in one of those member states, exclusively under the legislation of the member state to which the employed or self-employed person was last subject<sup>10</sup>. If an employed or self-employed person is entitled to claim sickness benefits under the legislation of the United Kingdom and Ireland for the same period of incapacity for work, those benefits are granted exclusively under the legislation of the member state to which the person concerned was last subject<sup>11</sup>.

1 For the meaning of 'legislation' see PARA 461 ante.

2 For the meaning of 'benefits' see PARA 460 ante.

3 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

4 For the meaning of 'member of the family' see PARA 458 ante.

5 I.e. EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1): see generally para 454 ante. As to citation of this regulation see PARA 454 note 4 ante.

6 As to the persons to whom these provisions apply see PARA 456 ante.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 35(3). For the meaning of 'residence' see PARA 459 note 2 ante.

8 For the meaning of 'institution' see PARA 455 note 3 ante.

9 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 35(4). As to implementation of this provision see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) arts 33, 34. As to citation of this regulation see PARA 454 note 11 ante.

10 Ibid art 8(1). This provision must be interpreted as applying only to the extent to which a claim by the person concerned may in fact be satisfied by the application of the legislation of two or more member states and only in regard to the period for which the claimant may claim benefits under it: Case 143/79 *Walsh v National Insurance Officer* [1980] ECR 1639, [1980] 3 CMLR 573, ECJ.

11 EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 8(2).

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### **C. INVALIDITY BENEFITS**

#### **502. Entitlement to invalidity benefits.**

The rules for determining entitlement to invalidity benefits<sup>1</sup> are contained in Chapter 2 of Title III of the EC Council Regulation on social security for migrant persons<sup>2</sup>. An employed person or a self-employed person<sup>3</sup> who has been successively or alternately subject to the legislation of two or more member states and who has completed periods of insurance<sup>4</sup> exclusively under legislation<sup>5</sup> according to which the amount of invalidity benefits is independent of the duration of periods of insurance is entitled to receive benefits in accordance with the provisions<sup>6</sup> of that regulation<sup>7</sup>.

An employed person or a self-employed person who has been successively or alternately subject to the legislation of two or more member states, of which at least one is not of the type referred to above<sup>8</sup> is entitled to receive such benefits<sup>9</sup>. However, an employed or self-employed person who suffers incapacity for work leading to invalidity while subject to a listed legislation<sup>10</sup> is entitled to receive benefits in accordance with the above but on the following conditions:

- 1223 (1) that he satisfies the conditions of that legislation or other legislation of the same type<sup>11</sup> but without having recourse to periods of insurance completed under legislation not so listed; and
- 1224 (2) that he does not satisfy the conditions required for the acquisition of the right to invalidity benefits under a legislation not so listed; and
- 1225 (3) that he does not assert any claims<sup>12</sup> to old age benefits<sup>13</sup>.

1 Invalidity benefits include those provided by national provisions granting benefits to the handicapped to the extent that those provisions concern persons to whom EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) applies: see Case 187/73 *Callemeyn v Belgian State* [1974] ECR 553, ECJ; Case 39/74 *Costa v Belgian State* [1974] ECR 1251, ECJ; Case 7/75 *F v Belgian State* [1975] ECR 679, [1975] 2 CMLR 442, ECJ. See also Case 24/64 *Dingemans v Bestuur der Sociale Verzekeringsbank* [1964] ECR 647, [1965] CMLR 144, ECJ. As to national legislations concerning invalidity benefits to which EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) applies see PARA 461 ante. As to citation of this regulation see PARA 454 note 4 ante.

A decision taken by an institution of a member state concerning the degree of invalidity of a claimant is binding on the institution of any other member state concerned, provided that the concordance between the legislation of these states on conditions relating to the degree of invalidity is acknowledged in Annex V: art 40(4).

In order to determine the degree of invalidity, the institution of the member state must take into consideration the documents and medical reports and the information of an administrative nature obtained by the institution of any other member state; but each institution must retain the right to have the claimant examined by a doctor of its own choice except where the provisions of art 40(4) apply: EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 40. As to citation of this regulation see PARA 454 note 11 ante.

2 I.e. EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) Title III Ch 2 (arts 37-43).

3 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

4 For the meaning of 'periods of insurance' see PARA 463 note 5 ante.

5 For the meaning of 'legislation' see PARA 461 ante.

6 I.e. in accordance with EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 39: see PARA 503 post.

7 See *ibid* art 37(1). Article 37 does not affect pension increases or supplements in respect of children, granted in accordance with Ch 8 (arts 77-79) (see PARA 533 *et seq post*): see art 37(1). Annex VI (as amended) lists legislation of the kind mentioned in art 37(1) which is in force in the territory of each of the member states concerned: art 37(2). This legislation is commonly referred to as 'Type A Legislations'; and the legislation under which entitlement is dependent on the duration of periods of insurance is referred to as 'Type B Legislations'.

If an employed or self-employed person has submitted a claim for invalidity benefits, and the institution establishes that the provisions of art 37(1) apply, that institution must, where necessary, obtain from the institution with which the person concerned was last insured a certified statement of the periods of insurance completed by him under the legislation administered by the last institution: EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 39(1). Where it is necessary to take into account periods of insurance previously completed under the legislation of any other member state in order to satisfy the conditions of the legislation of the competent state, the provisions of art 39(1) apply by analogy: art 39(2).

8 It is not of the type referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 37(1).

9 *Ibid* art 40(1). The benefits here concerned are those under the provisions of Ch 3 (arts 44-51), which apply *mutatis mutandis*, taking into account the provisions of art 40(4). See also Case 140/73 *Direction Régionale de la sécurité sociale de la région parisienne v Mancuso* [1973] ECR 1449, ECJ; Case 57/75 *Plaquet v Caisse Primaire d'Assurance Maladie du Havre* [1975] ECR 1581, ECJ; Case 62/76 *Strehl v Nationaal Pensioenfonds voor Mijnwerkers* [1977] ECR 211, [1977] 2 CMLR 743, ECJ; Case 75/76 *Kaucic v Institut National d'Assurances Maladie-Invalidité* [1977] ECR 495, [1977] 2 CMLR 259, ECJ; Case 112/76 *Manzoni v Fonds National de Retraite des Ouvriers Mineurs* [1977] ECR 1647, [1978] 2 CMLR 416, ECJ; Case 22/77 *Fonds National de Retraite des Ouvriers Mineurs v Mura* [1977] ECR 1699, [1978] 2 CMLR 416, ECJ; Case 32/77 *Giuliani v Landesversicherungsanstalt Schwaben* [1977] ECR 1857, [1978] 2 CMLR 416, ECJ; Case 37/77 *Greco v Fonds National de Retraite des Ouvriers Mineurs* [1977] ECR 1711, [1978] 2 CMLR 416, ECJ; Case 41/77 *R v National Insurance Comr, ex p Warry* [1977] ECR 2085, [1977] 2 CMLR 783, ECJ; Case 1/80 *Fonds National de Retraite des Ouvriers Mineurs v Salmon* [1980] ECR 1937, [1981] 1 CMLR 303, ECJ. See further Case 28/68 *Caisse Régionale de Sécurité Sociale du Nord de la France v Torrekens* [1969] ECR 125, [1969] CMLR 377, ECJ. As to the position where there is a change in the relevant national legislation see Case 109/76 *Blottner v Bestuur der Nieuwe Algemene Bedrijfsvereniging* [1977] ECR 1141, ECJ.

In order to receive benefits under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 40-51, except in cases referred to in EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 35, the person concerned must submit a claim to the institution of the place of residence in accordance with the procedure provided for by the legislation administered by that institution: art 36(1). If the employed or self-employed person has not been subject to that legislation, the institution of the place of residence must forward the claim to the institution of the member state to whose legislation he was last subject, indicating the date on which the claim was submitted: art 36(1). That date is regarded as the date on which the claim was submitted to the latter institution: art 36(1). As to the procedure in such claims generally see further arts 36(2)-(4), 37. As to the investigation of claims and the payment of benefits under these provisions see generally arts 41-52.

10 It is a legislation listed in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) Annex IV Pt A. For the purpose of determining the right to benefits under the legislation of a member state so listed, which makes the granting of invalidity benefits conditional upon the person concerned having received cash benefits or having been incapable of work during a specified period, where an employed or a self-employed person who has been subject to that legislation suffers incapacity for work leading to invalidity while subject to the legislation of another member state, account must be taken of the following, without prejudice to art 37(1):

- 156 (1) any period during which, in respect of that incapacity for work, he has, under the legislation of the second member state, received cash sickness benefits, or, in lieu thereof, continued to receive a wage or salary;
- 157 (2) any period during which, in respect of the invalidity which followed that incapacity for work, he has received benefits within the meaning of Ch 2 and of Ch 3, granted in respect of invalidity under the legislation of the second member state,

as if it were a period during which cash sickness benefits were paid to him under the legislation of the first member state or during which he was incapable of working within the meaning of that legislation: art 40(3)(a). As to the meaning of 'invalidity benefit' in head (2) *supra* see *Re Invalidity Benefit* [1988] 1 CMLR 1.

The right to invalidity benefits under the legislation of the first member state is acquired either upon expiry of the preliminary period of compensation for sickness, as required by that legislation, or upon expiry of the preliminary period of incapacity of work as required by that legislation, but not before the date of acquisition of the right to invalidity benefits referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 40(3)(a)(ii) (see head (2) *supra*) under the legislation of the second member state, or the day following the last day on which the person concerned is entitled to cash sickness benefits under the legislation

of the second member state: art 40(3)(b). See also Case 108/75 *Balsamo v Institut national d'assurance maladie-invalidité* [1976] ECR 375, ECJ; Case 41/77 *R v National Insurance Comr, ex p Warry* [1977] ECR 2085, [1977] 2 CMLR 783, ECJ. As to the national legislation to which EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 40(3) applies see Annex IV Pt A.

- 11    le taking account where appropriate of ibid art 38: see PARA 504 post.
- 12    le account being taken of ibid art 44(2).
- 13    Ibid art 40(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/12. EUROPEAN COMMUNITY LAW/(4) SOCIAL SECURITY FOR MIGRANT PERSONS/(v) Particular Benefits/C. INVALIDITY BENEFITS/503. Award of benefits.

### **503. Award of benefits.**

The institution<sup>1</sup> of a member state whose legislation<sup>2</sup> was applicable at the time when incapacity for work followed by invalidity occurred must determine, in accordance with that legislation, whether the person concerned satisfies<sup>3</sup> the conditions for entitlement to benefit<sup>4</sup>. A person who satisfies the conditions referred to above may receive the benefits only from that institution, in accordance with the provisions of the legislation which it administers<sup>5</sup>. However, a person who is not so entitled to benefits may receive the benefits to which he is still entitled under the legislation of another member state<sup>6</sup>.

A wholly unemployed employee<sup>7</sup> may receive the invalidity benefits provided by the competent institution<sup>8</sup> of the member state in whose territory he resides, in accordance with the legislation which it administers, as though he had been subject to that legislation during his last employment<sup>9</sup>. The institution of the country of residence is responsible for paying those benefits<sup>10</sup>. Where that institution applies legislation providing for deduction of contributions payable by unemployed persons to cover invalidity benefits, it is authorised to make such deductions in accordance with the provisions of its legislation<sup>11</sup>. If the legislation which that institution administers provides for the calculation of benefits to be based on wages or salaries, the institution must take into account the wages or salaries received in the last country of employment and in the country of residence in accordance with the legislation it administers. Where no wage or salary has been received in the country of residence, the competent institution must refer, as necessary and in accordance with the rules laid down in its legislation, to the salaries received in the last country of employment<sup>12</sup>.

1 For the meaning of 'institution' see PARA 455 note 3 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 In taking account, where appropriate, of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 38. As to the citation of this regulation see PARA 454 note 4 ante.

4 See *ibid* art 39(1). In order to receive benefits under arts 37, 38, 39, including the cases referred to in arts 40(2), 41(1), 42(2), an employed or self-employed person must submit a claim either to the institution of the member state to whose legislation he was subject at the time of occurrence of the incapacity for work followed by invalidity or the aggravation of such invalidity, or to the institution of the place of residence (see PARA 455 ante), which then forwards the claim to the first institution, indicating the date on which it was submitted; this date is regarded as the date of submission of the claim to the first institution: EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 35(1). However, if sickness insurance cash benefits have been granted, the date on which such cash benefits ceased to be granted must, where appropriate, be regarded as the date of submission of the pension claim: art 35(1). As to citation of this regulation see PARA 454 note 11 ante.

5 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 39(2).

6 See *ibid* art 39(3). For the purposes of this provision, account must be taken, where appropriate, of art 38: see PARA 504 post. If the legislation referred to in art 39(2) or (3) provides that the amount of the benefits must be determined taking into account the existence of members of the family other than the children, the competent institution must also take into consideration those members of the family of the person concerned who are residing in the territory of another member state, as if they were residing in the territory of the competent state: art 39(4). If the legislation referred to in art 39(2) or (3) lays down provisions for the reduction, suspension or withdrawal of benefits in the case of overlapping with other income or with benefits of a different kind within the meaning of art 46(1), (2) (see PARA 512 post), arts 46a(3), 46c(5) will apply *mutatis mutandis*: art 39(5).

In order to receive benefits under the provisions of art 39(4) or art 47(3) (see PARA 512 post), the claimant must submit a certified statement relating to the members of his family, his children excepted, who are residing in the territory of a member state other than that in which the institution responsible for the award of benefits is situated: EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 38(1). The certified statement must be issued by the sickness insurance institution of the place of residence of the members of the family, or by another institution designated by the competent authority of the member state in whose territory they are resident: art 38(1). The provisions of art 25(2) PARAS 2, 3 (see PARA 487 ante) apply by analogy: see art 38(1). In place of a certified statement, the institution responsible for the award of benefits may require the claimant to supply recent civil status documents relating to the members of his family, his children excepted, who are residing in the territory of a member state other than the state in which the said institution is situated: art 38(1). In a case referred to in art 38(1), if the legislation administered by the institution concerned requires that the members of the family should live under the same roof as the pensioner, the fact that the members of the family who do not satisfy that condition are nevertheless mainly dependant on the claimant must be established by documents proving the regular transmission of part of the claimant's earnings: art 38(2).

7     Ie an employee to whom EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 71(1)(a)(ii) or art 71(1)(b)(ii) (first sentence) applies: see PARA 528 post.

8     For the meaning of 'competent institution' see PARA 455 ante.

9     Ie account being taken, where appropriate, of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 38 (see PARA 504 ante) and/or art 25(2) (see PARA 490 ante).

10    Ibid art 39(6) PARA 1.

11    Ibid art 39(6) PARA 2.

12    Ibid art 39(6) PARA 3.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/12. EUROPEAN COMMUNITY LAW/(4) SOCIAL SECURITY FOR MIGRANT PERSONS/(v) Particular Benefits/C. INVALIDITY BENEFITS/504. Consideration of periods of insurance or residence.

#### **504. Consideration of periods of insurance or residence.**

Where the legislation<sup>1</sup> of a member state makes the acquisition, retention or recovery of the right to benefits<sup>2</sup>, under a scheme which is not a special scheme<sup>3</sup>, subject to the completion of periods of insurance<sup>4</sup> or of residence<sup>5</sup>, the competent institution<sup>6</sup> of that member state must take account, where necessary, of the periods of insurance or residence completed under the legislation of any other member state, be it under a general scheme or under a special scheme, and either as an employed person or as a self-employed person. For that purpose it must take account of these periods as if they had been completed under its own legislation<sup>7</sup>.

1 For the meaning of 'legislation' see PARA 461 ante.

2 For the meaning of 'benefits' see PARA 460 ante.

3 I.e. a scheme within the meaning of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 38(2), (3): see note 7 infra. As to citation of this regulation see PARA 454 note 4 ante.

4 For the meaning of 'periods of insurance' see PARA 463 note 5 ante.

5 For the meaning of 'periods of residence' see PARA 463 note 6 ante.

6 For the meaning of 'competent institution' see PARA 455 ante.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 38(1). See Case CS 7/76 *Re An Absence in Ireland* [1977] 1 CMLR 5, NIC; and Case CS 8/76 *Re Retirement to Ireland* [1977] 1 CMLR 1, NIC. Where the legislation of a member state makes the granting of certain benefits conditional upon the periods of insurance having been completed only in an occupation which is subject to a special scheme for employed persons (or where appropriate in a specific employment) or self-employed persons, as the case may be, periods completed under the legislation of other member states may be taken into account for the granting of these benefits only if completed under a corresponding scheme or, failing that, in the same occupation or, in the case of employed persons and where appropriate, in the same employment. If, account having been taken of the periods thus completed, the person concerned does not satisfy the conditions for receipt of these benefits, these periods are to be taken into account for the granting of the benefits under the general scheme or, failing that, under the scheme applicable to manual or clerical workers, as the case may be, subject to the condition that the person concerned has been affiliated to one or other of these schemes: see EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 38(2), (3). The special schemes for self-employed persons are listed in Annex IV Pt B.

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### **505. Aggravation of invalidity.**

In the case of aggravation of an invalidity for which an employed person or a self-employed person<sup>1</sup> is receiving benefits<sup>2</sup> under the legislation<sup>3</sup> of a single member state, the following provisions apply:

- 1226 (1) if the person concerned has not been subject to the legislation of another member state since receiving benefits, the competent institution<sup>4</sup> of the first state must grant the benefits, taking the aggravation into account, in accordance with the provisions of the legislation which it administers<sup>5</sup>;
- 1227 (2) if the person concerned has been subject to the legislation of one or more of the other member states since receiving benefits, the benefits are granted to him, taking the aggravation into account<sup>6</sup> as appropriate<sup>7</sup>;
- 1228 (3) if the total number (sic) of the benefit or benefits payable under head (2) above is lower than the amount of the benefit which the person concerned was receiving at the expense of the institution<sup>8</sup> previously liable for payment, that institution must pay him a supplement equal to the difference between the two amounts<sup>9</sup>;
- 1229 (4) if, in the case referred to in head (2) above, the person concerned is not entitled to benefits at the expense of an institution of another member state, the competent institution of the first state must grant the benefits<sup>10</sup> according to the provisions of the legislation of that state and taking into account the aggravation<sup>11</sup>.

1 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

2 For the meaning of 'benefits' see PARA 460 ante.

3 For the meaning of 'legislation' see PARA 461 ante.

4 For the meaning of 'competent institution' see PARA 455 ante.

5 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 41(1)(a). As to citation of this regulation see PARA 454 note 4 ante.

6 Ie in accordance with ibid art 37(1) or art 40(1) or (2): see PARA 502 ante.

7 Ibid art 41(1)(b). For the provisions applicable in this case where the institution responsible for the initial incapacity is a Dutch institution see art 41(1)(d).

8 For the meaning of 'institution' see PARA 455 note 3 ante.

9 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 41(1)(c). It is submitted the word 'number' as it appears in art 41(1)(c) (head (3) in the text) is intended to mean 'amount'.

10 Ie taking into account, where appropriate, the provisions of ibid art 38: see PARA 504 ante.

11 Ibid art 41(1)(e). In the case of aggravation of an invalidity for which an employed or a self-employed person is receiving benefits under the legislations of two or more member states, the benefits are granted to him, taking the aggravation into account, in accordance with art 40(1) (as to which see PARA 502 ante): art 41(2).

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**506. Resumption of provision of benefits after suspension or withdrawal.**

If provision of benefits is to be resumed after suspension, such provision is the responsibility of the institution<sup>1</sup> or institutions which were responsible for provision of the benefits at the time of their suspension<sup>2</sup>. If, after withdrawal of benefits, the condition of the person concerned warrants the granting of further benefits, they are to be granted<sup>3</sup> as appropriate<sup>4</sup>.

1 For the meaning of 'institution' see PARA 455 note 3 ante.

2 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 42(1). This provision is without prejudice to the provisions of art 43 (as to which see PARA 507 post): see art 42(1). As to citation of this regulation see PARA 454 note 4 ante.

3 Ie in accordance with ibid art 37(1) or art 40(1) or (2) (see PARA 502 ante).

4 Ibid art 42(2).

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### **507. Conversion of invalidity benefits into old age benefits.**

Invalidity benefits are converted into old age benefits, where appropriate, under the conditions laid down by the legislation<sup>1</sup> under which they were granted<sup>2</sup> and in accordance with the provisions of Chapter 3 of Title III of the EC Council Regulation on social security for migrant persons<sup>3</sup> which govern old age and death (pensions)<sup>4</sup>.

Where a person receiving invalidity benefits can establish a claim to old age benefits under the legislation of one or more other member states<sup>5</sup>, any institution<sup>6</sup> which is responsible for providing invalidity benefits under the legislation of a member state must continue to provide such a person with the invalidity benefits to which he is entitled under the legislation which it administers until the relevant provisions<sup>7</sup> become applicable as regards that institution or so long as the person concerned fulfils the conditions for such benefits<sup>8</sup>.

Invalidity benefits provided<sup>9</sup> must be recalculated pursuant to the old age benefit provisions<sup>10</sup> as soon as the beneficiary satisfies the qualifications for invalidity benefits laid down by an unlisted legislation<sup>11</sup>, or as soon as he receives old age benefits under the legislation of another member state<sup>12</sup>.

1 For the meaning of 'legislation' see PARA 461 ante.

2 As to the grant of invalidity benefits see PARA 502 et seq ante.

3 I.e EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) Title III Ch 3 (arts 44-51). As to citation of this regulation see PARA 454 note 4 ante.

4 See ibid art 43(1). As to the provisions governing old age pensions generally see PARA 508 et seq post.

5 I.e in accordance with ibid art 49: see PARA 513 post.

6 For the meaning of 'institution' see PARA 455 note 3 ante.

7 I.e the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 43(1).

8 Ibid art 43(2). Where invalidity benefits granted in accordance with art 39 (see PARA 503 ante) under the legislation of a member state are converted into old age benefits and where the person concerned does not yet satisfy the conditions required by one or more national legislations to receive these benefits, the person concerned is entitled to receive, from this or these member states, from the date of the conversion, invalidity benefits granted in accordance with Title III Ch 3 (arts 44-51) as if that chapter had been applicable at the time when his incapacity for work leading to invalidity occurred, until the person concerned satisfies the qualifying conditions for old age benefit laid down by the national legislations concerned or, where such conversion is not provided for, as long as he has the right to invalidity benefits under the legislation or legislations concerned: art 43(3).

9 I.e provided under ibid art 39: see PARA 503 ante.

10 I.e pursuant to ibid Ch 3 (arts 44-51): see generally para 508 et seq post.

11 I.e a legislation not listed in ibid Annex IV Pt A.

12 Ibid art 43(4).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/12. EUROPEAN COMMUNITY LAW/(4) SOCIAL SECURITY FOR MIGRANT PERSONS/(v) Particular Benefits/D. OLD AGE AND SURVIVORS' PENSIONS/508. General provisions relating to old age and survivors' pensions.

## **D. OLD AGE AND SURVIVORS' PENSIONS**

### **508. General provisions relating to old age and survivors' pensions.**

The rights to old age benefits of an employed or self-employed person<sup>1</sup> who has been subject to the legislation<sup>2</sup> of two or more member states, or of his survivors<sup>3</sup>, are determined in accordance with the provisions of Chapter 3<sup>4</sup> of Title III of the EC Council Regulation on social security for migrant persons<sup>5</sup>.

Save as otherwise provided<sup>6</sup>, the processing of a claim for an award submitted by the person concerned must have regard to all the legislation to which the employed or self-employed person has been subject<sup>7</sup>.

The relevant provisions relating to old age and death (pensions)<sup>8</sup> do not apply to increases in pensions or to supplements for pensions in respect of children or to orphans' pensions<sup>9</sup>.

1 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 For the meaning of 'survivor' see PARA 458 ante. See also Case 1/72 *Frilli v Belgium* [1972] ECR 457, [1973] CMLR 386, ECJ.

4 I.e EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) Title III Ch 3 (arts 44-51). As to citation of this regulation see PARA 454 note 4 ante.

5 See *ibid* art 44(1).

6 I.e as provided in *ibid* art 49: see PARA 513 post.

7 *Ibid* art 44(2). Exception is to be made to this rule if the person concerned expressly asks for postponement of the award of old age benefits to which he would be entitled under the legislation of one or more member states: see art 44(2).

8 See note 4 *supra*.

9 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 44(3). As to the granting of pensions in respect of children or orphans see Title III Ch 8 (arts 77-79); and PARA 533 et seq post.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/12. EUROPEAN COMMUNITY LAW/(4) SOCIAL SECURITY FOR MIGRANT PERSONS/(v) Particular Benefits/D. OLD AGE AND SURVIVORS' PENSIONS/509. Aggregation of periods of insurance and residence.

### **509. Aggregation of periods of insurance and residence.**

Where the legislation<sup>1</sup> of a member state makes the acquisition, retention or recovery of the right to benefits<sup>2</sup>, under a scheme which is not a special scheme<sup>3</sup>, subject to the completion of periods of insurance<sup>4</sup> or periods of residence<sup>5</sup>, the competent institution<sup>6</sup> of that member state must take account, where necessary, of the periods of insurance or residence completed under the legislation of any member state, be it under a general scheme or under a special scheme and either as an employed or self-employed person. For that purpose, it must take account of these periods as if they were periods completed under its own legislation<sup>7</sup>.

Where the legislation of a member state makes the acquisition, retention or recovery of the right to benefits conditional upon the person concerned being insured at the time of the materialisation of the risk, this condition must be regarded as having been satisfied in the case of insurance under the legislation of another member state, in accordance with specified procedures<sup>8</sup> for each member state concerned<sup>9</sup>.

1 For the meaning of 'legislation' see PARA 461 ante.

2 For the meaning of 'benefits' see PARA 460 ante.

3 Is not a special scheme within the meaning of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 45(2) or (3): see note 7 infra. As to citation of this regulation see PARA 454 note 4 ante.

4 For the meaning of 'periods of insurance' see PARA 463 note 5 ante.

5 For the meaning of 'periods of residence' see PARA 463 note 6 ante.

6 For the meaning of 'competent institution' see PARA 455 note 3 ante.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 45(1). Aggregation is only required for the purpose of acquisition of pension entitlement, not for the size of the pension: see Case C-227/89 *Rönfeldt v Bundesversicherungsanstalt für Angestellte* [1991] ECR I-323, [1993] 1 CMLR 73, ECJ. However, the periods may be taken into account in relation to the size of the pension if the legislation so provides: see Case C-302/90 *Caisse auxiliaire d'assurance maladies-invalidité (CAAM) v Faux* [1991] ECR I-4875; Case C-146/93 *McLachlan v Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés de la Région d'Ile de France* [1994] ECR I-3229, [1995] 2 CMLR 540, ECJ. See also Case 26/71 *Gross v Caisse Régionale d'Assurance Vieillesse des Travailleurs Salariés de Strasbourg* [1971] ECR 871, ECJ; Case 2/72 *Murru v Caisse Régionale d'Assurance Maladie de Paris* [1972] ECR 333, [1972] CMLR 888, ECJ; Case 20/75 *D'Amico v Landesversicherungsanstalt Rheinland-Pfalz* [1975] ECR 891, [1976] 2 CMLR 361, ECJ; Case 33/75 *Galati v Landesversicherungsanstalt Schwaben* [1975] ECR 1323, ECJ; Case 266/78 *Brunori v Landesversicherungsanstalt Rheinprovinz* [1979] ECR 2705, [1980] 1 CMLR 660, ECJ. Periods completed in non-member states may be counted if the legislation so provides: Case 21/87 *Borowitz v Bundesversicherungsanstalt für Angestellte* [1988] ECR 3715, [1990] 1 CMLR 34, ECJ.

For the provisions implementing EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 45(1)-(3) see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 15. As to citation of this regulation see PARA 454 note 11 ante.

Where the legislation of a member state makes the granting of certain benefits conditional upon the periods of insurance having been completed only in an occupation subject to a special scheme for employed persons or for self-employed persons, or (where appropriate) in a specific employment, periods completed under the legislation of the other member states must be taken into account for the granting of these benefits only if completed under a corresponding scheme or, failing that, in the same occupation or, where appropriate, in the same employment: see art 45(2), (3). If, account having been taken of the periods thus completed, the person concerned does not satisfy the conditions for receipt of these benefits, these periods must be taken into

account for the granting of the benefits under the general scheme or, failing that, under the scheme applicable to manual or clerical workers, as the case may be, subject to the condition that the person concerned has been affiliated to one or other of these schemes: see art 45(2), (3). The special schemes for self-employed persons referred to in art 45(3) are listed in Annex IV Pt B, for each member state concerned.

The periods of insurance completed under a special scheme of a member state must be taken into account under the general scheme or, failing that, under the scheme applicable to manual or clerical workers, as the case may be, of another member state of the acquisition, retention or recovery of the right to benefits, subject to the condition that the person concerned has been affiliated to one or other of these schemes, even if these periods have already been taken into account in the latter state under a scheme referred to in art 45(2) or (3): art 45(4).

8 le in accordance with the procedures provided in *ibid* Annex VI (as amended).

9 *Ibid* art 45(5). A period of full employment of a worker to whom art 81(1)(a)(ii) or (b)(ii) (first sentence) applies must be taken into account by the competent institution of the member state in whose territory the worker concerned resides in accordance with the legislation administered by that institution, as if that legislation applied to him during his last employment: art 45(6). Where that institution applies legislation providing for deduction of contributions payable by unemployed persons to cover old age pensions and death, it must be authorised to make such deductions in accordance with the provisions of its legislation: art 45(6). If the period of full employment in the country of residence of the person concerned can be taken into account only if contribution periods have been completed in that country, this condition is deemed to be fulfilled if the contribution periods have been completed in another member state: art 45(6).

## UPDATE

### 509 Aggregation of periods of insurance and residence

NOTE 7--The competent institution of one member state must take into account periods completed in a non-member country by a national of another member state if a national of the first member state is entitled to have such periods taken into account under a bilateral convention concluded between the first member state and the non-member country: Case C-55/00 *Gottardo v Istituto Nazionale della Previdenza Sociale* [2004] 1 CMLR 783, ECJ.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/12. EUROPEAN COMMUNITY LAW/(4) SOCIAL SECURITY FOR MIGRANT PERSONS/(v) Particular Benefits/D. OLD AGE AND SURVIVORS' PENSIONS/510. Periods of insurance or residence of less than one year.

### **510. Periods of insurance or residence of less than one year.**

Notwithstanding certain provisions relating to the award of old age and survivors' benefits<sup>1</sup>, the institution<sup>2</sup> of a member state is not required to award benefits<sup>3</sup> in respect of periods of insurance<sup>4</sup> or residence<sup>5</sup> completed under the legislation<sup>6</sup> it administers which are taken into account when the risk materialises, if the duration of the periods does not amount to one year and taking only these periods into consideration, no right to benefit is acquired by virtue of the provisions of the legislation<sup>7</sup>.

1    le EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 46(2): see PARA 512 post. As to citation of this regulation see PARA 454 note 4 ante.

2    For the meaning of 'institution' see PARA 455 note 3 ante.

3    For the meaning of 'benefits' see PARA 460 ante.

4    For the meaning of 'periods of insurance' see PARA 463 note 5 ante.

5    For the meaning of 'periods of residence' see PARA 463 note 6 ante.

6    For the meaning of 'legislation' see PARA 461 ante.

7    EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 48(1). Article 48(1) does not apply in respect of orphans' benefits: Case 269/87 *Ventura v Landesversicherungsanstalt Schwaben* [1988] ECR 6411, [1990] 1 CMLR 762, ECJ. See also Case 49/75 *Borella v Landesversicherungsanstalt Schwaben* [1975] ECR 1461, ECJ.

The competent institution of each member state concerned must take into account the periods referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 48(1) for the purposes of applying art 46(2), excepting art 46(2)(b): art 48(2).

If the effect of applying art 48(1) would be to relieve all the institutions of the member states concerned of their obligations, benefits are awarded exclusively under the legislation of the last of those states whose conditions are satisfied, as if all the periods of insurance and residence completed and taken into account under art 45(1)-(4) (see PARA 509 ante) had been completed under the legislation of that state: art 48(3).

## **UPDATE**

### **510 Periods of insurance or residence of less than one year**

NOTE 7--See also Case C-331/06 *Chuck v Raad van Bestuur van de Sociale Verzekeringsbank* [2009] PTSR 131, [2008] All ER (D) 43 (Apr), ECJ.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/12. EUROPEAN COMMUNITY LAW/(4) SOCIAL SECURITY FOR MIGRANT PERSONS/(v) Particular Benefits/D. OLD AGE AND SURVIVORS' PENSIONS/511. Special provisions with regard to overlapping of benefits.

### **511. Special provisions with regard to overlapping of benefits.**

For the purposes of Chapter 3 of Title III of the EC Council Regulation on social security for migrant persons<sup>1</sup>, overlapping of benefits of the same kind means all overlapping of benefits in respect of invalidity, old age and survivors calculated or provided on the basis of periods of insurance<sup>2</sup> and/or residence<sup>3</sup> completed by one and the same person<sup>4</sup>; and overlapping of benefits of different kinds means all overlapping of benefits that cannot be regarded as being of the same kind as that previously mentioned<sup>5</sup>.

For the application of provisions on reduction, suspension or withdrawal laid down by the legislation of a member state in the case of overlapping of a benefit in respect of invalidity, old age or survivors with a benefit of the same kind or a benefit of a different kind or with income:

- 1230 (1) account must be taken of the benefits acquired under the legislation<sup>6</sup> of another member state or of another income acquired in another member state only where the legislation of the first member state provides for the taking into account of benefits or income acquired abroad;
- 1231 (2) account must be taken of the amount of benefits to be granted by another member state before deductions of taxes, social security contributions and other individual levies or deductions;
- 1232 (3) no account is to be taken of the amount of benefits acquired under the legislation of another member state which are awarded on the basis of voluntary insurance or continued optional insurance;
- 1233 (4) where provisions on reduction, suspension or withdrawal are applicable under the legislation of only one member state on account of the fact that the person concerned receives benefits of a similar or different kind payable under the legislation of other member states or other income acquired within the territory of other member states, the benefit payable under the legislation of the first member state may be reduced only within the limit of the amount of the benefits payable under the legislation or the income acquired within the territory of other member states<sup>7</sup>.

1 The EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) Title III Ch 3 (arts 44-51). As to citation of this regulation see PARA 454 note 4 ante.

2 For the meaning of 'periods of insurance' see PARA 463 note 5 ante.

3 For the meaning of 'periods of residence' see PARA 463 note 6 ante.

4 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 46a(1). See also Case C-98/94 *Schmidt v Rijksdienst voor Pensioenen* [1995] All ER (EC) 833, [1996] ICR 91, ECJ. As to the special provision applicable in the case of overlapping benefits of the same kind under the legislation of two or more member states see art 46b.

5 Ibid art 46a(2).

6 For the meaning of 'legislation' see PARA 461 ante.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 46a(3).



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/12. EUROPEAN COMMUNITY LAW/(4) SOCIAL SECURITY FOR MIGRANT PERSONS/(v) Particular Benefits/D. OLD AGE AND SURVIVORS' PENSIONS/512. Calculation of benefits.

## **512. Calculation of benefits.**

Where an employed or self-employed person<sup>1</sup> has been subject to the legislation<sup>2</sup> of a member state and the conditions for entitlement to benefit have been satisfied without the application of certain specified provisions<sup>3</sup>, the competent institution<sup>4</sup> of that member state must calculate the amount of benefit which would be due, on the one hand only under the provisions of the legislation which it administers<sup>5</sup>, and on the other hand in accordance with the provisions<sup>6</sup> set out below<sup>7</sup>.

Where the conditions required by the legislation of a member state for entitlement to benefits are satisfied only after application of the specified provisions<sup>8</sup>:

- 1234 (1) the competent institution must calculate the theoretical amount of the benefit to which the person concerned could lay claim provided all periods of insurance and/or residence, which have been completed under the legislation of the member state to which the employed or self-employed person was subject, have been completed in the state in question under the legislation which it administers on the date of the award of the benefit; and if, under this legislation, the amount of the benefit is independent of the duration of the periods completed, the amount is regarded as being that theoretical amount<sup>9</sup>;
- 1235 (2) the competent institution must subsequently determine the actual amount of the benefit on the basis of the theoretical amount referred to above in accordance with the ratio of the duration of the periods of insurance and of residence completed before the materialisation of the risk under the legislation which it administers to the total duration of the periods of insurance and residence completed before the materialisation of the risk under the legislation of all the member states concerned<sup>10</sup>.

For the calculation of the theoretical amount referred to in head (1) above, the following rules apply:

- 1236 (a) where the total length of the periods of insurance and residence completed before the risk materialised under the legislation of all the member states concerned is longer than the maximum period required by the legislation of one of these states for receipt of full benefit, the competent institution of that state, when applying these provisions, must take into consideration this maximum period instead of the total length of the periods completed<sup>11</sup>;
- 1237 (b) where, under the legislation of a member state, benefits are calculated on the basis of average earnings, an average contribution, an average increase or on the relation which existed, during the periods of insurance, between the claimant's gross earnings and the average gross earnings of all insured persons other than apprentices, such average figures or relations must be determined by the competent institution of that state solely on the basis of the periods of insurance completed under the legislation of that state, or the gross earnings received by the person concerned during those periods only<sup>12</sup>;
- 1238 (c) where, under the legislation of a member state, benefits are calculated on the basis of the amount of earnings, contributions or increases, the competent institution of that state must determine the earnings, contributions and increases

to be taken into account in respect of the periods of insurance or residence completed under the legislation of other member states on the basis of the average earnings, contributions or increases recorded in respect of the periods of insurance completed under the legislation which it administers<sup>13</sup>;

1239 (d) where, under the legislation of a member state, benefits are calculated on the basis of standard earnings or a fixed amount, the competent institution of that state must consider the standard earnings or the fixed amount to be taken into account by it in respect of periods of insurance or residence completed under the legislation of other member states as being equal to the standard earnings or fixed amount or, where appropriate, to the average of the standard earnings or the fixed amount corresponding to the periods of insurance completed under its own legislation<sup>14</sup>;

1240 (e) where, under the legislation of a member state, benefits are calculated for some periods on the basis of the amount of earnings, and for other periods on the basis of standard earnings or a fixed amount, the competent institution of that state must take into account, in respect of periods of insurance or residence completed under the legislation of other member states, the earnings or fixed amounts determined in accordance with head (c) or head (d) above or, as appropriate, the average of these earnings or fixed amounts; where benefits are calculated on the basis of standard earnings or a fixed amount for all the periods completed under the legislation which it administers, the competent institution must consider the earnings to be taken into account in respect of the periods of insurance or residence completed under the legislations of other member states as being equal to the national earnings corresponding to the standard earnings or fixed amounts<sup>15</sup>;

1241 (f) where, under the legislation of a member state, benefits are calculated on the basis of average contributions, the competent institution must determine that average by reference only to those periods of insurance completed under the legislation of that state<sup>16</sup>.

The provisions of the legislation of a member state concerning the revalorisation of the factors taken into account for the calculation of benefits apply, as appropriate, to the factors to be taken into account by the competent institution of that state, in accordance with heads (a) to (f) above, in respect of the periods of insurance or residence completed under the legislation of other member states<sup>17</sup>.

If, under the legislation of a member state, the amount of benefits is determined taking into account the existence of members of the family<sup>18</sup> other than children, the competent institution of that state must also take into consideration those members of the family of the person concerned who are residing<sup>19</sup> in the territory of another member state as if they were residing in the territory of the competent state<sup>20</sup>.

1 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 I.e. without application of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 45 (aggregation of periods of insurance or residence: see PARA 509 ante) or art 40(3) (receipt of benefit: see PARA 502 ante). As to citation of this regulation see PARA 454 note 4 ante.

4 For the meaning of 'competent institution' see PARA 455 ante.

5 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 46(1)(a)(i). See also Case 21/87 *Borowitz v Bundesversicherungsanstalt für Angestellte* [1988] ECR 3715, [1990] 1 CMLR 34, ECJ. If the investigation institution establishes that the claimant is entitled to benefits under the legislation which it administers without having recourse to periods of insurance or residence completed under the legislation of other member states, it must pay such benefits immediately on a provisional basis: EC Council Regulation

574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 45(1). As to citation of this regulation see PARA 454 note 11 ante. As to special provisions in the case of overlapping of benefits see EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 46b, 46c.

6 le pursuant to *ibid* art 46(2): see text and notes 9, 10 *infra*.

7 *Ibid* art 46(1)(a)(ii). The competent institution may, however, waive the calculation to be carried out in accordance with art 46(1)(a)(ii) if the result of the calculation, apart from differences arising from the use of round figures, is equal to or lower than the result of the calculation in accordance with art 46(1)(a)(i), in so far as that institution does not apply any legislation containing rules against overlapping as referred to in arts 46b, 46c or if the aforementioned institution applies a legislation containing rules against overlapping in the case referred to in art 46c, provided that the legislation lays down that benefits of a different kind are to be taken into consideration only on the basis of the relation of the periods of insurance or of residence completed under that legislation alone to the periods of insurance or of residence required by that legislation in order to qualify for full benefit entitlement. Annex IV Pt C lists for each member state concerned the cases where the two calculations would lead to a result of this kind: art 46(1)(b).

8 See note 3 *supra*.

9 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 46(2)(a). See Case 793/79 *Menzies v Bundesversicherungsanstalt für Angestellte* [1980] ECR 2085, [1981] 1 CMLR 190, ECJ.

10 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 46(2)(b). See Case 793/79 *Menzies v Bundesversicherungsanstalt für Angestellte* [1980] ECR 2085, [1981] 1 CMLR 190, ECJ. See also PARA 514 post. As to special provisions in the case of overlapping benefits see EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 46b, 46c; and PARA 511 post.

11 See *ibid* art 47(1)(a). However, this method of calculation must not result in the imposition on that institution of the cost of a benefit greater than the full benefit provided for by the legislation which it administers. This provision does not apply to benefits the amount of which does not depend on the length of insurance: see art 47(1)(a). As to the procedure for taking account of overlapping periods see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 47(1)(b). As to citation of this regulation see PARA 454 note 11 ante.

12 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 47(1)(c).

13 *Ibid* art 47(1)(d).

14 *Ibid* art 47(1)(e).

15 *Ibid* art 47(1)(f).

16 *Ibid* art 47(1)(g).

17 *Ibid* art 47(2).

18 For the meaning of 'members of the family' see PARA 458 ante.

19 For the meaning of 'residence' see PARA 459 note 2 ante.

20 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 47(3). If the legislation which the competent institution of a member state administers requires a salary to be taken into account for the calculation of benefits, where art 45(6) has been applied, and if, in this member state, only periods of full unemployment with benefit in accordance with art 71(1)(a)(ii) or art 71(1)(b)(ii) (first sentence) are taken into consideration for the payment of pensions, the competent institution of that member state must pay the pension on the basis of the salary it used as the reference for providing that unemployment benefit in accordance with the legislation which it administers: see art 47(4).

## UPDATE

### 512 Calculation of benefits

NOTE 9--See also Case C-30/04 *Koschitzki v Istituto Nazionale della Previdenza Sociale (INPS)* [2006] 1 CMLR 79, ECJ.

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**513. Calculation of benefits where conditions not simultaneously satisfied or postponement of old age benefits requested.**

If, at a given time, the person concerned does not satisfy the conditions laid down for the provision of benefits by all the legislations<sup>1</sup> of the member states to which he has been subject<sup>2</sup>, but satisfies the conditions of one or more of them only, then each of the competent institutions<sup>3</sup> administering a legislation whose conditions are satisfied must calculate<sup>4</sup> the amount of benefit due<sup>5</sup>. However:

- 1242 (1) if the person concerned satisfies the conditions of at least two legislations without having recourse to periods of insurance<sup>6</sup> or residence<sup>7</sup> completed under the legislations whose conditions are not satisfied, these periods are not to be taken into account for the purposes of calculating the theoretical and actual amounts of benefit, unless taking account of the periods makes it possible to determine a higher amount of benefit<sup>8</sup>;
- 1243 (2) if the person concerned satisfies the conditions of one legislation only without having recourse to periods of insurance or residence completed under the legislations whose conditions are not satisfied, the amount of the benefit due is<sup>9</sup> calculated only in accordance with the provisions of the legislation whose conditions are satisfied, taking account of the periods completed under that legislation only, unless taking account of the periods completed under the legislations whose conditions are not satisfied makes it possible<sup>10</sup> to determine a higher amount of benefit<sup>11</sup>.

The benefit or benefits so awarded under one or more of the legislations in question<sup>12</sup> is recalculated automatically<sup>13</sup> as and when the conditions required by one or more of the other legislations to which the person concerned has been subject are satisfied<sup>14</sup> as appropriate<sup>15</sup>. A recalculation is made<sup>16</sup> automatically when the conditions required by one or more of the legislations concerned are no longer satisfied<sup>17</sup>.

1 For the meaning of 'legislation' see PARA 461 ante.

2 I.e. taking into account, where appropriate, the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 45 (see PARA 509 ante) and/or art 40(3) (see PARA 502 ante). As to citation of this regulation see PARA 454 note 4 ante.

3 For the meaning of 'competent institution' see PARA 455 ante.

4 I.e. in accordance with EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 46: see PARA 512 ante.

5 Ibid art 49(1)(a).

6 For the meaning of 'periods of insurance' see PARA 463 note 5 ante.

7 For the meaning of 'periods of residence' see PARA 463 note 6 ante.

8 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 49(1)(b)(i). As to the calculation of the theoretical and actual amounts of benefit see art 46(2); and PARA 512 ante.

9 le in accordance with *ibid* art 46(1)(a)(i): see PARA 512 ante.

10 le in accordance with *ibid* art 46(1)(a)(ii): see PARA 512 ante.

11 *Ibid* art 49(1)(b)(ii). The provisions of this paragraph apply *mutatis mutandis* where the person concerned has expressly requested the postponement of the award of old age benefits, in accordance with art 44(2) (second sentence): see art 49(1). See also Case C-146/93 *McLachlan v Caisse Nationale d'Assurance Vieillesse des Travailleurs Salariés de la Région d'Ile-de-France* [1994] ECR I-3229, [1995] 2 CMLR 540, ECJ (for purposes of determining acquisition of right to a pension, and its rate, account may be taken of periods of insurance completed in another member state).

12 le in the case referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 49(1).

13 le in accordance with *ibid* art 46: see PARA 512 ante.

14 le taking into account once again, where appropriate, *ibid* art 45 (see PARA 509 ante) and art 49(1).

15 See *ibid* art 49(2). This paragraph applies *mutatis mutandis* where a person requests the award of old age benefits acquired under the legislation of one or more member states which had until then been postponed in accordance with art 44(2) (second sentence): see art 49(2). As to implementation of art 49(2), (3) see generally EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 49. As to citation of this regulation see PARA 454 note 11 ante.

16 le in accordance with the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 49(1).

17 *Ibid* art 49(3). The recalculation under this provision is without prejudice to the provisions of art 40(2) (see PARA 502 ante): see art 49(3).

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#### **514. Awards of benefits.**

The person concerned is entitled to the highest amount calculated<sup>1</sup> from the competent institution<sup>2</sup> of each member state, without prejudice to the application of the provisions concerning reduction, suspension or withdrawal provided for by the legislation<sup>3</sup> under which the benefit<sup>4</sup> is due<sup>5</sup>. Where that is the case, the comparison to be carried out relates to the amounts to be determined after the application of those provisions<sup>6</sup>.

When, in the case of invalidity, old age or survivors' pensions, the total of the benefits due from the competent institutions of two or more member states under the provisions of a multilateral social security convention<sup>7</sup> does not exceed the total which would be due from such member states<sup>8</sup>, the person concerned is given the benefit of the appropriate EC provisions<sup>9</sup>.

1    In accordance with EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 46(1), (2): see PARA 512 ante. As to citation of this regulation see PARA 454 note 4 ante.

2    For the meaning of 'competent institution' see PARA 455 ante.

3    For the meaning of 'legislation' see PARA 461 ante.

4    For the meaning of 'benefits' see PARA 460 ante.

5    EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 46(3) PARA 1.

6    Ibid art 46(3) PARA 2. To the extent that the previous version of art 46(3) PARA 2 imposed a limitation on the overlapping of two benefits acquired in different member states by a reduction in the amount of benefit acquired under national legislation alone, it was held to be incompatible with the EC Treaty art 51: see Case 24/75 *Petroni v Office national des pensions pour travailleurs salariés* [1975] ECR 1149, ECJ. See also Case 37/77 *Greco v Fonds National de Retraite des Ouvriers Mineurs* [1977] ECR 1711, [1978] 2 CMLR 416, ECJ; Case 98/77 *Schaap v Bestuur van de Bedrijfsvereniging voor Bank-en Verzekeringswezen, Groothandel en Vrije Beroepen* [1978] ECR 707, [1979] 1 CMLR 270, ECJ; Case 176/78 *Schaap v Bestuur van de Bedrijfsvereniging voor Bank-en Verzekeringswezen, Groothandel en Vrije Beroepen* [1979] ECR 1673, [1980] 2 CMLR 13, ECJ; and Case 236/78 *Fonds national de retraite des ouvriers mineurs (FNROM) v Mura* [1979] ECR 1819, ECJ.

7    Ie a social security convention referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 6(b) (a convention binding at least two member states and one or more other states, where settlement of the cases concerned does not involve any institution of one of the latter states): see PARA 462 ante.

8    Ie under ibid art 46(1)-(3): see PARA 512 ante.

9    See ibid art 46(4). The appropriate EC provisions here concerned are the provisions of Title III Ch 3 (arts 44-51).

#### **UPDATE**

#### **514 Awards of benefits**

NOTE 6--See also C-34/02 *Sante Pasquini v Istituto Nazionale Della Previdenza Sociale (INPS)* [2004] 1 CMLR 1451, ECJ.

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### 515. Supplements.

A recipient of old age and death (pensions) benefits<sup>1</sup> may not, in the state in whose territory he resides<sup>2</sup> and under whose legislation<sup>3</sup> a benefit is payable to him, be awarded a benefit which is less than the minimum benefit fixed by that legislation for a period of insurance<sup>4</sup> or residence<sup>5</sup> equal to all the periods of insurance taken into account for the payment in accordance with the relevant provisions of the EC Council Regulation on social security for migrant persons<sup>6</sup>. The competent institution<sup>7</sup> of that state must, if necessary, pay him throughout the period of his residence in its territory a supplement equal to the difference between the total of the benefits payable and the amount of the minimum benefit<sup>8</sup>.

1 The benefits to which EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) Title III Ch 3 (arts 44-51) applies. As to citation of this regulation see PARA 454 note 4 ante.

2 For the meaning of 'residence' see PARA 459 note 2 ante.

3 For the meaning of 'legislation' see PARA 461 ante.

4 For the meaning of 'periods of insurance' see PARA 463 note 5 ante.

5 For the meaning of 'periods of residence' see PARA 463 note 6 ante.

6 The preceding articles of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1).

7 For the meaning of 'competent institution' see PARA 455 ante.

8 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 50. Article 50 applies only in cases in which provision is made for a minimum pension in the legislation of the member state in whose territory the person concerned resides: see Case 64/77 *Torri v Office National des Pensions pour Travailleurs Salariés* [1977] ECR 2299, [1978] 2 CMLR 711, ECJ. See also Case 22/81 *R v Social Security Comr, ex p Browning* [1982] 1 CMLR 427, ECJ (preliminary reference); and, on appeal, *R v National Insurance Comrs, ex p Browning* (1983) Times, 13 May, CA. As to the declarations of member states concerning minimum benefits see PARA 461 ante.

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### **516. Revalorisation.**

If, by reason of an increase in the cost of living or changes in the level of wages or salaries or other reasons for adjustment, the benefits of the states concerned are altered by a fixed percentage or amount, such percentage or amount must be applied directly to the benefits determined under the specified provisions<sup>1</sup> without the need for a recalculation under those provisions<sup>2</sup>. On the other hand, if the method of determining benefits or the rules for calculating benefits should be altered, such a recalculation must be carried out<sup>3</sup>.

1     I.e. EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 46: see PARA 512 ante. As to citation of this regulation see PARA 454 note 4 ante.

2     Ibid art 51(1).

3     Ibid art 51(2). See Case C-301/93 *Bettacini v Fonds National de Retraite des Ouvriers Mineurs* [1995] 3 CMLR 73, ECJ; and Case C-199/88 *Cabras v Institut National d'Assurance Maladie-Invalidité* [1990] ECR I-1023, [1991] 3 CMLR 182, ECJ.

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## ***E. ACCIDENTS AT WORK AND OCCUPATIONAL DISEASES***

### **517. Scope of provisions.**

Benefits in respect of accidents at work and occupational diseases are dealt with in Chapter 4 of Title III of the EC Council Regulation on social security for migrant persons<sup>1</sup>. These provisions cover both benefits in cash<sup>2</sup> and in kind<sup>3</sup>, and the costs of transporting a person who has sustained an accident at work or is suffering from an occupational disease to his residence or to a hospital<sup>4</sup>.

Where the legislation<sup>5</sup> of a member state provides expressly or by implication that accidents at work or occupational diseases which have occurred or have been confirmed previously are taken into consideration in order to assess the degree of incapacity, to establish a right to any benefit, or to determine the amount of benefit, the competent institution<sup>6</sup> of that member state must also take into consideration accidents at work or occupational diseases which have occurred or have been confirmed previously under the legislation of another member state as if they had occurred or been confirmed under the legislation which it administers<sup>7</sup>. Where the legislation of a member state provides expressly or by implication that accidents at work or occupational diseases which have occurred or have been confirmed subsequently are to be taken into consideration in order to assess the degree of incapacity, to establish the right to any benefit, or to determine the amount of any benefit, the competent institution of that member state must also take into consideration accidents at work or occupational diseases which have occurred or have been confirmed subsequently under the legislation of another member state, as if they had occurred or been confirmed under the legislation which it administers, but only where:

- 1244 (1) no compensation is due in respect of the accident at work or the occupational disease which had occurred or had been confirmed previously under the legislation which it administers; and
- 1245 (2) no compensation is due by virtue of the legislation of the other member state under which the accident at work or the occupational disease occurred or was confirmed subsequently<sup>8</sup> in respect of that accident at work or that occupational disease<sup>9</sup>.

If the legislation of the country of stay<sup>10</sup> or residence<sup>11</sup> has several insurance schemes, the provisions applicable to employed or self-employed persons<sup>12</sup> are those of the scheme for manual workers in the steel industry. However, if that legislation includes a special scheme for workers in mines and similar undertakings, the provisions of that scheme apply to that category of workers where the institution of the place of stay or residence to which they submit their claim is competent to administer that scheme<sup>13</sup>.

If the legislation of a member state fixes a maximum period during which benefits may be granted, the institution which administers that legislation may take into account any period during which the benefits have already been provided by the institution of another member state<sup>14</sup>.

The competent institution of a member state whose legislation provides for meeting the costs of transporting a person who has sustained an accident at work or is suffering from an occupational disease either to his place of residence or to a hospital must meet such costs to

the corresponding place in the territory of another member state where the person resides, provided that that institution gives prior authorisation for such transport, duly taking into account the reasons justifying it<sup>15</sup>.

1     I.e. EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) Title III Ch 4 (arts 52-63). As to citation of this regulation see PARA 454 note 4 ante. As to the national legislation concerning industrial injuries benefits see PARA 461 ante. As to industrial injuries see also PARA 126 et seq ante; and as to industrial diseases see PARA 150 et seq ante. As to the exchange of relevant information between the appropriate institutions in cases of industrial injury see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) arts 65, 66. As to citation of this regulation see PARA 454 note 11 ante.

2     As to the calculation of cash benefits see PARA 518 note 7 post.

3     As to the meaning of 'benefits in kind' see PARA 483 note 6 ante. If there is no insurance against accidents at work or occupational diseases in the territory of the member state in which the person concerned happens to be, or if such insurance exists but there is no institution (see PARA 455 note 3 ante) responsible for providing benefits in kind, those benefits are provided by the institution of the place of stay or residence responsible for providing benefits in the case of sickness: EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 61(1). For the meaning of 'institution of the place of stay' and 'institution of the place of residence' see PARA 455 ante. Where the nature of the scheme of the competent state (see PARA 455 ante) relating to compensation for accidents at work is not that of compulsory insurance, the provision of benefits in kind are made directly by the employer or the insurer involved: art 61(4).

4     See *ibid* Title III Ch 4 (arts 52-63).

5     For the meaning of 'legislation' see PARA 461 ante.

6     For the meaning of 'competent institution' see PARA 455 ante.

7     EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 61(5). This provision does not require subsequent accidents or diseases to be taken into account: *Joined Cases 173, 174/78 Villano v Nordwestliche Eisen-und Stahl-Berufsgenossenschaft* [1979] ECR 1851, [1980] 1 CMLR 613, ECJ.

In order to assess the degree of incapacity under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 61(5), the claimant must supply the competent institution of the member state to whose legislation he was subject at the time of the occurrence of the accident or disease in question with all information on previous accidents or diseases: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 72.

8     I.e. account having been taken of the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 61(5).

9     *Ibid* art 61(6).

10    For the meaning of 'stay' see PARA 455 note 11 ante.

11    For the meaning of 'residence' see PARA 459 note 2 ante.

12    I.e. those employed or self-employed persons covered by EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 52 or art 55(1). For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

13    *Ibid* art 62(1). For the provisions implementing this provision see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 73.

14    EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 62(2). For the provisions implementing this provision see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) arts 74, 75.

15    EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 59(1). Such authorisation is not required in the case of a frontier worker (see PARA 484 ante): see art 59(1). Similar provision is made in respect of the costs of transporting the body of a person killed in an accident at work: see art 59(2).

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### **518. Benefit during residence in a member state other than the competent state.**

An employed or self-employed person<sup>1</sup> who sustains an accident at work or contracts an occupational disease, and who is residing<sup>2</sup> in the territory of a member state other than the competent state, is entitled to receive in the state in which he is residing:

1246 (1) benefits in kind<sup>3</sup>, provided on behalf of the competent institution<sup>4</sup> by the institution of his place of residence<sup>5</sup> in accordance with the legislation which it administers as if he were insured with it<sup>6</sup>; and

1247 (2) cash benefits<sup>7</sup> provided by the competent institution in accordance with the legislation which it administers<sup>8</sup>.

A frontier worker<sup>9</sup> may also obtain benefits in the territory of the competent state<sup>10</sup>.

An employed or self-employed person in such a case who is staying<sup>11</sup> in the territory of the competent state or who transfers his place of residence to the territory of the competent state is entitled to receive benefits in accordance with the provisions of the legislation of that state, even if he has already received benefits before his stay or before transferring his residence<sup>12</sup>.

1 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

2 For the meaning of 'residence see PARA 459 note 2 ante.

3 As to the meaning of 'benefits in kind' see PARA 483 note 6 ante. Where the legislation (see PARA 461 ante) of the competent state makes wholly cost-free benefits in kind conditional upon use of the medical service organised by the employer, benefits in kind provided under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 52, 55(1) (see infra and PARA 519 post) are deemed to have been provided by that medical service: art 61(2). Where the legislation of the competent state includes a scheme relating to the obligations of the employer, benefits in kind provided under arts 52, 55 (1) are deemed to have been provided at the request of the competent institution: art 61(3). As to citation of this regulation see PARA 454 note 4 ante. As to the provision of benefits in kind generally see PARA 517 note 3 ante.

4 For the meaning of 'competent institution' see PARA 455 ante.

5 For the meaning of 'institution of the place of residence' see PARA 455 ante.

6 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 52(a). In order to obtain benefits in kind under this provision the claimant must submit to the institution of the place of residence a certified statement, issued by the competent institution, testifying that he is entitled to those benefits: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 60. As to citation of this regulation see PARA 454 note 11 ante. As to the reimbursement of benefits provided on behalf of a competent institution see EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 63.

7 The competent institution of a member state whose legislation provides that the calculation of cash benefits is to be based on average earnings must determine those average earnings exclusively by reference to earnings confirmed as having been paid during the periods completed under that legislation: *ibid* art 58(1). The competent institution of a member state whose legislation provides that the calculation of cash benefits is to be based on standard earnings must take account exclusively of the standard earnings or, where appropriate, of the average standard earnings for the periods completed under that legislation: art 58(2). The competent institution of a member state whose legislation provides that the amount of cash benefits is to vary with the number of members of the family (see PARA 458 ante) must also take into account the members of the family of the person concerned who are residing in the territory of another member state, as if they were residing in the territory of the competent state: art 58(3). In order to receive benefits under this provision the claimant must

submit a certified statement, issued by the sickness insurance institution of the place of residence of the members of the family or by another institution designated by the competent authority of the state of residence, relating to the members of his family who are residing in the territory of a member state other than that in which the institution responsible for the award of cash benefits is situated: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 70.

8 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 52(b). However, by agreement between the competent institution and the institution of the place of residence, the benefits may be provided by the latter institution on behalf of the former in accordance with the legislation of the competent state: see art 52(b). In order to receive cash benefits other than pensions under this provision the claimant, within three days of commencement of the incapacity for work, must apply to the institution of the place of residence by a notification of having ceased work issued by his doctor: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 61.

9 For the meaning of 'frontier worker' see PARA 484 note 1 ante.

10 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 53. Such benefits are to be provided by the competent institution in accordance with the provisions of the legislation of that state, as if the person concerned were residing there: see art 53.

11 For the meaning of 'stay' see PARA 455 note 11 ante.

12 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 54(1), (2). Article 54(1) does not apply to frontier workers: see art 54(1).

## UPDATE

### **518 Benefit during residence in a member state other than the competent state**

NOTE 7--The competent institution is not entitled to take into account income earned in another state, but must consider what the claimant could reasonably have been able to earn in the state of the institution: Case C-205/05 *Nemec v Caisse regionale d'assurance maladie du Nord-Est* [2007] 1 CMLR 805, ECJ.

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### **519. Other cases of absence from the competent state.**

An employed or self-employed person<sup>1</sup> who sustains an accident at work or contracts<sup>2</sup> an occupational disease is entitled to receive benefits in respect of that accident or disease in any of the following circumstances:

- 1248 (1) if he is staying<sup>3</sup> in the territory of a member state other than the competent state<sup>4</sup>;
- 1249 (2) if, after having become entitled to benefits chargeable to the competent institution<sup>5</sup>, he is authorised<sup>6</sup> by that institution to return to the territory of the member state where he is resident<sup>7</sup>, or to transfer his place of residence to the territory of another member state<sup>8</sup>; or
- 1250 (3) if he is authorised<sup>9</sup> by the competent institution to go to the territory of another member state in order to receive there the treatment appropriate to his condition<sup>10</sup>.

Benefits in kind are provided on behalf of the competent institution by the institution of the place of stay or residence<sup>11</sup> in accordance with the provisions of the legislation<sup>12</sup> administered by that institution as though he were insured with it; the period during which benefits are provided must, however, be governed by the legislation of the competent state<sup>13</sup>. Cash benefits are provided by the competent institution in accordance with the legislation which it administers<sup>14</sup>.

1 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

2 See Decision R(1) 1/75 *Re a Visit to Italy* [1976] 1 CMLR 506, NIC.

3 For the meaning of 'stay' see PARA 455 note 11 ante. See also Decision R(1) 1/75 *Re a Visit to Italy* [1976] 1 CMLR 506, NIC; Decision CI 202/77 *Re the Key Gibraltar Oil-Drilling Rig* [1979] 1 CMLR 362, NIC.

4 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 55(1)(a). As to citation of this regulation see PARA 454 note 4 ante.

5 For the meaning of 'competent institution' see PARA 455 ante.

6 Such authorisation may be refused only if it is established that movement of the person concerned would be prejudicial to his state of health or to the medical treatment being given: EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 55(2) PARA 1.

7 For the meaning of 'residence' see PARA 459 note 2 ante.

8 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 55(1)(b).

9 Such authorisation may not be refused where the treatment in question cannot be given to the person concerned in the territory of the member state in which he resides: *ibid* art 55(2) PARA 2.

10 *Ibid* art 55(1)(c).

11 For the meaning of 'institution of the place of stay' and 'institution of the place of residence' see PARA 455 ante.

12 For the meaning of 'legislation' see PARA 461 ante.

13 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 55(1)(i). In order to receive benefits in kind under this provision the claimant must submit to the institution of the place of residence a certified statement, issued by the competent institution before his departure, testifying that he is entitled to continue to receive those benefits: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) arts 62, 63. As to citation of this regulation see PARA 454 note 11 ante. As to the reimbursement of benefits provided on behalf of a competent institution see EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 63.

14 Ibid art 55(1)(ii). However, by agreement between the competent institution and the institution of the place of residence, the benefits may be provided by that institution on behalf of the competent institution in accordance with the legislation of the competent state: see art 55(1)(ii). For the provisions implementing those provisions see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 61, applied by art 64; and PARA 518 note 8 ante.

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### **520. Accidents while travelling.**

An accident while travelling which occurs in a member state other than the competent state<sup>1</sup> is deemed to have occurred in the territory of the competent state<sup>2</sup>.

1 For the meaning of 'competent state' see PARA 455 ante.

2 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 56. As to citation of this regulation see PARA 454 note 4 ante. See also Decision CI 487/74 *Re a Car Accident in West Berlin* [1979] 2 CMLR 42, NIC.

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**521. Benefit for occupational diseases where exposure to the same risk has occurred in several member states.**

Where under the legislation<sup>1</sup> of two or more member states, a person who has contracted an occupational disease has pursued an activity by its nature likely to cause that disease, the benefits that he or his survivors<sup>2</sup> may claim are awarded exclusively under the legislation of the last of those states whose conditions are satisfied<sup>3</sup>.

1 For the meaning of 'legislation' see PARA 461 ante.

2 For the meaning of 'survivor' see PARA 458 ante.

3 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 57(1). If, under the legislation of a member state, the granting of benefits in respect of an occupational disease is subject to the condition that the disease in question was first diagnosed within its territory, that condition is deemed to be satisfied if the disease was first diagnosed in the territory of another member state: art 57(2). See also Case 28/85 *Deghillage v Caisse Primaire d'Assurance Maladie, Maubeuge* [1986] ECR 991, [1987] 2 CMLR 812, ECJ. Where benefits are subject to a condition that diagnosis must follow within a specific time limit from the cessation of the relevant activity, or to a condition that the activity was pursued for a certain length of time, activities pursued under the legislation of other member states are to be taken into account also: see EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 57(3), (4). In cases of sclerogenic pneumoconiosis there is special provision for dividing the cost between competent institutions of member states: see art 57(5). The provisions of art 57(5) may be extended to apply to other occupational diseases: art 57(6). For the provisions implementing art 57 see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) arts 67-69. As to citation of this regulation see PARA 454 note 11 ante.

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## **522. Aggravation of an occupational disease.**

In the event of aggravation of an occupational disease for which an employed or self-employed person<sup>1</sup> has received, or is receiving, benefit under the legislation<sup>2</sup> of a member state, the following rules apply:

- 1251 (1) if the person concerned has not, while in receipt of benefits, been engaged in an occupation under the legislation of another member state likely to cause or aggravate the disease in question, the competent institution<sup>3</sup> of the first member state is bound to meet the cost of the benefits under the provisions of the legislation which it administers, taking into account the aggravation<sup>4</sup>;
- 1252 (2) if the person concerned, while in receipt of benefits, has pursued such an activity under the legislation of another member state (a) the competent institution of the first member state is bound to meet the cost of the benefits under the legislation which it administers without taking into account the aggravation; (b) the competent institution of the second member state must grant a supplement to the person concerned, the amount of which is equal to the difference between the amount of benefits due after the aggravation and the amount which would have been due prior to the aggravation under the legislation which it administers if the disease in question had occurred under the legislation of that member state<sup>5</sup>.

1 For the meaning of 'employed person', and 'self-employed person' see PARA 457 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 For the meaning of 'competent institution' see PARA 455 ante.

4 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 60(1)(a). As to citation of this regulation see PARA 454 note 4 ante. In the cases covered by art 60(1) the claimant must supply the institution of the member state from which he is claiming rights to benefits with all information relating to benefits previously granted in respect of the occupational disease in question; and that institution may apply to any other institution which has previously been competent in order to obtain any information which it considers necessary: EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 71. As to citation of this regulation see PARA 454 note 11 ante.

5 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 60(1)(b). The provisions for reduction, suspension or withdrawal laid down by the legislation of a member state do not apply to persons receiving benefits awarded by institutions of two member states in accordance with art 60(1)(b): art 60(1)(d). As to the special provisions which apply in the case of sclerogenic pneumoconiosis see art 60(1)(c), (2).

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## ***F. DEATH GRANTS***

### **523. Aggregation of periods of insurance or residence.**

The competent institution<sup>1</sup> of a member state whose legislation<sup>2</sup> makes the acquisition, retention or recovery of the right to death grants<sup>3</sup> subject to the completion of periods of insurance<sup>4</sup> or residence<sup>5</sup> must take account, to the extent necessary, of such periods completed under the legislation of any other member state as though they had been completed under the legislation which it administers<sup>6</sup>.

Where the death occurs in the territory of a member state, the right to a death grant acquired under the legislation of that member state only is maintained, whilst the right acquired under the legislation of any other member state lapses<sup>7</sup>. Where the death occurs in the territory of one member state when the right to a death grant has been acquired under the legislation of two or more other member states, or where the death occurs outside the territory of the member states and that right has been acquired under the legislation of two or more member states, only the right acquired under the legislation of the member state to which the deceased person was last subject is maintained, whilst the right acquired under the legislation of any other member state lapses<sup>8</sup>.

1 For the meaning of 'competent institution' see PARA 455 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 Death grants means any once-for-all payment in the event of death, exclusive of the lump sum benefits referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(t) (see PARA 460 ante): art 1(v). As to citation of this regulation see PARA 454 note 4 ante.

4 For the meaning of 'periods of insurance' see PARA 463 note 5 ante.

5 For the meaning of 'periods of residence' see PARA 463 note 6 ante.

6 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 64. In order to invoke those provisions, the claimant must submit a certified statement, issued at his request by the relevant insurance institution, specifying the relevant completed periods of insurance or residence: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 79. As to citation of this regulation see PARA 454 note 11 ante.

7 Ibid art 9(1).

8 Ibid art 9(2). By way of derogation from art 9(1), (2) in the instances referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 14c(b) of the regulation, entitlement to death grants acquired under the legislation of each of the two member states concerned referred to in Annex VII (as amended) is retained: EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 9(3).

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#### **524. Other provisions relating to death grants.**

When an employed or self-employed person<sup>1</sup>, a pensioner or a pension<sup>2</sup> claimant, or a member of his family<sup>3</sup>, dies<sup>4</sup> in the territory of a member state other than the competent state<sup>5</sup>, the death is deemed to have occurred in the territory of the competent state<sup>6</sup> and the competent institution<sup>7</sup> is obliged to award death grants<sup>8</sup> payable under the legislation<sup>9</sup> which it administers, even if the person entitled resides<sup>10</sup> in the territory of a member state other than the competent state<sup>11</sup>.

In the event of the death of a pensioner who was entitled to a pension under the legislation of one member state or to pensions under the legislations of two or more member states, when the pensioner was residing in the territory of a member state other than the one whose institution was responsible under those measures for providing him with benefits in kind<sup>12</sup>, the death grants payable under the legislation administered by that institution are provided by it at its own expense as though he had been residing in the territory of the member state of that institution at the time of his death<sup>13</sup>. These provisions apply by analogy to the members of the family of a pensioner<sup>14</sup>.

1 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

2 For the meaning of 'pensions' see PARA 460 ante.

3 For the meaning of 'member of the family' see PARA 458 ante.

4 The provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 65 (1), (2) also apply when the death is the result of an accident at work or an occupational disease: art 65(3). As to citation of this regulation see PARA 454 note 4 ante.

5 For the meaning of 'competent state' see PARA 455 ante.

6 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 65(1).

7 For the meaning of 'competent institution' see PARA 455 ante.

8 For the meaning of 'death grants' see PARA 523 note 3 ante.

9 For the meaning of 'legislation' see PARA 461 ante.

10 For the meaning of 'residence' see PARA 459 note 2 ante.

11 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 65(2). In order to receive a death grant under those provisions the claimant must submit his claim, accompanied by supporting documents, to either the competent institution or the institution of the place of residence: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 78. As to citation of this regulation see PARA 454 note 11 ante.

12 Ie under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 28: see PARA 494 ante.

13 Ibid art 66 para 1.

14 Ibid art 66 para 2.

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## **G. UNEMPLOYMENT BENEFITS**

### **525. Aggregation of periods of insurance or employment.**

The competent institution<sup>1</sup> of a member state whose legislation<sup>2</sup> makes the acquisition, retention or recovery of the right to unemployment benefits<sup>3</sup> subject to the completion of periods of insurance<sup>4</sup> must take into account, to the extent necessary, periods of insurance or employment<sup>5</sup> completed as an employed person<sup>6</sup> under the legislation of any other member state as though they were periods completed under the legislation which it administers, provided, however, that the periods of employment would have been counted as periods of insurance had they been completed under that legislation<sup>7</sup>.

The competent institution of a member state whose legislation makes the acquisition, retention or recovery of the right to benefits subject to the completion of periods of employment must take into account, to the extent necessary, periods of insurance or employment completed as an employed person under the legislation of any other member state as though they were periods of employment completed under the legislation which it administers<sup>8</sup>.

Subject to certain exceptions<sup>9</sup>, the application of these provisions is subject to the condition that the person concerned<sup>10</sup> should have completed lastly either periods of insurance or periods of employment, as appropriate, in accordance with the provisions of the legislation under which the benefits are claimed<sup>11</sup>.

1 For the meaning of 'competent institution' see PARA 455 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 The sole purpose of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) Title III Ch 6 (arts 67-70) (see infra and PARA 526 et seq post), relating to unemployment benefits, is to co-ordinate the rights to those benefits provided by virtue of the national legislation of the member states for employed persons who are nationals of a member state: Case 40/76 *Kermaschek v Bundesanstalt für Arbeit* [1976] ECR 1669, ECJ. See also Case 39/76 *Bestuur der Bedrijfsvereniging voor de Metaalnijverheid v Moutaen* [1976] ECR 1901 ECJ. As to the national legislation concerning unemployment benefits to which EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) applies see PARA 461 ante. As to citation of this regulation see PARA 454 note 4 ante.

4 For the meaning of 'periods of insurance' see PARA 463 note 5 ante.

5 For the meaning of 'periods of employment' see PARA 463 note 5 ante.

6 For the meaning of 'employed person' see PARA 457 ante.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 67(1). See also Case 388/87 *Bestuur van de Nieuwe Algemene Bedrijfsvereniging v Warmerdam-Steggerda* [1989] ECR 1203, [1991] 2 CMLR 86, ECJ (insurance need not be against the same risk); and Decision R(U) 4/86. A period of employment completed under the legislation of a member state other than one in which the competent institution is established, and defined or recognised as an insurance period under that legislation, is not subject to the proviso: Case 126/77 *Frangiamore v Office National de l'Emploi* [1978] ECR 725, [1978] 3 CMLR 166, ECJ. Where the length of the period during which benefits may be granted depends on the length of periods of insurance or employment, the provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 67(1), (2) apply as appropriate: art 67(4). In order to invoke the provisions of art 67(1), (2), or (4) the person concerned must submit to the competent institution a certified statement, issued at his request by either the competent institution in respect of unemployment of the member state to whose legislation he was last subject

or by another institution designated by the competent authority of that member state, specifying the relevant completed periods of insurance or employment: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 80. As to citation of this regulation see PARA 454 note 11 ante.

8 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 67(2). See also note 7 supra.

9 le the cases referred to in ibid art 71(1)(a)(ii), (b)(ii): see PARA 528 post.

10 See Case 40/76 *Kermaschek v Bundesanstalt für Arbeit* [1976] ECR 1669, ECJ.

11 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 67(3). Article 67(3) is not contrary to the EC Treaty art 51: see Case C-62/91 *Gray v Adjudication Officer* [1992] ECR I-2737, [1992] 2 CMLR 584, ECJ.

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## **526. Calculation of unemployment benefits.**

The competent institution<sup>1</sup> of a member state whose legislation<sup>2</sup> provides that the calculation of benefits should be based on the amount of the previous wage or salary must take into account exclusively the wage or salary received by the person concerned in respect of his last employment in the territory of that state; however, if the person concerned had been in his last employment in that territory for less than four weeks, the benefits are calculated on the basis of the normal wage or salary corresponding, in the place where the unemployed person is residing<sup>3</sup> or staying<sup>4</sup>, to an equivalent or similar employment to his last employment in another member state<sup>5</sup>.

The competent institution of a member state whose legislation provides that the amount of benefits varies with the number of members of the family<sup>6</sup> must also take into account members of the family of the person concerned who are residing in the territory of another member state as though they were residing in the territory of the competent state<sup>7</sup>.

1 For the meaning of 'competent institution' see PARA 455 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 For the meaning of 'residence' see PARA 459 note 2 ante.

4 For the meaning of 'stay' see PARA 455 note 11 ante.

5 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 68(1). As to citation of this regulation see PARA 454 note 4 ante. See Case 67/79 *Fellinger v Bundesanstalt für Arbeit, Nuremberg* [1980] ECR 535, [1981] 1 CMLR 471, ECJ; Case 268/78 *Pennartz v Caisse Primaire d'Assurance Maladie des Alpes-Maritimes* [1979] ECR 2411, [1980] 1 CMLR 682, ECJ. As to the certified statement to be submitted by a claimant under those provisions relating to his last employment see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 81. As to citation of this regulation see PARA 454 note 11 ante.

6 For the meaning of 'member of the family' see PARA 458 ante.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 68(2). However, this provision does not apply if, in the country of residence of the members of the family, another person is entitled to unemployment benefits for the calculation of which the members of the family are taken into consideration: see art 68(2). In order to invoke those provisions, the claimant must submit to the competent institution a certified statement, issued by the institution designated by the competent authority of the member state in which the members of the family reside, relating to those persons: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 82.

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### **527. Unemployed persons seeking employment in another member state.**

An employed or self-employed person<sup>1</sup> who is wholly unemployed and who satisfies the conditions of the legislation<sup>2</sup> of a member state for entitlement to unemployment benefits<sup>3</sup> and who goes to one or more other member states in order to seek employment there<sup>4</sup> retains his entitlement to such benefits subject to the following conditions and limits<sup>5</sup>:

- 1253 (1) before his departure he must have been registered with the employment services of the competent state<sup>6</sup> as a person seeking work and have remained available to the employment services of the competent state for at least four weeks after becoming unemployed<sup>7</sup>;
- 1254 (2) he must register as a person seeking work with the employment services of each of the member states to which he goes and be subject to the control procedure of each of those states<sup>8</sup>;
- 1255 (3) Entitlement to unemployment benefits continues for a maximum period of three months from the date when the person concerned ceased to be available to the employment services of the state which he left, provided that the total duration of the benefits does not exceed the duration of the period of benefits to which he was entitled under the legislation of that state<sup>9</sup>.

If the person concerned returns to the competent state before the expiry of the period during which he is entitled to benefits, he continues to be entitled to benefits under the legislation of that state; however, if he does not return there before the expiry of that period he loses all such entitlement<sup>10</sup>.

1 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 For the meaning of 'benefits' see PARA 460 ante.

4 As to freedom of movement for persons generally see EUROPEAN COMMUNITIES.

5 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 69(1). As to citation of this regulation see PARA 454 note 4 ante. As to the conditions and limits of the retention of rights to benefit under those provisions see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 83. As to citation of this regulation see PARA 454 note 11 ante. In the cases referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 69(1), benefits are provided by the institution (see PARA 455 note 3 ante) of each of the states to which an unemployed person goes to seek work, and the competent institution (see PARA 455 ante) of the member state to whose legislation an employed or self-employed person was subject at the time of his last employment is obliged to reimburse the amount of those benefits: see art 70(1). As to the reimbursement of benefits see art 70(2), (3); and EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 97. Subject to certain exceptions, EC law does not provide for the right of an unemployed worker to claim unemployment benefits under the legislation of a member state other than the state in which he became unemployed: see Case 20/75 *D'Amico v Landesversicherungsanstalt Rheinland-Pfalz* [1975] ECR 891, [1976] 2 CMLR 361, ECJ. EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 69 is intended solely to ensure for the migrant worker the limited and conditional preservation of the unemployment benefits of the competent state even if he goes to another member state, which state cannot, therefore, rely on mere failure to comply with the conditions prescribed under art 69 to deny the worker entitlement to the benefit which he may claim under the national legislation of that state: see Case 27/75 *Bonaffini v Istituto Nazionale della Previdenza Sociale (INPS)* [1975] ECR 971, ECJ; adopted in

Decision CU 6/79 *Re Unemployment Benefits* [1979] 3 CMLR 449, NIC, where the National Insurance Commissioner said that regard must be had to the legislation of the member state in which benefit is claimed. The provisions of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 69(1) may be invoked only once between two periods of employment: art 69(3).

6 For the meaning of 'competent state' see PARA 455 ante.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 69(1)(a). However, the competent services or institutions may authorise the person's departure before the expiry of the four weeks: see art 69(1)(a). See also Case 139/78 *Coccioli v Bundesanstalt für Arbeit* [1979] ECR 991, [1979] 3 CMLR 144, ECJ.

8 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 69(1)(b). This condition is considered satisfied for the period before registration if the person concerned registered within seven days of the date when he ceased to be available to the employment services of the state he left, but in exceptional cases this period may be extended by the competent services or institutions: see art 69(1)(b).

9 Ibid art 69(1)(c). See Case C-272/90 *Van Noorden v Association pour l'Emploi dans l'Industrie et le Commerce (ASSEDIC)* [1991] ECR I-2543, [1993] 2 CMLR 732, ECJ. In the case of a seasonal worker (see PARA 481 note 7 ante), the duration of the period of benefits is limited to the period remaining until the end of the season for which he was engaged: see EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 69(1)(c). Where the competent state is Belgium, an unemployed person who returns there after the expiry of the three-month period cannot requalify for benefits in that country until he has been employed there for at least three months: see art 69(4).

10 Ibid art 69(2). In exceptional cases the time limit may be extended by the competent services or institutions: see art 69(2). See Joined Cases 41, 121, 796/79 *Testa, Maggio and Vitale v Bundesanstalt für Arbeit* [1980] ECR 1979, [1981] 2 CMLR 552, ECJ.

## UPDATE

### 527 Unemployed persons seeking employment in another member state

NOTE 9--Regulation 1408/71 art 69(4) deleted: European Parliament and EC Council Regulation 647/2005 (OJ L117, 4.5.2005, p 1)).

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**528. Unemployed persons who during their last employment were residing in a member state other than the competent state.**

An unemployed person who was formerly employed<sup>1</sup> and who, during his last employment, was residing<sup>2</sup> in the territory of a member state other than the competent state<sup>3</sup> is entitled to receive unemployment benefits<sup>4</sup> in accordance with the following provisions<sup>5</sup>:

- 1256 (1) a frontier worker<sup>6</sup> who is partially or intermittently unemployed in the undertaking which employs him is entitled to receive benefits in accordance with the provisions of the legislation<sup>7</sup> of the competent state as if he were residing in the territory of that state<sup>8</sup>;
- 1257 (2) a frontier worker who is wholly unemployed is entitled to receive benefits in accordance with the provisions of the legislation of the member state in whose territory he resides as though he had been subject to that legislation while last employed<sup>9</sup>;
- 1258 (3) an unemployed person other than a frontier worker who is partially, intermittently or wholly unemployed and who remains available to his employer or to the employment services in the territory of the competent state is entitled to receive benefit in accordance with the provisions of the legislation of that state as though he were residing in that territory<sup>10</sup>;
- 1259 (4) an unemployed person other than a frontier worker who is wholly unemployed and who makes himself available for work to the employment services in the territory of the member state in which he resides, or who returns to that territory<sup>11</sup>, is entitled to receive benefits in accordance with the legislation of that state as if he had last been employed there<sup>12</sup>.

An unemployed person may not claim benefits under the legislation of the member state in whose territory he resides while he is entitled to benefits under head (1) or head (3) above<sup>13</sup>.

1 For the meaning of 'employed person' see PARA 457 ante.

2 For the meaning of 'residence' see PARA 459 note 2 ante.

3 For the meaning of 'competent state' see PARA 455 ante.

4 For the meaning of 'benefits' see PARA 460 ante.

5 See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 71(1). As to citation of this regulation see PARA 454 note 4 ante. For the provisions implementing those provisions see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 84. As to citation of this regulation see PARA 454 note 11 ante.

EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 71 cannot apply to the case of an unemployed person who has not pursued any activity as an employed person or any activity treated as such and who has not yet acquired any entitlement to unemployment benefit: Case 66/77 *Kuyken v Rijksdienst voor Arbeidsvoorziening* [1977] ECR 2311, [1978] 2 CMLR 304, ECJ. EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 71 is intended to ensure that migrant workers receive unemployment benefit in the conditions most favourable to the search for new employment; benefit is not merely pecuniary but includes the assistance in finding new employment which the employment services provide for workers who have made themselves available to them: see Case 1/85 *Miethe v Bundesanstalt für Arbeit* [1986] ECR 1837, [1988] 1

CMLR 507, ECJ. EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 71 only concerns workers resident in a member state other than that in which they were last employed: see Case 128/83 *Caisse Primaire d'Assurance Maladie de Rouen v Guyot* [1984] ECR 3507, [1986] 3 CMLR 454, ECJ; C-287/92 *Toosey v Chief Adjudication Officer* [1994] ECR I-279, [1994] 2 CMLR 745, ECJ. Article 71 also applies if residence is transferred during the employment: see Case 236/87 *Bergemann v Bundesanstalt für Arbeit* [1988] ECR 5125, [1990] 1 CMLR 525, ECJ.

6 For the meaning of 'frontier worker' see PARA 484 note 1 ante.

7 For the meaning of 'legislation' see PARA 461 ante.

8 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 71(1)(a)(i). These benefits are provided by the competent institution: see art 71(1)(a)(i).

9 Ibid art 71(1)(a)(ii). These benefits are provided by the institution of the place of residence (see PARA 455 ante) at its own expense: see art 71(1)(a)(ii).

10 Ibid art 71(1)(b)(i). These benefits are provided by the competent institution: see art 71(1)(b)(i).

11 See Case 76/76 *Di Paolo v Office National de l'Emploi* [1977] ECR 315, [1977] 2 CMLR 59, ECJ, where the court held that the concept of 'the member state in which he resides' is limited to the state where the person concerned continues habitually to reside, even though he is occupied in another member state.

12 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 71(1)(b)(ii). These benefits are provided by the institution of the place of residence at its own expense: see art 71(1)(b)(ii). However, if such an employed person has become entitled to benefits at the expense of the competent institution of the member state to whose legislation he was last subject, he is entitled to receive benefits under the provisions of art 69 (see PARA 527 ante): see art 71(1)(b)(ii). Receipt of benefits under this provision will be suspended for any period during which, under art 69 (see PARA 527 ante), the unemployed person may claim benefits under the legislation to which he was last subject: see art 71(1)(b)(ii). A wholly unemployed person who, in the course of his last employment, was employed in a member state other than that of his residence by an undertaking established in the state of residence and who, in respect of that activity, was subject to the legislation of the state of employment may claim, by virtue of art 71(1)(b)(ii), unemployment benefits under the provisions of the national legislation of the state where he resides and to whose employment services he makes himself available for work: Case 39/76 *Bestuur der Bedrijfsvereniging voor de Metaalnijverheid v Moutaen* [1976] ECR 1901, ECJ.

13 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 71(2).

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## **H. FAMILY BENEFITS AND FAMILY ALLOWANCES**

### **529. Aggregation of periods of insurance, employment or self-employment.**

Where the legislation<sup>1</sup> of a member state makes acquisition of the right to family benefits<sup>2</sup> and family allowances<sup>3</sup> conditional upon completion of periods of insurance<sup>4</sup>, employment<sup>5</sup> or self-employment<sup>6</sup>, the competent institution<sup>7</sup> of that state must take into account for this purpose, to the extent necessary, periods of insurance, employment or self-employment completed in any other member state as if they were periods completed under the legislation which it administers<sup>8</sup>.

Entitlement to family benefits or family allowances due under the legislation of a member state, according to which the acquisition of the right to those benefits or allowances is not subject to conditions of insurance, employment or self-employment is suspended when, during the same period and for the same member of the family, benefits are due only in pursuance of the national legislation of another member state or in application of specified provisions<sup>9</sup>, up to the sum of those benefits<sup>10</sup>.

Where an employed or self-employed person<sup>11</sup> has been subject successively to the legislation of two member states during the period separating two dates for the payment of family benefits as provided for by the legislation of one or both of the member states concerned, the benefits or allowances which the person concerned may claim by virtue of being subject to the legislation of each of those states must correspond to the number of daily benefits due under the relevant legislation<sup>12</sup>.

1 For the meaning of 'legislation' see PARA 461 ante.

2 'Family benefits' means all benefits in kind or in cash intended to meet family expenses under the legislation provided for in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 4(1)(h) (see PARA 460 ante), excluding the special childbirth or adoption allowances referred to in Annex II (as amended): art 1(u)(i). As to citation of this regulation see PARA 454 note 4 ante. As to the national legislations to which art 4(1)(h) applies see PARA 461 ante. There are no exclusions in the case of the United Kingdom. For the meaning of 'benefits' see PARA 460 ante.

3 'Family allowances' means periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family: EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 1(u)(ii). See Case 313/86 *Lenoir v Caisse d'Allocations Familiales des Alpes-Maritimes* [1988] ECR 5391, [1990] 1 CMLR 543, ECJ. See also note 2 supra. For the meaning of 'member of the family' see PARA 458 ante. As to child benefit see PARA 237 et seq ante.

4 For the meaning of 'periods of insurance' see PARA 463 note 5 ante.

5 For the meaning of 'periods of employment' see PARA 463 note 5 ante.

6 For the meaning of 'periods of self-employment' see PARA 463 note 5 ante.

7 For the meaning of 'competent institution' see PARA 455 ante.

8 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 72. In order to invoke those provisions the claimant must submit to the competent institution a certified statement, issued at his request by either the competent institution of the member state with which he was last insured or by another institution designated by the competent authority of that member state, specifying the periods of employment or self-

employment completed under the legislation to which he was last subject: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 85. As to citation of this regulation see PARA 454 note 11 ante.

9 le in application of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 73, 74, 77, or 78: see PARA 531 et seq post.

10 EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 10(1)(a). However, where a professional or trade activity is carried out in the territory of the first member state (1) in the case of benefits due either under national legislation of another member state or under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 73 or 74 to the person entitled to family benefits or to the person to whom they are to be paid, the right to family benefits due either only under national legislation of that other member state or under those provisions is suspended up to the sum of family benefits provided for by the legislation of the member state in whose territory the member of the family is residing, and the cost of the benefits paid by the member state in whose territory the member of the family is residing is borne by that member state; (2) in the case of benefits due either only under national legislation of another member state or under art 77 or 78, to the person entitled to these benefits or to the person to whom they are payable, the right to these family benefits or family allowances due either only under the national legislation of that other member state or in application of those provisions is suspended: EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 10(1)(b). In a case falling in head (2) supra, the person concerned is entitled to the family benefits or family allowances of the member state in whose territory the children reside, the cost to be borne by that member state, and, where appropriate, to benefits other than the family allowances referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 77 or 78, the cost to be borne by the competent state as defined by those articles: EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 10(1)(b). See also Case 104/80 *Beeck v Bundesanstalt für Arbeit* [1981] ECR 503, [1982] 2 CMLR 663, ECJ; Case 104/84 *JWM Kromhout v Raad Van Arbeid* [1985] ECR 2205, [1987] 3 CMLR 621, ECJ; Case 377/85 *Burchell v Adjudication Officer* [1987] ECR 3329, [1987] 3 CMLR 757, ECJ.

For special provisions in relation to periods of insurance or employment previously completed under Greek legislation see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 10(2).

11 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

12 See EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 10a. Where the relevant legislation does not provide for daily benefits, the benefits are granted in proportion to the length of time during which the person concerned has been subject to the legislation of each one of the member states in relation to the period fixed by the legislation concerned: art 10a(a). See also art 10a(b)(d).

## UPDATE

### 529 Aggregation of periods of insurance, employment or self-employment

NOTE 2--See Case C-333/00 *Maaheimo* [2003] 1 CMLR 325, ECJ (home child-care allowance, a benefit available to all parents who did not take advantage of child-care places provided by the state, constituted a family benefit).

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### **530. Benefits for employed persons who have become fully unemployed.**

An employed person who has become fully unemployed, and to whom specified provisions apply<sup>1</sup>, is entitled, for the members of his family<sup>2</sup> residing<sup>3</sup> in the territory of the same member state as he, to receive family benefits in accordance with the legislation<sup>4</sup> of the state, as if he had been subject to that legislation during his last employment<sup>5</sup>.

1     le to whom EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 71(1)(a)(ii) or (b) (ii) (first sentence) apply: see PARA 528 ante. As to citation of this regulation see PARA 454 note 4 ante.

2     For the meaning of 'member of the family' see PARA 458 ante.

3     For the meaning of 'residence' see PARA 459 note 2 ante.

4     For the meaning of 'legislation' see PARA 461 ante.

5     See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 72a para 1. Account must be taken, where appropriate, of the provisions of art 72 (see PARA 529 ante) and these benefits are to be provided by, and at the expense of, the institution of the place of residence: see art 72a para 1. Where that institution applies legislation providing for deduction of contributions payable by unemployed persons to cover family benefits, it is authorised to make such deductions in accordance with the provisions of its legislation: art 72a para 2.

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### **531. Benefits where the family members reside in a member state other than the competent state.**

An employed or self-employed person<sup>1</sup> subject to the legislation<sup>2</sup> of a member state<sup>3</sup> is entitled, in respect of the members of his family<sup>4</sup> who are residing<sup>5</sup> in another member state, to the family benefits<sup>6</sup> provided for by the legislation of the former state, as if they were residing in that state<sup>7</sup>. An unemployed person who was formerly employed or self-employed and who draws unemployment benefits under the legislation of a member state is entitled, in respect of the members of his family residing in another member state, to the family benefits provided for by the legislation of the former state, as if they were residing in that state<sup>8</sup>.

Family benefits are provided in the former cases<sup>9</sup> by the competent institution<sup>10</sup> of the state to the legislation of which the employed or self-employed person is subject, and, in the latter cases where an unemployed person was formerly employed or self-employed<sup>11</sup>, by the competent institution of the state under the legislation of which an unemployed person who was formerly employed or self-employed receives unemployment benefits; and these benefits are provided in accordance with the provisions administered by the appropriate institution, whether or not the natural or legal person to whom such benefits are payable is residing or staying<sup>12</sup> in the territory of the competent state<sup>13</sup> or in that of another member state<sup>14</sup>. However, if the family benefits are not used by the person to whom they should be provided for the maintenance of the members of the family, the competent institution must discharge its legal obligations by providing the said benefits to the natural or legal person actually maintaining the members of the family, at the request of, and through the agency of, the institution of their place of residence<sup>15</sup> or of the designated institution or body appointed for this purpose by the competent authority<sup>16</sup> of the country of their residence<sup>17</sup>. Two or more member states may agree<sup>18</sup> that the competent institution is to provide the family benefits due under the legislation of those states or of one of those states to the natural or legal person actually maintaining the members of the family, either directly or through the agency of the institution of their place of residence<sup>19</sup>.

1 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

2 For the meaning of 'legislation' see PARA 461 ante.

3 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 73 originally made special provision for France but was held to be invalid in this form: see Case 41/84 *Pinna v Caisse d'Allocations Familiales de la Savoie* [1986] ECR I, [1988] 1 CMLR 350, ECJ. As to citation of this regulation see PARA 454 note 4 ante.

4 For the meaning of 'member of the family' see PARA 458 ante.

5 For the meaning of 'residence' see PARA 459 note 2 ante.

6 For the meaning of 'family benefits' see PARA 529 note 2 ante. See also Case C-228/88 *Bronzino v Kindergeldkasse* [1990] ECR I-531, ECJ (benefits intended to help families meet cost of supporting unemployed children aged over 16 and under 21 years fall within 'family benefits'); Case C-12/89 *Gatto v Bundesanstalt für Arbeit* [1990] ECR I-557, ECJ.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 73. This is subject to Annex VI (as amended): see art 73. As to the implementation of this provision see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 86. As to citation of this regulation see PARA 454 note 11 ante.

The competent state cannot impose a condition that the employed or self-employed person must reside in its territory: Case 101/83 *Raad van Arbeid v Brusse* [1984] ECR 2223, [1985] 2 CMLR 633, ECJ. See also Joined Cases C-245, 312/94 *Hoever and Zachow v Land Nordrhein-Westfalen* [1996] ECR I-4895, [1996] 3 CMLR 611, ECJ; Case C-15/90 *Middleburgh v Chief Adjudication Officer* [1991] ECR I-4655, [1992] 1 CMLR 353, ECJ (claim by self-employed person prior to 1989, when self-employed person brought within scope of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 73).

8 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 74. This provision is subject to the provisions of Annex VI (as amended): see art 74. As to the implementation of this provision see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 88, which applies the provisions of art 86 by analogy.

9 Ie in the cases referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 73: see text and note 7 supra.

10 For the meaning of 'competent institution' see PARA 455 ante.

11 Ie in the cases referred to in EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 74: see text and note 8 supra. See also Case C-243/94 *Moreno v Bundesanstalt für Arbeit* [1996] ECR I-1887, ECJ.

12 For the meaning of 'stay' see PARA 455 note 11 ante.

13 For the meaning of 'competent state' see PARA 455 ante.

14 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 75(1). As to the implementation of these provisions see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 86. See also Case C-78/91 *Hughes v Chief Adjudication Officer* [1992] ECR I-4839, [1993] 1 FLR 791, ECJ (wife living in one member state could claim family credit from another member state in which husband employed even though she neither resided nor worked there). As to family credit see PARA 202 et seq ante.

15 For the meaning of 'institution of the place of residence' see PARA 455 ante.

16 For the meaning of 'competent authority' see PARA 455 ante.

17 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 75(2).

18 Ie in accordance with the provisions of *ibid* art 8: see PARA 462 ante.

19 *Ibid* art 75(3).

## UPDATE

### **531 Benefits where the family members reside in a member state other than the competent state**

NOTE 7--See Case C-255/99 *Humer* [2004] 1 CMLR 1312, ECJ (family benefits claim could be made by any family member, including minor child). A member state may require that a prisoner in respect of whose family the application for family benefits is made remains a prisoner of that state: Case C-302/02 *Proceedings concerning Effing* [2005] 1 FCR 441, ECJ.

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### **532. Priority in cases of overlapping entitlement.**

Where, during the same period, for the same family member<sup>1</sup> and by reason of carrying on an occupation, family benefits<sup>2</sup> are provided for by the legislation<sup>3</sup> of the member state in whose territory the members of the family are residing<sup>4</sup>, entitlement to the family benefits due in accordance with the legislation of another member state<sup>5</sup> is suspended up to the amount provided for in the legislation of the first member state<sup>6</sup>. If an application for benefits is not made in the member states in whose territory the members of the family are residing, the competent institution<sup>7</sup> of the other member state may apply the above provisions as if benefits were granted in the first member state<sup>8</sup>.

1 For the meaning of 'member of the family' see PARA 458 ante.

2 For the meaning of 'family benefits' see PARA 529 note 2 ante.

3 For the meaning of 'legislation' see PARA 461 ante.

4 For the meaning of 'residence' see PARA 459 note 2 ante.

5 Ie if appropriate under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 73 or art 74: see PARA 531 ante. As to citation of this regulation see PARA 454 note 4 ante.

6 Ibid art 76(1). Article 76 applies also where benefits are paid to two different persons in respect of the same child: see Case C-168/88 *Dammer v VZW Securex Kinderbijslagfonds* [1989] ECR 4553, [1991] 2 CMLR 297, ECJ. See also Case 134/77 *Ragazzoni v Caisse de Compensation pour Allocations Familiales Assubel* [1978] ECR 963, [1979] 3 CMLR 67, ECJ.

7 For the meaning of 'competent institution' see PARA 455 ante.

8 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 76(2). This provisions reverses the effect of the decision in Case 153/84 *Ferraioli v Deutsche Bundespost* [1986] ECR 1401, [1987] 2 CMLR 911, ECJ.

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## ***I. DEPENDENT CHILDREN OF PENSIONERS; ORPHANS***

### **533. Dependent children of pensioners.**

Persons receiving pensions<sup>1</sup> for old age, invalidity, accidents at work or occupational diseases are entitled to benefits<sup>2</sup> in respect of their children, irrespective of the member state in whose territory the pensioner or the children are residing<sup>3</sup>, in accordance with the following rules:

1260 (1) in the case of a pensioner who draws a pension under the legislation<sup>4</sup> of one member state only, in accordance with the legislation of the member state responsible for the pension<sup>5</sup>;

1261 (2) in the case of the pensioner who draws a pension under the legislation of more than one member state:

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184. (a) in accordance with the legislation of whichever of those states he resides in, provided that a right to one of the benefits is acquired<sup>6</sup> under the legislation of that state<sup>7</sup>;

185. (b) in other cases, in accordance with the legislation of the member state to which he has been subject for the longest period of time, provided a right to one of the benefits is acquired<sup>8</sup> under that legislation; if no right to benefit is acquired under that legislation, the conditions for the acquisition of such right under the legislations of the other member states concerned must be examined in decreasing order of the length of periods of insurance<sup>9</sup> or residence<sup>10</sup> completed under the legislation of those member states<sup>11</sup>.

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1 For the meaning of 'pension' see PARA 460 ante. See also Case 17/75 *Anselmetti v Caisse de Compensation des Allocations Familiales de l'Industrie Charbonnière* [1975] ECR 781, [1976] 2 CMLR 350, ECJ.

2 The term 'benefits', for the purposes of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 77, means family allowances (see PARA 529 note 3 ante) and increases or supplements to the relevant pensions, with the exception of supplements granted under insurance schemes for accidents at work and occupational diseases: see art 77(1). As to citation of this regulation see PARA 454 note 4 ante.

As to the national legislation concerning benefits to which arts 77, 78 apply see PARA 461 ante. See also Case 99/80 *Galinsky v Insurance Officer* [1981] ECR 941, [1981] 3 CMLR 361, ECJ. In order to receive benefits under EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 77, 78 (see infra and PARA 534 post), the claimant must submit a claim to the institution of his place of residence in accordance with the procedures laid down by the legislation administered by that institution: see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) art 90. As to citation of this regulation see PARA 454 note 11 ante. As to the payment of benefits see EC Council Regulation 574/72 (OJ L74, 27.3.72, p 1; OJ C325, 10.12.92, p 96) arts 91, 92. See also Case 313/86 *Lenoir v Caisse d'Allocations Familiales des Alpes-Maritimes* [1988] ECR 5391, [1990] 1 CMLR 543, ECJ; Case C-59/95 *Bastos Moriana v Bundesanstalt für Arbeit* [1997] All ER (EC) 317, ECJ.

3 For the meaning of 'residence' see PARA 459 note 2 ante.

4 For the meaning of 'legislation' see PARA 461 ante.

5 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 77(2)(a).

6 In taking account, where appropriate, of the provisions of *ibid* art 79(1)(a): see PARA 535 post. See also Case 19/76 *Triches v Caisse de Compensation pour Allocations Familiales de la Région Liégeoise* [1976] ECR

1243, [1977] 1 CMLR 213, ECJ; Case 733/79 *Caisse de Compensation des Allocations Familiales des Régions de Charleroi et de Namur v Laterza* [1980] ECR 1915, [1981] 1 CMLR 158, ECJ.

7 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 77(2)(b)(i).

8 le taking into account, where appropriate, the provisions of *ibid* art 79(1)(a): see PARA 535 post.

9 For the meaning of 'periods of insurance' see PARA 463 note 5 ante.

10 For the meaning of 'periods of residence' see PARA 463 note 6 ante.

11 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 77(2)(b)(ii).

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### 534. Orphans.

Benefits<sup>1</sup> for orphans are granted in accordance with the following rules, irrespective of the member state in whose territory the orphan or the natural or legal person actually maintaining him is resident<sup>2</sup>:

1262 (1) for the orphan of a deceased employed or self-employed person<sup>3</sup> who was subject to the legislation<sup>4</sup> of one member state only, in accordance with the legislation of that state<sup>5</sup>;

1263 (2) for the orphan of a deceased employed or self-employed person who was subject to the legislation of several member states:

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186. (a) in accordance with the legislation of the member state in whose territory the orphan resides, provided that a right to one of the benefits is acquired<sup>6</sup> under the legislation of that state<sup>7</sup>;

187. (b) in other cases, in accordance with the legislation of the member state to which the deceased had been subject for the longest period of time, provided that the right to one of the benefits is acquired<sup>8</sup> under that legislation; the conditions for the acquisition of such right under the legislation of the other member states must be examined in decreasing order of the length of periods of insurance<sup>9</sup> or residence<sup>10</sup> completed under the legislation of those member states<sup>11</sup>.

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1 'Benefits' for the purposes of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 78 means family allowances (see PARA 529 note 3 ante) and, where appropriate, supplementary or special allowances or orphans and orphans' pensions, except those granted under insurance schemes for accidents at work and occupational diseases: art 78(1). As to citation of this regulation see PARA 454 note 4 ante. See also Case 269/87 *Ventura v Landesversicherungsanstalt Schwaben* [1988] ECR 6411, [1990] 1 CMLR 762, ECJ.

2 For the meaning of 'residence' see PARA 459 note 2 ante.

3 For the meaning of 'employed person' and 'self-employed person' see PARA 457 ante.

4 For the meaning of 'legislation' see PARA 461 ante.

5 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 78(2)(a). See Case 3/70 *Caisse de Compensation pour Allocations Familiales des Charbonnages du Couchant de Mons v Beninato* [1970] ECR 415, [1970] CMLR 232, ECJ.

6 Ie taking account, where appropriate, of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 79(1)(a): see PARA 535 post.

7 Ibid art 79(2)(b)(i).

8 Ie taking into account, where appropriate, the provisions of ibid art 79(1)(a): see PARA 535 post.

9 For the meaning of 'periods of insurance' see PARA 463 note 5 ante.

10 For the meaning of 'periods of residence' see PARA 463 note 6 ante.

11 EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 78(2)(b)(ii). However, the legislation of the member state applicable in respect of provisions of the benefits referred to in art 77 (see PARA

533 ante) for a pensioner's children remains applicable after the death of the pensioner in respect of the provisions of the benefits to his orphans: see art 78(2).

## **UPDATE**

### **534 Orphans**

NOTE 11--The ending of a benefit covered by Council Regulation (EC) art 78(2)(b)(i) when an age limit is reached, terminating benefit entitlement generally, does not result in the application of art 78(2)(b)(ii): Case C-113/96 *Rodríguez v Landesversicherungsanstalt Rheinprovinz* [1999] 1 CMLR 129, ECJ.

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### **535-550. Common provisions.**

Benefits<sup>1</sup> for dependent children of pensioners and for orphans are provided in accordance with the legislation<sup>2</sup> of the institution<sup>3</sup> responsible for administering such legislation and at its expense as if the pensioner or the deceased had been subject only to the legislation of the competent state<sup>4</sup>.

Where there are several competent states<sup>5</sup>, the length of the periods being equal, benefits<sup>6</sup> are granted in accordance with the legislation of the member states to which the pensioner or the deceased was last subject<sup>7</sup>.

The right to benefits due only under the national legislation or under the provisions set out above<sup>8</sup> is suspended if the children become entitled to family benefits<sup>9</sup> or family allowances<sup>10</sup> under the legislation of a member state by virtue of the pursuit of a professional or trade activity<sup>11</sup>.

1    I.e. benefits within the meaning of EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) arts 77, 78: see PARAS 533-534 ante. As to citation of this regulation see PARA 454 note 4 ante.

2    For the meaning of 'legislation' see PARA 461 ante.

3    For the meaning of 'institution' see PARA 455 note 3 ante.

4    See EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 79(1). However if that legislation provides that the acquisition, retention or recovery of the right to benefits is dependent on the length of periods of insurance, employment, self-employment or residence, such length must be determined taking into account, where appropriate, the provisions of art 45 (see PARA 509 ante) or, as the case may be, art 72 (see PARA 533 ante): art 79(1)(a). Again, if that legislation provides that the amount of benefits is to be calculated on the basis of the amount of the pension, or is to depend on the length of periods of insurance, the amount of these benefits must be calculated on the basis of the theoretical amount determined in accordance with the provisions of art 46(2) (see PARA 512 ante): art 79(1)(b). For the meaning of 'periods of insurance' and periods of employment see PARA 463 note 5 ante. For the meaning of 'periods of residence' see PARA 463 note 6 ante.

5    I.e. as a result of applying ibid art 77(2)(b)(ii) or art 78(2)(b)(ii): see PARA 534 ante. For the meaning of 'competent state' see PARA 455 ante.

6    I.e. benefits within the meaning of ibid arts 77, 78: see PARAS 533-534 ante.

7    Ibid art 79(2).

8    I.e. under ibid arts 77, 78, 79(2).

9    For the meaning of 'family benefits' see PARA 529 note 2 ante.

10   For the meaning of 'family allowances' see PARA 529 note 3 ante.

11   EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 79(3). In such a case the persons concerned are considered as members of the family of an employed or self-employed person: see art 79(3). For the meaning of 'member of the family' see PARA 458 ante; and for the meaning of 'employed person' and 'self-employed person' see PARA 457 ante. See also Case 9/79 *Wörsdorfer v Raad van Arbeid* [1979] ECR 2717, [1980] 1 CMLR 87, ECJ.

See Case 100/78 *Rossi v Caisse de Compensation pour Allocations Familiales des Regions de Charleroi et Namur* [1979] ECR 831, [1979] 3 CMLR 544, ECJ, where the court confirmed and explained Case 134/77 *Ragazzoni v Caisse de Compensation pour Allocations Familiales 'Assubel'* [1978] ECR 963, [1979] 3 CMLR 67, ECJ, in relation to EC Council Regulation 1408/71 (OJ L149, 5.7.71, p 2; OJ L28, 30.1.97, p 1) art 79(3), finding that it is applicable only to the extent of the amount due by virtue of the pursuit of a professional or trade

activity. Case 100/78 *Rossi v Caisse de Compensation pour Allocations Familiales des Regions de Charleroi et Namur* supra was followed in Case 733/79 *Caisse de Compensation des Allocations Familiales des Régions de Charleroi et de Namur v Laterza* [1980] ECR 1915, [1981] 1 CMLR 158, ECJ. Cf Case 807/79 *Gravina v Landesversicherungsanstalt Schwaben* [1980] ECR 2205, [1981] 1 CMLR 529, ECJ.

For further provisions relating to the overlapping of rights to family benefits or allowances in the case of children of pensioners see PARA 529 ante.

## **II. PENSIONS**

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## 13. INTRODUCTION TO PENSIONS

### (1) IN GENERAL

#### 551. Categories of pension provision and scope of this part of the title.

There are five principal categories of pension provision:

- 1264 (1) state retirement pensions<sup>1</sup>;
- 1265 (2) retirement annuity contracts<sup>2</sup>;
- 1266 (3) personal pensions<sup>3</sup>;
- 1267 (4) occupational pension schemes<sup>4</sup>; and
- 1268 (5) public service pension schemes<sup>5</sup>.

Personal equity plans may also be used as a form of savings to provide for retirement<sup>6</sup>.

All these types of pension provision are discussed in this part of this title<sup>7</sup>. Public service pension schemes are, however, discussed in relation to the general legislation only and not in relation to the details of schemes made for particular categories of employees or public servants<sup>8</sup>. War pensions and other pensions for members of the armed forces are discussed elsewhere in this work<sup>9</sup>.

1 See PARA 561 et seq post.

2 See PARA 677 et seq post.

3 See PARA 710 et seq post.

4 See PARA 741 et seq post.

5 See PARA 874 et seq post.

6 See PARAS 739-740 post. The present tax regime for personal equity plans is due to be replaced in 1999 with a new regime for individual savings accounts: see PARA 739 note 21 post.

7 See PARA 552 et seq post. For a discussion of pension provision generally see 582 HL Official Report (5th series), 15 October 1997, col 486 et seq. With regard to EC law see Case C-57/95 *France v EC Commission (Re Pension Funds Communication)* [1997] 2 CMLR 935, ECJ (in the absence of agreement on a directive relating to the freedom of management and investment of funds held by institutions for retirement provision, a purported EC Commission Communication on an internal market for pension funds was of no legal effect and would be annulled). As to the equal treatment principle under EC law see PARA 554 post.

8 For more detailed discussion of the pension schemes relating to particular occupations, reference should be made to the appropriate title in this work: eg in relation to teachers' superannuation see **EDUCATION** vol 15(2) (2006 Reissue) PARA 867 et seq; and in relation to parliamentary pensions see **PARLIAMENT** vol 78 (2010) PARA 926 et seq. The instruments governing such pension schemes are, however, not normally set out in their entirety in this work.

9 See **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 595 et seq; and see generally **ARMED FORCES**.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/13. INTRODUCTION TO PENSIONS/(1) IN GENERAL/552. The legislation.

## 552. The legislation.

The primary legislation concerned with state retirement pensions was consolidated in 1992 and is now contained in the Social Security Contributions and Benefits Act 1992 and the Social Security Administration Act 1992<sup>1</sup>. With regard to occupational and other private pension provision, the Pension Schemes Act 1993 consolidates enactments concerned with occupational and pension schemes generally which were passed between the years 1973 and 1993, with amendments to give effect to recommendations made by the Law Commission and the Scottish Law Commission in their report on the consolidation<sup>2</sup>. The main enactments repealed and replaced were contained in the Social Security Act 1973, the Social Security Pensions Act 1975 and the Social Security Act 1986<sup>3</sup>. The Pension Schemes Act 1993 is now extensively amended by the Pensions Act 1995 which introduces new provisions relating to occupational pensions and replaces the regulatory regime set up by the 1993 Act<sup>4</sup>.

In relation to public service pension schemes, the Superannuation Act 1972, which consolidates and modernises the legislative framework of such schemes, has been amended by, inter alia, the Pensions (Miscellaneous Provisions) Act 1990 in relation to provision for the civil service<sup>5</sup>, teachers<sup>6</sup> and National Health Service<sup>7</sup> superannuation schemes and the Judicial Pensions and Retirement Act 1993 in relation to the Comptroller and Auditor General's pension<sup>8</sup>.

1 As to the 1992 consolidations see generally para 5 ante.

2 See *Pension Schemes Bill: Report on the Consolidation of the Legislation relating to Pension Schemes* (Cm 2184; Law Com no 212; Scot Law Com no 142) (1993).

3 For a table showing the destination of the repealed enactments see 33 Halsbury's Statutes (1997 Reissue) 848-858.

4 The Pensions Act 1995 received the royal assent on 19 July 1995, when Pt II (ss 126-136, Sch 4), ss 168, 170, 171, 179 came into force, subject to the provision in Sch 4 for equalisation of pensionable ages for men and women to take place in stages up to the year 2020 (see PARA 562 post): see s 180(2). The other provisions of the Act are to come into force on such days as the Secretary of State may by order made by statutory instrument appoint, and different days may be appointed for different purposes, save that (1) any repeal in s 177, Sch 7 for which there is a note comes into force in accordance with that note; and (2) s 166 came into force (amendment of the Matrimonial Causes Act 1973: see PARAS 961-963 post) on a day appointed by the Lord Chancellor by statutory instrument: see the Pensions Act 1995 s 180(1)-(3); and the Pensions Act 1995 (Commencement No 5) Order 1996, SI 1996/1675, made by the Lord Chancellor. At the date at which this volume states the law, the latest commencement order made by the Secretary of State was the Pensions Act 1995 (Commencement No 10) Order 1997, SI 1997/664, made on 6 March 1997, which appointed either 1 April 1997 or 6 April 1997 as the day on which the majority of the provisions of the 1995 Act not previously in force were to come into force: see art 2, Schedule.

5 As to civil service superannuation see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 565 et seq.

6 As to teachers' superannuation see **EDUCATION** vol 15(2) (2006 Reissue) PARA 867 et seq.

7 As to superannuation in the National Health Service see **HEALTH SERVICES** vol 54 (2008) PARA 711 et seq.

8 As to the Comptroller and Auditor General's pension see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 725.

## UPDATE

## 552 The legislation

TEXT AND NOTES--See also the Pensions Act 2004 (partly in force: SI 2004/3350, SI 2005/275, SI 2005/695, SI 2005/1108, SI 2005/1436, SI 2005/1720, SI 2005/2447) which makes provision relating to (1) the Pensions Regulator; (2) the Board of the Pension Protection Fund; (3) scheme funding; (4) financial planning for retirement; (5) occupational and personal pension schemes; (6) financial assistance scheme for members of certain pension schemes; (7) cross-border activities within the European Union; (8) state pensions; and (9) miscellaneous and supplementary provision.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/13. INTRODUCTION TO PENSIONS/(1) IN GENERAL/553. Tax treatment of pensions and pension schemes; in general.

### **553. Tax treatment of pensions and pension schemes; in general.**

Payments of benefit in respect of contributory state retirement pensions<sup>1</sup> are charged to income tax under Schedule E<sup>2</sup>. Other pension income is normally chargeable to income tax but there are exemptions in relation to certain overseas pensions<sup>3</sup>.

Certain tax reliefs are available in respect of retirement benefit schemes<sup>4</sup>, retirement annuities<sup>5</sup>, personal pension schemes<sup>6</sup> and personal equity plans<sup>7</sup> and these are discussed below.

Pension funds were formerly entitled to the payment of tax credits<sup>8</sup> but, with effect from 2 July 1997, no claim may be made for payment of the amount of a tax credit<sup>9</sup> if or to the extent that the qualifying distribution<sup>10</sup> to which the credit relates is income<sup>11</sup> of a pension fund<sup>12</sup>. Furthermore, with effect from that date, the aggregate amount of the tax credits in respect of which claims are made by individuals or other unincorporated persons<sup>13</sup> in the case of any pension fund must not exceed, for any year of assessment<sup>14</sup>, the aggregate amount of the tax credits in respect of the qualifying distributions comprised in the income of the pension fund and brought into charge to tax<sup>15</sup>. Accordingly, no payment may be made<sup>16</sup> in respect of so much of the excess of tax credit over income tax<sup>17</sup> as is referable to a tax credit in respect of a qualifying distribution if or to the extent that the qualifying distribution is income of a pension fund<sup>18</sup>. These rules are to be the subject of further changes in relation to distributions made on or after 6 April 1999<sup>19</sup>.

1    I.e. Category A and Category B retirement pensions, benefits in respect of which are payable under the Social Security Contributions and Benefits Act 1992 Pt IV (ss 20-62) (as amended): see PARA 561 et seq post.

2    See the Income and Corporation Taxes Act 1988 s 671(1) (amended by, inter alia, the Social Security (Consequential Provisions) Act 1990 s 4, Sch 2 para 93(1), (2)). As to the charge to income tax under Schedule E (PAYE) see **INCOME TAXATION** vol 23(1) (Reissue) PARA 605 et seq.

3    See generally **INCOME TAXATION** vol 23(1) (Reissue) PARA 605 et seq. As to exemptions for certain overseas pensions see the Income and Corporation Taxes Act 1988 ss 614, 615 (as amended); s 616. Special provision is also made in relation to the taxation of parliamentary pension funds: see s 613.

4    See PARA 747 et seq post.

5    See PARA 677 et seq post.

6    See PARA 715 et seq post.

7    See PARAS 739-740 post.

8    I.e. under the Income and Corporation Taxes Act 1988 s 231 (as amended): see **INCOME TAXATION** vol 23(1) (Reissue) PARA 934.

9    I.e. under ibid s 231(2) (as amended).

10   As to qualifying distributions see **INCOME TAXATION** vol 23(1) (Reissue) PARA 912.

11   For these purposes, 'income', in relation to a pension fund, means income derived from investments or deposits held for the purposes of the pension fund; 'pension fund' means any scheme, fund or other arrangements established and maintained, whether in the United Kingdom or elsewhere, for the purpose of providing pensions, retirement annuities, allowances, lump sums, gratuities or other superannuation benefits, with or without subsidiary benefits; and 'scheme' includes any deed, agreement or series of agreements:

Income and Corporation Taxes Act 1988 s 231A(4) (s 231A added by the Finance (No 2) Act 1997 s 19(2), (3)). For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

12 Income and Corporation Taxes Act 1988 s 231A(1) (as added: see note 11 supra). For convenience of identification only, the schemes, funds or other arrangements which are 'pension funds' for these purposes by virtue of the definition in note 11 supra include, in particular, those whose income is, in whole or in part, exempt, or eligible for exemption, from tax under or by virtue of any of the following provisions: s 512(2) (as amended) (see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1217); s 592(2) (see PARA 754 post); s 608(2)(a) (see PARA 748 post); s 613(4) (parliamentary pensions); s 614(2), (3), (4) or (5) (certain overseas pensions); s 620(6) (see PARA 690 post); s 643(2) (see PARA 720 post); s 231A(5) (as so added). Section 231A(1)-(5) (as so added) does not have effect in relation to (1) claims made in respect of tax credits to which entitlement arises by virtue of s 232(3); or (2) claims made by virtue of arrangements having effect under s 788 (double taxation agreements: see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1087 et seq); s 231A(6) (as so added).

13 Ie claims under ibid s 231(3) (as amended): see **INCOME TAXATION** vol 23 (Reissue) PARA 907.

14 For the meaning of 'year of assessment' see PARA 680 note 1 post.

15 Income and Corporation Taxes Act 1988 s 231A(2) (as added: see note 11 supra).

16 Ie under ibid s 231(3) (as amended): see **INCOME TAXATION** vol 23(2) (Reissue) PARA 934.

17 Ie the excess mentioned in ibid s 231(3) (as amended): see **INCOME TAXATION** vol 23(2) (Reissue) PARA 934.

18 Ibid s 231A(3) (as added: see note 11 supra); and see note 12 supra.

19 See the Finance (No 2) Act 1997 s 30.

## UPDATE

### 553 Tax treatment of pensions and pension schemes; in general

NOTE 3--1988 Act ss 613 (in part), 615, 616 replaced by provisions of the Income Tax (Earnings and Pensions) Act 2003. For destination of replaced provisions, see table, **INCOME TAXATION** vol 23(2) (Reissue) PARA 1900A. Section 613(1), (2) is treated as not having been repealed: Finance Act 2005 Sch 10 para 63.

TEXT AND NOTE 12--Certain tax reliefs do not apply to income derived from investments (including futures and options: see the Income and Corporation Taxes Act 1988 s 659A; and PARA 720), deposits or other property held as a member of a property investment LLP: s 659E (added by the Finance Act 2001 Sch 25 para 2). The exemptions are those provided by the Income and Corporation Taxes Act 1988 ss 592(2) (see PARA 754), 608(2)(a) (see PARA 748), 613(4), 614(3), (4), 620(6) (see PARA 690) and 643(2) (see PARA 720): s 659A(1) (s 659A added by the Finance Act 1990 s 81(2), (5)). The income concerned includes relevant stock lending fees, in relation to any investments, to which any of those exemptions would apply by virtue of the Income and Corporation Taxes Act 1988 s 129B (see PARA 690). For the meaning of 'property investment LLP' ('LLP' signifying 'limited liability partnership') see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1433.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/13. INTRODUCTION TO PENSIONS/(1) IN GENERAL/554. The equal treatment principle; in general.

**554. The equal treatment principle; in general.**

Under European Community law, the provision of occupational retirement benefits is subject to the principle of equal treatment for men and women<sup>1</sup>. There is to be a graduated process of equalisation of the state retirement age<sup>2</sup>.

1 See further PARA 771 et seq post.

2 See further PARA 562 post.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/13. INTRODUCTION TO PENSIONS/(2) GENERAL PRINCIPLES RELATING TO OCCUPATIONAL AND OTHER PRIVATE PENSION PROVISION/555. Voluntary contributions.

## **(2) GENERAL PRINCIPLES RELATING TO OCCUPATIONAL AND OTHER PRIVATE PENSION PROVISION**

### **555. Voluntary contributions.**

Except in such cases as may be prescribed<sup>1</sup>, and except so far as is necessary to ensure that an occupational pension scheme<sup>2</sup> or a personal pension scheme<sup>3</sup> has, or may be expected to qualify for, tax exemption<sup>4</sup> or tax approval<sup>5</sup>, the rules of the scheme:

- 1269 (1) must not prohibit, or allow any person to prohibit, the payment by a member<sup>6</sup> of voluntary contributions<sup>7</sup>;
  - 1270 (2) must not impose, or allow any person to impose, any upper or lower limit on the payment by a member of voluntary contributions<sup>8</sup>;
  - 1271 (3) must secure that any voluntary contributions paid by a member are to be used by the trustees or managers<sup>9</sup> of the scheme to provide additional benefits for or in respect of him<sup>10</sup>; and
  - 1272 (4) must secure that the value of the additional benefits is reasonable, having regard:
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- 188. (a) to the amount of the voluntary contributions; and
  - 189. (b) to the value of the other benefits under the scheme<sup>11</sup>.
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1 'Prescribe' means prescribed by regulations and 'prescribed' is to be construed accordingly: Pension Schemes Act 1993 s 181(1). The Pensions Act 1995 s 124(1) contains an identical definition of 'prescribed'. As to the prescribed exceptions see PARA 556 post.

2 For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 post.

3 For the meaning of 'personal pension scheme' see *ibid* s 1; and PARA 710 post.

4 For these purposes, 'tax exemption' means exemption from tax under either the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended) or Ch IV (ss 630-655) (as amended) (see PARA 747 et seq, 711 et seq respectively post): Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations 1987, SI 1987/1108, reg 2A (added by SI 1988/474; amended by SI 1994/1062).

5 For these purposes, 'tax approval' means approval of the Inland Revenue under either the Income and Corporation Taxes Act 1988 Pt XIV Ch I (as amended) or Ch IV (as amended): Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations 1987, SI 1987/1108, reg 2A (as added and amended: see note 4 *supra*).

6 The Pension Schemes Act 1993 s 181(4) (as amended) (power to prescribe persons who are to be regarded as members or prospective members of a pension scheme) does not apply for these purposes: see PARA 557 note 9 post.

7 *Ibid* s 111(1)(a).

8 *Ibid* s 111(1)(b).

9 The Secretary of State may by regulations provide who is to be treated as a manager of an occupational pension scheme for any of the purposes of the provisions of the Pension Schemes Act 1993 (except Pt VII Ch II

(ss 123-127) (as amended) (see PARA 853 et seq post) or s 157) or the Social Security Administration Act 1992 Pt VI (ss 110-133) (as amended (see PARA 401 et seq ante)): see the Pension Schemes Act 1993 s 178(a). By virtue of s 189(1), Sch 6 para 2(2), the Occupational Pension Schemes (Managers) Regulations 1986, SI 1986/1718 (as amended) have effect as if so made. For the purposes of ss 113, 115 (disclosure of information about occupational pension schemes: see PARA 557 post) and Pt VIII (ss 129-132) (as amended) (see PARA 972 post) as it applies for the purposes of those sections in their application to the making available of information and documents to a particular member or prospective member of a public service pension scheme, or by reason of his membership or prospective membership to any other person or body, the following persons or bodies are treated as managers of the scheme: (1) in the case of a local government scheme, the appropriate administering authority; (2) in the case of the Firemen's Scheme, the fire authority by which the member or prospective member is employed, or if he is not employed by a fire authority, the fire authority by which he was last employed; (3) in the case of the Police Scheme, the police authority of the police force in which the member or prospective member is serving, or if he is not serving in a police force, the police authority of the police force in which he last served; (4) in the case of a government scheme, the government department responsible for its administration; (5) in any other case, the board, council, commission or other person or body responsible for its administration; and for the purposes of those statutory provisions in their application to the making available of information and documents to a particular member or prospective member of any occupational pension scheme established outside the United Kingdom, or by reason of his membership or prospective membership to any other person or body, the person or body to be treated as the manager of the scheme is such person as is for the time being treated by the Board of Inland Revenue as the administrator of the scheme for the purposes of the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-629) (as amended) (see PARA 747 et seq post): see the Occupational Pension Schemes (Managers) Regulations 1986, SI 1986/1718, regs 2, 3 (reg 3 added by SI 1986/1718; the Occupational Pension Schemes (Managers) Regulations 1986, SI 1986/1718, regs 2, 3 both amended by SI 1994/1062).

10 Pension Schemes Act 1993 s 111(1)(c).

11 Ibid s 111(1)(d). The requirements specified in s 111 are in the Pension Schemes Act 1993 referred to as 'the voluntary contributions requirements': s 111(2). Section 111 does not apply in relation to any pension payable under the Judicial Pensions and Retirement Act 1993, the Judicial Pensions Act 1981 or the Sheriffs' Pensions (Scotland) Act 1961; and accordingly none of the provisions of the Pension Schemes Act 1993, in so far as it has effect in relation to the voluntary contributions requirements, applies to any such pension: s 111(3).

## UPDATE

### 555 Voluntary contributions

TEXT AND NOTES--Pension Schemes Act 1993 s 111 repealed: Pensions Act 2004 s 267(1), Sch 13 Pt 1.

NOTE 9--The Secretary of State may also now by regulations provide who is to be treated as a manager of an occupational pension scheme for any of the purposes of the provisions of the Social Security Acts 1975 to 1991, the Pensions Act 1995 ss 22-26, the Matrimonial Causes Act 1973 s 25D, the Welfare Reform and Pensions Act 1999 Pts III or IV (ss 19-26, 27-51) or the Child Support, Pensions and Social Security Act 2000 Sch 5 Pt II: Pension Schemes Act 1993 s 178(a) (amended by the Pensions Act 1995 Sch 3 para 43; the Welfare Reform and Pensions Act 1999 Sch 12 paras 28, 40, Sch 13 Pt III; and the Child Support, Pensions and Social Security Act 2000 Sch 5 para 17(9)). SI 1986/1718 reg 3 further amended: SI 2006/744.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/13. INTRODUCTION TO PENSIONS/(2) GENERAL PRINCIPLES RELATING TO OCCUPATIONAL AND OTHER PRIVATE PENSION PROVISION/556. Exceptions to the voluntary contributions requirements.

### **556. Exceptions to the voluntary contributions requirements.**

The voluntary contributions requirements<sup>1</sup> do not apply:

- 1273 (1) to the rules of any public service pension scheme<sup>2</sup> unless it is an exempt approved scheme<sup>3</sup>;
- 1274 (2) to the rules of any personal pension scheme<sup>4</sup> in so far as it is comprised in an annuity contract made before 1 July 1988<sup>5</sup>.

The requirements that the scheme must not prohibit, or allow any person to prohibit, the payment by a member<sup>6</sup> of voluntary contributions<sup>7</sup> and must not impose, or allow any person to impose, any upper or lower limit on the payment by a member of voluntary contributions<sup>8</sup>, do not apply:

- 1275 (a) to the rules of any scheme in so far as they relate to the payment by a member of any sum as voluntary contributions where that payment would not qualify<sup>9</sup> for relief from tax<sup>10</sup>;
- 1276 (b) to the rules of any scheme in so far as they provide that a member of the scheme must give the trustees or managers<sup>11</sup> of the scheme notice, of a period not exceeding 12 months, of his intention to pay voluntary contributions at a specified rate or to vary that rate<sup>12</sup>;
- 1277 (c) to the rules of any personal pension scheme in so far as they relate to a member whose rights under the scheme derive only from one or more transfer payments<sup>13</sup>;
- 1278 (d) to the rules of any occupational pension scheme<sup>14</sup> ('the first scheme') in so far as they relate to a member:

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- 190. (i) in respect of whose current pensionable service<sup>15</sup> the scheme will provide benefit only on his death; or
- 191. (ii) whose pensionable service either has not begun or has terminated; or
- 192. (iii) who is either within one year of reaching, or has reached, normal pension age<sup>16</sup>; or
- 193. (iv) who is, or is eligible to become, a member of at least one other occupational pension scheme which applies to the same employment as the first scheme and which, if he is a member of it, complies in relation to him, or, if he is not a member of it, would comply in relation to him if he were, with the voluntary contributions requirements, and is not a scheme which, if he is a member of it, falls in relation to him, or, if he is not a member of it, would fall in relation to him if he were, to be regarded as a scheme excepted from the application of those requirements by virtue of the specified<sup>17</sup> provisions<sup>18</sup>;

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- 1279 (e) to the rules of any scheme which provide that the only contributions payable in respect of a member must be the minimum contributions payable by the Secretary of State in respect of that member<sup>19</sup> if:

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- 194. (i) the scheme is an appropriate scheme<sup>20</sup>; and

195. (ii) the member to whom the limitation applies is concurrently a member of an occupational pension scheme; and  
 196. (iii) the scheme is currently the member's chosen scheme<sup>21</sup>; and  
 197. (iv) the member has entered into a written agreement with the trustees or managers of the scheme that this exception is to apply in his case<sup>22</sup>.
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The requirement that the rules of the scheme must not impose, or allow any person to impose, any upper or lower limit on the payment by a member of voluntary contributions does not apply to the rules of any scheme in so far as they impose, or allow any person to impose, a lower limit on the payment by a member of voluntary contributions in respect of any tax year if that lower limit is not higher than the specified amount<sup>23</sup>; nor does it apply to the rules of any scheme in so far as they impose, or allow any person to impose, an upper limit on the payment by a member of voluntary contributions which is equivalent to the maximum amount which, ignoring any remuneration in kind, could be paid in any period without prejudicing the qualification of the scheme for tax exemption<sup>24</sup> or tax approval<sup>25</sup>.

The requirements that the rules of the scheme must secure that any voluntary contributions paid by a member are to be used by the trustees or managers of the scheme to provide additional benefits for or in respect of him<sup>26</sup> and must secure that the value of the additional benefits is reasonable, having regard to the specified matters<sup>27</sup>, do not apply to the rules of any scheme in relation to a member's voluntary contributions to the extent that those contributions are paid under an agreement which was made before the specified date<sup>28</sup> and which has not, since that date, been varied<sup>29</sup>; and the requirement that the rules of the scheme must secure that the value of the additional benefits is reasonable having regard to the value of the other benefits under the scheme<sup>30</sup> does not apply to the rules of any scheme to the extent that the additional benefits provided in accordance with them are money purchase benefits<sup>31</sup>.

None of the voluntary contributions requirements applies to judicial pensions<sup>32</sup>.

1 For the meaning of 'voluntary contributions requirements' see PARA 556 note 11 ante.

2 For the meaning of 'public service pension scheme' see the Pension Schemes Act 1993 s 181(1); and PARA 874 post.

3 For the meaning of 'exempt approved scheme' see PARA 754 post.

4 For the meaning of 'personal pension scheme' see PARA 710 post.

5 Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations 1987, SI 1987/1108, reg 2(1), (2) (amended by SI 1994/1062; reg 2(2) also amended by SI 1987/1933).

6 The Pension Schemes Act 1993 s 181(4) (as amended) (power to prescribe persons who are to be regarded as members or prospective members of a pension scheme) does not apply for these purposes: see PARA 557 note 9 post.

7 I.e. the requirements of *ibid* s 111(1)(a): see PARA 555 ante.

8 I.e. the requirements of *ibid* s 111(1)(b): see PARA 555 ante.

9 I.e. in accordance with the Income and Corporation Taxes Act 1988 ss 592, 594 (as amended): see PARAS 754, 756 post.

10 Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations 1987, SI 1987/1108, reg 2(3) (regs 1(2), 2(3)-(6), (7), (10)-(12) amended by SI 1994/1062).

11 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme see PARA 555 note 9 ante.

- 12 Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations 1987, SI 1987/1108, reg 2(4) (as amended: see note 10 supra).
- 13 Ibid reg 2(5) (as amended: see note 10 supra).
- 14 For the meaning of 'occupational pension scheme' see PARA 741 post.
- 15 'Pensionable service' must be construed in accordance with the Pension Schemes Act 1993 s 70 (see PARA 664 note 2 post): Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations 1987, SI 1987/1108, reg 1(2) (as amended: see note 10 supra).
- 16 For the meaning of 'normal pension age' see the Pension Schemes Act 1993 ss 180, 181(1); and PARA 896 note 6 post.
- 17 Ie by virtue of the Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations 1987, SI 1987/1108, reg 2(1), (2), (6)(a), (b) or (c) (as amended): see heads (1)-(2), (d)(i)-(iii) in the text.
- 18 Ibid reg 2(6) (as amended: see note 10 supra).
- 19 Ie under the Pension Schemes Act 1993 s 43 (as amended): see PARA 913 post.
- 20 For the meaning of 'appropriate scheme' see PARA 880 note 9 post.
- 21 Ie under the Pension Schemes Act 1993 s 44 (as amended): see PARA 914 post.
- 22 Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations 1987, SI 1987/1108, reg 2(6A) (added by SI 1988/830; amended by SI 1994/1062).
- 23 Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations 1987, SI 1987/1108, reg 2(7) (as amended: see note 10 supra). The specified amount is 0.5% of the member's earnings in that tax year, or, if it is greater, three times the lower earnings limit (as to which see PARA 34 ante) for that tax year; and for these purposes 'member's earnings' mean (1) in the case of a member of a personal pension scheme, his earnings attributable to his employment as an employed earner; or (2) in the case of a member of an occupational pension scheme, his earnings attributable to his relevant employment in respect of which secondary Class 1 contributions (as to which see PARA 37 ante) are payable: reg 2(8), (9).
- 24 For the meaning of 'tax exemption' see PARA 555 note 4 ante.
- 25 Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations 1987, SI 1987/1108, reg 2(10) (as amended: see note 10 supra). For the meaning of 'tax approval' see PARA 555 note 5 ante.
- 26 Ie the requirements of the Pension Schemes Act 1993 s 111(1)(c): see PARA 555 head (3) ante.
- 27 Ie the requirements of ibid s 111(1)(d): see PARA 555 head (4) ante.
- 28 Ie the date on which the Social Security Act 1986 s 12 (repealed), from which the Pension Schemes Act 1993 s 111 is derived, came into force.
- 29 Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations 1987, SI 1987/1108, reg 2(11) (as amended: see note 10 supra).
- 30 Ie the requirement of the Pension Schemes Act 1993 s 111(1)(d)(ii): see PARA 555 head (4)(b) ante).
- 31 Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations 1987, SI 1987/1108, reg 2(12) (as amended: see note 10 supra).
- 32 See PARA 555 note 11 ante.

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### **556A. Monitoring of employers' payments to personal pension schemes.**

The following provisions apply where an employee is a member of a personal pension scheme and direct payment arrangements exist between the employee and his employer<sup>1</sup>. 'Direct payment arrangements' means arrangements under which contributions fall to be paid by or on behalf of the employer towards the scheme either on the employer's own account (but in respect of the employee), or on behalf of the employee out of deductions from the employee's earnings<sup>2</sup>.

The trustees or managers of the scheme must monitor the payment of contributions by or on behalf of the employer under the direct payment arrangements<sup>3</sup>. The trustees or managers may request the employer to provide them, (or arrange for them to be provided) with the payment information specified in the request<sup>4</sup>. Where, as a result of the employer's failure to so comply, the trustees or managers are unable to discharge the above duty<sup>5</sup>, they must give notice to that effect to the Regulatory Authority<sup>6</sup> within a reasonable period<sup>7</sup>. Where (1) a contribution payable under the direct payment arrangements has not been paid on or before its due date<sup>8</sup>, and (2) the trustees or managers have reasonable cause to believe that the failure to pay the contribution is likely to be of material significance in the exercise by the Regulatory Authority of any of their functions, they must give notice to that effect to the Regulatory Authority and the employee within a reasonable period after the due date<sup>9</sup>.

A person is guilty of an offence if he is knowingly concerned in the fraudulent evasion of the direct payment arrangements so far as they are arrangements for the payment by him or any other person of any contribution towards the scheme made on behalf of the employee out of deductions from the employee's earnings<sup>10</sup>. A person guilty of such an offence is liable, on summary conviction, to a fine not exceeding the statutory maximum and, on conviction on indictment, to imprisonment for a term not exceeding seven years or a fine or both<sup>11</sup>. No prosecution may be brought against the Crown for such an offence<sup>12</sup>.

In certain circumstances, regulations may provide for the above provisions to apply with such modifications as may be prescribed<sup>13</sup>. The provisions above do not vary the provisions of the direct payment arrangements or affect their enforceability<sup>14</sup>.

1 Pension Schemes Act 1993 s 111A(1) (s 111A added by the Welfare Reform and Pensions Act 1999 s 9).

2 Pension Schemes Act 1993 s 111A(2).

3 Ibid s 111A(3) (s 111A(3) substituted by Pensions Act 2004 s 268(2)).

4 Pension Schemes Act 1993 s 111A(4). For the purposes of s 111A(4) 'payment information' is information required by the trustees or managers to enable them to discharge the duty imposed by s 111A(3): s 111A(5). The employer must comply with a request under s 111A(4) within a reasonable period: s 111A(6). If (1) the employer fails to take all such steps as are reasonable to secure compliance with the Pension Schemes Act 1993 s 111A(6) and as a result the trustees or managers of the scheme are unable to discharge the duty imposed by s 111A(3), or (2) a contribution payable under the direct payment arrangements is not paid to the trustees or managers of the scheme on or before its due date, the Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to the employer: Pension Schemes Act 1993 s 111A(8) a), (b) respectively (s 111A(8) amended by Pensions Act 2004 s 268(3)). A person is not required by virtue of head (2) above to pay a penalty under the Pensions Act 1995 s 10 in respect of a failure if in respect of that failure he has been (a) required to pay a penalty under that provision by virtue of the Welfare Reform and Pensions Act 1999 s 3(7) (see PARA

873A.3) or (b) convicted of an offence under the Pension Schemes Act 1993 s 111A(12) (see TEXT AND NOTE 10); s 111A(11).

5     le the duty imposed by *ibid* s 111A(3).

6     le the Occupational Pensions Regulatory Authority: see further PARA 598 et seq.

7     Pension Schemes Act 1993s 111A(7). See further NOTE 9.

8     'Due date', in relation to a contribution payable under the direct payment arrangements, means (1) if the contribution falls to be paid on the employer's own account, the latest day under the arrangements for paying it; (2) if the contribution falls to be paid on behalf of the employee, the last day of a prescribed period: *ibid* s 111A(15). The prescribed period is the period of 19 days commencing on the day following the last day of the month in which the deduction was made from the employee's earnings: Personal Pension Schemes (Payments by Employers) Regulations 2000, SI 2000/2692 reg 5.

9     Pension Schemes Act 1993 s 111A(7A) (s 111A(7A) added by Pensions Act 2004 s 268(2)).

If the Pension Schemes Act 1993 s 111A(7) or (7A) is not complied with, the Pensions Act 1995 s 10 applies to any trustee or manager of the scheme who has failed to take all such steps as are reasonable to secure compliance: Pension Schemes Act 1993 s 111A(9) (s 111A(9) amended by Pensions Act 2004 s 268(4)).

10    Pension Schemes Act 1993 s 111A(12).

11    *Ibid* s 111A(13).

12    However, *ibid* s 111A(12) applies to persons in the public service of the Crown as it applies to other persons: s 111A(14).

13    le in a case where direct payment arrangements give effect to a requirement arising under the Welfare Reform and Pensions Act 1999 s 3(5): see further the Pension Schemes Act 1993 s 111A(16); and PARA 873A.3.

14    *Ibid* s 111A(17).

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### **557. Disclosure of information about schemes to members.**

The Secretary of State<sup>1</sup> may by regulations<sup>2</sup> specify requirements to be complied with in the case of an occupational pension scheme<sup>3</sup> or a personal pension scheme<sup>4</sup> with respect to keeping the specified persons informed:

- 1280 (1) of its constitution<sup>5</sup>;
- 1281 (2) of its administration and finances<sup>6</sup>;
- 1282 (3) of the rights and obligations that arise or may arise under it<sup>7</sup>; and
- 1283 (4) of any other matters that appear to the Secretary of State to be relevant to occupational pension schemes or personal pension schemes in general or to schemes of a description to which the scheme in question belongs<sup>8</sup>.

The specified persons are:

- 1284 (a) members and, in the case of an occupational pension scheme, prospective members<sup>9</sup> of the scheme<sup>10</sup>;
- 1285 (b) spouses of members and, in the case of an occupational pension scheme, of prospective members<sup>11</sup>;
- 1286 (c) persons within the application of the scheme and qualifying or prospectively qualifying for its benefits<sup>12</sup>;
- 1287 (d) in the case of an occupational pension scheme, independent trade unions<sup>13</sup> recognised to any extent for the purposes of collective bargaining in relation to members and to prospective members of the scheme<sup>14</sup>.

If the trustees or managers<sup>15</sup> of an occupational pension scheme or a personal pension scheme, having made default in complying with such regulations, fail to make good the default within 14 days after the service on them of a notice requiring them to do so, an order may be made under this provision<sup>16</sup>. The Secretary of State may by regulations specify forms for such notices<sup>17</sup>. Such an order is an order directing the trustees or managers to make good the default within such time as may be specified in the order<sup>18</sup>.

The power to make such an order is exercisable by the appropriate court<sup>19</sup> on the application of any of the following persons<sup>20</sup>:

- 1288 (i) the Secretary of State<sup>21</sup>;
- 1289 (ii) any person authorised by the Secretary of State to make such an application<sup>22</sup>; and
- 1290 (iii) any aggrieved person<sup>23</sup>.

Such an order may provide that all costs of and incidental to the application must be borne personally by any of the trustees or managers of the scheme<sup>24</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 'Regulations' means regulations made by the Secretary of State under the Pension Schemes Act 1993: s 181(1).

3 For the meaning of 'occupational pension scheme' see PARA 741 post.

4 For the meaning of 'personal pension scheme' see PARA 710 post.

5 Pension Schemes Act 1993 s 113(1)(a).

6 Ibid s 113(1)(b).

7 Ibid s 113(1)(c).

8 Ibid s 113(1)(d). In exercise of the powers conferred, inter alia, by s 113(1), the Secretary of State has made (1) the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172 (as amended); (2) the Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655 (as amended); (3) the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847 (as amended); (4) the Occupational Pension Schemes (Winding up) Regulations 1996, SI 1996/3126 (as amended); and (5) the Occupational Pension Schemes (Independent Trustee) Regulations 1997, SI 1997/252. In addition, by virtue of the Interpretation Act 1978 s 17(2)(b), the Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110 (as amended) have effect as if so made. The relevant provisions of these regulations are discussed in their appropriate contexts in this title.

9 Regulations may for any purpose of any provision of the Pension Schemes Act 1993 (other than the excluded provisions or ss 6, 27, 28, 29, 31, 32, 43, 44, 111, 160, 164, 165 or 169) prescribe the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member: s 181(4). 'The excluded provisions' means ss 123-127, 157, 160: s 181(2) (amended by the Pensions Act 1995 s 122, Sch 3 para 44).

10 Pension Schemes Act 1993 s 113(2)(a).

11 Ibid s 113(2)(b).

12 Ibid s 113(2)(c).

13 For the meaning of 'independent trade union' see the Trade Union and Labour Relations (Consolidation) Act 1992 s 1; and **EMPLOYMENT** vol 40 (2009) PARA 859 (definition applied by the Pension Schemes Act 1993 s 181(1)).

14 Ibid s 113(2)(d). Without prejudice to the generality of s 113(2) the regulations may distinguish between cases in which information is to be given as of course; and cases in which information need only be given on request or in other prescribed circumstances: s 113(3). For the meaning of 'prescribed' see PARA 555 note 1 ante. The regulations must make provision for referring to an industrial tribunal any question whether an organisation is such a trade union as is mentioned in s 113(2)(d): s 113(4). 'Industrial tribunal' means a tribunal established or having effect as if established under the Industrial Tribunals Act 1996 s 1(1): Pension Schemes Act 1993 s 181(1) (amended by the Industrial Tribunals Act 1996 s 43, Sch 1 para 11).

15 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme see PARA 555 note 9 ante.

16 Pension Schemes Act 1993 s 115(1).

17 Ibid s 115(2).

18 Ibid s 115(3).

19 'The appropriate court' means in England and Wales, a county court; and in Scotland, the sheriff: ibid s 115(6). An application to the sheriff must be made by summary application: s 115(7).

20 Ibid s 115(4).

21 Ibid s 115(5)(a).

22 Ibid s 115(5)(b).

23 Ibid s 115(5)(c).

24 Ibid s 115(8).

## UPDATE

### 557 Disclosure of information about schemes to members

TEXT AND NOTES--See also Pension Schemes Act 1993 s 113A (added by Pensions Act 2004 Sch 12 para 18) (disclosure of information about transfers etc).

See also the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.1.

TEXT AND NOTES 1-8--Also head (3A) of the pensions and other benefits an entitlement to which would be likely to accrue to the member, or be capable of being secured by him, in respect of the rights that may arise under it: 1993 Act s 113(1) (amended by the Child Support, Pensions and Social Security Act 2000 s 52(1)).

NOTE 8--Head (1). SI 1996/1172 further amended: SI 1997/3038, SI 1998/1397, Employment Rights (Dispute Resolution) Act 1998 s 1(2), SI 1999/3198, SI 2000/2975, SI 2001/943, SI 2002/681, SI 2005/706, SI 2005/2050, SI 2005/3377, SI 2006/744, SI 2006/1337, SI 2007/60, SI 2007/814, SI 2007/834, SI 2007/1154, SI 2007/3014, SI 2008/2301, SI 2009/598, SI 2009/615, SI 2009/846, SI 2009/2930. The functions of the Secretary of State under SI 1996/1172 (except those under regs 23, 61) transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2. Head (2). SI 1996/1655 further amended: SI 1997/3038, SI 1999/3198, SI 2000/1403, SI 2005/704, SI 2005/706, SI 2005/2877, SI 2005/3377, SI 2006/467, SI 2006/1733, SI 2007/60, SI 2007/814, SI 2008/649, SI 2009/598, SI 2009/615. Head (5). SI 1997/252 replaced: Occupational Pension Schemes (Independent Trustee) Regulations 2005, SI 2005/703 (amended by SI 2009/615). See also the Occupational Pension Schemes (Internal Dispute Resolution Procedures Consequential and Miscellaneous Amendments) Regulations 2008, SI 2008/649, reg 2 (requirement to inform applicant of role of the Pensions Advisory Service to assist and role of the Pensions Ombudsman to investigate and determine any complaint or dispute).

NOTE 9--Pension Schemes Act 1993 s 181(4) amended, Pensions Act 1995 Sch 3 para 44 amended: Pensions Act 2004 Sch 13 Pt 1.

1993 Act s 181(4) further amended: Pensions Act 2007 Sch 4 para 34(3), Sch 7 Pt 6 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

TEXT AND NOTES 10-14--Also, head (e) persons of prescribed descriptions: Pension Schemes Act 1993 s 113(2)(e) (added by Pensions Act 2004 Sch 12 para 17).

TEXT AND NOTE 11--Pension Schemes Act 1993 s 113(2)(b) amended: SI 2005/2053.

NOTE 14--Industrial Tribunals Act 1996 now called Employment Tribunals Act 1996: Employment Rights (Dispute Resolution) Act 1998 s 1. The regulations under the Pension Schemes Act 1993 s 113 may provide for the information that must be given to be determined, in whole or part, by reference to guidance which is prepared and from time to time revised by a prescribed body: s 113(3A) (added by the Child Support, Pensions and Social Security Act 2000 s 52(2); amended by Pensions Act 2007 Sch 5 para 6).

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### **558. Regulations as to form and content of advertisements.**

Regulations<sup>1</sup> may be made relating to the form and content of advertisements and such other material as may be prescribed<sup>2</sup> issued by or on behalf of the trustees or managers<sup>3</sup> of a personal<sup>4</sup> or occupational pension scheme<sup>5</sup> for the purposes of the scheme<sup>6</sup>.

1 For the meaning of 'regulations' generally see PARA 557 note 2 ante.

2 For the meaning of 'prescribed' see PARA 555 note 1 ante.

3 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme see PARA 555 note 9 ante.

4 For the meaning of 'personal pension scheme' see PARA 710 post.

5 For the meaning of 'occupational pension scheme' see PARA 741 post.

6 Pension Schemes Act 1993 s 117. At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Interpretation Act 1978 s 17(2)(b), the Personal Pension Schemes (Advertisements) Regulations 1990, SI 1990/1140 (as amended) (see PARA 734 post) had effect as if so made.

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### **559. Membership to be voluntary.**

Subject to such exceptions as may be prescribed<sup>1</sup>:

- 1291 (1) any term of a contract of service<sup>2</sup> (whenever made) or any rule of a personal or occupational pension scheme<sup>3</sup> to the effect that an employed earner<sup>4</sup> must be a member<sup>5</sup>:
- 145
198. (a) of a personal or occupational pension scheme;
199. (b) of a particular personal or occupational pension scheme; or
200. (c) of one or other of a number of particular personal or occupational pension schemes,
- 146
- 1292 is void<sup>6</sup>; and
- 1293 (2) any such term or rule to the effect that contributions must be paid by or in respect of an employed earner:
- 147
201. (a) to a particular personal or occupational pension scheme of which the earner is not a member; or
202. (b) to one or other of a number of personal or occupational pension schemes of none of which he is a member,
- 148
- 1294 is unenforceable for so long as he is not a member of the scheme or any of the schemes<sup>7</sup>.

The above provision must not be construed so as to have the effect that an employer<sup>8</sup> is required, when he would not otherwise be, to make contributions to a personal or occupational pension scheme; or to increase an employed earner's pay in lieu of making contributions to a personal or occupational pension scheme<sup>9</sup>.

1 For the meaning of 'prescribed' see PARA 555 note 1 ante. For the prescribed exceptions see PARA 744 post.

2 For the meaning of 'contract of service' see PARA 32 note 4 ante (definition applied by the Pension Schemes Act 1993 s 181(1)).

3 For the meaning of 'personal' and 'occupational' pension schemes see PARAS 710, 741 post.

4 For the meaning of 'employed earner' see PARA 32 ante (definition applied by the Pension Schemes Act 1993 s 181(1)).

5 Ibid s 181(4) (as amended) (power to prescribe persons who are to be regarded as members or prospective members of an pension scheme) does not apply for these purposes: see PARA 557 note 9 ante.

6 Ibid s 160(1)(a).

7 Ibid s 160(1)(b).

8 For these purposes, 'employer' means: (1) in the case of an employed earner employed under a contract of service, his employer; (2) in the case of an employed earner employed in an office with emoluments, such person as may be prescribed in relation to that office or, if no such person is prescribed, the government department, public authority or body of persons responsible for paying the emoluments of the office: ibid s

181(1). Section 181(2), (3) (as amended) (construction of references to employers) does not apply for these purposes: see PARA 660 note 18 post.

9 Ibid s 160(2).

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#### **560. Exemption of certain schemes from rule against perpetuities.**

The rules of law relating to perpetuities do not apply to the trusts of, or any disposition made under or for the purposes of, a personal or occupational pension scheme<sup>1</sup> at any time when it is<sup>2</sup>:

- 1295 (1) a public service pension scheme<sup>3</sup>;
- 1296 (2) an occupational pension scheme which is a contracted-out scheme<sup>4</sup> in relation to any employment<sup>5</sup>;
- 1297 (3) a personal pension scheme which is an appropriate scheme<sup>6</sup>; or
- 1298 (4) an occupational or personal pension scheme which satisfies prescribed<sup>7</sup> requirements<sup>8</sup>.

Regulations<sup>9</sup> under head (4) above may require a scheme:

- 1299 (a) to contain provisions in any prescribed form, or to any prescribed effect<sup>10</sup>;  
or
- 1300 (b) to have tax exemption or tax approval<sup>11</sup> or to be such a scheme that it may be expected to qualify for tax exemption or tax approval<sup>12</sup>.

Such regulations may be so framed that, in prescribed circumstances, the requirements can be treated as satisfied if application has been duly made to the Inland Revenue with a view to obtaining tax approval for the scheme<sup>13</sup>. Regulations may include provision by which a scheme (other than a public service pension scheme<sup>14</sup>) to which this exemption ceases to apply may nevertheless be treated as continuing to be a scheme to which it applies for a period of two years from its ceasing to be such a scheme, or for such longer period as the Secretary of State<sup>15</sup> considers to be reasonable in the case of a particular scheme<sup>16</sup>. If this exemption ceases to apply to a scheme, trusts created and dispositions made under it or for its purposes are then again subject to the rules of law relating to perpetuities as if exemption had never applied to it<sup>17</sup>.

1 For the meaning of 'personal' or 'occupational' pension schemes see PARAS 710, 741 post.

2 Pension Schemes Act 1993 s 163(1). Section 163(1) applies whether the trusts or dispositions in question are created or made before or after s 163 first applies to the scheme, but s 163 does not validate with retrospective effect any trusts or dispositions which the rules of law relating to perpetuities (including, where applicable, the Perpetuities and Accumulations Act 1964 s 3(1) ('wait and see': see **PERPETUITIES AND ACCUMULATIONS** vol 35 (Reissue) PARA 1009)) already require to be treated as void before the Pension Schemes Act 1993 s 163 applies to the scheme: s 163(3).

3 Ibid s 163(2)(a). For the meaning of 'public service pension scheme' see PARA 874 post.

4 For the meaning of 'contracted-out scheme' see PARA 880 post.

5 Pension Schemes Act 1993 s 163(2)(b). 'Employment' includes any trade, business, profession, office or vocation and 'employed' except in the expression 'employed earner' (see PARA 32 ante: definition applied by s 181(1)) is to be construed accordingly: s 181(1).

6 Ibid s 163(3)(c). For the meaning of 'appropriate scheme' see PARA 880 note 9 post.

7 For the meaning of 'prescribed' see PARA 555 note 1 ante. An occupational pension scheme is a scheme to which *ibid* s 163 (as amended) applies at any time when it satisfies any of the following requirements: (1) it is a superannuation fund to which exemption from income tax is allowed under the Income and Corporation Taxes Act 1988 s 608 (see PARA 748 post); (2) it is a superannuation fund to which the Inland Revenue gives relief from income tax under s 614(5) (overseas pensions); (3) it is a trust scheme approved by the Inland Revenue for the purposes of s 620(5) (see PARA 690 post); (4) it is a scheme, or part of a scheme, which is a retirement benefits scheme approved by the Inland Revenue for the purposes of Pt XIV Ch I (ss 590-612) (as amended) (see PARA 747 et seq post); and where an application for approval of the scheme or part of the scheme has been made under s 604 (see PARA 747 post), the scheme will be treated as satisfying the requirements of this head for so long as the application is not withdrawn or refused and the Inland Revenue has not told the applicant that it believes the application has been dropped; and (5) it is a retirement benefits scheme and the Inland Revenue is satisfied, under s 596(2)(b) (as amended) (see PARA 557 post), that the scheme corresponds to a scheme approved by the Inland Revenue for the purposes of Pt XIV Ch I (as amended): see the Personal and Occupational Pension Schemes (Perpetuities) Regulations 1990, SI 1990/1143, reg 3 (amended by SI 1994/1062).

A personal pension scheme is a scheme to which the Pension Schemes Act 1993 s 163 (as amended) applies at any time when it is approved by the Inland Revenue for the purposes of the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended) (see PARA 711 et seq post); and where an application for approval of the scheme has been made under s 631 (see PARA 711 post), the scheme will be treated as satisfying these requirements for so long as the application is not withdrawn or refused and the Inland Revenue has not told the applicant that it believes the application has been dropped: see the Personal and Occupational Pension Schemes (Perpetuities) Regulations 1990, SI 1990/1143, reg 4 (amended by SI 1994/1062).

8 Pension Schemes Act 1993 s 163(2)(d).

9 For the meaning of 'regulations' see PARA 557 note 2 ante.

10 Pension Schemes Act 1993 s 163(4)(a).

11 For these purposes, 'tax exemption' and 'tax approval' mean respectively exemption from tax and approval of the Inland Revenue, in either case under any such provision of the Income Tax Acts as may be prescribed: Pension Schemes Act 1993 s 181(1). For the meaning of 'the Income Tax Acts' see **INCOME TAXATION** vol 23(1) (Reissue) PARA 21.

12 Pension Schemes Act 1993 s 163(4)(b).

13 *Ibid* s 163(5).

14 For the meaning of 'public service pension scheme' see PARA 874 post.

15 As to the Secretary of State see PARA 1 ante.

16 Pension Schemes Act 1993 s 163(6) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 21). An occupational pension scheme that ceases to be contracted-out or to satisfy the requirements of any of heads (1)-(5) set out in note 7 supra, and a personal pension scheme that ceases to be an appropriate scheme or to satisfy the relevant requirements set out in that note, will nevertheless be treated as continuing to be a scheme to which the Pension Schemes Act 1993 s 163 (as amended) applies for a further period of two years from the cesser, or for such longer period as the Secretary of State considers reasonable in the case of the particular scheme: see the Personal and Occupational Pension Schemes (Perpetuities) Regulations 1990, SI 1990/1143, reg 4 (amended by SI 1994/1062; and SI 1996/2131).

17 Pension Schemes Act 1993 s 163(7). Section 163(7) is without prejudice to any rights which vested while s 163 (as amended) applied: s 163(8). Regulations may provide for a scheme, whose fund was registered under the Superannuation and other Trust Funds (Validation) Act 1927 immediately before the repeal of that Act took effect, to retain the benefit of that Act subject to prescribed conditions and either indefinitely or for a prescribed period: Pension Schemes Act 1993 s 163(9). At the date at which this volume states the law, no order bringing into force the repeal of the Superannuation and other Trust Funds (Validation) Act 1927 had been made. Until such time as that repeal is brought into force, the Pension Schemes Act 1993 s 163 (as amended) has effect with the omission of s 163(9): see s 191, Sch 9 paras 1, 2.

## UPDATE

### 560 Exemption of certain schemes from rule against perpetuities

TEXT AND NOTES--Pension Schemes Act 1993 s 163 (as amended) repealed in relation to instruments taking effect, or wills being executed, on or after 6 April 2010: Perpetuities and Accumulations Act 2009 ss 4(c), 15(1), Schedule, SI 2010/37.

TEXT AND NOTE 6--1993 Act s 163(2)(c) repealed: Pensions Act 2007 Sch 4 para 31, Sch 7 Pt 6 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

NOTE 7--SI 1990/1143 regs 3, 4 substituted: SI 2006/744. An occupation pension scheme is a scheme to which the Pension Schemes Act 1993 s 163 applies at any time when (1) it is a superannuation fund which is to be treated as becoming a registered pension scheme (see PARA 873B.1) under the Finance Act 2004 s 153(9) in accordance with Sch 36 para 1(1)(b); or (2) it is a superannuation fund to which the Income and Corporation Taxes Act 1988 s 615(3) (see PARA 553) applies, or to which relief from income tax is given under s 614(5) (see PARA 553); or (3) it is a trust scheme which is to be treated as becoming a registered pension scheme under the 2004 Act s 153(9) in accordance with Sch 36 para 1(1)(f); or (4) the scheme, or part of the scheme, is either (a) an occupational pension scheme registered under s 153, or (b) treated as becoming a registered pension scheme under s 153(9) in accordance with Sch 36 para 1(1)(a); or (5) it is an occupational pension scheme which the Inland Revenue is satisfied corresponds to a scheme registered for the purposes of Pt 4 (ss 149-284): SI 1990/1143 reg 3 (as so substituted). A personal pension scheme is a scheme to which the 1993 Act s 163 applies at any time when it, or part of it, is either registered under the 2004 Act s 153 or treated as becoming a registered pension scheme under s 153(9) in accordance with Sch 36 para 1(1)(g): SI 1990/1143 reg 4 (as so substituted).

TEXT AND NOTES 11-13--Head (b) now requires the scheme to be a registered pension scheme under the 2004 Act s 153 (see PARA 873B.1) or to be a scheme that may be expected to satisfy the conditions for registration: 1993 Act s 163(4)(b) (substituted by SI 2006/745). 1993 Act 163(5) repealed: Taxation of Pension Schemes (Consequential Amendments) Order 2006, SI 2006/745.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(1) INTRODUCTION/561. Types of state retirement pension.

## **14. STATE RETIREMENT PENSIONS**

### **(1) INTRODUCTION**

#### **561. Types of state retirement pension.**

There are four principal categories of state retirement pension which are payable to persons who have reached pensionable age<sup>1</sup>. The four categories are defined as a Category A<sup>2</sup> retirement pension, a Category B<sup>3</sup> retirement pension, a Category C<sup>4</sup> retirement pension and a Category D<sup>5</sup> retirement pension. The right to claim<sup>6</sup> either a Category A or a Category B retirement pension is based upon the contributions record of the claimant or the claimant's spouse<sup>7</sup>. Both Category C and Category D retirement pensions are non-contributory in nature<sup>8</sup>.

1 For the meaning of 'pensionable age' see PARA 562 post.

2 See the Social Security Contributions and Benefits Act 1992 s 44 (as amended); and PARA 568 post.

3 See *ibid* ss 48A-48C (as added); s 51 (as amended); and PARA 572 post.

4 See *ibid* s 78(1); and PARA 579 post.

5 See *ibid* s 78(3); and PARA 580 post.

6 As to claims generally see PARA 596 post; and see further PARA 337 et seq ante.

7 See the Social Security Contributions and Benefits Act 1992 s 20(1)(f) (amended by the Pensions Act 1995 s 126(c), Sch 4 para 21(1)). As to contributions generally see PARA 31 et seq ante.

8 See the Social Security Contributions and Benefits Act 1992 s 63(f). As to non-contributory benefits generally see PARA 91 et seq ante.

### **UPDATE**

#### **561 Types of state retirement pension**

NOTE 7--Subject to savings (see SI 2003/938), Social Security Contributions and Benefits Act 1992 s 20(1)(f) further amended: Tax Credits Act 2002 Sch 6. 1992 Act s 20(1)(f) further amended by Civil Partnership Act 2004 Sch 24 para 13.

NOTE 8--Subject to savings (see SI 2003/938), Social Security Contributions and Benefits Act 1992 s 63(f) amended: Tax Credits Act 2002 Sch 6.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(1) INTRODUCTION/562. Meaning of 'pensionable age'.

## **562. Meaning of 'pensionable age'.**

Pensionable age<sup>1</sup> means, in the case of a man, the age of 65<sup>2</sup> and, in the case of a woman,<sup>3</sup> the age of 60<sup>4</sup>. There is to be a graduated equalisation of the pensionable age until it is 65 for both men and women. The process of equalisation will begin on 6 July 2010 and will be completed by 6 March 2020<sup>5</sup>. Women born before 6 April 1950 will be unaffected<sup>6</sup> while women born after 5 April 1955 attain pensionable age at 65<sup>7</sup>. Once a person has reached the pensionable age he will be treated as being retired unless he opts for deferment of his pension entitlement<sup>8</sup>.

1 'Pensionable age' has the meaning given by the rules contained in the Pensions Act 1995 s 126, Sch 4 para 1: see the Social Security Contributions and Benefits Act 1992 s 122(1) (definition substituted by the Pensions Act 1995 ss 126(c), 134(4), Sch 4 para 13(a)). A population census is acceptable proof of a claimant's age in certain circumstances: see Decision CP 11/49. Medical evidence may also be relied upon: see Decision R(P)1/75.

2 Pensions Act 1995 Sch 4 para 1 r (1).

3 Whether a claimant is a woman or not is to be determined biologically and not on the basis of status or medical and psychiatric treatment: see Decisions R(P)1/80; R(P)2/80.

4 Pensions Act 1995 Sch 4 para 1 r (2).

5 See *ibid* Sch 4 para 1 r (3), Table.

6 *Ibid* Sch 4 para 1 r (2).

7 *Ibid* Sch 4 para 1 r (4).

8 See the Social Security Contributions and Benefits Act 1992 s 54 (as amended); and PARA 584 post.

## **UPDATE**

### **562 Meaning of 'pensionable age'**

TEXT AND NOTES--1995 Act s 126, Sch 4 Pt 1 amended for the purpose of increasing the pensionable age for men and women progressively over a period of 22 years beginning with 6 April 2024: Pensions Act 2007 s 13(1), Sch 3.

NOTE 1--1995 Act Sch 4 para 1 amended: Welfare Reform Act 2007 Sch 3 para 13.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(1) INTRODUCTION/563. Elements which make up a state retirement pension payment.

**563. Elements which make up a state retirement pension payment.**

A state retirement pension payment may include one or more of the following elements, namely:

- 1301 (1) a flat rate payment<sup>1</sup>;
- 1302 (2) an earnings related element with respect to earnings received between 1961 and 1975<sup>2</sup> and/or post 1978<sup>3</sup>;
- 1303 (3) increases for dependants<sup>4</sup> or invalidity<sup>5</sup>;
- 1304 (4) an age addition<sup>6</sup>;
- 1305 (5) increments in respect of periods of deferred retirement<sup>7</sup>; or
- 1306 (6) a Christmas bonus<sup>8</sup>.

1 See the Social Security Contributions and Benefits Act 1992 s 44(3)(a); and PARA 569 post; s 48A(4)(a) (as added); and PARA 573 post; s 48B(2)(a) (as added); and PARA 575 post; s 78(2), (6); and PARAS 579, 581 post.

2 See *ibid* s 62(1) (as amended); and PARA 583 post.

3 See *ibid* ss 44(3)(b), 45(1); and PARA 569 post.

4 See *ibid* s 80 (as amended); s 81; and PARA 590 post.

5 See *ibid* ss 82, 83, 84 (as amended); and PARA 586 post.

6 See *ibid* s 79; and PARA 588 post.

7 See *ibid* s 54 (as amended); and PARA 584 post.

8 See *ibid* s 148; and PARAS 29 ante, 589 post.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(1) INTRODUCTION/564. State retirement pensions payable for life.

#### **564. State retirement pensions payable for life.**

Category A<sup>1</sup>, Category B<sup>2</sup>, Category C<sup>3</sup> and Category D<sup>4</sup> retirement pensions are payable for life<sup>5</sup>. Payment of retirement pensions commences on the first payday after the conditions for entitlement have been met and is payable weekly in advance<sup>6</sup>. The amount of the payment is up-rated annually<sup>7</sup>.

1 As to Category A retirement pensions see PARA 568 post.

2 As to Category B retirement pensions see PARA 572 post.

3 As to Category C retirement pensions see PARA 568 post.

4 As to Category D retirement pensions see PARA 569 post.

5 Social Security Contributions and Benefits Act 1992 ss 44(1), 48C(1) (added by the Pensions Act 1995 s 126(b), Sch 4 para 3(1)); Social Security Contributions and Benefits Act 1992 s 78(7).

6 See *ibid* s 44(2); the Social Security Administration Act 1992 s 5(1)(k); and the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 22 (as amended). The provision is not ultra vires or unreasonable in that it discriminates against claimants on the basis of their date of birth: see Decision R(P)2/73.

7 See the Social Security Administration Act 1992 s 150 (as amended); and PARA 17 ante.

#### **UPDATE**

#### **564 State retirement pensions payable for life**

NOTE 6--The pension may be paid at intervals of four weeks, or weekly in advance: SI 1987/1968 reg 22 (amended by SI 2002/2441, SI 2009/604).

SI 1987/1968 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(1) INTRODUCTION/565. Consequences of a failure to meet contribution conditions in full.

### **565. Consequences of a failure to meet contribution conditions in full.**

Benefits may be payable at a reduced rate for claimants who do not satisfy the contribution conditions in full but who otherwise qualify for a Category A or a Category B retirement pension<sup>1</sup>.

Regulations may provide for persons to be entitled to any of the following benefits, namely:

- 1307 (1) a widowed mother's allowance<sup>2</sup>;
- 1308 (2) a widow's pension<sup>3</sup>;
- 1309 (3) a Category A retirement pension<sup>4</sup>;
- 1310 (4) a Category B retirement pension<sup>5</sup>,

in cases where the first contribution condition specified in relation to that benefit<sup>6</sup> is satisfied and the second contribution condition so specified is not<sup>7</sup>. The first condition is that the contributor concerned<sup>8</sup> must in respect of any one relevant year<sup>9</sup> have actually paid contributions of a relevant class<sup>10</sup> and that the earnings factor<sup>11</sup> must be not less than the qualifying earnings factor for that year<sup>12</sup>. The second condition is that (a) the contributor concerned must, in respect of each of not less than the requisite number of years of his working life<sup>13</sup>, have paid or been credited with contributions of a relevant class or been credited (in the case of 1987-88 or any subsequent year) with earnings; and that (b) in the case of each of those years, the earnings factor<sup>14</sup> must be not less than the qualifying earnings factor for that year<sup>15</sup>.

Regulations so made must provide for benefit payable by virtue of any such regulations to be payable at a rate, or to be of an amount, less than that which would be applicable<sup>16</sup> had both of the relevant contribution conditions been fully satisfied<sup>17</sup>; the rate or amount prescribed may vary with the extent to which the relevant contribution conditions are satisfied (and may be nil)<sup>18</sup> but the amount prescribed for any increase of benefit in respect of a child<sup>19</sup> must be the same as if both of the relevant contribution conditions had been fully satisfied<sup>20</sup>.

Regulations may also provide that where a person is entitled by virtue of the above provisions to a Category A or Category B retirement pension consisting only of the additional pension<sup>21</sup> with no basic pension<sup>22</sup>, and that retirement pension, and any graduated retirement benefit<sup>23</sup> to which he may be entitled, together amount to less than the prescribed rate, that person's entitlement as respects that retirement pension is to be satisfied either altogether or for a prescribed period by the making of a single payment of the prescribed amount<sup>24</sup>.

In any case where an employed earner<sup>25</sup> who is married dies as a result of a personal injury arising out of and in the course of his employment<sup>26</sup> or of a prescribed disease or injury<sup>27</sup> and the contribution conditions are not wholly satisfied in respect of the employed earner, those conditions must be taken to be satisfied for the purposes of the entitlement of the employed earner's widow or widower to any of the following benefits<sup>28</sup>:

- 1311 (i) a widow's payment<sup>29</sup>;
- 1312 (ii) a widowed mother's allowance;
- 1313 (iii) a widow's pension;
- 1314 (iv) a Category B retirement pension<sup>30</sup> for widows and widowers<sup>31</sup>,

but this has effect only where the employed earner's death occurred on or after 11 April 1988<sup>32</sup>.

1 See the Social Security Contributions and Benefits Act 1992 s 60 (amended by the Pensions Act 1995 s 126(c), Sch 4 para 21(9)); the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, SI 1979/642, reg 6 (as amended); and the text and notes 5-32 *infra*. As to Category A and Category B retirement pensions see PARAS 568, 572 *post*; and as to contributions generally see PARA 31 *et seq ante*.

2 As to widowed mother's allowance see PARA 85 *ante*.

3 As to widow's pension see PARA 86 *ante*.

4 See PARA 568 *post*.

5 See PARA 572 *post*.

6 The conditions are specified in the Social Security Contributions and Benefits Act 1992 s 21(3), Sch 3 para 5 (as amended): see the text and notes 8-15 *infra*.

7 *Ibid* s 60(1).

8 For the meaning of 'contributor concerned' see PARA 55 note 7 *ante*.

9 For the purposes of the first condition, a relevant year is any year ending before that in which the contributor concerned attained pensionable age or died under that age; and the table set out in the Social Security Contributions and Benefits Act 1992 Sch 3 para 5(5) shows the requisite number of years for the purpose of the second condition, by reference to a working life of a given duration: Sch 3 para 5(5). For the purposes of Pts I-VI (ss 1-122) (as amended), a person's working life is the period between (1) (inclusive) the tax year in which he attained the age of 16; and (2) (exclusive) the tax year in which he attained pensionable age or died under that age: Sch 3 para 5(8) (amended by the Pensions Act 1995 s 134(5)). For the meaning of 'year' see PARA 55 note 7 *ante*; and for the meaning of 'pensionable age' see PARA 562 *ante*.

10 For the meaning of 'relevant class' see PARA 55 *ante*.

11 *Ie* the earnings factor derived (1) if that year is 1987-88 or any subsequent year, from earnings upon which such of those contributions as are primary Class 1 contributions were paid or treated as paid and any Class 2 or Class 3 contributions; or (2) if that year is an earlier year, from the contributions referred to in head (1) *supra*: Social Security Contributions and Benefits Act 1992 Sch 3 para 5(2)(b). For the meaning of 'the earnings factor' see PARA 56 *ante*.

12 *Ibid* Sch 3 para 5(2). The first condition is taken to be satisfied if the contributor concerned was entitled to long-term incapacity benefit at any time during the year in which he attained pensionable age or died under that age, or the year immediately preceding that year: Sch 3 para 5(6) (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 38(1), (3)).

13 The second condition is taken to be satisfied notwithstanding that the Social Security Contributions and Benefits Act 1992 Sch 3 para 5(3)(a), (b) is not complied with as respects each of the requisite number of years if its requirements are complied with as respects at least half that number of years (or at least 20 of them, if that is less than half); and in each of the other years the contributor concerned was, within the meaning of regulations, precluded from regular employment by responsibilities at home: Sch 3 para 5(7) (the words in parentheses are prospectively repealed by the Pensions Act 1995 ss 126(b), 177, Sch 4 para 4, Sch 7 Pt II with effect to any person attaining pensionable age on or after 6 April 2010).

14 For these purposes, the earnings factor in the case of 1987-88 or any subsequent year is that which is derived from any earnings upon which such of the contributions mentioned in head (a) in the text as are primary Class 1 contributions were paid or treated as paid or earnings credited and any Class 2 or Class 3 contributions for the year; or in the case of any earlier year, is that which is derived from the contributions mentioned in head (a) in the text: Social Security Contributions and Benefits Act 1992 Sch 3 para 5(4).

15 *Ibid* Sch 3 para 5(3).

16 *Ie* under *ibid* Pt II (ss 20-62, Schs 3-5) (as amended): see PARA 54 *et seq ante*, 566 *et seq post*.

17 *Ibid* s 60(4).

18 *Ibid* s 60(5).

19 For the meaning of 'child' see PARA 19 note 11 *ante*.

- 20 Social Security Contributions and Benefits Act 1992 s 60(6).
- 21 As to the additional pension see PARA 569 post.
- 22 As to the basic pension see PARA 569 post.
- 23 As to graduated retirement benefit see PARA 583 post.
- 24 Social Security Contributions and Benefits Act 1992 s 60(7).
- 25 For the meaning of 'employed earner' see PARA 32 ante.
- 26 Is a personal injury of a kind mentioned in the Social Security Contributions and Benefits Act 1992 s 94(1): see PARA 127 ante.
- 27 Is a disease or injury such as is mentioned in *ibid* s 108(1): see PARA 153 ante.
- 28 *Ibid* s 60(2) (s 60(2), (3) amended by the Pensions Act 1995 Sch 4 para 21(9)).
- 29 As to widow's payment see PARA 84 ante.
- 30 Is payable by virtue of the Social Security Contributions and Benefits Act 1992 s 48B (as added): see PARA 574 post.
- 31 *Ibid* s 60(3) (as amended: see note 28 *supra*).
- 32 *Ibid* s 60(8).

## UPDATE

### 565 Consequences of failure to meet contribution conditions in full

TEXT AND NOTES--References in the 1992 Act s 60 to a Category A or Category B retirement pension do not include one to which Sch 3 para 5A applies: s 60(9) (added by Pensions Act 2007 Sch 1 para 4). See also 1992 Act s 60A (added by 2007 Act Sch 1 para 5) (failure to satisfy contribution condition in Sch 3 para 5A).

TEXT AND NOTES 1-15--The following provisions apply to (1) a Category A retirement pension in a case where the contributor concerned attains pensionable age on or after 6 April 2010; (2) a Category B retirement pension payable by virtue of the 1992 Act s 48A (see PARAS 572, 573) in a case where the contributor concerned attains pensionable age on or after that date; (3) a Category B retirement pension payable by virtue of s 48B (see PARAS 574, 575) in a case where the contributor concerned dies on or after that date without having attained pensionable age before that date: Sch 3 para 5A(1) (added by Pensions Act 2007 s 1(3)). The contribution condition for a Category A or Category B retirement pension in relation to which the 1992 Act Sch 3 para 5A applies is that (a) the contributor concerned must, in respect of each of not less than 30 years of his working life, have paid or been credited with contributions of a relevant class or been credited (in the case of 1987-88 or any subsequent year) with earnings; and (b) in the case of each of those years, the earnings factor derived as mentioned in Sch 3 para 5A(3) must be not less than the qualifying earnings factor for that year: Sch 3 para 5A(2) (as added). For the purposes of head (b), the earnings factor (i) in the case of 1987-88 or any subsequent year, is that which is derived from (A) so much of the contributor's earnings as did not exceed the upper earnings limit and upon which such of the contributions mentioned in head (a) as are primary Class 1 contributions were paid or treated as paid or earnings credited; and (B) any Class 2 or Class 3 contributions for the year; or (ii) in the case of any earlier year, is that which is derived from the contributions mentioned in head (a): Sch 3 para 5A(3) (as added). Regulations may modify Sch 3 para 5A(2) and (3) for the purposes of their application in a case

where the contributor concerned has paid, or been credited with, contributions, or contributions have been deemed to be, or treated as, paid by or credited to him, under the National Insurance Act 1946 or the National Insurance Act 1965: 1992 Act Sch 3 para 5A(4) (as added).

NOTE 1--SI 1979/642 reg 6 further amended: SI 2000/1483, SI 2003/937, SI 2009/2206. SI 1979/642 regs 6A, 6B added: SI 2009/2206.

TEXT AND NOTES 2-7--Also, heads (5) widowed parent's allowance (see PARA 87A); (6) bereavement allowance (see PARA 87B): Social Security Contributions and Benefits Act 1992 s 60(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 8 para 8(2)).

Social Security Contributions and Benefits Act 1992 Sch 3 para 5(1) amended: Welfare Reform and Pensions Act 1999 Sch 8 para 13(3); Pensions Act 2007 s 1(2).

NOTE 11--In head (1) for 'earnings' read 'so much of the contributor's earnings as did not exceed the upper earnings limit and': Social Security Contributions and Benefits Act 1992 Sch 3 para 5(2)(b) (amended by the National Insurance Contributions Act 2002 Sch 1 para 14(4), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2))).

NOTE 12--The first condition will be taken to be satisfied if the contributor concerned was entitled to main phase employment and support allowance at any time during (1) the year in which he attained pensionable age or died under that age, or (2) the year immediately preceding that year: 1992 Act Sch 3 para 5(6A) (added by Welfare Reform Act 2007 Sch 3 para 9(13)). The reference in the 1992 Act Sch 3 para 5(6A) to main phase employment and support allowance is to an employment and support allowance in the case of which the calculation of the amount payable in respect of the claimant includes an addition under the Welfare Reform Act 2007 s 2(1)(b) or 4(2)(b) (addition where conditions of entitlement to support component or work-related activity component satisfied): 1992 Act Sch 3 para 5(6B) (added by 2007 Act Sch 3 para 9(13)).

NOTE 13--Nothing in the 1992 Act Sch 3 para 5(7) applies in relation to any benefit to which s 23A (see PARA 565A) applies: Sch 3 para 5(7) (amended by Pensions Act 2007 s 3(2)).

Regulations may provide that a person is not to be taken for the purposes of the Social Security Contributions and Benefits Act 1992 Sch 3 para 5(7) as precluded from regular employment by responsibilities at home unless he meets the prescribed requirements as to the provision of information to the Secretary of State: Sch 3 para 5(7A) (added by the Child Support, Pensions and Social Security Act 2000 s 40). See the Additional Pension and Social Security Pensions (Home Responsibilities) (Amendment) Regulations 2001, SI 2001/1323 (amended by SI 2009/2206), and the Social Security Pensions (Home Responsibilities) Amendment Regulations 2008, SI 2008/498.

NOTE 14--In head (1) for 'any earnings' read 'so much of the contributor's earnings as did not exceed the upper earnings limit and': Social Security Contributions and Benefits Act 1992 Sch 3 para 5(4) (amended by the National Insurance Contributions Act 2002 Sch 1 para 14(5), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2))).

TEXT AND NOTES 17, 18--Social Security Contributions and Benefits Act 1992 s 60(4), (5) amended: Tax Credits Act 2002 Sch 3 para 33.

TEXT AND NOTE 20--Subject to savings (see SI 2003/938), Social Security Contributions and Benefits Act 1992 s 60(6) repealed: Tax Credits Act 2002 Sch 6.

TEXT AND NOTE 28--In Social Security Contributions and Benefits Act 1992 s 60(2) after 'married' add 'or a civil partner' and for 'widow or widower' read 'widow, widower or surviving civil partner': Civil Partnership Act 2004 Sch 24 para 31.



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(1) INTRODUCTION/565A. Contributions credits for relevant parents and carers.

### **565A. Contributions credits for relevant parents and carers.**

The following provisions<sup>1</sup> apply to the following benefits (1) a Category A retirement pension in a case where the contributor concerned<sup>2</sup> attains pensionable age on or after 6 April 2010; (2) a Category B retirement pension<sup>3</sup> in a case where the contributor concerned attains pensionable age on or after that date; (3) a Category B retirement pension<sup>4</sup> in a case where the contributor concerned dies on or after that date without having attained pensionable age before that date; (4) a widowed parent's allowance payable in a case where the contributor concerned dies on or after that date; (5) a bereavement allowance payable in a case where the contributor concerned dies on or after that date<sup>5</sup>. The contributor concerned in the case of a benefit to which these provisions apply will be credited with a Class 3 contribution for each week falling after 6 April 2010 in respect of which the contributor was a relevant carer<sup>6</sup>. A person is a relevant carer in respect of a week if the person (a) is awarded child benefit for any part of that week in respect of a child under the age of 12, (b) is a foster parent<sup>7</sup> for any part of that week, or (c) is engaged in caring, within the meaning given by regulations, in that week<sup>8</sup>. The contributor concerned in the case of a benefit to which these provisions apply will be credited with 52 Class 3 contributions for each tax year ending before 6 April 2010 in which the contributor was precluded from regular employment by responsibilities at home<sup>9</sup>.

1    Ie the Social Security Contributions and Benefits Act 1992 s 23A.

2    In *ibid* s 23A 'the contributor concerned' has the meaning given in s 21(5)(a) (see PARA 55): s 23A(9) (added by Pensions Act 2007 s 3(1)).

3    Payable by virtue of the 1992 Act s 48A (see PARAS 572, 573).

4    Payable by virtue of *ibid* s 48B (see PARAS 574, 575).

5    *Ibid* s 23A(1).

6    *Ibid* s 23A(2).

7    In *ibid* s 23A 'foster parent' has the meaning given by regulations: s 23A(9).

8    *Ibid* s 23A(3). Regulations may make provision for a person's entitlement to be credited with Class 3 contributions by virtue of falling within head (b) or (c) in the text to be conditional on the person (1) applying to be so credited in accordance with the prescribed requirements, and (2) complying with the prescribed requirements as to the provision of information to the Secretary of State: s 23A(4). In exercise of the power so conferred, the Secretary of State has made the Social Security (Contributions Credits for Parents and Carers) Regulations 2010, SI 2010/19 (amended by SI 2010/385).

9    Within the meaning of regulations under the 1992 Act Sch 3 para 5(7) (see PARA 565): s 23A(5). But the maximum number of tax years for which a person can be credited with contributions under s 23A(5) is (1) in the case of a benefit mentioned in heads (1)-(3) in the text, 22; (2) in the case of a benefit mentioned in head (4) or (5) in the text, half the requisite number of years of the person's working life: s 23A(6). The table in Sch 3 para 5(5) (requisite number of years of a working life of given duration: see PARA 565) applies for the purposes of head (2) as it applies for the purposes of the second condition set out in Sch 3 para 5(3): s 23A(7).

For the purpose of determining entitlement to a benefit to which s 23A applies, a week that falls partly in one tax year and partly in another is to be treated as falling in the year in which it begins and not in the following year: s 23A(8).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(1) INTRODUCTION/566. Contributions paid in error.

### **566. Contributions paid in error.**

Regulations may, where the following provisions apply in the case of any individual, and the Secretary of State<sup>1</sup> is of the opinion that it is appropriate for the regulations to apply to the individual, provide for entitlement to, and the amount of, additional pension<sup>2</sup> to be determined as if the individual had been an employed earner<sup>3</sup> and, accordingly, the contributions had been properly paid<sup>4</sup>. These provisions apply in the case of any individual if the individual has paid amounts by way of primary Class 1 contributions which, because the individual was not an employed earner, were paid in error, and prescribed conditions<sup>5</sup> are satisfied<sup>6</sup>. Where they apply in the case of any individual, and the Secretary of State is of the opinion that it is appropriate for regulations made to provide, during the transition from invalidity benefit to incapacity benefit<sup>7</sup>, for incapacity benefit to include the additional pension element of invalidity pension<sup>8</sup>, to have the following effect in the case of the individual, regulations may also provide for the transitional regulations mentioned to have effect as if, in relation to the provisions in force before 18 November 1994<sup>9</sup> with respect to that additional pension element, the individual had been an employed earner and, accordingly, the contributions had been properly paid<sup>10</sup>.

Regulations may also provide, where:

- 1315 (1) such provision made by regulations as is mentioned above<sup>11</sup> applies in respect of any individual;
- 1316 (2) prescribed conditions are satisfied; and
- 1317 (3) any amount calculated by reference to the contributions in question has been paid in respect of that individual by way of minimum contributions by the Secretary of State<sup>12</sup>,

for that individual to be treated for the purposes of the Pension Schemes Act 1993 as if that individual had been an employed earner and, accordingly, the amount had been properly paid<sup>13</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 This reference to additional pension is to additional pension for the individual or the individual's spouse falling to be calculated under the Social Security Contributions and Benefits Act 1992 s 45 for the purposes of (1) Category A retirement pension; (2) Category B retirement pension for widows or widowers; (3) widowed mother's allowance and widow's pension; and (4) incapacity benefit (except in transitional cases): s 61A(3) (s 61A added by the Pensions Act 1995 s 133). As to Category A and Category B retirement pension see PARA 568 et seq post; as to widowed mother's allowance see PARA 85 ante; as to widow's pension see PARA 86 ante; and as to incapacity benefit see PARA 59 et seq ante.

3 For the meaning of 'employed earner' see PARA 32 ante.

4 Social Security Contributions and Benefits Act 1992 s 61A(2) (as added: see note 2 supra). Where such provision made by such regulations applies in respect of any individual, regulations under s 1(4), Sch 1 para 8(1)(m) (return of contributions: see PARA 47 ante) may not require the amounts paid by way of primary Class 1 contributions to be repaid: s 61A(5) (as so added). For the meaning of 'primary Class 1 contributions' see PARA 36 ante; and as to contributions generally see PARA 31 et seq ante.

Where s 61A (as so added) applies in the case of an individual and the Secretary of State is of the opinion that it is appropriate for the following provision to apply, the entitlement of the individual to, and the amount of, additional pension is to be determined as if the individual had been an employed earner and, accordingly, all of the primary Class 1 contributions in question had been properly paid: Social Security (Additional Pension) (Contributions Paid in Error) Regulations 1996, SI 1996/1245, reg 3(1)(a). The reference to additional pension is

to additional pension for the individual or the individual's spouse falling to be calculated under the Social Security Contributions and Benefits Act 1992 s 45 for the purposes of Category A retirement pension, Category B retirement pension for widows or widowers, widowed mother's allowance and widow's pension, and incapacity benefit (except in transitional cases): reg 3(2).

5 The prescribed conditions are that: (1) the Secretary of State is satisfied that the error was not made with the individual's consent or connivance or attributable to any negligence on the individual's part; (2) none of the contributions in question has been returned to the individual in accordance with the Social Security (Contributions) Regulations 1979, SI 1979/591, reg 32 (as amended) (which provides for the return of contributions overpaid or paid in error); and (3) by the date on which the individual reaches pensionable age, or such later date as the Secretary of State considers reasonable in a particular case, the Secretary of State has not received written notification from the individual by a notice stating that the individual does not wish the Social Security (Additional Pension) (Contributions Paid in Error) Regulations 1996, SI 1996/1245, reg 3 (see note 4 supra) to apply in his case: reg 2(1), (2). In a case where the individual in question has died, a reference to the individual, except in head (1) supra, includes a reference to his surviving spouse: reg 2(3).

6 Social Security Contributions and Benefits Act 1992 s 61A(1) (as added: see note 2 supra).

7 As to that transition see PARA 59 ante.

8 Ie regulations made by virtue of the Social Security (Incapacity for Work) Act 1994 s 4(8): see PARA 59 ante.

9 Ie the commencement date of the Social Security (Incapacity for Work) Act 1994 s 4(8): see the Social Security (Incapacity for Work) Act 1994 (Commencement) Order 1994, SI 1994/2926.

10 Social Security Contributions and Benefits Act 1992 s 61A(4) (as added: see note 2 supra). Where s 61A (as so added) applies in the case of an individual and the Secretary of State is of the opinion that it is appropriate for the following provision to apply, in the case of an individual who is entitled to a transitional award of incapacity benefit, regulations made by virtue of the Social Security (Incapacity for Work) Act 1994 s 4(8) (provision during transition from invalidity benefit to incapacity benefit for incapacity benefit to include the additional pension element of invalidity pension) have effect as if, in relation to the provisions in force before the commencement of that section with respect to that additional pension element, the individual had been an employed earner and, accordingly, all of the primary Class I contributions in question had been properly paid: Social Security (Additional Pension) (Contributions Paid in Error) Regulations 1996, SI 1996/1245, reg 3(1)(b).

11 Ie regulations as mentioned in the Social Security Contributions and Benefits Act 1992 s 61A(2) or (4): see the text and notes 1-4, 7-10 supra.

12 Ie under the Pension Schemes Act 1993 s 43 (as amended): see PARA 913 post.

13 Where the Social Security Contributions and Benefits Act 1992 s 61A (as added) applies in the case of an individual and the Secretary of State is of the opinion that it is appropriate for the following provision to apply, where any amount calculated by reference to the contributions in question has been paid in respect of the individual by way of minimum contributions under the Pension Schemes Act 1993 s 43 (as amended) (contributions to personal pension schemes: see PARA 913 post) the individual is to be treated for the purposes of that Act as if he had been an employed earner and, accordingly, the amount had been properly paid: Social Security (Additional Pension) (Contributions Paid in Error) Regulations 1996, SI 1996/1245, reg 3(1)(c).

## UPDATE

### 566 Contributions paid in error

NOTES--Secretary of State's functions under SI 1996/1245 transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

TEXT AND NOTE 1--For 'Secretary of State is' read 'Inland Revenue are': Social Security Contributions and Benefits Act 1992 s 61A(2)(b) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 8).

NOTE 2--Now, head (2) Category B retirement pension for widows, widowers or surviving civil partners payable by virtue of the Social Security Contributions and Benefits Act 1992 s 48B (see PARA 575) or s 48BB (see PARA 575A); and also head (5) widowed parent's allowance (see PARA 87A): s 61A(3) (amended by the Welfare Reform and

Pensions Act 1999 Sch 8 para 10; the Civil Partnership Act 2004 Sch 24 para 32; and the Welfare Reform Act 2007 Sch 3 para 9(6)).

NOTE 4--1992 Act s 1(4) amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 5, Sch 10.

NOTE 5--1979 Regulations reg 32 now Social Security (Contributions) Regulations 2001, SI 2001/1004, regs 52, 52A (substituted by SI 2004/770).

TEXT AND NOTE 7--For 'Secretary of State is' read 'Inland Revenue is': 1992 Act s 61A(4) (b) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 8).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(1) INTRODUCTION/567. Persons not generally entitled to more than one retirement pension.

### **567. Persons not generally entitled to more than one retirement pension.**

A person is not entitled<sup>1</sup> for the same period to more than one retirement pension<sup>2</sup> except as provided below<sup>3</sup>.

A person who would, apart from the general rule<sup>4</sup>, be entitled for the same period to both a Category A or a Category B retirement pension<sup>5</sup> and a Category C or a Category D retirement pension<sup>6</sup> is entitled to both of those pensions for that period, subject to any adjustment<sup>7</sup> of them in pursuance of regulations<sup>8</sup>; and a person who would, apart from the general rule, be entitled to both a Category A and a Category B retirement pension for the same period, or to both a Category C and a Category D retirement pension for the same period, may from time to time give notice in writing to the Secretary of State specifying which of those pensions he wishes to receive<sup>9</sup>. If a person gives such a notice, the pension so specified is the one to which he is entitled in respect of any week commencing after the date of the notice<sup>10</sup>. If no such notice is given, the person is entitled to whichever of the pensions is from time to time the most favourable to him (whether it is the pension which he claimed or not)<sup>11</sup>.

1 For the meaning of 'entitled' see PARA 21 note 9 ante.

2 I.e. under the Social Security Contributions and Benefits Act 1992 Pt II (ss 20-62) (as amended): see PARA 54 et seq ante, 568 et seq post.

3 Ibid s 43(1).

4 I.e. apart from ibid s 43(1): see the text and notes 1-3 supra.

5 As to Category A and Category B retirement pensions under ibid Pt II (as amended) see PARA 568 et seq post.

6 As to Category C and Category D retirement pensions under ibid Pt III (ss 64-79) see PARA 579 et seq post.

7 I.e. in pursuance of regulations made under the Social Security Administration Act 1992 s 73 (as amended): see PARA 393 ante.

8 Social Security Contributions and Benefits Act 1992 s 43(2).

9 Ibid s 43(3). As to the Secretary of State see PARA 1 ante.

10 Ibid s 43(4). For the meaning of 'week' see PARA 32 note 7 ante.

11 Ibid s 43(5).

### **UPDATE**

### **567 Persons not generally entitled to more than one retirement pension**

NOTE 2--For the purposes of the Social Security Contributions and Benefits Act 1992 s 43, a pension under s 55A (see PARA 582A) is not a retirement pension: s 43(6) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 14, 18).

TEXT AND NOTE 9--Social Security Contributions and Benefits Act 1992 s 43(3) amended: Pensions Act 2004 s 296.



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(i) Category A Retirement Pensions/568. Entitlement to a Category A retirement pension.

## **(2) ENTITLEMENT**

### **(i) Category A Retirement Pensions**

#### **568. Entitlement to a Category A retirement pension.**

A person is entitled<sup>1</sup> to a Category A retirement pension if he is over pensionable age<sup>2</sup> and he satisfies the specified<sup>3</sup> contribution conditions<sup>4</sup>. The person becomes so entitled on the day on which he attains pensionable age and his entitlement continues throughout his life<sup>5</sup>. A Category A retirement pension is not payable in respect of any period falling before the day on which the pensioner's entitlement is regarded<sup>6</sup> as commencing for that purpose<sup>7</sup>.

A failure to meet the full contribution conditions may mean that the retirement pension is paid at a reduced rate<sup>8</sup>. Except in certain limited circumstances<sup>9</sup>, the entitlement to a Category A retirement pension is based upon the claimant's own contributions record<sup>10</sup>.

1 For the meaning of 'entitled' see PARA 32 note 7 ante.

2 For the meaning of 'pensionable age' see PARA 562 ante.

3 Ie specified in the Social Security Contributions and Benefits Act 1992 s 21(1), (4), Sch 3 para 5 (as amended): see PARA 565 ante.

4 Ibid s 44(1). As to contributions generally see PARA 31 et seq ante.

5 Ibid s 44(1).

6 Ie by virtue of the Social Security Administration Act 1992 s 5(1)(k): see PARA 330 ante.

7 Social Security Contributions and Benefits Act 1992 s 44(2).

8 See PARA 565 ante.

9 See PARA 570 post.

10 See the Social Security Contributions and Benefits Act 1992 s 44(1)(b).

### **UPDATE**

#### **568-570 Category A Retirement Pensions**

As to the entitlement to a Category A retirement pension where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 7. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

#### **568 Entitlement to a Category A retirement pension**

TEXT AND NOTES--Now a person will be entitled to a Category A retirement pension if he is over pensionable age and he satisfies the relevant conditions or condition: 1992 Act

s 44(1) (amended by Pensions Act 2007 Sch 1 para 1(2)). 'The relevant conditions or condition' means (1) in a case where the person attains pensionable age before 6 April 2010, the conditions specified in the 1992 Act Sch 3 para 5; (2) in a case where the person attains pensionable age on or after that date, the condition specified in Sch 3 para 5A (see [PARA 565](#)): s 44(1A) (added by 2007 Act Sch 1 para 1(3)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(i) Category A Retirement Pensions/569. Composition of a Category A retirement pension.

### **569. Composition of a Category A retirement pension.**

A Category A retirement pension consists of a basic pension<sup>1</sup> payable at a weekly rate and an additional pension<sup>2</sup> payable where there are one or more surpluses in the pensioner's earnings factors<sup>3</sup> for the relevant years<sup>4</sup>. The weekly rate of the basic pension is determined in accordance with legislation which is frequently updated<sup>5</sup>. The weekly rate of the additional pension in a Category A retirement pension in any case where the pensioner attained pensionable age in a tax year<sup>6</sup> before 6 April 1999 is the weekly equivalent of 1.25 per cent of the amount of the surpluses in the pensioner's earnings factors for the relevant years<sup>7</sup>. The weekly rate of the additional pension in a Category A retirement pension in any case where the pensioner attains pensionable age in a tax year after that date is to be:

1318 (1) in relation to any surpluses in the pensioner's earnings factors for the tax years in the period beginning with 1978-79 and ending with 1987-88, the weekly equivalent of a percentage of the amount of those surpluses, that percentage being expressed as 25 divided by the number of tax years in the pensioner's working life<sup>8</sup> which fall after 5 April 1978<sup>9</sup>;

1319 (2) in relation to any surpluses in the pensioner's earnings factors in a tax year after 1987-88, the weekly equivalent of the relevant percentage<sup>10</sup> of the amount of those surpluses<sup>11</sup>.

Adjustments are made to the earnings factor for the purpose of calculating additional pension where, in the case of any relevant year, family credit<sup>12</sup> is paid in respect of any employed earner or disability working allowance<sup>13</sup> is paid to any employed earner<sup>14</sup>.

The sums which are the weekly rate of the additional pension in a Category A retirement pension are subject to alteration by orders made<sup>15</sup> by the Secretary of State<sup>16</sup>.

1 See the Social Security Contributions and Benefits Act 1992 s 44(3)(a).

2 See *ibid* s 44(3)(b).

3 For these purposes and the purposes of *ibid* s 45 (see the text and notes 6-11 *infra*), there is a surplus in the pensioner's earnings factor for a relevant year if that factor exceeds the qualifying earnings factor for that year, and the amount of the surplus is the amount of that excess, as increased by the last order under the Social Security Administration Act 1992 s 148 (as amended) (see PARA 56 *ante*) to come into force before the end of the final relevant year: Social Security Contributions and Benefits Act 1992 s 44(5A) (added by the Pensions Act 1995 s 128(1), (2)). For transitional provisions see the Social Security Contributions and Benefits Act 1992 s 44(8). Any reference for those purposes to the pensioner's earnings factor for any relevant year is a reference: (1) where the relevant year is 1987-88 or any subsequent tax year, to the aggregate of (a) his earnings factors derived from earnings upon which primary Class 1 contributions were paid or treated as paid in respect of that year, and (b) his earnings factors derived from Class 2 and Class 3 contributions actually paid in respect of that year, or, if less, the qualifying earnings factor for that year; and (2) where the relevant year is an earlier tax year, to the aggregate of (a) his earnings factors derived from Class 1 contributions actually paid by him in respect of that year, and (b) his earnings factors derived from Class 2 and Class 3 contributions actually paid by him in respect of that year, or, if less, the qualifying earnings factor for that year: Social Security Contributions and Benefits Act 1992 s 44(6) (amended by the Pensions Act 1995 s 128(1), (2)). The Secretary of State may, however, until an appointed day, prescribe circumstances in which pensioner's earnings factors for any relevant year may be calculated in such manner as may be prescribed: Social Security Contributions and Benefits Act 1992 s 44(7A) (added, with transitory effect, by virtue of the Social Security (Consequential Provisions) Act 1992 s 6, Sch 4 paras 1-3). At the date at which this volume states the law, no such day had been appointed. For these purposes, 'relevant year' means 1978-79 or any subsequent tax year in the period

between (inclusive) the tax year in which the pensioner attained the age of 16, and (exclusive) the tax year in which he attained pensionable age; and 'final relevant year' means the last tax year which is a relevant year in relation to the pensioner: Social Security Contributions and Benefits Act 1992 s 44(7).

4 Ibid s 44(3).

5 See ibid s 44(4) (amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 11; and amended by annual benefits up-rating orders: see PARA 17 ante).

6 For the meaning of 'tax year' see PARA 9 note 6 ante.

7 Social Security Contributions and Benefits Act 1992 s 45(1). As to calculating the weekly equivalent see s 45(6), (7).

8 For the meaning of 'working life' see PARA 565 note 9 ante.

9 See the Social Security Contributions and Benefits Act 1992 s 45(2)(a), (4)(b). Regulations may direct that in prescribed cases or classes of cases any tax year must be disregarded for the purpose of calculating the number of tax years for these purposes, if it is a tax year after 5 April 1978 in which the (1) pensioner was credited with contributions or earnings by virtue of regulations under s 22(5) (see PARA 56 ante); or (2) was precluded from regular employment by responsibilities at home; or (3) would have been treated as falling within heads (1) or (2) supra in prescribed circumstances, but not so as to reduce the number of years below 20: s 45(5). The number of tax years is also calculated differently for the purpose of determining the additional pension falling to be calculated under s 45 by virtue of s 39(1) (as amended) (see PARA 87 ante) or s 48A(4) or s 48B(2) (both as added) (see PARAS 573, 575 post) in a case where the deceased spouse died under pensionable age: see s 46(2) (amended by the Social Security (Incapacity for Work) Act 1994 s 11, Sch 1 para 12; and the Pensions Act 1995 s 126(b), (c), Sch 4 paras 5, 21(5)).

10 As to the relevant percentage see the Social Security Contributions and Benefits Act 1992 s 45(3), (4).

11 Ibid s 45(2).

12 As to family credit see PARA 202 et seq ante.

13 As to disability working allowance see PARA 218 et seq ante.

14 See the Social Security Contributions and Benefits Act 1992 s 45A (added by the Pensions Act 1995 s 127(1)).

15 Ie under the Social Security Administration Act 1992 s 150 (as amended): see PARA 17 ante.

16 Social Security Contributions and Benefits Act 1992 s 45(8).

## UPDATE

### 568-570 Category A Retirement Pensions

As to the entitlement to a Category A retirement pension where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 7. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

### 569 Composition of a Category A retirement pension

TEXT AND NOTES--The weekly rate of the additional pension in a Category A retirement pension is reduced as follows in any case where (1) the pensioner has become subject to a state scheme pension debit; and (2) the debit is to any extent referable to the additional pension: Social Security Contributions and Benefits Act 1992 s 45B(1) (s 45B added by Welfare Reform and Pensions Act 1999 Sch 6 paras 1, 2). If the pensioner became subject to the debit in or after the final relevant year, the weekly rate of the additional pension is reduced by the appropriate weekly amount: Social Security Contributions and Benefits Act 1992 s 45B(2). If the pensioner became subject to the

debit before the final relevant year, the weekly rate of the additional pension is reduced by the appropriate weekly amount multiplied by the relevant revaluation percentage: s 45B(3). The appropriate weekly amount for the purposes of s 45B(2), (3) is the weekly rate, expressed in terms of the valuation day, at which the cash equivalent, on that day, of the pension mentioned in s 45B(5) is equal to so much of the debit as is referable to the additional pension: s 45B(4). The pension referred to above is a notional pension for the pensioner by virtue of s 44(3)(b) which becomes payable on the later of (a) his attaining pensionable age; and (b) the valuation day: s 45B(5). The relevant revaluation percentage is the percentage specified, in relation to earnings factors for the tax year in which the pensioner became subject to the debit, by the last order under the Social Security Administration Act 1992 s 148 (see PARA 56) to come into force before the end of the final relevant year: Social Security Contributions and Benefits Act 1992 s 45B(6). The Secretary of State may by regulations make provision about the calculation and verification of cash equivalents for the purposes of s 45B: s 45B(7) (substituted by Child Support, Pensions and Social Security Act 2000 s 41(2)). The power conferred by the Social Security Contributions and Benefits Act 1992 s 45B(7) includes power to provide (i) for calculation or verification in such manner as may be approved by or on behalf of the Government Actuary; and (ii) for things done under the regulations to be required to be done in accordance with guidance from time to time prepared by a person prescribed by the regulations: s 45B(7A) (added by 2000 Act s 41(2)). In exercise of such power, it is now provided that cash equivalents are to be calculated and verified in such manner as may be approved by or on behalf of the Government Actuary: Sharing of State Scheme Rights (Provision of Information and Valuation) (No 2) Regulations 2000, SI 2000/2914, reg 4. 'Final relevant year' means the tax year immediately preceding that in which the pensioner attains pensionable age; 'state scheme pension debit' means a debit under the Welfare Reform and Pensions Act 1999 s 49(1)(a) (see PARA 961B.3); and 'valuation day' means the day on which the pensioner became subject to the state scheme pension debit: Social Security Contributions and Benefits Act 1992 s 45B(8). For the meaning of tax year see PARA 961B.3.

NOTE 3--Reference to s 45 is now to s 45, Schs 4A and 4B; and for 'that year, and the amount of the surplus' read 'that year, the amount of the surplus is the amount of that excess and, for the purposes of s 45(1), (2)(a), (b), the adjusted amount of the surplus': Social Security Contributions and Benefits Act 1992 s 44(5A) (amended by 2000 Act s 35(5), (6); and Pensions Act 2007 Sch 2 para 5(2)).

Head (1) now refers to any subsequent tax year before the first appointed year; and new head (3) where the relevant year is the first appointed year or any subsequent year, to the aggregate of his earnings factors derived from so much of his earnings as did not exceed the applicable limit and on which primary Class 1 contributions have been paid or treated as paid in respect of that year: Social Security Contributions and Benefits Act 1992 s 44(6) (amended by 2000 Act ss 30(2), 35(7); National Insurance Contributions Act 2002 Sch 1 para 10; and 2007 Act s 12(2)(a), Sch 2 para 5(3)). For the meaning of 'first appointed year' see PARA 56. 'The applicable limit' means (a) in relation to a tax year before 2009-10, the upper earnings limit; (b) in relation to 2009-10 or any subsequent tax year, the upper accrual point: Social Security Contributions and Benefits Act 1992 s 44(7)(c) (added by 2007 Act s 12(2)(b); and amended by National Insurance Contributions Act 2008 s 3(3)). 'The upper accrual point' is £770: 1992 Act s 122(1) (substituted by National Insurance Contributions Act 2008 s 3(4)(a)). The Treasury may by regulations prescribe an equivalent of the upper accrual point in relation to earners paid otherwise than weekly (and references in this or any other Act to 'the prescribed equivalent', in the context of the upper accrual point, are to the equivalent prescribed under this provision in relation to such earners: 1992 Act s 122(6A) (s 122(6A), (6B) added by National Insurance Contributions Act 2008 s 3(4)

(b)). The power conferred by the 1992 Act s 122(6A) includes power to prescribe an amount which exceeds by not more than £1 the amount which is the arithmetical equivalent of the upper accrual point: s 122(6B) (as added).

The Social Security Contributions and Benefits Act 1992 s 44A(1)-(4) applies to the first appointed year or any subsequent tax year before 2010-11: s 44A(A1) (added by 2007 Act Sch 1 para 34(2)). For the purposes of head (3), if any of the conditions in the Social Security Contributions and Benefits Act 1992 s 44A(2) is satisfied for a relevant year to which s 44A(1) applies, a pensioner is deemed to have an earnings factor for that year which is derived from so much of his earnings as did not exceed the applicable limit and on which primary Class 1 contributions were paid; and is equal to the amount which, when added to any other earnings factors taken into account under s 44A(2), produces an aggregate of earnings factors equal to the low earnings threshold: s 44A(1) (s 44A added by 2000 Act s 30(3); Social Security Contributions and Benefits Act 1992 s 44A(1) amended by National Insurance Contributions Act 2002 Sch 1 para 11; 2007 Act Sch 1 para 34(3); and National Insurance Contributions Act 2008 Sch 1 para 4(2)). For these purposes 'the applicable limit' has the same meaning as in the Social Security Contributions and Benefits Act 1992 s 44: s 44A(5A) (added by National Insurance Contributions Act 2008 Sch 1 para 4(3)). The conditions referred to in the Social Security Contributions and Benefits Act 1992 s 44A(1) are that (a) the pensioner would, apart from s 44A, have an earnings factor for the year (i) equal to or greater than the qualifying earnings factor for the year; but (ii) less than the low earnings threshold for the year; (b) invalid care allowance (i) was payable to the pensioner throughout the year; or (ii) would have been so payable but for the fact that under regulations the amount payable to him was reduced to nil because of his receipt of other benefits; (c) for the purposes of Sch 3 para 5(7)(b) (see PARA 565), the pensioner is taken to be precluded from regular employment by responsibilities at home throughout the year by virtue of (i) the fact that child benefit was payable to him in respect of a child under the age of six; or (ii) his satisfying such other condition as may be prescribed; (d) the pensioner is a person satisfying the requirement in s 44A(3) to whom long-term incapacity benefit or qualifying employment and support allowance was payable throughout the year, or would have been so payable but for the fact that (i) he did not satisfy the contribution conditions in Sch 3 para 2 (see PARA 61) or, as the case may be, the Welfare Reform Act 2007 Sch 1; or (ii) under regulations the amount payable to him was reduced to nil because of his receipt of other benefits or of payments from an occupational pension scheme or personal pension scheme: s 44A(2) (s 44A as so added). For provision under head (c)(ii) see the Additional Pension and Social Security Pensions (Home Responsibilities) (Amendment) Regulations 2001, SI 2001/1323 (amended by SI 2009/2206); and the Social Security Pensions (Home Responsibilities) Amendment Regulations 2008, SI 2008/498. The requirement referred to in head (d) is that for one or more relevant years the pensioner has paid, or (apart from the Social Security Contributions and Benefits Act 1992 s 44A) is treated as having paid, primary Class 1 contributions on earnings equal to or greater than the qualifying earnings factor, and the years for which he has such a factor constitute at least one-tenth of his working life: s 44A(3). For these purposes, a pensioner's working life does not include any tax year before 1978-79, or any year in which he is deemed under s 44A(1) to have an earnings factor by virtue of fulfilling the condition in heads (b) and (c), and the figure calculated by dividing his working life by ten is rounded to the nearest whole year (and any half year is rounded down): s 44A(4). The Social Security Administration Act 1992 s 148A (added by 2000 Act s 33(1)) makes provision concerning the review by the Secretary of State, in the tax year preceding the first appointed year, and in each subsequent tax year, of the general level of earnings obtaining in Great Britain and, where there has been an increase in that level, to increase the low earnings threshold accordingly. As to the low earnings threshold for the tax years following the tax year 2008-09 see Social Security Pensions (Low

Earnings Threshold) Order 2009, SI 2009/610; and as to that for the tax years following the tax year 2009-10 see Social Security Pensions (Low Earnings Threshold) Order 2010, SI 2010/468. In head (d)(ii) 'occupational pension scheme' and 'personal pension scheme' have the meanings given by the Social Security Contributions and Benefits Act 1992 s 30DD(6) for the purposes of s 30DD(5) (see PARA 62): s 44A(6). In s 44A(2)(d) 'qualifying employment and support allowance' means contributory employment and support allowance where (A) that allowance was payable for a continuous period of 52 weeks; (B) that allowance included the support component under the Welfare Reform Act 2007 s 2(2); or (C) in the case of a man born between 6 April 1944 and 5 April 1947 or a woman born between 6 April 1949 and 5 April 1951, that allowance was payable for a continuous period of 13 weeks immediately following a period throughout which statutory sick pay was payable: Social Security Contributions and Benefits Act 1992 s 44A(7) (added by SI 2008/1554). For the purposes of the Social Security Contributions and Benefits Act 1992 s 44A(1), a pensioner is deemed to have an earnings factor in relation to any relevant year as specified in s 44A(1) if severe disablement allowance was payable to him throughout the year, and he satisfies the requirement in s 44A(3): 2000 Act s 30(4). The following do not apply to a pensioner attaining pensionable age on or after 6 April 2010 (A) the requirement referred to in head (d), and (B) s 44A(3) and (4): s 44A(4A) (added by 2007 Act Sch 1 para 34(4)).

For deemed earnings factors from 2010-11 onwards and earnings factor credits see 1992 Act ss 44B, 44C (added by 2007 Act s 9(1); 1992 Acts s 44B amended by National Insurance Contributions Act 2008 Sch 1 para 5, Sch 2).

The 2007 Act s 12(6) applies if it appears to the Secretary of State that (apart from s 12(6)) he would be required to make an order under the Social Security Administration Act 1992 s 148A by virtue of which the low earnings threshold for the following tax year would be an amount not less than the upper accrual point: 2007 Act s 12(5). In s 12 'the low earnings threshold' has the meaning given by the Social Security Contributions and Benefits Act 1992 s 44A(5); and 'the upper accrual point' has the meaning given by s 122(7) and (8): 2007 Act s 12(10). In that event the Secretary of State (1) is not required to make such an order under the Social Security Administration Act 1992 s 148A, and (2) instead must make an order abolishing the low earnings threshold and the upper accrual point as from the beginning of the following tax year: 2007 Act s 12(6). An order under s 12(6) may make (a) such consequential, incidental or supplemental provision, and (b) such transitional, transitory or saving provision, as the Secretary of State thinks necessary or expedient in connection with, or in consequence of, the abolition of the low earnings threshold and the upper accrual point: s 12(7). An order under s 12(6) may in particular amend, repeal or revoke any provision of any Act or subordinate legislation (whenever passed or made): s 12(8). No order may be made under s 12(6) unless a draft of the order has been laid before and approved by a resolution of each House of Parliament: s 12(9).

NOTE 5--Social Security Contributions and Benefits Act 1992 s 44(4) further amended: Social Security Act 1998 s 68; SI 2008/632.

TEXT AND NOTE 7--For 'amount' read 'adjusted amount': Social Security Contributions and Benefits Act 1992 s 45(1) (amended by 2000 Act s 35(1), (8)(a)). Social Security Contributions and Benefits Act 1992 s 45(6) amended: 2000 Act s 35(1), (8)(b)).

TEXT AND NOTES 8-11--The weekly rate of the additional pension in a Category A retirement pension in any case where the pensioner attains pensionable age in a tax year after that date is now to be the sum of heads (1)-(3); in heads (1) and (2) for 'amount' read 'adjusted amount'; head (2) now refers to a tax year after 1987-88 but before the first appointed year; and new head (3) in relation to any tax years falling within the Social Security Contributions and Benefits Act 1992 s 45(3A), the weekly equivalent of the amount calculated in accordance with Sch 4A; and new head (4) in

relation to the flat rate introduction year and subsequent tax years, the weekly equivalent of the amount calculated in accordance with Sch 4B: Social Security Contributions and Benefits Act 1992 s 45(2) (amended by 2000 Act ss 31(1), 35(8)(a); and 2007 Act s 11(2)). 'The flat rate introduction year' means such tax year as may be designated as such by order: Social Security Contributions and Benefits Act 1992 s 122(1) (amended by 2007 Act s 11(4)). The first appointed year and subsequent tax years before the flat rate introduction year fall within the Social Security Contributions and Benefits Act 1992 s 45(3A): s 45(3A) (added by 2000 Act s 31(2); amended by 2007 Act s 11(3)). As to the amount of the additional pension see the Social Security Contributions and Benefits Act 1992 Sch 4A (added by 2000 Act s 31(3); and amended by Civil Partnership Act 2004 Sch 24 para 51; 2007 Act s 10, Sch 2 para 11, Sch 7 Pt 5; and National Insurance Contributions Act 2008 Sch 2). See also, with regard to the amount of the additional pension, the Additional Pension and Social Security Pensions (Home Responsibilities) (Amendment) Regulations 2001, SI 2001/1323 (amended by SI 2009/2206), and the Social Security Pensions (Home Responsibilities) Amendment Regulations 2008, SI 2008/498. See also Social Security Contributions and Benefits Act 1992 Sch 4B (added by 2007 Act s 11(5)(a), Sch 2 Pt 1; and amended by National Insurance Contributions Act 2008 Sch 2) (additional pension: accrual rates for purposes of head (4); further amended by Pensions Act 2008 Sch 11 Pt 2). See further Social Security Administration Act 1992 s 148AA (added by 2007 Act s 11(5)(b), Sch 2 Pt 2) which makes provision for up-rating the flat rate accrual amount introduced by the Social Security Contributions and Benefits Act 1992 Sch 4B.

NOTE 9--Social Security Contributions and Benefits Act 1992 s 46(2) refers also to the calculation of additional pension under s 39C(1) (see PARA 87C): s 46(2) (amended by Welfare Reform and Pensions Act 1999 Sch 8 paras 2, 5(a)). Social Security Contributions and Benefits Act 1992 s 46(2) further amended: Civil Partnership Act 2004 Sch 24 para 23. The number of tax years is also now calculated differently for the purpose of determining the additional pension falling to be calculated under the Social Security Contributions and Benefits Act 1992 s 45 by virtue of s 48BB (see PARA 575A) in a case where the deceased spouse or civil partner died under pensionable age: see s 46(3) (added by 2000 Act s 32(1); and amended by Civil Partnership Act 2004 Sch 24 para 23). For the purpose of determining the additional pension falling to be calculated under the Social Security Contributions and Benefits Act 1992 s 45 by virtue of s 39C(1) (see PARA 87C) in a case where the deceased spouse or civil partner died under pensionable age, s 45 has effect subject to the following additional modifications (1) the omission of s 45(2)(d), and (2) the omission in s 45(3A)(b) of the words 'before the flat rate introduction year': s 46(4) (added by 2007 Act Sch 2 para 6).

TEXT AND NOTES 12-14--Social Security Contributions and Benefits Act 1992 s 45A repealed: Tax Credits Act 2002 Sch 6.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(i) Category A Retirement Pensions/570. Use of former spouse's contributions.

### **570. Use of former spouse's contributions.**

Where a person has been married<sup>1</sup> and, in respect of the tax year<sup>2</sup> in which the marriage terminated or any previous tax year, does not with his own contributions<sup>3</sup> satisfy the contribution conditions<sup>4</sup> for a Category A<sup>5</sup> retirement pension then, for the purpose of enabling him to satisfy those conditions (but only in respect of any claim for a Category A retirement pension), the contributions of his former spouse may to the prescribed extent<sup>6</sup> be treated as if they were his own contributions<sup>7</sup>.

This right to rely upon the contributions of a former spouse does not apply in relation to any person who attained pensionable age<sup>8</sup> before 6 April 1979 if the termination of his marriage also occurred before that date<sup>9</sup>. Where a person has been married more than once the entitlement to use a former spouse's contributions applies only to the spouse of the last marriage<sup>10</sup>.

1 The marriage in question must be valid both as to essential and formal validity: see Decisions R(P)9/59; R(P)1/59. Polygamous marriages are treated as monogamous during periods in which they are monogamous in fact: see the Social Security and Family Allowances (Polygamous Marriages) Regulations 1975, SI 1975/561 (as amended); and PARA 26 ante.

2 For the meaning of 'tax year' see PARA 9 note 6 ante.

3 As to contributions generally see PARA 31 et seq ante.

4 As to the contribution conditions see PARA 565 ante.

5 As to Category A retirement pensions generally see PARA 568 ante.

6 For the meaning of 'prescribed' see PARA 19 note 3 ante.

7 Social Security Contributions and Benefits Act 1992 s 48(1). At the date at which this volume states the law, no regulations had been made for these purposes and none had effect as if so made.

8 For the meaning of 'pensionable age' see PARA 562 ante.

9 Social Security Contributions and Benefits Act 1992 s 48(2).

10 Ibid s 48(3).

### **UPDATE**

#### **568-570 Category A Retirement Pensions**

As to the entitlement to a Category A retirement pension where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 7. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

### **570 Use of former spouse's contributions**

TEXT AND NOTE 7--In Social Security Contributions and Benefits Act 1992 s 48(1) for 'married' read 'in a relevant relationship', for 'marriage' read 'relationship', and after 'spouse' add 'or civil partner': Civil Partnership Act 2004 Sch 24 para 24(2). As to 'relevant relationships' see TEXT AND NOTE 10. See further **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

TEXT AND NOTE 9--In Social Security Contributions and Benefits Act 1992 s 48(2) for 'marriage' read 'relevant relationship': Civil Partnership Act 2004 Sch 24 para 24(3). As to 'relevant relationships' see TEXT AND NOTE 10.

TEXT AND NOTE 10--Where a person has been in a relevant relationship more than once, the Social Security Contributions and Benefits Act 1992 s 48 applies only to the last relevant relationship and the references to his relevant relationship and his former spouse or civil partner must be construed accordingly: s 48(3) (substituted by Civil Partnership Act 2004 Sch 24 para 24(4)). In the 1992 Act s 48, 'relevant relationship' means a marriage or civil partnership: s 48(4) (added by 2004 Act Sch 24 para 24(4)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(ii) Category B Retirement Pensions/571. In general.

## **(ii) Category B Retirement Pensions**

### **571. In general.**

A person's entitlement to a Category B<sup>1</sup> retirement pension begins on the day on which the conditions of entitlement<sup>2</sup> become satisfied and continues for life<sup>3</sup>. In any case where a person would otherwise<sup>4</sup> be entitled both to a Category A<sup>5</sup> and to a Category B retirement pension and would be entitled to an increase for invalidity<sup>6</sup> of the Category A retirement pension, that person is entitled to an increase of the Category B retirement pension on the same terms<sup>7</sup>.

1 As to Category B retirement pensions see PARA 572 et seq post.

2 As to the conditions of entitlement see PARA 572 post.

3 Social Security Contributions and Benefits Act 1992 s 48C(1) (s 48C added by the Pensions Act 1995 s 126(b), Sch 4 para 3(1)).

4 Ie apart from the Social Security Contributions and Benefits Act 1992 s 43: see PARA 567 ante.

5 As to Category A retirement pensions generally see PARA 568 ante.

6 Ie the Social Security Contributions and Benefits Act 1992 s 47(1) (as amended) would apply: see PARA 586 post.

7 See *ibid* s 48C(2) (as added: see note 3 *supra*). Section 47(1) (as amended) is taken as applying for the increase of the Category B retirement pension subject to reduction or extinguishment of the increase by the application of s 47(2) (see PARA 586 post) or the Pension Schemes Act 1993 s 46(5) (see PARA 916 post): Social Security Contributions and Benefits Act 1992 s 48C(2) (as so added).

## **UPDATE**

### **571-578 Category B Retirement Pensions**

As to the entitlement to a Category B retirement pension where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 8. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(ii) Category B Retirement Pensions/572. Entitlement to a Category B retirement pension for a married person.

## **572. Entitlement to a Category B retirement pension for a married person.**

A person who has attained pensionable age<sup>1</sup> and on attaining that age was a married<sup>2</sup> person or marries after attaining that age is entitled<sup>3</sup> to a Category B retirement pension by virtue of the contributions<sup>4</sup> of the other party to the marriage ('the spouse') if certain requirements are met<sup>5</sup>. The requirements are that the spouse has attained pensionable age and become entitled to a Category A<sup>6</sup> retirement pension and that the spouse satisfies the specified contribution conditions<sup>7</sup>. A person's Category B retirement pension is not payable for any period falling before the day on which the spouse's entitlement is to be regarded as beginning<sup>8</sup> for that purpose<sup>9</sup>.

These provisions do not confer a right to a Category B retirement pension on a man by reason of his marriage to a woman who was born before 6 April 1950<sup>10</sup>.

1 For the meaning of 'pensionable age' see PARA 562 ante.

2 For the meaning of 'marriage' see PARA 570 note 1 ante.

3 For the meaning of 'entitled' see PARA 21 note 9 ante.

4 As to contributions generally see PARA 31 et seq ante.

5 Social Security Contributions and Benefits Act 1992 s 48A(1) (s 48A added by the Pensions Act 1995 s 126(b), Sch 34 para 3(1)).

6 As to Category A retirement pensions generally see PARA 568 ante.

7 Social Security Contributions and Benefits Act 1992 s 48A(2) (as added: see note 5 supra). The contribution conditions referred to are those specified in s 21(3), (4), Sch 3 para 5 (as amended): see PARA 565 ante.

8 Ie by virtue of the Social Security Administration Act 1992 s 5(1)(k): see PARA 330 ante.

9 Social Security Contributions and Benefits Act 1992 s 48A(5) (as added: see note 5 supra).

10 Pensions Act 1995 s 126(b), Sch 4 para 3(2).

## **UPDATE**

### **571-578 Category B Retirement Pensions**

As to the entitlement to a Category B retirement pension where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 8. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

## **572 Entitlement to a Category B retirement pension for a married person**

TEXT AND NOTES 1-7--A person who (1) has attained pensionable age, and (2) on attaining that age was a civil partner or forms a civil partnership after attaining that age, will be entitled to a Category B retirement pension by virtue of the contributions of the other party to the civil partnership ('the contributing civil partner') if the

following requirement is met: Social Security Contributions and Benefits Act 1992 s 48A(2A) (added by Civil Partnership Act 2004 Sch 24 para 25(2)). The requirement is that the contributing civil partner (a) has attained pensionable age and become entitled to a Category A retirement pension, and (b) satisfies the condition specified in the 1992 Act Sch 3 para 5A (see **PARA 565**): s 48A(2B) (as so added; amended by Pensions Act 2007 Sch 1 para 2(4)). See further **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**. The words 'and become entitled to a Category A retirement pension' in s 48A(2B) omitted: Pensions Act 2007 s 2(2), Sch 7 Pt 1 (repeal has effect as from 6 April 2010: see s 2(5)). For further effect see s 2(6).

1992 Act s 48A (as amended by 2004 Act Sch 24 para 25) does not confer a right to a Category B retirement pension on a person by reason of his or her forming a civil partnership with a person who was born before 6 April 1950: 2004 Act Sch 24 para 25(6).

TEXT AND NOTE 7--Spouse must now satisfy the relevant conditions or condition: 1992 Act s 48A(2) (amended by Pensions Act 2007 Sch 1 para 2(2)). 'The relevant conditions or condition' means (1) in a case where the spouse is a married man who attains pensionable age before 6 April 2010, the conditions specified in the 1992 Act Sch 3 para 5; (2) in a case where the spouse attains pensionable age on or after that date, the condition specified in Sch 3 para 5A (see **PARA 565**): s 48A(2ZA) (added by 2007 Act Sch 1 para 2(3)).

The words 'and become entitled to a Category A retirement pension' in 1992 Act s 48A(2) omitted: Pensions Act 2007 s 2(2), Sch 7 Pt 1 (repeal has effect as from 6 April 2010: see s 2(5)). For further effect see s 2(6).

TEXT AND NOTE 9--Now refers to spouse's or contributing civil partner's entitlement: 1992 Act s 48A(5) (amended by 2004 Act Sch 24 para 25(5)).

1992 Act s 48A(5) and 2004 Act Sch 24 para 25(5) repealed: 2007 Act s 2(3), Sch 7 Pt 1 (repeal has effect as from 6 April 2010: see ss 2(5), 27(4)(a)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(ii) Category B Retirement Pensions/573. The rate of the Category B retirement pension for married persons.

### **573. The rate of the Category B retirement pension for married persons.**

During any period when the spouse<sup>1</sup> is alive a Category B retirement pension for a married person is payable at the specified<sup>2</sup> weekly rate<sup>3</sup>. During any period after the spouse is dead a Category B retirement pension for a married person is payable at a weekly rate corresponding to the weekly rate of the basic pension<sup>4</sup> plus half of the weekly rate of the additional pension<sup>5</sup> as they apply in relation to a Category A retirement pension<sup>6</sup> subject to the modification that in the case of a pensioner whose spouse died before, or dies on or before, 5 April 2000, the full weekly rate of the additional pension is payable<sup>7</sup>.

These provisions do not confer a right to a Category B retirement pension on a man by reason of his marriage to a woman who was born before 6 April 1950<sup>8</sup>.

1 For the meaning of 'the spouse' see PARA 572 ante.

2 Ie the rate specified in the Social Security Contributions and Benefits Act 1992 s 48A(3), Sch 4 Pt I para 5 (ss 48A, 48C added, and Sch 4 Pt I para 5 amended, by the Pensions Act 1995 s 126(b), (c), Sch 4 paras 3(1), 21(11)). The provisions set out in the Social Security Contributions and Benefits Act 1992 Sch 4 are frequently amended by annual benefits up-rating orders: see generally para 17 ante.

3 Ibid s 48A(3) (as added: see note 2 supra).

4 As to the basic pension see PARA 569 text and note 1 ante.

5 As to the additional pension see PARA 569 text and note 2 ante.

6 Ie determined in accordance with the Social Security Contributions and Benefits Act 1992 ss 44-45A (as amended and added) (see PARA 569 ante), but subject to s 46(2) (as amended) (see PARA 569 note 9 ante) and with the modification that references to the pensioner are to be taken as references to the spouse: ss 48A(4), 48C(4) (as added: see note 2 supra). As to Category A retirement pensions generally see PARA 568 ante.

7 Ibid ss 48A(4), 48C(4) (as added: see note 2 supra).

8 Pensions Act 1995 Sch 4 para 3(2).

## **UPDATE**

### **571-578 Category B Retirement Pensions**

As to the entitlement to a Category B retirement pension where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 8. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

### **573 The rate of the Category B retirement pension for married persons**

TEXT AND NOTES 3, 7--Social Security Contributions and Benefits Act 1992 s 48A(3), (4) now refers to spouse or contributing civil partner: Civil Partnership Act 2004 Sch 24 para 25(3). 1992 Act s 48A (as amended by 2004 Act Sch 24 para 25) does not confer a right to a Category B retirement pension on a person by reason of his or her forming

a civil partnership with a person who was born before 6 April 1950: 2004 Act Sch 24 para 25(6). See further **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

TEXT AND NOTES 6, 7--Social Security Contributions and Benefits Act 1992 s 48C(4) further amended: SI 2005/2053.

TEXT AND NOTE 6--Reference to ss 44-45A is now to ss 44-45B, Schs 4A and 4B: Social Security Contributions and Benefits Act 1992 ss 48A(4), 48C(4) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras, 19, 21, Child Support, Pensions and Social Security Act 2000 s 35(9), (12), Pensions Act 2007 Sch 2 paras 7, 10). However, if the pensioner is not the widow, widower or surviving civil partner of the person by virtue of whose contributions the pension is payable, omit 'plus half ... Category A retirement pension', and omit text of NOTE 6: Social Security Contributions and Benefits Act 1992 s 48A(4A) (added by the Welfare Reform and Pensions Act 1999 Sch 8 para 33; amended by Civil Partnership Act 2004 Sch 24 para 25(4)).

TEXT AND NOTE 7--Reference to Social Security Contributions and Benefits Act 1992 s 48C(4) should be to s 48C(3). For '5 April 2000' read '5 October 2002': s 48C(3) (amended by the Child Support, Pensions and Social Security Act 2000 s 39(1), (2)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(ii) Category B Retirement Pensions/574. Entitlement to a Category B retirement pension for widows and widowers.

#### **574. Entitlement to a Category B retirement pension for widows and widowers.**

A person ('the pensioner') whose spouse died while they were married<sup>1</sup> and after the pensioner attained pensionable age<sup>2</sup> is entitled to a Category B retirement pension by virtue of the contributions<sup>3</sup> of the spouse if the spouse satisfied the specified contribution conditions<sup>4</sup>.

A pensioner who has attained pensionable age whose spouse died before the pensioner attained that age is entitled to a Category B retirement pension by virtue of the contributions of the spouse if, where the pensioner is a woman<sup>5</sup>, she is entitled<sup>6</sup> to a widow's pension<sup>7</sup> and became entitled to that pension in consequence of the spouse's death<sup>8</sup> and, where the pensioner is a man, he would have been entitled to a widower's pension<sup>9</sup> in consequence of the spouse's death on the assumption that a man is entitled to a widower's pension on the same terms and conditions, and at the same rate, as a woman is entitled to a widow's pension<sup>10</sup>.

These provisions do not confer a right to a Category B retirement pension on a man who attains pensionable age before 6 April 2010<sup>11</sup>.

1 For the meaning of 'married' see PARA 570 note 1 ante.

2 For the meaning of 'pensionable age' see PARA 562 ante.

3 As to contributions generally see PARA 31 et seq ante.

4 Social Security Contributions and Benefits Act 1992 s 48B(1) (ss 48B, 48C added by the Pensions Act 1995 s 126(b), Sch 4 para 3(1)). The contribution conditions referred to are those specified in the Social Security Contributions and Benefits Act 1992 s 21(3), (4), Sch 3 para 5 (as amended): see PARA 565 ante. For the meaning of 'the spouse' see PARA 572 ante.

5 As to the determination of gender see PARA 562 note 3 ante.

6 Is or is treated by regulations as entitled: Social Security Contributions and Benefits Act 1992 s 48B(5)(a) (as added: see note 4 supra). For the meaning of 'entitled' see PARA 21 note 9 ante.

7 Is by virtue of *ibid* s 38: see PARA 86 ante.

8 *Ibid* s 48B(4)(a), (5) (as added: see note 4 supra).

9 See note 7 supra.

10 Social Security Contributions and Benefits Act 1992 ss 48B(4)(b), 48B(7) (as added: see note 4 supra).

11 Pensions Act 1995 Sch 4 para 3(3).

#### **UPDATE**

#### **571-578 Category B Retirement Pensions**

As to the entitlement to a Category B retirement pension where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 8. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

**574-575 Entitlement to Category B retirement pension for widows and widowers, The rate of a Category B retirement pension for widows and widowers**

Nothing in the Social Security Contributions and Benefits Act 1992 s 48B(4)-(7) applies in a case where the spouse dies on or after the appointed day (as defined by s 36A(3): see PARA 85-89): s 48B(8) (added by the Welfare Reform and Pensions Act 1999 Sch 8 paras 2, 6).

**574 Entitlement to a Category B retirement pension for widows and widowers**

TEXT AND NOTE 4--Spouse must now satisfy the relevant conditions or condition: 1992 Act s 48B(1) (amended by Pensions Act 2007 Sch 1 para 3(2)). In the 1992 Act s 48B(1) 'the relevant conditions or condition' means (1) in a case where the spouse (a) died before 6 April 2010, or (b) died on or after that date having attained pensionable age before that date, the conditions specified in Sch 3 para 5; (2) in a case where the spouse died on or after that date without having attained pensionable age before that date, the condition specified in Sch 3 para 5A (see PARA 565): s 48B(1ZA) (added by 2007 Act Sch 1 para 3(3)).

A person ('the pensioner') who attains pensionable age on or after 6 April 2010 and whose civil partner died (1) while they were civil partners of each other, and (2) after the pensioner attained pensionable age, will be entitled to a Category B retirement pension by virtue of the contributions of the civil partner if the civil partner satisfied the condition specified in the Social Security Contributions and Benefits Act 1992 Sch 3 para 5A (see PARA 565): s 48B(1A) (added by Civil Partnership Act 2004 Sch 24 para 26(2); amended by Pensions Act 2007 Sch 3 para 3(4)). See further **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(ii) Category B Retirement Pensions/575. The rate of a Category B retirement pension for widows and widowers.

### **575. The rate of a Category B retirement pension for widows and widowers.**

A Category B retirement pension payable for widows and widowers<sup>1</sup> is payable at a weekly rate corresponding to the weekly rate of the basic pension<sup>2</sup> plus half of the weekly rate of the additional pension<sup>3</sup> as they apply in relation to a Category A retirement pension<sup>4</sup> subject to the modification that in the case of a pensioner whose spouse died before, or dies on or before, 5 April 2000, the full weekly rate of the additional pension is payable<sup>5</sup>.

Where the spouse died before pensionable age, a Category B retirement pension for widows and widowers<sup>6</sup> is payable where the pensioner is a woman<sup>7</sup> at the same weekly rate as her widow's pension<sup>8</sup>, and where the pensioner is a man, at the same weekly rate as that of the pension to which he would have been entitled if he had been entitled<sup>9</sup> to a widower's pension on the same terms and conditions and at the same rate as a woman entitled to a widow's pension<sup>10</sup>.

These provisions do not confer a right to a Category B retirement pension on a man who attains pensionable age before 6 April 2010<sup>11</sup>.

1    Ie a pension payable by virtue of the Social Security Contributions and Benefits Act 1992 s 48B(1) (as added): see PARA 574 ante.

2    As to the basic pension see PARA 569 text and note 1 ante.

3    As to the additional pension see PARA 569 text and note 2 ante.

4    Ie determined in accordance with the Social Security Contributions and Benefits Act 1992 ss 44-45A (as amended and added) (see PARA 569 ante), but subject to s 46(2) (as amended) (see PARA 569 note 9 ante) and with the modifications that (1) where the spouse died under pensionable age, references in the provisions of ss 44-45A (as amended and added) as so applied to the tax year in which the pensioner attained pensionable age must be taken as references to the tax year in which the spouse died; and (2) references to the pensioner are to be taken as references to the spouse: ss 48B(2), (3), 48C(4) (ss 48B, 48C added by the Pensions Act 1995 s 126(b), Sch 4 para 3(1)). As to Category A retirement pensions generally see PARA 568 ante. For the meaning of 'tax year' see PARA 9 note 6 ante; for the meaning of 'pensionable age' see PARA 562 ante; and for the meaning of 'the spouse' see PARA 572 ante.

5    Social Security Contributions and Benefits Act 1992 ss 48B(2), 48C(4) (as added: see note 4 supra).

6    Ie a pension payable by virtue of *ibid* s 48B(4) (as added: see note 4 supra): see PARA 574 ante.

7    As to the determination of gender see PARA 562 note 3 ante.

8    Social Security Contributions and Benefits Act 1992 s 48B(6)(a) (as added: see note 4 supra). As to widow's pension generally see PARA 86 ante.

9    Ie by virtue of *ibid* s 38: see PARA 86 ante.

10   Ibid s 48B(6)(b), (7) (as added: see note 4 supra).

11   Pensions Act 1995 Sch 4 para 3(3).

## **UPDATE**

### **571-578 Category B Retirement Pensions**

As to the entitlement to a Category B retirement pension where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 8. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

**574-575 Entitlement to Category B retirement pension for widows and widowers, The rate of a Category B retirement pension for widows and widowers**

Nothing in the Social Security Contributions and Benefits Act 1992 s 48B(4)-(7) applies in a case where the spouse dies on or after the appointed day (as defined by s 36A(3): see PARA 85-89): s 48B(8) (added by the Welfare Reform and Pensions Act 1999 Sch 8 paras 2, 6).

**575 The rate of a Category B retirement pension for widows and widowers**

TEXT AND NOTES 4, 5--Social Security Contributions and Benefits Act 1992 s 48B(2), (3) further amended: Civil Partnership Act 2004 Sch 24 para 26(3), (4). 1992 Act s 48C(4) further amended: SI 2005/2053.

NOTE 4--For 'ss 44-45A' (both places) read 'ss 44-45B, Schs 4A and 4B': Social Security Contributions and Benefits Act 1992 ss 48B(2), 48C(4) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 14, 20, 21, Child Support, Pensions and Social Security Act 2000 s 35(1), (10), (12), Pensions Act 2007 Sch 2 paras 8, 10).

For 'ss 44-45A' read 'ss 44-45B, Sch 4A': Social Security Contributions and Benefits Act 1992 ss 48B(3) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 14, 20, 21, Child Support, Pensions and Social Security Act 2000 s 35(1), (10), (12)).

TEXT AND NOTE 5--Reference to Social Security Contributions and Benefits Act 1992 s 48C(4) should be to s 48C(3). For '5 April 2000' read '5 October 2002': s 48C(3) (amended by the Child Support, Pensions and Social Security Act 2000 s 39(1), (2)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(ii) Category B Retirement Pensions/575A. Category B retirement pension: entitlement by reference to widowed parent's allowance and bereavement allowance.

**575A. Category B retirement pension: entitlement by reference to widowed parent's allowance and bereavement allowance.**

Where a person who has attained pensionable age (1) was, immediately before attaining that age, entitled to a widowed parent's allowance in consequence of the death of his or her spouse or civil partner; and (2) has not following that death married or formed a civil partnership, that person is entitled to a Category B retirement pension by virtue of the contributions of the spouse or civil partner, which is payable at the same weekly rate as the widowed parent's allowance<sup>1</sup>.

Where a person who has attained pensionable age (a) was in consequence of the death of his or her spouse or civil partner either (i) entitled to a bereavement allowance at any time prior to attaining that age; or (ii) entitled to a widowed parent's allowance at any time when over the age of 45, but not immediately before attaining pensionable age; and (b) has not following that death married or formed a civil partnership, the person is entitled to a Category B retirement pension by virtue of the contributions of the spouse or civil partner<sup>2</sup>.

<sup>1</sup> Social Security Contributions and Benefits Act 1992 s 48BB(1), (2) (s 48BB added by the Welfare Reform and Pensions Act 1999 s 56; and amended by Civil Partnership Act 2004 Sch 24 para 27). As to commencement see PARA 85-89.

<sup>2</sup> Social Security Contributions and Benefits Act 1992 s 48BB(3), (4) (as added and amended: see NOTE 1). A pension so payable is payable at a weekly rate corresponding to the weekly rate of the additional pension determined in accordance with ss 44-45, Schs 4A and 4B (see PARAS 568, 569) as those provisions apply in relation to a Category A retirement pension, but subject to s 46(3) and to s 48BB(6)-(10) and the modification in s 48C(4): s 48BB(5) (as added, amended by the Child Support, Pensions and Social Security Act 2000 ss 32(2), 35(1), (11); the Tax Credits Act 2002 Sch 3 para 31; and the Pensions Act 2007 Sch 2 para 9). Where the spouse or civil partner died under pensionable age, references in the Social Security Contributions and Benefits Act 1992 ss 44-45, Sch 4A, as so applied, to the tax year in which the person attained pensionable age will be taken as references to the tax year in which the spouse or civil partner died: s 48BB(6) (as added, amended by the Child Support, Pensions and Social Security Act 2000 s 35(1), (11); the Tax Credits Act 2002 Sch 3 para 31; and the Civil Partnership Act 2004 Sch 24 para 27). Where the spouse or civil partner dies after 5 October 2002, the pension payable by virtue of the Social Security Contributions and Benefits Act 1992 s 48BB(4) will, before making any reduction required by s 48BB(8), be one half of the amount which it would be apart from this provision: s 48BB(7) (as added; and amended by Child Support, Pensions and Social Security Act 2000 s 39(1), (2); and the Civil Partnership Act 2004 Sch 24 para 27). Where the person was under the age of 55 at the relevant time, the weekly rate of the pension will be reduced by seven per cent of what it would be apart from this provision multiplied (1) by the number of years by which the person's age at that time was less than 55, any fraction of a year being counted as a year; or (2) by ten, if that number exceeds ten: Social Security Contributions and Benefits Act 1992 s 48BB(8) (as added). For these purposes, 'the relevant time' means (a) where the person became entitled to a widowed parent's allowance in consequence of the death of the spouse or civil partner, the time when the person's entitlement to that allowance ended; and (b) otherwise, the time of the spouse's or civil partner's death: s 48BB(9) (as added; and amended by Civil Partnership Act 2004 Sch 24 para 27). The amount determined in accordance with the Social Security Contributions and Benefits Act 1992 s 48BB(5)-(9) as the weekly rate of the pension payable to the person by virtue of s 48BB(4) will be increased by such percentage as equals the overall percentage by which, had the pension been in payment as from the date of the spouse's or civil partner's death until the date when the person attained pensionable age, that weekly rate would have been increased during that period by virtue of any orders under the Social Security Administration Act 1992 s 150 (annual up-rating of benefits: see PARA 17): Social Security Contributions and Benefits Act 1992 s 48BB(10) (as added; and amended by Civil Partnership Act 2004 Sch 24 para 27).

**UPDATE**

**571-578 Category B Retirement Pensions**

As to the entitlement to a Category B retirement pension where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 8. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(ii) Category B Retirement Pensions/576. Category B retirement pension for widowers attaining pensionable age before 6 April 2010.

### **576. Category B retirement pension for widowers attaining pensionable age before 6 April 2010.**

A man is entitled<sup>1</sup> to a Category B retirement pension if he has had a wife and she has died on or after 6 April 1979, and he was married<sup>2</sup> to her when she died and (1) they were both over pensionable age<sup>3</sup> when she died<sup>4</sup>; and (2) before her death she satisfied the relevant contribution conditions<sup>5</sup> for a Category A retirement pension<sup>6</sup>. In these circumstances the weekly rate of the man's Category B retirement pension is determined on the same basis as a Category A retirement pension<sup>7</sup> taking references in the relevant statutory provisions to the pensioner as being references to the wife<sup>8</sup>. In the case of a widower whose wife dies after 5 April 2000, the additional pension falling to be calculated<sup>9</sup> is to be one-half of the amount which it would otherwise be<sup>10</sup>.

A man becomes entitled to a Category B retirement pension on the day on which the conditions of entitlement become satisfied in his case and his entitlement continues throughout his life<sup>11</sup>. These provisions do not, however, confer a right to a Category B retirement pension on a man who attains pensionable age on or after 6 April 2010<sup>12</sup>.

1 For the meaning of 'entitled' see PARA 21 note 9 ante.

2 For the meaning of 'marriage' see PARA 570 note 1 ante.

3 For the meaning of 'pensionable age' see PARA 562 ante.

4 Social Security Contributions and Benefits Act 1992 s 51(1)(a), (b).

5 I.e. the contribution conditions in *ibid* s 21(3), (4), Sch 3 para 5 (as amended): see PARA 565 ante.

6 *Ibid* s 51(1)(c). As to Category A retirement pensions generally see PARA 568 ante.

7 I.e. determined in accordance with *ibid* ss 44-45A (as added and amended): see PARA 569 ante.

8 *Ibid* s 51(2) (s 51(2), (3) amended by the Pensions Act 1995 s 127(2)).

9 I.e. under the Social Security Contributions and Benefits Act 1992 ss 44-45A (as added and amended) by virtue of s 51(2) (as amended): see the text and notes 7-8 *supra*.

10 *Ibid* s 51(3) (as amended: see note 8 *supra*).

11 *Ibid* s 51(4).

12 Pensions Act 1995 s 126(b), Sch 4 para 3(3).

## **UPDATE**

### **571-578 Category B Retirement Pensions**

As to the entitlement to a Category B retirement pension where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 8. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

**576 Category B retirement pension for widowers attaining pensionable age before 6 April 2010**

TEXT AND NOTES 4, 6--A civil partner is entitled to a Category B retirement pension if (1) his or her civil partner has died and they were civil partners of each other at the time of that death, (2) they were both over pensionable age at the time of that death, and (3) before that death the deceased civil partner satisfied the contribution conditions for a Category A retirement pension in the Social Security Contributions and Benefits Act 1992 Sch 3 Pt 1 para 5: s 51(1A) (added by Civil Partnership Act 2004 Sch 24 para 28(2)). See further **MATRIMONIAL AND CIVIL PARTNERSHIP LAW**.

1992 Act s 51 (amended by 2004 Act Sch 24 para 28) does not confer a right to a Category B retirement pension on a person who attains pensionable age on or after 6 April 2010: 2004 Act Sch 24 para 28(6).

NOTES 7-9--Now refers to the Social Security Contributions and Benefits Act 1992 ss 44-45, Sch 4A: s 51(2), (3) (amended by Child Support, Pensions and Social Security Act 2000 s 35(13); and Tax Credits Act 2002 Sch 3 para 32). Pensions Act 1995 s 127 repealed: Tax Credits Act 2002 Sch 6.

TEXT AND NOTE 8--For 'man's' read 'person's' and reference to wife now to wife or deceased civil partner: Social Security Contributions and Benefits Act 1992 s 51(2) (amended by Civil Partnership Act 2004 Sch 24 para 28(3)).

TEXT AND NOTE 9--Reference to 5 April 2000 now to 5 October 2002: Social Security Contributions and Benefits Act 1992 s 51(3) (amended by Child Support, Pensions and Social Security Act 2000 s 39(1), (2)).

TEXT AND NOTES 10, 11--Social Security Contributions and Benefits Act 1992 s 51(3) further amended, s 51(4) amended: Civil Partnership Act 2004 Sch 24 para 28(4), (5).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(ii) Category B Retirement Pensions/577. Special provision for married people.

### **577. Special provision for married people.**

If by reason of a deficiency of contributions<sup>1</sup> the basic pension<sup>2</sup> in the Category A<sup>3</sup> retirement pension falls short of the weekly rate as specified in the legislation<sup>4</sup> that basic pension must be increased by the lesser of the amount of the shortfall or the amount of the weekly rate of the Category B<sup>5</sup> retirement pension in circumstances where a married person<sup>6</sup> would otherwise<sup>7</sup> be entitled to both a Category A retirement pension and a Category B retirement pension by virtue of the contributions of the other party to the marriage<sup>8</sup>. The increase does not, however, apply in any case where both parties to the marriage attained pensionable age<sup>9</sup> before 6 April 1979<sup>10</sup>.

1 As to contributions generally see PARA 31 et seq ante.

2 As to the basic pension see PARA 569 text and note 1 ante.

3 As to Category A retirement pensions generally see PARA 568 ante.

4 Ie the rate as specified in the Social Security Contributions and Benefits Act 1992 Sch 4 para 5 (as amended): see PARA 565 ante.

5 As to Category B retirement pensions generally see PARA 571 et seq ante

6 For the meaning of 'married' see PARA 570 note 1 ante.

7 Ie apart from the Social Security Contributions and Benefits Act 1992 s 43(1): see PARA 567 ante.

8 Ibid s 51A(1), (2) (s 51A added by the Pensions Act 1995 s 126(c), Sch 4 para 21(6)).

9 For the meaning of 'pensionable age' see PARA 562 ante.

10 Social Security Contributions and Benefits Act 1992 s 51A(3) (as added: see note 8 supra).

### **UPDATE**

#### **571-578 Category B Retirement Pensions**

As to the entitlement to a Category B retirement pension where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 8. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

### **577 Special provision for married people**

NOTES--See *Secretary of State for Work and Pensions v Nelligan* [2003] EWCA Civ 555, [2003] 4 All ER 171 (spouse who claimed category B pension eight years after eligible, not entitled to claim backdated payments for whole of eight-year period).

TEXT AND NOTE 8--Social Security Contributions and Benefits Act 1992 s 51A(1) amended: Civil Partnership Act 2004 Sch 24 para 29.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(ii) Category B Retirement Pensions/578. Special provision for surviving spouses.

### **578. Special provision for surviving spouses.**

If, in the case of a person who would otherwise<sup>1</sup> be entitled both to a Category A<sup>2</sup> retirement pension and to a Category B<sup>3</sup> retirement pension by virtue of the contributions<sup>4</sup> of a spouse who has died<sup>5</sup>, the basic pension<sup>6</sup> in the Category A retirement pension falls short of the full amount<sup>7</sup> by reason of a deficiency of contributions, that basic pension is to be increased by the lesser of (1) the amount of the shortfall; or (2) the amount of the basic pension in the rate of the Category B retirement pension<sup>8</sup>. If the additional pension in the Category A retirement pension falls short of the prescribed maximum<sup>9</sup>, that additional pension is to be increased by the lesser of (a) the amount of the shortfall; or (b) the amount of the additional pension in the Category B retirement pension<sup>10</sup>.

These provisions do not apply in any case where the death of the wife or husband, as the case may be, occurred before 6 April 1979 and the surviving spouse had attained pensionable age<sup>11</sup> before that date<sup>12</sup>.

1    Ie apart from the Social Security Contributions and Benefits Act 1992 s 43(1): see PARA 567 ante.

2    As to Category A retirement pensions generally see PARA 568 ante.

3    As to Category B retirement pensions generally see PARA 572 ante.

4    As to contributions generally see PARA 31 et seq ante.

5    See the Social Security Contributions and Benefits Act 1992 s 52(1) (amended by the Pensions Act 1995 s 126(c), Sch 4 para 21(7)).

6    As to the basic pension see PARA 569 text and note 1 ante.

7    For these purposes, 'full amount' means the sum specified in the Social Security Contributions and Benefits Act 1992 s 44(4) (as amended) as the weekly rate of the basic pension in a Category A retirement pension: see PARA 569 ante.

8    Ibid s 52(2).

9    For the meaning of 'prescribed' see PARA 19 note 3 ante. For the prescribed maximum see the Social Security (Maximum Additional Pension) Regulations 1978, SI 1978/949, reg 2 (as amended).

10   Social Security Contributions and Benefits Act 1992 s 52(3). In any case where a person is entitled to a Category A retirement pension with an increase, under s 52(3), in the additional pension on account of the contributions of a spouse who has died, then where, in the case of any up-rating order under the Social Security Administration Act 1992 s 150 (as amended) (see PARA 17 ante), (1) the spouse's final relevant year is the tax year preceding the tax year in which the up-rating order comes into force; but (2) the person's final relevant year was an earlier tax year, then the up-rating order does not have effect in relation to that part of the additional pension which is attributable to the spouse's contributions: s 156(1), (2) (substituted by the Pensions Act 1995 s 130(1)). Where, in the case of any such up-rating order, (a) the person's final relevant year is the tax year preceding the tax year in which the up-rating order comes into force; but (b) the spouse's final relevant year was an earlier tax year, then the up-rating order does not have effect in relation to that part of the additional pension which is attributable to the person's contributions: Social Security Administration Act 1992 s 156(3) (as so substituted).

11   For the meaning of 'pensionable age' see PARA 562 ante.

12   Social Security Contributions and Benefits Act 1992 s 52(4).

### **UPDATE**

### **571-578 Category B Retirement Pensions**

As to the entitlement to a Category B retirement pension where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 8. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

### **578 Special provision for surviving spouses**

TEXT AND NOTE 5--Social Security Contributions and Benefits Act 1992 s 52(1) further amended: Civil Partnership Act 2004 Sch 24 para 30.

NOTE 9--SI 1978/949 reg 2 replaced by Social Security (Maximum Additional Pension) Regulations 2010, SI 2010/426, reg 3.

NOTE 10--Social Security Administration Act 1992 s 156(1)-(3) amended: 2004 Act Sch 24 para 66.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(iii) Category C and Category D Retirement Pensions/579. Entitlement to a Category C retirement pension.

### **(iii) Category C and Category D Retirement Pensions**

#### **579. Entitlement to a Category C retirement pension.**

A person who was over pensionable age<sup>1</sup> on 5 July 1948 and who satisfies the prescribed conditions<sup>2</sup> is entitled to a Category C retirement pension at the appropriate weekly rate<sup>3</sup>. If a woman<sup>4</sup> whose husband is entitled to a Category C retirement pension is over pensionable age and satisfies such other conditions as may be prescribed<sup>5</sup>, she is entitled to a Category C retirement pension at the appropriate weekly rate<sup>6</sup>.

Regulations may provide for the payment to a widow whose husband was over pensionable age on 5 July 1948, or to a woman whose marriage to a husband who was over pensionable age on that date was terminated otherwise than by his death, of a Category C retirement pension or of benefit corresponding to a widow's pension<sup>7</sup> or a widowed mother's allowance<sup>8</sup>; and any such retirement pension or any such benefit must be at the prescribed rate<sup>9</sup>.

1 For the meaning of 'pensionable age' see PARA 562 ante.

2 For the meaning of 'prescribed' see PARA 19 note 3 ante. For the prescribed conditions see the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, SI 1979/642, reg 9 (as amended).

3 Social Security Contributions and Benefits Act 1992 s 78(1). For the appropriate weekly rate see PARA 581 post.

4 As to the determination of gender see PARA 562 note 3 ante.

5 For the prescribed conditions see the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, SI 1979/642, reg 9 (as amended).

6 Social Security Contributions and Benefits Act 1992 s 78(2).

7 As to widow's pension see PARA 86 ante.

8 As to widowed mother's allowance see PARA 85 ante.

9 Social Security Contributions and Benefits Act 1992 s 78(9). At the date at which this volume states the law, no such regulations had been made but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, SI 1979/642, regs 11-14 (as amended) have effect as if so made.

### **UPDATE**

#### **579 Entitlement to a Category C retirement pension**

TEXT AND NOTES--As to the entitlement to a Category C retirement pension where a full gender recognition certificate is issued to a person see Gender Recognition Act 2004 Sch 5 para 11. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(iii) Category C and Category D Retirement Pensions/580. Entitlement to a Category D retirement pension.

### **580. Entitlement to a Category D retirement pension.**

A person who is over the age of 80 and satisfies such conditions as may be prescribed<sup>1</sup> is entitled to a Category D retirement pension at the appropriate weekly rate if he is not entitled to a Category A<sup>2</sup>, Category B<sup>3</sup> or Category C<sup>4</sup> retirement pension<sup>5</sup> or if he is so entitled but it is payable at a weekly rate which is less than the appropriate weekly rate<sup>6</sup>. The appropriate weekly rate is calculated for these purposes without regard to: (1) any additional pension<sup>7</sup>; (2) any increase so far as attributable to any additional pension or any increase in a guaranteed minimum pension<sup>8</sup>; (3) any graduated retirement benefit<sup>9</sup>; and (4) any increase<sup>10</sup> for dependants<sup>11</sup>.

1 For the meaning of 'prescribed' see PARA 19 note 3 ante. For the prescribed conditions see the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, SI 1979/642, reg 10 (as amended).

2 As to Category A retirement pensions generally see PARA 568 ante.

3 As to Category B retirement pensions generally see PARA 572 ante.

4 As to Category C retirement pensions generally see PARA 579 ante.

5 Social Security Contributions and Benefits Act 1992 s 78(3)(a).

6 Ibid s 78(3)(b). For the appropriate weekly rate see PARA 581 post.

7 As to additional pension generally see PARA 569 ante.

8 As to guaranteed minimum pension generally see PARA 878 et seq post.

9 As to graduated retirement benefit see PARA 583 post.

10 Ie under the Social Security Contributions and Benefits Act 1992 s 80 (as amended) (see PARA 590 post); s 83 (see PARA 591 post); or s 85 (as amended) (see PARA 594 post): s 78(4). With effect from 6 April 2010, s 78(4) is amended by the Pensions Act 1995 s 126(c), Sch 4 paras 18(c), 20, to substitute for the reference to the Social Security Contributions and Benefits Act 1992 s 83 a reference to s 83A (as added).

11 Ibid s 78(4).

### **UPDATE**

### **580 Entitlement to a Category D retirement pension**

TEXT AND NOTES 10, 11--Head (4) (together with the 'and' preceding it) omitted: Pensions Act 2007 Sch 1 para 13, Sch 7 Pt 2.

NOTE 10--Subject to savings (see SI 2003/938), reference to Social Security Contributions and Benefits Act 1992 s 80 omitted: s 78(4) (amended by Tax Credits Act 2002 Sch 6).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(iii) Category C and Category D Retirement Pensions/581. Amount of a Category C or Category D retirement pension.

### **581. Amount of a Category C or Category D retirement pension.**

The appropriate weekly rate of a Category C retirement pension<sup>1</sup> is set by statute<sup>2</sup> and is to be at the lower rate where the pensioner is a married<sup>3</sup> woman<sup>4</sup> and has not at any time since she became entitled to her pension ceased to be a married woman<sup>5</sup>, and at the higher rate in any other case<sup>6</sup>.

The appropriate weekly rate of a Category D retirement pension<sup>7</sup> is specified<sup>8</sup> in the legislation<sup>9</sup>.

The rates of both pensions are up-rated annually<sup>10</sup>.

1 As to Category C retirement pensions generally see PARA 579 ante.

2 See the Social Security Contributions and Benefits Act 1992 s 21(3), (4), Sch 4 Pt III para 6 (as amended).

3 For the meaning of 'marriage' see PARA 570 note 1 ante.

4 As to the determination of gender see PARA 562 note 3 ante.

5 Social Security Contributions and Benefits Act 1992 s 78(5)(a).

6 Ibid s 78(5)(b).

7 As to Category D retirement pensions generally see PARA 580 ante.

8 Ie in the Social Security Contributions and Benefits Act 1992 Sch 4 Pt III para 7 (as amended).

9 Ibid s 78(6).

10 See the Social Security Administration Act 1992 s 150 (as amended); and PARA 17 ante.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(iii) Category C and Category D Retirement Pensions/582. Further provisions relating to Category C and Category D retirement pensions.

**582. Further provisions relating to Category C and Category D retirement pensions.**

Entitlement<sup>1</sup> to a Category C<sup>2</sup> or Category D<sup>3</sup> retirement pension continues throughout the pensioner's life<sup>4</sup>.

A Category C or Category D retirement pension is not payable for any period falling before the day on which the pensioner's entitlement is to be regarded<sup>5</sup> as commencing for that purpose<sup>6</sup>.

1 As to the meaning of 'entitlement' see PARA 21 note 9 ante.

2 As to Category C retirement pensions generally see PARA 579 post.

3 As to Category D retirement pensions generally see PARA 580 post.

4 Social Security Contributions and Benefits Act 1992 s 78(7).

5 Ie by virtue of the Social Security Administration Act 1992 s 5(1)(k): see PARA 330 ante.

6 Social Security Contributions and Benefits Act 1992 s 78(8).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(2) ENTITLEMENT/(iii) Category C and Category D Retirement Pensions/582A. Shared additional pension.

### **582A. Shared additional pension.**

A person is entitled to a shared additional pension if he is (1) over pensionable age; and (2) entitled to a state scheme pension credit<sup>1</sup>. A person's entitlement to a shared additional pension continues throughout his life<sup>2</sup>. The weekly rate of a shared additional pension is the appropriate weekly amount<sup>3</sup>, unless the pensioner's entitlement to the state scheme pension credit arose before the final relevant year<sup>4</sup>, in which case it is that amount multiplied by the relevant revaluation percentage<sup>5</sup>.

The weekly rate of a shared additional pension is reduced as follows in any case where (a) the pensioner has become subject to a state scheme pension debit<sup>6</sup>; and (b) the debit is to any extent referable to the pension<sup>7</sup>. If the pensioner became subject to the debit in or after the final relevant year, the weekly rate of the pension is reduced by the appropriate weekly amount<sup>8</sup>. If the pensioner became subject to the debit before the final relevant year, the weekly rate of the additional pension is reduced by the appropriate weekly amount multiplied by the relevant revaluation percentage<sup>9</sup>. The pension referred to above is a notional pension for the pensioner<sup>10</sup> which becomes payable on the later of (i) his attaining pensionable age; and (ii) the valuation day<sup>11</sup>.

A person's entitlement to a shared additional pension is deferred (A) where he would be entitled to a Category A or Category B retirement pension but for the fact that his entitlement to such a pension is deferred, if and so long as his entitlement to such a pension is deferred; and (B) otherwise, if and so long as he does not become entitled to the shared additional pension by reason only of not satisfying the conditions relating to entitlement to benefit dependent on claim<sup>12</sup>.

Provision is made as to the entitlement to a shared additional pension where a full gender recognition certificate is issued to a person<sup>13</sup>.

1 Social Security Contributions and Benefits Act 1992 s 55A(1) (ss 55A-55C added by Welfare Reform and Pensions Act 1999 Sch 6 para 3; Social Security Contributions and Benefits Act 1992 s 55C substituted by Pensions Act 2004 s 297(2)). 'State scheme pension credit' means a credit under the Welfare Reform and Pensions Act 1999 s 49(1)(b) (see PARA 961B.3): Social Security Contributions and Benefits Act 1992 s 55A(7).

2 Ibid s 55A(2).

3 The appropriate weekly amount for these purposes is the weekly rate, expressed in terms of the valuation day, at which the cash equivalent, on that day, of the pensioner's entitlement, or prospective entitlement, to the shared additional pension is equal to the state scheme pension credit: *ibid* s 55A(4). 'Valuation day', in s 55A, means the day on which the pensioner becomes entitled to the state scheme pension credit: s 55A(7). The Secretary of State may by regulations make provision about the calculation and verification of cash equivalents for the purposes of s 55A: s 55A(6) (substituted by Child Support, Pensions and Social Security Act 2000 s 41(3)). The power conferred by the Social Security Contributions and Benefits Act 1992 s 55A(6) includes power to provide (1) for calculation or verification in such manner as may be approved by or on behalf of the Government Actuary; and (2) for things done under the regulations to be required to be done in accordance with guidance from time to time prepared by a person prescribed by the regulations: s 55A(6A) (added by Child Support, Pensions and Social Security Act 2000 s 41(3)). In exercise of the power under ss 55A(6), 55B(7) (see NOTE 8) it is now provided that cash equivalents are to be calculated and verified in such manner as may be approved by or on behalf of the Government Actuary: Sharing of State Scheme Rights (Provision of Information and Valuation) (No 2) Regulations 2000, SI 2000/2914, reg 4. In relation to increased in the rates of shared additional pensions under the Social Security Contributions and Benefits Act 1992 s 55A, see further the Social Security Benefits Up-rating Order 2007, SI 2006/688, arts 4, 6.

4 'Final relevant year' means the tax year immediately preceding that in which the pensioner attains pensionable age: Social Security Contributions and Benefits Act 1992 s 55A(7). For the meaning of tax year see PARA 961B.3.

5 Ibid s 55A(3). For the purposes of s 55A(3), the relevant revaluation percentage is the percentage specified, in relation to earnings factors for the tax year in which the entitlement to the state scheme pension credit arose, by the last order under the Social Security Administration Act 1992 s 148 (see PARA 56) to come into force before the end of the final relevant year: Social Security Contributions and Benefits Act 1992 s 55A(5).

6 'State scheme pension debit', means a debit under the Welfare Reform and Pensions Act 1999 s 49(1)(a) (see PARA 961B.3): Social Security Contributions and Benefits Act 1992 s 55B(8).

7 Ibid s 55B(1).

8 Ibid s 55B(2). The appropriate weekly amount for the purposes of s 55B(2) and (3) (see TEXT AND NOTE 9) is the weekly rate, expressed in terms of the valuation day, at which the cash equivalent, on that day, of the pension mentioned in s 55B(5) (see TEXT AND NOTES 10, 11) is equal to so much of the debit as is referable to the shared additional pension: s 55B(4). 'Valuation day', in s 55B, means the day on which the pensioner became subject to the state scheme pension debit: s 55B(8). The Secretary of State may by regulations make provision about the calculation and verification of cash equivalents for the purposes of s 55B: s 55B(7) (s 55B(7) substituted by the Child Support, Pensions and Social Security Act 2000 s 41(4)). The power conferred by the Social Security Contributions and Benefits Act 1992 s 55B(7) includes power to provide (1) for calculation or verification in such manner as may be approved by or on behalf of the Government Actuary; and (2) for things done under the regulations to be required to be done in accordance with guidance from time to time prepared by a person prescribed by the regulations: s 55B(7A) (added by the Child Support, Pensions and Social Security Act 2000 s 41(4)). As to the exercise of this power, see NOTE 3.

9 Social Security Contributions and Benefits Act 1992 s 55B(3). For the purposes of s 55B(3), the relevant revaluation percentage is the percentage specified, in relation to earnings factors for the tax year in which the pensioner became subject to the debit, by the last order under the Social Security Administration Act 1992 s 148 to come into force before the end of the final relevant year: Social Security Contributions and Benefits Act 1992 s 55B(6).

10 Ie by virtue of ibid s 55A: see NOTE 1.

11 Ibid s 55B(5).

12 Ie the conditions of the Social Security Administration Act 1992 s 1 (see PARA 337): see further the Social Security Contributions and Benefits Act 1992 s 55C.

13 See Gender Recognition Act 2004 Sch 5 para 9. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(3) GRADUATED RETIREMENT BENEFIT/583. Graduated retirement benefit.

### **(3) GRADUATED RETIREMENT BENEFIT**

#### **583. Graduated retirement benefit.**

Graduated retirement benefit is payable as an increase in the weekly rate of the retirement pension. Graduated retirement benefit was introduced by the National Insurance Act 1959<sup>1</sup> and is now governed by provisions of the National Insurance Act 1965<sup>2</sup> which remain in force in order to ensure payment of the benefit for those who had actual or prospective rights prior to 6 April 1975<sup>3</sup>.

So long as the relevant provisions continue in force<sup>4</sup>, regulations may make provision:

- 1320 (1) for amending the provision relating to the value of unit of graduated contributions<sup>5</sup> so that the value is the same for women as it is for men and for replacing the provisions for an increase of graduated retirement benefit in cases of deferred retirement<sup>6</sup> with provisions corresponding to those providing for an increase in Category A or Category B retirement pensions<sup>7</sup> in cases of deferred retirement<sup>8</sup>;
- 1321 (2) for amending the provision for persons to be treated as receiving a nominal retirement pension<sup>9</sup> so that where a person has claimed a Category A or Category B retirement pension but is not entitled<sup>10</sup> to such a pension, either because of an election to defer retirement<sup>11</sup> or because he has withdrawn his claim for the pension, he is not to be treated for those purposes as receiving such a pension at a nominal weekly rate<sup>12</sup>;
- 1322 (3) for extending the provision for an increase of a woman's retirement pension by reference to her late husband's graduated retirement benefit<sup>13</sup> to men and their late wives and for that provision to apply, with modifications, as it applies to women and their late husbands<sup>14</sup>.

Heads (1) to (3) above are without prejudice to any other statutory power<sup>15</sup> to modify the provisions relating to graduated retirement benefit<sup>16</sup>.

The amount of the graduated retirement benefit is calculated as a specified sum per week of graduated contributions paid<sup>17</sup>. The pensioner must be over pensionable age<sup>18</sup>.

1 See the National Insurance Act 1959 s 4 (repealed).

2 The provisions are the National Insurance Act 1965 ss 36, 37, 118(1); continued in force in modified form by virtue of the Social Security (Graduated Retirement Benefit) (No 2) Regulations 1978, SI 1978/393 (as amended and modified).

3 See *ibid* reg 3.

4 *Ie* by virtue of regulations made under the Social Security (Consequential Provisions) Act 1975 s 2, Sch 3 or under the Social Security Consequential Provisions Act 1992 s 5(1), Sch 3: see note 2 *supra*.

5 *Ie* the National Insurance Act 1965 s 36(2) (as continued in force: see note 2 *supra*).

6 *Ie* *ibid* s 36(4) (as continued in force: see note 2 *supra*).

7 le those contained in the Social Security Contributions and Benefits Act 1992 s 55, Sch 5 paras 1-3 (as amended): see PARA 585 post. As to Category A and Category B retirement pensions generally see PARA 568 et seq ante.

8 Ibid s 62(1)(a) (amended by the Pensions Act 1995 ss 126(b), 131(1), Sch 4 para 7).

9 le the National Insurance Act 1965 s 36(7) (as continued in force: see note 2 supra).

10 For the meaning of 'entitled' see PARA 21 note 9 ante.

11 le an election under the Social Security Contributions and Benefits Act 1992 s 54(1) (as amended): see PARA 584 post.

12 Ibid s 62(1)(aa) (added by the Pensions Act 1995 Sch 4 para 7).

13 le the National Insurance Act 1965 s 37 (as continued in force: see note 2 supra).

14 See the Social Security Contributions and Benefits Act 1992 s 62(1)(b) (as amended: see note 8 supra). The modifications are that the National Insurance Act 1965 s 37(5) is not to apply: Social Security Contributions and Benefits Act 1992 s 62(1)(b) (as so amended).

15 le conferred by the Social Security (Consequential Provisions) Act 1992 Sch 3.

16 Social Security Contributions and Benefits Act 1992 s 62(2).

17 See the Social Security (Graduated Retirement Benefit) (No 2) Regulations 1978, SI 1978/393, reg 4, Sch 1 (as amended).

18 See ibid Sch 1 (as amended). For the meaning of 'pensionable age' see PARA 562 ante.

## UPDATE

### 583 Graduated retirement benefit

TEXT AND NOTES--See also the Gender Recognition Act 2004 Sch 5 para 12; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 121A.

TEXT AND NOTES 2, 3, 17, 18--SI 1978/393 amended: SI 2005/3078.

NOTE 2--1965 Act ss 36, 37 amended: SI 2005/454 (amended by SI 2005/846, SI 2005/2677, SI 2005/3078, SI 2006/516), SI 2009/2206.

TEXT AND NOTES 8-14--Social Security Contributions and Benefits Act 1992 s 62(1) further amended: Pensions Act 2004 Sch 11 para 17; Civil Partnership Act 2004 Sch 24 para 33; SI 2005/2053, SI 2005/3029.

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## **(4) INCREASES IN RETIREMENT PENSIONS**

### **(i) Increases for Deferred Retirement**

#### **584. Election to defer retirement.**

Regulations may provide that in the case of a person of any prescribed description<sup>1</sup> who has become entitled<sup>2</sup> to a Category A or Category B retirement pension<sup>3</sup> (but is, in the case of a woman<sup>4</sup>, under the age of 65 or, in the case of a man, under the age of 70)<sup>5</sup>, and who elects in such manner and in accordance with such conditions as may be prescribed<sup>6</sup> that the regulations are to apply in his case, the statutory provisions relating to contributory pensions<sup>7</sup> are to have effect as if that person had not become entitled to such a retirement pension<sup>8</sup>.

Where both parties to a marriage<sup>9</sup> have become entitled to retirement pensions and one party ('P') is entitled to a Category A retirement pension and the other party ('S') is entitled to either a Category B retirement pension by virtue of P's contributions<sup>10</sup>, or to a Category A retirement pension with an increase<sup>11</sup> by virtue of P's contributions, then P is not entitled to make an election to defer retirement without S's consent, unless that consent is unreasonably withheld<sup>12</sup>.

1 For the meaning of 'prescribed' see PARA 19 note 3 ante. For the prescribed descriptions of persons see the Social Security Benefit (Persons Abroad) Regulations 1975, SI 1975/563, reg 6 (as amended); the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, SI 1979/642, reg 2 (as amended) (both having effect as if made under these provisions by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2)).

2 For the meaning of 'entitled' see PARA 21 note 9 ante.

3 As to Category A and Category B retirement pensions generally see PARA 568 et seq ante.

4 As to the determination of gender see PARA 562 note 3 ante.

5 The words in parentheses in the text are prospectively repealed, with effect from 6 April 2010, by the Pensions Act 1995 ss 126(b), 177, Sch 4 para 6(1), (5), Sch 7 Pt II.

6 See the Social Security Benefit (Persons Abroad) Regulations 1975, SI 1975/563, reg 6 (as amended); the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, SI 1979/642, reg 2 (as amended) (both having effect as if made under these provisions by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2)).

7 Ie the Social Security Contributions and Benefits Act 1992 Pt II (ss 20-62) (as amended): see PARA 54 et seq, 568 et seq ante, 585 et seq post.

8 Ibid s 54(1).

9 For the meaning of 'marriage' see PARA 570 note 1 ante.

10 As to contributions generally see PARA 31 et seq ante.

11 Ie under the Social Security Contributions and Benefits Act 1992 s 51A(2) (as added): see PARA 577 ante.

12 Ibid s 54(3) (substituted by the Pensions Act 1995 Sch 4 para 21(8)). The withholding of consent must be unreasonable and includes motives such as pique, spite, or a desire to stand in the way of the other party: see Decision R(P)6/60.

## **UPDATE**

### **584 Election to defer retirement**

NOTE 5--Pensions Act 1995 Sch 4 para 6(5) substituted: Pensions Act 2004 s 297(3).

TEXT AND NOTE 8--Now to such a retirement pension or to a shared additional pension: Social Security Contributions and Benefits Act 1992 s 54(1) (amended by the Welfare Reform and Pensions Act 1992 Sch 12 paras 14, 22). As to shared additional pensions see PARA 582A.

TEXT AND NOTE 12--1992 Act s 54(3) (as substituted) repealed: Pensions Act 2007 Sch 1 para 6, Sch 7 Pt 1 (repeal has effect as from 6 April 2010: see s 2(5)).

Social Security Contributions and Benefits Act 1992 s 54(3) amended: SI 2005/2053 (amendment repealed as from 6 April 2010: see Pensions Act 2007 s 27(4)(a), Sch 7 Pt 1).

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### **585. Increase of retirement pension where entitlement is deferred.**

Where a person's entitlement to a Category A<sup>1</sup> or Category B<sup>2</sup> retirement pension is deferred the rate of pension is increased in accordance with the statutory provisions<sup>3</sup>. A person's entitlement to a Category A or Category B retirement pension is deferred if and so long as that person:

- 1323 (1) falls to be treated as not having become entitled<sup>4</sup> to that pension in consequence of an election<sup>5</sup> properly made<sup>6</sup>; or
- 1324 (2) does not become entitled to that pension by reason only of not satisfying the statutory conditions with respect to making a claim<sup>7</sup> for the benefit, or in the case of a Category B retirement pension payable by virtue of a spouse's contributions<sup>8</sup>, of the spouse not satisfying those conditions with respect to his Category A retirement pension<sup>9</sup>,

and, in relation to any such pension, 'period of deferment' is to be construed accordingly<sup>10</sup>.

The sums which are the increases in the rates of retirement pension where entitlement is deferred are subject to annual up-rating<sup>11</sup>.

1 As to Category A retirement pensions generally see PARA 568 ante.

2 As to Category B retirement pensions generally see PARA 572 ante.

3 Social Security Contributions and Benefits Act 1992 s 55(1) (s 55 substituted by the Pensions Act 1995 s 143(3)). Where a person's entitlement to a Category A or Category B retirement pension is deferred, the rate of his pension is, in general, to be increased by an amount equal to the aggregate of the increments to which he is entitled under the Social Security Contributions and Benefits Act 1992 s 55(1), Sch 5 para 2 (as amended), but only if that amount is enough to increase the rate of the pension by at least 1%: Sch 5 para 1. As to the calculation of increments see Sch 5 paras 2, 3 (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 42; and by the Pensions Act 1995 s 126(c), Sch 4 para 21; further prospectively amended, with effect from 6 April 2010, by Sch 4 para 6). As to the increase of pension where the pensioner's deceased spouse has deferred entitlement see the Social Security Contributions and Benefits Act 1992 Sch 5 paras 4-7 (amended by the Pensions Act 1995 Sch 4 para 21; further amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 40). Special provisions apply in relation to married women: see the Social Security Contributions and Benefits Act 1992 Sch 5 para 8 (amended by the Pensions Act 1995 Sch 4 para 21; further prospectively amended, with effect from 6 April 2010, by Sch 4 para 6). The receipt of a graduated retirement pension by a spouse during a period of deferment of a Category A pension by the national insurance contributor does not affect the right to an increment in the Category B retirement pension: see *Chief Adjudication Officer v Pearse* [1992] TLR 297, CA, sub nom *Pearse v Secretary of State for Social Security* [1992] PLR 117, CA.

4 For the meaning of 'entitled' see PARA 21 note 9 ante.

5 Ie under the Social Security Contributions and Benefits Act 1992 s 54(1): see PARA 584 ante.

6 Ibid s 55(2)(b) (as substituted: see note 3 supra).

7 Ie the conditions of the Social Security Administration Act 1992 s 1 (as amended): see PARA 337 ante.

8 As to contributions generally see PARA 31 et seq ante.

9 Social Security Contributions and Benefits Act 1992 s 55(2)(a) (as substituted: see note 3 supra).

10 Ibid s 55(2) (as substituted: see note 3 supra).

11 See *ibid* Sch 5 para 9; the Social Security Administration Act 1992 s 150 (as amended); and PARA 17 ante.

## UPDATE

### 585 Increase of retirement pension where entitlement is deferred

TEXT AND NOTES--Where a person's entitlement to a Category A or Category B retirement pension is deferred, the Social Security Contributions and Benefits Act 1992 Sch 5 has effect: s 55(1) (substituted by Pensions Act 2004 s 297(1)). The Social Security Contributions and Benefits Act 1992 Sch 5 para A1 makes provision enabling an election to be made where the pensioner's entitlement is deferred, Sch 5 paras 1-3 make provision about increasing pension where the pensioner's entitlement is deferred, Sch 5 paras 3A, 3B make provision about lump sum payments where the pensioner's entitlement is deferred, Sch 5 para 3C makes provision enabling an election to be made where the pensioner's deceased spouse or civil partner has deferred entitlement, Sch 5 paras 4-7 make provision about increasing pension where the pensioner's deceased spouse or civil partner has deferred entitlement, Sch 5 paras 7A, 7B make provision about lump sum payments where the pensioner's deceased spouse or civil partner has deferred entitlement, Sch 5 paras 7C-9 make supplementary provision: s 55(2) (as so substituted; amended by SI 2005/2053). For the purposes of the Social Security Contributions and Benefits Act 1992 a person's entitlement to a Category A or Category B retirement pension is deferred if and so long as that person (1) does not become entitled to that pension by reason only (a) of not satisfying the conditions of the Social Security Administration Act 1992 s 1 (entitlement to benefit dependent on claim), or (b) in the case of a Category B retirement pension payable by virtue of a spouse's or civil partner's contributions, of the spouse or civil partner not satisfying those conditions with respect to his Category A retirement pension, or (2) in consequence of an election under the Social Security Contributions and Benefits Act 1992 s 54(1), falls to be treated as not having become entitled to that pension, and, in relation to any such pension, 'period of deferment' must be construed accordingly: s 55(3) (as substituted and amended). Schedule 5 further amended, Sch 5A (pension increase or lump sum where entitlement to shared additional pension deferred) added: Pensions Act 2004 s 297(4), Sch 11 Pt 1; SI 2005/469 (amended by SI 2006/2677, SI 2006/516). Pensions Act 2004 Sch 11 Pt 1 amended: Pensions Act 2007 s 27(4)(a), Sch 7 Pt 1. Social Security Contributions and Benefits Act 1992 Sch 5 (amended by SI 2005/2053) makes provision for civil partners. For further amendments relating to the deferral of retirement pensions and shared additional pensions see Pensions Act 2004 s 297(4), Sch 11 Pt 2; Social Security (Deferral of Retirement Pensions) Regulations 2005, SI 2005/453 (amended by SI 2005/1551, SI 2005/2878). See also the Social Security (Deferral of Retirement Pensions, Shared Additional pension and Graduated Retirement Benefit) (Miscellaneous Provisions) Regulations 2005, SI 2005/2677.

1992 Act s 55(3), Sch 5 further amended: Pensions Act 2007 Sch 1 paras 7, 8, Sch 7 Pt 1. 1992 Act Sch 5 further amended: 2007 Act Sch 1 paras 19, 20, Sch 7 Pt 3 (partly in force: see 2007 Act ss 5(3)-(7), 27(3)(c), 30(1)(a)).

NOTE 3--Social Security Contributions and Benefits Act 1992 Sch 5 para 2 further amended: Tax Credits Act 2002 Sch 6.

Social Security Contributions and Benefits Act 1992 Sch 5 paras 4-6 amended: Child Support, Pensions and Social Security Act 2000 s 39(1), (2).

In relation to increases in the rates of retirement pensions under the 1992 Act Sch 5, see further the Social Security Benefits Up-rating Order 2008, SI 2008/632, art 4.

Pensions Act 1995 Sch 4 para 21 further amended: Pensions Act 2004 Sch 13 Pt 1;  
Pensions Act 2007 s 27(4)(a), Sch 7 Pt 1, Sch 7 Pt 2.

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## **(ii) Increases for Invalidity**

### **586. Increase of a Category A retirement pension for invalidity.**

Apart from circumstances in which there has been a failure to meet the contribution<sup>1</sup> conditions<sup>2</sup>, the weekly rate<sup>3</sup> of a Category A retirement pension is to be increased if the pensioner was entitled to an age addition<sup>4</sup> to long-term incapacity benefit<sup>5</sup> in respect of any day falling within the period of eight weeks<sup>6</sup> ending immediately before the day on which he attains pensionable age<sup>7</sup> or the last day before the beginning of that period<sup>8</sup>.

The increase of a Category A retirement pension for invalidity is of an amount equal to the appropriate weekly rate of the age addition to long-term incapacity benefit on that day with regard to the rates in force from time to time<sup>9</sup>. Where for any period the weekly rate of a Category A retirement pension includes an additional pension<sup>10</sup>, the relevant amount<sup>11</sup> must be deducted from the amount that would otherwise be the increase for invalidity<sup>12</sup>. The pensioner is entitled to an increase only if there is a balance remaining after the deduction of the relevant amount and, if there is such a balance, the entitlement of the pensioner is to an increase equal to the balance remaining<sup>13</sup>.

1 As to contributions generally see PARA 31 et seq ante.

2 I.e. subject to the Social Security Contributions and Benefits Act 1992 s 61 (as amended): s 47(1). A Category A or Category B retirement pension which is payable by virtue of s 60(1) (as amended) (see PARA 565 ante) must not be increased under s 47(1) (as amended) if the pension contains no basic pension in consequence of a failure to satisfy a contribution condition: s 61(1). Where a person is entitled to short-term incapacity benefit at a rate determined under section 30B(3) (as added) (see PARA 62 ante) and the retirement pension by reference to which the rate of the benefit is determined would have been payable only by virtue of s 60 (as amended) and would, in consequence of a failure to satisfy a contribution condition, have contained no basic pension, the benefit must not be increased under s 47(1): s 61(2) (substituted by the Jobseekers Act 1995 s 41(4), Sch 2 para 23). For the meaning of 'basic pension' see PARA 569 text and note 1 ante. As to Category A and Category B retirement pension generally see PARA 568 et seq ante.

3 For the meaning of 'week' see PARA 32 note 7 ante.

4 As to age addition generally see PARA 588 post.

5 I.e. by virtue of regulations under the Social Security Contributions and Benefits Act 1992 s 30B(7) (as amended): see PARA 62 ante.

6 Regulations may provide that *ibid* s 47(1) (as amended) is to have effect as if for the reference to eight weeks there were substituted a reference to a larger number of weeks specified in the regulations: s 47(8).

7 For the meaning of 'pensionable age' see PARA 562 ante.

8 Social Security Contributions and Benefits Act 1992 s 47(1) (s 47(1), (5) amended by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 13).

9 See the Social Security Contributions and Benefits Act 1992 s 47(1), (5) (as amended: see note 8 *supra*).

10 For these purposes, any reference to an additional pension is a reference to that pension after any increase under *ibid* s 52(3) (see PARA 578 ante) but without any increase under s 55, Sch 5 paras 1, 2 (see PARA 585 ante): s 47(4). As to additional pension generally see PARA 579 text and note 2 ante.

11 For these purposes, 'the relevant amount' means an amount equal to the additional pension, reduced by the amount of any reduction in the weekly rate of the Category A retirement pension made by virtue of the

Pension Schemes Act 1993 s 46 (as amended) (contracting out: see PARA 916 post): Social Security Contributions and Benefits Act 1992 s 47(3) (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 39).

12 See the Social Security Contributions and Benefits Act 1992 s 47(2).

13 See *ibid* s 47(2).

## **UPDATE**

### **586 Increase of a Category A retirement pension for invalidity**

TEXT AND NOTES--As from a day to be appointed 1992 Act s 47 repealed: Welfare Reform Act 2007 Sch 8. For employment and support allowance see PARA 75A.

NOTE 2--Subject to savings (see SI 2003/938), Social Security Contributions and Benefits Act 1992 s 61(1), (2) amended: Tax Credits Act 2002 Sch 6.

NOTE 6--The 1992 Act s 47(1) has effect, in any case where a person is treated in accordance with the Social Security (Incapacity for Work) (General) Regulations 1995, SI 1995/311, reg 13A (see PARA 71) as a welfare to work beneficiary, as if for the reference to eight weeks there were substituted a reference to 104 weeks: Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, SI 1979/642, reg 3A (added by SI 1998/2231; and amended by SI 2006/2378).

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**587. Increase of a Category B retirement pension for invalidity.**

In any case where a person would otherwise<sup>1</sup> have been entitled<sup>2</sup> both to a Category A and to a Category B<sup>3</sup> retirement pension and would also be entitled to an increase for invalidity<sup>4</sup> of the Category A retirement pension, that person is entitled to an increase of the Category B retirement pension on the same terms<sup>5</sup>.

1    Ie apart from the Social Security Contributions and Benefits Act 1992 s 43(1): see PARA 567 ante.

2    For the meaning of 'entitled' see PARA 21 note 9 ante.

3    As to Category A and Category B retirement pensions generally see PARA 568 et seq ante.

4    Ie under the Social Security Contributions and Benefits Act 1992 s 47(1) (as amended): see PARA 586 ante.

5    See *ibid* s 48C(2) (added by the Pensions Act 1995 s 126(b), Sch 4 para 3(1)).

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### **(iii) Age Addition and Christmas Bonus**

#### **588. Age Addition.**

A person who is over the age of 80<sup>1</sup> and entitled<sup>2</sup> to a retirement pension of any category<sup>3</sup> is entitled to an increase of the pension known as 'age addition'<sup>4</sup>.

Where a person is in receipt of a pension or allowance payable by the Secretary of State<sup>5</sup> by virtue of any prescribed enactment or instrument<sup>6</sup>, whenever passed or made, and he is over the age of 80 and fulfils such other conditions as may be prescribed, he is entitled to an increase of that pension or allowance, also known as age addition<sup>7</sup>.

Age addition is payable for the life of the person entitled at the weekly rate specified<sup>8</sup> in the legislation<sup>9</sup>.

1 As to when a person attains a particular age see PARA 19 note 11 ante.

2 For the meaning of 'entitled' see PARA 21 note 9 ante.

3 As to the categories of retirement pension see PARA 568 et seq ante.

4 Social Security Contributions and Benefits Act 1992 s 79(1).

5 As to the Secretary of State see PARA 1 ante.

6 For the meaning of 'prescribed' see PARA 19 note 3 ante.

7 Social Security Contributions and Benefits Act 1992 s 79(2). At the date at which this volume states the law, no regulations had been made for these purposes, but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, SI 1979/642 (as amended) partly have effect as if so made.

8 As specified in the Social Security Contributions and Benefits Act 1992 s 79(3), Sch 4 Pt III para 8 (as amended). Age addition, unlike the majority of social security benefits, is in practice updated very infrequently.

9 Ibid s 79(3).

#### **UPDATE**

#### **588 Age Addition**

NOTE 7--SI 1979/642 further amended: SI 2000/1483, SI 2001/1235, SI 2003/937, SI 2005/453, SI 2005/1551, SI 2005/2877, SI 2005/2878, SI 2006/516, SI 2006/692, SI 2006/2378, SI 2009/471, SI 2009/2206.

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**589. Christmas bonus.**

A person in receipt of a retirement pension is entitled to the payment of a Christmas bonus if the prescribed conditions are met<sup>1</sup>.

<sup>1</sup> See the Social Security Contributions and Benefits Act 1992 ss 148-150 (as amended); and PARA 29 ante.

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## **(iv) Increases for Dependants**

### **590. Beneficiary's dependent children.**

Apart from circumstances where there has been a failure to meet contribution conditions<sup>1</sup>, the weekly rate of a Category A, Category B or Category C<sup>2</sup> retirement pension is increased, for any period for which the beneficiary<sup>3</sup> is entitled to child benefit<sup>4</sup> in respect of a child<sup>5</sup> or children, in respect of that child or each respectively of those children by the amount specified<sup>6</sup> in the legislation<sup>7</sup>. In any case where a beneficiary is one of two persons who are spouses residing together or an unmarried couple<sup>8</sup> and the other person had earnings<sup>9</sup> in any week<sup>10</sup>, the beneficiary's right to payment for increases is subject to an earnings rule<sup>11</sup>.

1    Is subject to the Social Security Contributions and Benefits Act 1992 s 61 (as amended). A Category A or Category B retirement pension which is payable by virtue of s 60(1) (see PARA 565 ante) must not be increased under Pt IV (ss 80-93) (as amended) on account of a child if the pension contains no basic pension in consequence of a failure to satisfy a contribution condition: s 61(1). As to contributions generally see PARA 31 et seq ante; and for the meaning of 'basic pension' see PARA 569 text and note 1 ante. As to Category A and Category B retirement pensions see PARA 568 et seq ante.

2    As to Category C retirement pensions generally see PARA 579 ante.

3    For the meaning of 'beneficiary' see PARA 21 note 2 ante.

4    As to child benefit generally see PARA 237 et seq ante.

5    For the meaning of 'child' for the purposes of child benefit law see PARA 239 ante.

6    For the specified amount see the Social Security Contributions and Benefits Act 1992 Sch 4 Pt IV paras 5, 6, col 2 (as amended). As to annual up-rating of the amount see PARA 17 ante.

7    Ibid s 80(1), (2)(d).

8    Ibid s 80(3)(a). For the meaning of 'unmarried couple' see PARA 122 note 10 ante.

9    For the meaning of 'earnings' for these purposes see PARA 122 note 11 ante.

10   Social Security Contributions and Benefits Act 1992 s 80(3)(b). For the meaning of 'week' for these purposes see PARA 122 note 12 ante.

11   See ibid s 80(3), (4) (as amended); and PARA 122 ante.

## **UPDATE**

### **590 Beneficiary's dependent children**

TEXT AND NOTES--Subject to savings (see SI 2003/938), Social Security Contributions and Benefits Act 1992 s 80 repealed: Tax Credits Act 2002 Sch 6.

Social Security Contributions and Benefits Act 1992 s 80 (which continues to have effect in certain cases despite its repeal by the Tax Credits Act 2002) is to have effect as if the references in that provision to a child or children included references to a qualifying young person or persons: see Welfare Reform Act 2009 s 37(1), (2).

NOTE 6--1992 Act Sch 4 Pt 4 paras 5, 6 further amended: Pensions Act 2007 Sch 1 para 18.

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### **591. Pension increase in respect of wife.**

The weekly rate of a Category A<sup>1</sup> or Category C<sup>2</sup> retirement pension, when payable to a man, is increased by the amount specified in the legislation<sup>3</sup> for any period during which the pensioner is residing with his wife or for any period during which he is contributing to the maintenance of his wife at a weekly<sup>4</sup> rate not less than the amount of the increase and his wife does not have weekly earnings<sup>5</sup> which exceed the amount of the increase<sup>6</sup>. Regulations may provide that for any period during which the pensioner is residing with his wife and his wife has earnings, the increase of benefit under these provisions is to be subject to a reduction in respect of the wife's earnings or there is to be no such increase of benefit<sup>7</sup>.

A person is not entitled for the same period to an increase of benefit in respect of more than one person<sup>8</sup>.

Different provisions will apply from 6 April 2010<sup>9</sup>.

1 As to Category A retirement pensions generally see PARA 568 ante.

2 As to Category C retirement pensions generally see PARA 579 ante.

3 For the specified amount see the Social Security Contributions and Benefits Act 1992 Sch 4 Pt IV paras 5, 6, col (3) (as amended). As to the annual up-rating of benefits see PARA 17 ante.

4 For the meaning of 'week' see PARA 32 note 7 ante.

5 For the meaning of 'earnings' generally see 33 ante.

6 Social Security Contributions and Benefits Act 1992 s 83(1)(a), (2).

7 Ibid s 83(3). At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security Benefit (Dependency) Regulations 1977, SI 1977/343 (as amended) partly have effect as if so made.

8 Social Security Contributions and Benefits Act 1992 s 88 (substituted by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 25).

9 See the Social Security Contributions and Benefits Act 1992 s 83A (prospectively added by the Pensions Act 1995 s 126(b), Sch 4 para 2); and PARA 593 post.

## **UPDATE**

### **591 Pension increase in respect of wife**

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 s 83 repealed: Pensions Act 2007 s 4(1)(a), Sch 7 Pt 2. The Pensions Act 1995 Sch 4 para 2 (which replaces the 1992 Act s 83 with a new s 83A equalising pension increases for dependent spouses and civil partners with effect from 6 April 2010) is omitted: 2007 Act s 4(2), Sch 7 Pt 2. Nothing in the repeals in s 4(1) or the repeals in Sch 7 Pt 2 applies in relation to a qualifying person at any time falling on or after 6 April 2010 but before the appropriate date: s 4(5). In s 4(5) a 'qualifying person' means a person who (1) has, before 6 April 2010, made a claim for a relevant increase in accordance with the Social Security Administration Act 1992 s 1; and (2) immediately before that date is

either (a) entitled to the increase claimed, or (b) a beneficiary to whom the Social Security Contributions and Benefits Act 1992 s 92 (continuation of awards where fluctuating earnings) applies in respect of that increase: 2007 Act s 4(6). In s 4(5) 'the appropriate date' means the earlier (or earliest) of (i) 6 April 2020; (ii) the date when the qualifying person ceases to be either entitled to the relevant increase or a beneficiary to whom the Social Security Contributions and Benefits Act 1992 s 92 applies in respect of it; (iii) where the relevant increase is payable to the qualifying person under the Social Security Contributions and Benefits Act 1992 s 83, the date on which his wife attains pensionable age: Pensions Act 2007 s 4(7). In s 4 'relevant increase' means an increase in a Category A or Category C retirement pension under the Social Security Contributions and Benefits Act 1992 s 83, 84 or 85: 2007 Act s 4(8).

NOTE 3--1992 Act Sch 4 Pt 4 paras 5, 6 further amended: Pensions Act 2007 Sch 1 para 18.

TEXT AND NOTE 8--1992 Act s 88 amended: Welfare Reform Act 2007 Sch 3 para 9(7); Pensions Act 2007 Sch 1 para 14. See also Welfare Reform Act 2009 s 37(4).

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## **592. Pension increase in respect of husband.**

Where a Category A retirement pension<sup>1</sup> is payable to a woman<sup>2</sup> for any period:

- 1325 (1) which began immediately on the termination of a period for which the pensioner was entitled to an increase in incapacity benefit<sup>3</sup> by virtue of any provision of regulations prescribed for these purposes<sup>4</sup>; and
- 1326 (2) during which the pensioner is either residing with her husband or contributing to the maintenance of her husband at a weekly rate<sup>5</sup> not less than the specified amount<sup>6</sup>, and her husband does not have weekly earnings<sup>7</sup> which exceed that amount, and these requirements are satisfied without interruption<sup>8</sup>,

then the weekly rate of the pensioner's Category A retirement pension is to be increased by the specified amount<sup>9</sup>.

Regulations may provide that for any period during which the pensioner is residing with her husband and her husband has earnings, either the increase of benefit under these provisions is to be subject to a reduction in respect of the husband's earnings or there is to be no such increase of benefit<sup>10</sup>.

A person is not entitled for the same period to an increase of benefit in respect of more than one person<sup>11</sup>.

Different provisions will apply from 6 April 2010<sup>12</sup>.

1 As to Category A retirement pensions generally see PARA 568 et seq ante.

2 As to the determination of gender see PARA 562 note 3 ante.

3 As to incapacity benefit see PARA 59 et seq ante.

4 ie by virtue of any regulations prescribed under the Social Security Contributions and Benefits Act 1992 s 86A (as added): see PARA 123 ante.

5 For the meaning of 'week' see PARA 32 note 7 ante.

6 'The specified amount' means the amount specified in the Social Security Contributions and Benefits Act 1992 Sch 4 Pt IV para 5, col 3 (as amended): s 84(1). As to the annual up-rating of this amount see PARA 17 ante.

7 For the meaning of 'earnings' see PARA 33 ante.

8 Social Security Contributions and Benefits Act 1992 s 84(1), (2) (s 84(1) amended by the Jobseekers Act 1995 s 41(4), Sch 2 para 25).

9 Social Security Contributions and Benefits Act 1992 s 84(1).

10 Ibid s 84(3). At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Social Security (Consequential Provisions) Act 1992 s 2(2), the Social Security Benefit (Dependency) Regulations 1977, SI 1977/343 (as amended) partly have effect as if so made.

11 Social Security Contributions and Benefits Act 1992 s 88 (substituted by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 25).

12 See the Social Security Contributions and Benefits Act 1992 s 83A (prospectively added by the Pensions Act 1995 s 126(b), Sch 4 para 2); and PARA 593 post.

## **UPDATE**

### **592 Pension increase in respect of husband**

TEXT AND NOTES--Social Security Contributions and Benefits Act 1992 s 84 repealed: Pensions Act 2007 s 4(1)(b), Sch 7 Pt 2. The Pensions Act 1995 Sch 4 para 2 (which replaces the Social Security Contributions and Benefits Act 1992 s 84 with a new s 83A equalising pension increases for dependent spouses and civil partners with effect from 6 April 2010) is omitted: 2007 Act s 4(2), Sch 7 Pt 2. Nothing in the repeals in s 4(1) or the repeals in Sch 7 Pt 2 applies in relation to a qualifying person at any time falling on or after 6 April 2010 but before the appropriate date: s 4(5). See further s 4(6)-(8); and PARA 591.

NOTE 6--Social Security Contributions and Benefits Act 1992 Sch 4 Pt 4 para 5 further amended: Pensions Act 2007 Sch 1 para 18.

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### **593. Provisions for increase for spouse to apply after 6 April 2010.**

The weekly<sup>1</sup> rate of a Category A<sup>2</sup> or Category C<sup>3</sup> retirement pension payable to a married<sup>4</sup> pensioner is to be increased by the amount specified in the legislation<sup>5</sup> where for any period commencing on or after 6 April 2010 the pensioner is residing with the spouse or is contributing to the maintenance of the spouse at a weekly rate not less than the amount so specified, and the spouse does not have weekly earnings<sup>6</sup> which exceed that amount<sup>7</sup>.

Regulations may provide that for any period commencing on or after 6 April 2010 during which the pensioner is residing with the spouse and the spouse has earnings there is to be no increase of pension under these provisions<sup>8</sup>.

A person is not entitled for the same period to an increase of benefit in respect of more than one person<sup>9</sup>.

1 For the meaning of 'week' see PARA 32 note 7 ante.

2 As to Category A retirement pensions generally see PARA 568 ante.

3 As to Category C retirement pensions generally see PARA 579 ante.

4 For the meaning of 'married' see PARA 570 note 1 ante.

5 Ie the amount specified in relation to the pension in the Social Security Contributions and Benefits Act 1992 Sch 4 Pt IV, col 3 (as amended). As to the annual up-rating of benefits see PARA 17 ante.

6 For the meaning of 'earnings' see PARA 33 ante.

7 Social Security Contributions and Benefits Act 1992 s 83A(1), (2) (s 83A prospectively added, with effect on or after 6 April 2010, by the Pensions Act 1995 s 126(b), Sch 4 para 2).

8 Social Security Contributions and Benefits Act 1992 s 83A(3) (as prospectively added: see note 7 supra).

9 Ibid s 88 (substituted by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 25).

### **UPDATE**

#### **593 Provisions for increase for spouse to apply after 6 April 2010**

TEXT AND NOTES 1-8--Social Security Contributions and Benefits Act 1992 s 83A repealed: Pensions Act 2007 s 4(2), Sch 7 Pt 2. See further PARA 591.

TEXT AND NOTE 9--Social Security Contributions and Benefits Act 1992 s 88 amended: Welfare Reform Act 2007 Sch 3 para 9(7); Pensions Act 2007 Sch 1 para 14. See also Welfare Reform Act 2009 s 37(4).

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#### **594. Pension increase in respect of person with care of children.**

The weekly<sup>1</sup> rate of a Category A<sup>2</sup> retirement pension or a Category C<sup>3</sup> retirement pension payable to a person who satisfies the prescribed conditions<sup>4</sup> is to be increased by the amount specified in the legislation<sup>5</sup> for any period during which a person who is neither the spouse of the pensioner nor a child<sup>6</sup> has the care of a child or children in respect of whom the pensioner is entitled to child benefit<sup>7</sup>.

The increase does not apply if the pensioner is a person whose spouse is entitled to a Category B<sup>8</sup> retirement pension or to a Category C retirement pension where the entitlement to the Category C pension is on the basis<sup>9</sup> that she is over pensionable age and satisfies the prescribed conditions and her husband is entitled to a Category C pension<sup>10</sup>. Regulations may, however, in such a case in which the person referred to is residing with the pensioner and fulfils such further conditions as may be prescribed, authorise an increase of benefit under these provisions, but subject (taking account of the earnings<sup>11</sup> of the person residing with the pensioner, other than such of that person's earnings as may be prescribed) to provisions comparable to those that may be made<sup>12</sup> imposing an earnings reduction in any pension increase for a wife or (on or after 6 April 2010) for a spouse<sup>13</sup>.

A person is not entitled for the same period to an increase of benefit in respect of more than one person<sup>14</sup>.

1 For the meaning of 'week' see PARA 32 note 7 ante.

2 As to Category A retirement pensions generally see PARA 568 ante.

3 As to Category C retirement pensions generally see PARA 569 ante.

4 I.e. payable under the Social Security Contributions and Benefits Act 1992 s 78(1): see PARA 580 ante. The person must have been over pensionable age on 5 July 1948: see PARA 580 ante. For the meaning of 'pensionable age' see PARA 562 ante.

5 I.e. specified in relation to that pension in *ibid* Sch 4 Pt IV, col 3 (as amended). As to the annual up-rating of benefits see PARA 17 ante.

6 For the meaning of 'child' see PARA 19 note 11 ante.

7 Social Security Contributions and Benefits Act 1992 s 85(1)(a), (b), (2). As to child benefit see PARA 237 et seq ante. In view of the pensioner's age (see note 4 supra) an entitlement to child benefit in such cases will be rare in practice.

8 As to Category B retirement pensions see PARA 572 ante.

9 I.e. the entitlement is by virtue of the Social Security Contributions and Benefits Act 1992 s 78(2): see PARA 579 ante.

10 *Ibid* s 85(3) (amended by the Pensions Act 1995 s 126(c), Sch 4 para 21(10)).

11 For the meaning of 'earnings' see PARA 33 ante.

12 I.e. under the Social Security Contributions and Benefits Act 1992 s 83 (as amended) (see PARA 591 ante) or, with effect from 6 April 2010, under s 83A (as prospectively added) (see PARA 593 ante).

13 *Ibid* s 85(4) (prospectively amended by the Pensions Act 1995 Sch 4 paras 18(d), 20, with effect from 6 April 2010).

14 Social Security Contributions and Benefits Act 1992 s 88 (substituted by the Social Security (Incapacity for Work) Act 1994 s 11(1), Sch 1 para 25).

## **UPDATE**

### **594 Pension increase in respect of person with care of children**

TEXT AND NOTES 1-13--Social Security Contributions and Benefits Act 1992 s 85 repealed: Pensions Act 2007 s 4(1)(c), Sch 7 Pt 2. Nothing in the repeals in s 4(1) or the repeals in Sch 7 Pt 2 applies in relation to a qualifying person at any time falling on or after 6 April 2010 but before the appropriate date: s 4(5). See further s 4(6)-(8) and PARA 591.

Subject to the Social Security Contributions and Benefits Act 1992 s 85(2A) and (4), the weekly rate of a Category A retirement pension will be increased by the amount specified in relation to that pension in Sch 4 Pt 4 col (3) for any period during which a person who is neither the spouse or civil partner of the pensioner nor a child has the care of a child or children in respect of whom the pensioner is entitled to child benefit: s 85(1A) (added by Civil Partnership Act 2004 Sch 24 para 37(3)). Social Security Contributions and Benefits Act 1992 s 85(1A) does not apply if the pensioner is a person whose spouse or civil partner is entitled to a Category B retirement pension, or to a Category C retirement pension by virtue of s 78(2) or in such other cases as may be prescribed: s 85(2A) (added by Civil Partnership Act 2004 Sch 24 para 37(5)). See further MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

TEXT AND NOTES 10, 13--Pensions Act 1995 Sch 4 paras 18, 20, 21(10) repealed: Pensions Act 2007 s 27(3), (4), Sch 7 Pt 2.

TEXT AND NOTE 14--1992 Act s 88 amended: see PARA 593 TEXT AND NOTE 9.

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## **(v) Restrictions on Payment of Increases**

### **595. Exclusion of increase of benefit for failure to satisfy contribution conditions.**

A Category A<sup>1</sup> or Category B<sup>2</sup> retirement pension which is payable in circumstances in which there has been a complete or partial failure to satisfy contribution<sup>3</sup> conditions<sup>4</sup> is not to be increased for dependants<sup>5</sup> on account of a child or an adult if the pension or allowance contains no basic pension<sup>6</sup> in consequence of a failure to satisfy a contribution condition<sup>7</sup>.

Where a person over pensionable age<sup>8</sup> is entitled to short-term incapacity benefit<sup>9</sup> and would have been entitled<sup>10</sup> to the retirement pension by reference to which the rate of that benefit is determined only by virtue of the saving provisions which apply in circumstances in which there has been a complete or partial failure to satisfy contribution conditions<sup>11</sup>, the amount of any increase of the benefit attributable to the statutory increases for dependants<sup>12</sup> is to be determined in accordance with regulations which must not provide for any such increase in a case where the retirement pension by reference to which the rate of that benefit is determined would have been payable only by virtue of those saving provisions and would, in consequence of a failure to satisfy a contribution condition, have contained no basic pension<sup>13</sup>.

1 As to Category A retirement pensions generally see PARA 568 ante.

2 As to Category B retirement pensions generally see PARA 572 ante.

3 As to contributions generally see PARA 33 et seq ante.

4 Is payable by virtue of the Social Security Contributions and Benefits Act 1992 s 60(1): see PARA 565 ante.

5 Is under *ibid* Pt IV (ss 80-93) (as amended): see PARA 121 et seq, 590-594 ante.

6 For the meaning of 'basic pension' see PARA 569 text and note 1 ante.

7 Social Security Contributions and Benefits Act 1992 s 61(1).

8 For the meaning of 'pensionable age' see PARA 562 ante.

9 Is under the Social Security Contributions and Benefits Act 1992 s 30A(2)(b) (as added): see PARA 60 ante.

10 For the meaning of 'entitled' see PARA 21 note 9 ante.

11 Is by virtue of the Social Security Contributions and Benefits Act 1992 s 60 (as amended): see PARA 565 ante.

12 Is attributable to *ibid* ss 82-86A (as amended): see PARAS 121-123, 591-594 ante.

13 *Ibid* s 87(1), (2) (amended by the Social Security (Incapacity for Work) Act 1994 s 11, Sch 1 para 24, Sch 2; and the Jobseekers Act 1995 s 41(4), Sch 2 para 26).

## **UPDATE**

### **595 Exclusion of increase of benefit for failure to satisfy contribution conditions**

TEXT AND NOTE 7--Subject to savings (see SI 2003/938), words 'on account of a child or an adult' omitted: Social Security Contributions and Benefits Act 1992 s 61(1) (amended by the Tax Credits Act 2002 Sch 6).

TEXT AND NOTE 13--As from a day to be appointed 1992 Act s 87 repealed: Welfare Reform Act 2007 Sch 8.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/14. STATE RETIREMENT PENSIONS/(5) CLAIMS AND PAYMENT/596. Requirement to make claim; in general.

## **(5) CLAIMS AND PAYMENT**

### **596. Requirement to make claim; in general.**

In limited circumstances it is not a requirement for entitlement to a state retirement pension for the individual formally to make a claim<sup>1</sup>. In the case of a Category A<sup>2</sup> or a Category B<sup>3</sup> retirement pension, if the beneficiary is a woman over the age of 65 and is entitled to a widowed mother's allowance<sup>4</sup> immediately before her entitlement or where she has attained the age of 65 and was in receipt of a widow's pension<sup>5</sup>, there is no requirement formally to make a claim<sup>6</sup>. In the case of a Category C<sup>7</sup> retirement pension there is no requirement to make a claim where the beneficiary is in receipt of another retirement pension, a widow's benefit<sup>8</sup> or a widow's pension or a widowed mother's allowance<sup>9</sup>. In the case of a Category D<sup>10</sup> retirement pension, there is no requirement to make a claim where the claimant is in receipt of another retirement pension or is resident in Great Britain on the day on which he attains the age of 80<sup>11</sup>. There is also no requirement to make a claim for an age addition<sup>12</sup>.

In all other cases, a claim must be made<sup>13</sup>.

A claim may be amended at any time by notice in writing received at the appropriate office before a determination has been made on the claim<sup>14</sup>. A claim may also be withdrawn in similar circumstances<sup>15</sup>.

1 As to claims to benefit see PARA 337 et seq ante.

2 As to Category A retirement pensions generally see PARA 568 ante.

3 As to Category B retirement pensions generally see PARA 572 ante.

4 As to widowed mother's allowance generally see PARA 85 ante.

5 As to widow's pension see PARA 86 ante.

6 See the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 3(d)(i), (ii).

7 As to Category C retirement pensions generally see PARA 579 ante.

8 As to widow's benefit generally see PARA 80 et seq ante.

9 See the Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 3(a)(i), (ii), (iii).

10 As to Category D retirement pensions generally see PARA 580 ante.

11 Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 3(b)(i), (ii).

12 Ibid reg 3(2). As to age addition generally see PARA 588 ante.

13 As to the manner of making a claim and the prescribed requirements see PARA 337 et seq ante.

14 Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 5(1).

15 Ibid reg 5(2).

## **UPDATE**

## **596 Requirement to make claim; in general**

TEXT AND NOTES--SI 1987/1968 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257).

TEXT AND NOTES 4-5--For 'widowed mother's allowance' read 'widowed mother's allowance or widowed parent's allowance (see PARA 87A)'; and for 'widow's pension' read 'widow's pension or bereavement allowance (see PARA 87B)': SI 1987/1968 reg 3(d)(i), (ii) (amended by SI 2000/1483).

TEXT AND NOTE 9--For 'widowed mother's allowance' read 'widowed mother's allowance or a bereavement benefit (see PARA 54) under the Social Security Contributions and Benefits Act 1992 Pt II (ss 20-62)': SI 1987/1968 reg 3(a)(iv) (added by SI 2000/1483).

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### **597. Date and method of payment.**

A claimant is not entitled to payment of his retirement pension immediately upon reaching the relevant pensionable age<sup>1</sup>. Entitlement to payment actually commences on the first day of the next following benefit week<sup>2</sup>. The pension is payable weekly in advance by means of a benefit order payable in each case to the beneficiary at such place as the Secretary of State requires<sup>3</sup>.

1 For the meaning of 'pensionable age' see PARA 562 ante.

2 Social Security (Claims and Payments) Regulations 1987, SI 1987/1968, reg 16(1).

3 Ibid reg 22(1). As to the Secretary of State see PARA 1 ante.

### **UPDATE**

#### **597 Date and method of payment**

TEXT AND NOTES--As to the payability of state pension credit, see SI 1987/1968 reg 16A (added by SI 2002/3019). As to bereavement allowance, widowed mother's allowance, widowed parent's allowance and widow's pension, see SI 1987/1968 reg 22A (regs 22A, 22B added by SI 2009/604). As to payment of bereavement allowance, widowed mother's allowance, widowed parent's allowance and widow's pension at a daily rate, see SI 1987/1968 reg 22B (as added). See the Social Security (Transitional Payments) Regulations 2009, SI 2009/609, which make provision in respect of the payment of a one-off transitional payment and an adjusting payment of benefit where the manner in which certain benefits are paid is changed by the Secretary of State. SI 1987/1968 now replaced, in so far as it relates to child benefit or guardian's allowance, by Child Benefit (General) Regulations 2006, SI 2006/223 (see PARA 237-257).

NOTE 3--The pension may be paid at intervals of four weeks, or weekly in advance: SI 1987/1968 reg 22(1) (amended by SI 2002/2441, SI 2009/604).

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## **15. REGULATION OF PRIVATE PENSION PROVISION**

### **(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY**

#### **(i) Establishment**

##### **598. Establishment of the Occupational Pensions Regulatory Authority.**

There is a body corporate called the Occupational Pensions Regulatory Authority ('the authority')<sup>1</sup>. The authority must consist of not less than seven members appointed by the Secretary of State<sup>2</sup>, one of whom must be so appointed as chairman<sup>3</sup>. In addition to the chairman, the authority must comprise:

- 1327 (1) a member appointed after the Secretary of State has consulted organisations appearing to him to be representative of employers<sup>4</sup>;
- 1328 (2) a member appointed after the Secretary of State has consulted organisations appearing to him to be representative of employees<sup>5</sup>;
- 1329 (3) a member who appears to the Secretary of State to be knowledgeable about life assurance business<sup>6</sup>;
- 1330 (4) a member who appears to the Secretary of State to have experience of, and to have shown capacity in, the management or administration of occupational pension schemes<sup>7</sup>; and
- 1331 (5) two members who appear to the Secretary of State to be knowledgeable about occupational pension schemes<sup>8</sup>,

and such other member or members as the Secretary of State may appoint<sup>9</sup>. Neither the authority nor any person who is a member or employee of the authority is liable in damages for anything done or omitted in the discharge or purported discharge of the functions of the authority under Part I of the Pensions Act 1995<sup>10</sup> or the Pension Schemes Act 1993<sup>11</sup>, or any provisions in force in Northern Ireland corresponding to either of them, unless it is shown that the act or omission was in bad faith<sup>12</sup>.

The authority must not be regarded as the servant or agent of the Crown, or as enjoying any status, privilege or immunity of the Crown and its property must not be regarded as property of, or property held on behalf of, the Crown<sup>13</sup>. The authority may do anything (except borrow money) which is calculated to facilitate the discharge of its functions, or is incidental or conducive to their discharge<sup>14</sup>.

A person holds and vacates office as chairman or other member of the authority in accordance with the terms of the instrument appointing him<sup>15</sup>. If, however, a member of the authority becomes or ceases to be chairman, the Secretary of State may vary the terms of the instrument appointing him to be a member so as to alter the date on which he is to vacate office<sup>16</sup>. A person may at any time resign office as chairman or other member of the authority by giving written notice of his resignation signed by him to the Secretary of State<sup>17</sup>. The chairman of the authority may at any time be removed from office by notice in writing given to him by the Secretary of State<sup>18</sup> and if a person so ceases to be chairman, he must cease to be a member of the authority<sup>19</sup>.

If the Secretary of State is satisfied that a member of the authority other than the chairman:

- 1332 (a) has been absent from meetings of the authority for a period longer than three consecutive months without the authority's permission;
- 1333 (b) has become bankrupt or made an arrangement with his creditors; or
- 1334 (c) is unable or unfit to discharge the functions of a member,

the Secretary of State may remove that member by notice in writing<sup>20</sup>.

The Secretary of State may pay the authority such sums as he thinks fit towards its expenses<sup>21</sup>. The authority may pay, or make provision for paying, to or in respect of the chairman or any other member such salaries or other remuneration, and such pensions, allowances, fees, expenses or gratuities, as the Secretary of State may determine<sup>22</sup>. Where a person ceases to be a member of the authority otherwise than on the expiration of his term of office and it appears to the Secretary of State that there are circumstances which make it right for that person to receive compensation, the authority may make to that person a payment of such amount as the Secretary of State may determine<sup>23</sup>.

All members of the authority are disqualified for membership of the House of Commons<sup>24</sup>.

The authority is subject to investigation by the Parliamentary Commissioner for Administration<sup>25</sup>.

The authority is the Registrar of Occupational and Personal Pension Schemes<sup>26</sup>.

The Occupational Pensions Board was dissolved with effect from 6 April 1997<sup>27</sup>.

1 Pensions Act 1995 s 1(1).

2 As to the Secretary of State see PARA 1 ante.

3 Pensions Act 1995 s 1(2).

4 Ibid s 1(3)(a). 'Employer', in relation to an occupational pension scheme, means the employer of persons in the description or category of employment to which the scheme in question relates: s 124(1). Regulations may, however, in relation to occupational pension schemes, extend the meaning of 'employer' for these purposes to include persons who have been the employer in relation to the scheme: s 125(3).

5 Ibid s 1(3)(b). 'Employee' means a person gainfully employed in Great Britain either under a contract of service or in an office (including an elective office) with emoluments chargeable to income tax under Schedule E: Pension Schemes Act 1993 s 181(1) (definition applied by the Pensions Act 1995 s 124(5)). For the meaning of 'contract of service' see PARA 32 note 4 ante (definition as so applied).

6 Ibid s 1(3)(c). For these purposes, 'life assurance business' means the issue of, or the undertaking of liability under, policies of assurance upon human life, or the granting of annuities upon human life: s 1(6).

7 Ibid s 1(3)(d). For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 post (definition applied by the Pensions Act 1995 s 176). Regulations may apply the Pensions Act 1995 Pt I (ss 1-125) (see PARA 599 et seq post) with prescribed modifications to occupational pension schemes which are not money purchase schemes, but where some of the benefits that may be provided are money purchase benefits: s 125(2). For the meaning of 'modify' see PARA 664 note 10 post; and for the meaning of 'money purchase scheme' and money purchase benefits' see PARA 811 note 2 post (definitions applied by the Pensions Act 1995 s 124(5)).

8 Ibid s 1(3)(e).

9 Ibid s 1(3).

10 In the Pensions Act 1995 Pt I: see PARA 599 et seq post.

11 See PARA 660 et seq post.

12 Pensions Act 1995 s 1(4).

13 Ibid s 1(5), Sch 1 para 1.

14 Ibid Sch 1 para 2.

15 Ibid Sch 1 para 3.

16 Ibid Sch 1 para 4.

17 Ibid Sch 1 para 5.

18 Ibid Sch 1 para 6(1).

19 Ibid Sch 1 para 6(2).

20 Ibid Sch 1 para 7(1). In the application of Sch 1 para 7(1) to Scotland, the reference to a member's having become bankrupt must be read as a reference to sequestration of the member's estate having been awarded, and the reference to a member having made an arrangement with his creditors must be read as a reference to his having made a trust deed for the behoof of his creditors or a composition contract: Sch 1 para 7(2).

21 Ibid Sch 1 para 8(1).

22 Ibid Sch 1 para 8(2).

23 Ibid Sch 1 para 8(3).

24 See ibid Sch 1 para 9; and PARLIAMENT vol 78 (2010) PARA 908.

25 See ibid Sch 1 para 10; and as to the Parliamentary Commissioner see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARAS 41-44.

26 See the Register of Occupational and Personal Pension Schemes Regulations 1997, SI 1997/371, regs 1(4), 2(2); and PARA 661 post.

27 Pensions Act 1995 s 150(1); Pensions Act 1995 (Commencement No 10) Order 1995, SI 1997/664, art 2(2), Schedule Pt II. An order under the Pensions Act 1995 s 180 appointing the day on which s 150(1) was to come into force could provide: (1) for all property, rights and liabilities to which the board is entitled or subject immediately before that day to become property, rights and liabilities of the Occupational Pensions Regulatory Authority or the Secretary of State; and (2) for any function of the board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the authority, the Secretary of State or the Department of Health and Social Services for Northern Ireland: s 150(2). All property, rights and liabilities to which the board was entitled or subject immediately before 6 April 1997 became the property, rights and liabilities of the Secretary of State: Pensions Act 1995 (Commencement No 10) Order 1995, SI 1997/664, art 14.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87

(disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106); and PARA 636A.

## **598 Establishment of the Occupational Pensions Regulatory Authority**

TEXT AND NOTES--Pensions Act 1995 s 1, Sch 1 repealed: Pensions Act 2004 Sch 13 Pt 1.

As to the role of the Occupational Pensions Regulatory Authority in relation to the registration of stakeholder pension schemes see PARA 873A.2.

NOTE 4--In the definition of 'employer' in the Pensions Act 1995 s 124(1) words 'or category' prospectively repealed: Pensions Act 2004 Sch 13 Pt 1.

Definition may also be so extended to include such other persons as may be prescribed: 1995 Act s 125(3) (amended by 2004 Act s 240(1) (not yet in force)).

NOTE 5--In definition of 'employee' for 'emoluments ... under Schedule E' read 'general earnings (as defined by the Income Tax (Earnings and Pensions) Act 2003 s 7)': Pension Schemes Act 1993 s 181(1) (definition amended by the Income Tax (Earnings and Pensions) Act 2003 Sch 6 para 222).

NOTE 27--1995 Act s 150 repealed: Statute Law (Repeals) Act 2004.

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### **599. Staff.**

There must be a chief executive and, with the approval of the Secretary of State<sup>1</sup> as to numbers, other employees<sup>2</sup> of the Occupational Pensions Regulatory Authority<sup>3</sup>. The first chief executive must be appointed by the Secretary of State on such terms and conditions as to remuneration and other matters as the Secretary of State may determine<sup>4</sup>. Any reappointment of the first chief executive, and the appointment of the second and any subsequent chief executive, must be made by the authority, with the approval of the Secretary of State, on such terms and conditions as to remuneration and other matters as the authority may, with the approval of the Secretary of State, determine<sup>5</sup>. The other employees must be appointed by the authority on such terms and conditions as to remuneration and other matters as the authority may, with the approval of the Secretary of State, determine<sup>6</sup>. The Secretary of State may, on such terms as to payment by the authority as he thinks fit, make available to the authority such additional staff and such other facilities as he thinks fit<sup>7</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 For the meaning of 'employee' see PARA 598 note 5 ante.

3 Pensions Act 1995 s 1(5), Sch 1 para 11(1). As to the Occupational Pensions Regulatory Authority see PARA 598 ante. Employment with the authority is included among the kinds of employment to which a scheme under the Superannuation Act 1972 s 1 (as amended) (see PARA 875 post; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 567) applies: Pensions Act 1995 Sch 1 para 12(1). The authority must pay to the Treasury, at such times as the Treasury may direct, such sums as the authority may determine in respect of the increase attributable to Sch 1 para 12 in the sums payable out of money provided by Parliament under the Superannuation Act 1972: Pensions Act 1995 Sch 1 para 12(2).

4 Ibid Sch 1 para 11(2).

5 Ibid Sch 1 para 11(3).

6 Ibid Sch 1 para 11(4).

7 Ibid Sch 1 para 11(5).

### **UPDATE**

#### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

#### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the

Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

### **599-603 Staff ... Reports to the Secretary of State**

Pensions Act 1995 ss 1, 2, Sch 1 repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(i) Establishment/600. Proceedings.

## **600. Proceedings.**

The Secretary of State<sup>1</sup> may make regulations<sup>2</sup> generally as to the procedure to be followed by the Occupational Pensions Regulatory Authority<sup>3</sup> in the exercise of its functions and the manner in which its functions are to be exercised<sup>4</sup>. Such regulations may in particular make provision:

- 1335 (1) as to the hearing of parties, the taking of evidence and the circumstances (if any) in which a document of any prescribed<sup>5</sup> description is to be treated, for the purposes of any proceedings before the authority, as evidence, or conclusive evidence, of any prescribed matter<sup>6</sup>;
- 1336 (2) as to the time to be allowed for making any application or renewed application to the authority (whether for an order or determination of the authority or for the review of a determination, or otherwise)<sup>7</sup>;
- 1337 (3) as to the manner in which parties to any proceedings before the authority may or are to be represented for the purposes of the proceedings<sup>8</sup>.

Such regulations may provide for enabling the authority to summon persons:

- 1338 (a) to attend before it and give evidence (including evidence on oath) for any purposes of proceedings in connection with an occupational pension scheme<sup>9</sup>;
- 1339 (b) to produce any documents required by the authority for those purposes<sup>10</sup>;  
or
- 1340 (c) to furnish any information which the authority may require relating to any such scheme which is the subject matter of proceedings pending before it<sup>11</sup>.

The authority may establish a committee for any purpose<sup>12</sup>. The quorum of the authority must be such as it may determine, and the authority may regulate its own procedure and that of any of its committees<sup>13</sup>. The authority may authorise the chairman or any other member, the chief executive or any committee established by the authority to exercise such of the authority's functions as it may determine<sup>14</sup>. The validity of any proceedings of the authority, or of any of its committees, is not affected by any vacancy among the members or by any defect in the appointment of any member<sup>15</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 'Regulations' means regulations made by the Secretary of State: Pensions Act 1995 s 124(1).

3 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

4 Pensions Act 1995 s 1(5), Sch 1 para 13(1).

5 For the meaning of 'prescribed' see PARA 555 note 1 ante.

6 Pensions Act 1995 Sch 1 para 13(2)(a).

7 Ibid Sch 1 para 13(2)(b).

8 Ibid Sch 1 para 13(2)(c).

9 Ibid Sch 1 para 13(3)(a). For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 post (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

10 Ibid Sch 1 para 13(3)(b).

11 Ibid Sch 1 para 13(3)(c).

12 Ibid Sch 1 para 14(1).

13 Ibid Sch 1 para 14(2).

14 Ibid Sch 1 para 14(3). Schedule 1 para 14 is subject to regulations made by virtue of Sch 1 para 13 and to s 96(5) (see PARA 67 post): Sch 1 para 14(4).

15 Ibid Sch 1 para 15.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

### **599-603 Staff ... Reports to the Secretary of State**

Pensions Act 1995 ss 1, 2, Sch 1 repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(i) Establishment/601. Accounts, other expenses and fees.

### **601. Accounts, other expenses and fees.**

It is the duty of the Occupational Pensions Regulatory Authority<sup>1</sup>:

- 1341 (1) to keep proper accounts and proper records in relation to the accounts<sup>2</sup>;
- 1342 (2) to prepare in respect of each financial year<sup>3</sup> of the authority a statement of accounts<sup>4</sup>; and
- 1343 (3) to send copies of the statement to the Secretary of State<sup>5</sup> and to the Comptroller and Auditor General before the end of the month of August next following the financial year to which the statement relates<sup>6</sup>.

The statement of accounts must comply with any directions given by the Secretary of State with the approval of the Treasury as to:

- 1344 (a) the information to be contained in it<sup>7</sup>;
- 1345 (b) the manner in which the information contained in it is to be presented<sup>8</sup>; or
- 1346 (c) the methods and principles according to which the statement is to be prepared<sup>9</sup>,

and must contain such additional information as the Secretary of State may with the approval of the Treasury require to be provided for the information of Parliament<sup>10</sup>. The Comptroller and Auditor General must examine, certify and report on each such statement received by him and must lay copies of each statement and of his report before each House of Parliament<sup>11</sup>.

The authority may:

- 1347 (i) pay to persons attending meetings of the authority at the request of the authority such travelling and other allowances (including compensation for loss of remunerative time) as the Secretary of State may determine; and
- 1348 (ii) pay to persons from whom the authority may decide to seek advice, as being persons considered by the authority to be specially qualified to advise it on particular matters, such fees as the Secretary of State may determine<sup>12</sup>.

Regulations<sup>13</sup> made by the Secretary of State may authorise the authority to charge fees for its services in respect of the modification of an occupational pension scheme<sup>14</sup> on an application for such modification<sup>15</sup> including services in connection with the drawing up of any order of the authority made on application<sup>16</sup>.

1 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 Pensions Act 1995 s 1(5), Sch 1 para 16(1)(a).

3 For the purposes of *ibid* Sch 1 para 16, 'financial year' means the period beginning with the date on which the authority is established and ending with the next following 31 March, and each successive period of 12 months: Sch 1 para 16(4).

4 *Ibid* Sch 1 para 16(1)(b).

- 5 As to the Secretary of State see PARA 1 ante.
- 6 Pensions Act 1995 Sch 1 para 16(1)(c). As to the Comptroller and Auditor General see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 724-726.
- 7 Ibid Sch 1 para 16(2)(a).
- 8 Ibid Sch 1 para 16(2)(b).
- 9 Ibid Sch 1 para 16(2)(c).
- 10 Ibid Sch 1 para 16(2).
- 11 Ibid Sch 1 para 16(3).
- 12 Ibid Sch 1 para 17.
- 13 For the meaning of 'regulations' see PARA 600 note 2 ante.
- 14 For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 post (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.
- 15 ie an application made under ibid s 69 (see PARA 835 post), or under any corresponding provision in force in Northern Ireland: see Sch 1 para 18.
- 16 Ibid Sch 1 para 18.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

**599-603 Staff ... Reports to the Secretary of State**

Pensions Act 1995 ss 1, 2, Sch 1 repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(i) Establishment/602. Application of seal and proof of instruments.

## **602. Application of seal and proof of instruments.**

The fixing of the common seal of the Occupational Pensions Regulatory Authority<sup>1</sup> must be authenticated by the signature of the secretary of the authority or some other person authorised by it to act for that purpose<sup>2</sup>. A document purporting to be duly executed under the seal of the authority must be received in evidence and must, unless the contrary is proved, be deemed to be so executed<sup>3</sup>.

1 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 Pensions Act 1995 s 1(5), Sch 1 para 19(1). Schedule 1 para 19(1) does not apply in relation to any document which is or is to be signed in accordance with the law of Scotland: Sch 1 para 19(2).

3 Ibid Sch 1 para 20.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

**599-603 Staff ... Reports to the Secretary of State**

Pensions Act 1995 ss 1, 2, Sch 1 repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(i) Establishment/603. Reports to the Secretary of State.

### **603. Reports to the Secretary of State.**

The Occupational Pensions Regulatory Authority<sup>1</sup> must prepare a report for the first 12 months of its existence, and a report for each succeeding period of 12 months, and must send each report to the Secretary of State<sup>2</sup> as soon as practicable after the end of the period for which it is prepared<sup>3</sup>. Such a report for any period must deal with the activities of the authority in the period<sup>4</sup>. The Secretary of State must lay before each House of Parliament a copy of every such report received by him<sup>5</sup>.

1 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 As to the Secretary of State see PARA 1 ante.

3 Pensions Act 1995 s 2(1).

4 Ibid s 2(2).

5 Ibid s 2(3). As to laying documents before Parliament see generally PARLIAMENT vol 34 (Reissue) PARA 941.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as

in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

**599-603 Staff ... Reports to the Secretary of State**

Pensions Act 1995 ss 1, 2, Sch 1 repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(ii) Supervision by the Occupational Pensions Regulatory Authority/604. Prohibition orders.

## **(ii) Supervision by the Occupational Pensions Regulatory Authority**

### **604. Prohibition orders.**

The Occupational Pensions Regulatory Authority<sup>1</sup> may by order prohibit a person from being a trustee of a particular trust scheme<sup>2</sup> in any of the following circumstances<sup>3</sup>. The circumstances are:

- 1349 (1) that the authority is satisfied that while being a trustee of the scheme the person has been in serious or persistent breach of any of his duties under:
- 149
203. (a) Part I of the Pensions Act 1995<sup>4</sup>, with certain exceptions<sup>5</sup>; or
204. (b) certain provisions of the Pension Schemes Act 1993<sup>6</sup>;
- 150
- 1350 (2) that the authority is satisfied that, while being a trustee of the scheme, these provisions have applied to the person by virtue of any other provision of Part I of the Pensions Act 1995<sup>7</sup>;
- 1351 (3) that the person is a company and any director of the company is prohibited under these provisions from being a trustee of the scheme<sup>8</sup>;
- 1352 (4) that the person is a Scottish partnership<sup>9</sup> and any of the partners is prohibited under these provisions from being a trustee of the scheme<sup>10</sup>; or
- 1353 (5) that the person is a director of a company which, by reason of the above circumstances<sup>11</sup> is prohibited under these provisions from being a trustee of the scheme and the authority is satisfied that the acts or defaults giving rise to those circumstances were committed with the consent or connivance of, or were attributable to any neglect on the part of, the director<sup>12</sup>,

or any other prescribed<sup>13</sup> circumstances<sup>14</sup>.

The making of such an order against a person who is a trustee of the scheme in question has the effect of removing him<sup>15</sup>. The authority may, on the application of any person against whom such an order is in force, by order revoke the order, but a revocation made at any time cannot affect anything done before that time<sup>16</sup>.

1 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 'Trust scheme' means an occupational pension scheme established under a trust: Pensions Act 1995 s 124(1).

3 Ibid s 3(1).

4 Ie the Pensions Act 1995 Pt I (ss 1-125): see PARA 598 et seq ante, 605 et seq post.

5 Ibid s 3(2)(a)(i). The exceptions are the provisions contained in ss 51-54 (see PARAS 861-863 post); ss 62-65 (see PARAS 782-785 post); and ss 110-112 (see PARA 657 post).

6 Ibid s 3(2)(a)(ii). The relevant provisions are the Pension Schemes Act 1993 s 6 (as amended) (registration) (see PARA 660 post); Pt IV Ch IV (ss 93-101) (as amended) (transfer of values: see PARAS 951-958 post); s 113 (information: see PARA 557 ante); and s 175 (as substituted) (levy: see PARA 974 post).

- 7 Pensions Act 1995 s 3(2)(b).
- 8 Ibid s 3(2)(c).
- 9 'Scottish partnership' means a partnership constituted under the law of Scotland: *ibid* s 124(1).
- 10 Ibid s 3(2)(d).
- 11 Ie the circumstances falling within *ibid* s 3(2)(a) or s 3(2)(b): see the text and notes 5-7 *supra*.
- 12 Ibid s 3(2)(e).
- 13 For the meaning of 'prescribed' see PARA 555 note 1 *ante*.
- 14 Pensions Act 1995 s 3(2). In exercise of these powers, the Secretary of State for Social Security has made the Occupational Pension Schemes (Prohibition of Trustees) Regulations 1997, SI 1997/663, which came into force on 6 April 1997: reg 1(1). If (1) a company or a Scottish partnership is, or prior to dissolution was, prohibited under the Pensions Act 1995 s 3(2) from being a trustee of a scheme by reason of circumstances falling within head (1) or (2) in the text, and the authority is satisfied that the acts or defaults giving rise to those circumstances were committed with the consent or connivance of, or attributable to any neglect on the part of, an individual who at the time of those acts or defaults was a director of the company or a partner in the Scottish partnership, the authority (except where s 3(2) applies) may by order prohibit from being a trustee of a particular trust scheme: (a) the individual concerned; (b) any Scottish partnership in which the individual concerned is a partner; (c) any company of which the individual concerned is a director; (d) any company which has as a director a company of which the individual concerned is a director; (e) any company which is subject to a power of appointment to a directorship, in favour of a company of which the individual concerned is a director; and (f) any company which automatically has as a director, any director or other nominee of another company of which latter company the individual concerned is a director: Occupational Pension Schemes (Prohibition of Trustees) Regulations 1997, SI 1997/663, reg 2.
- 15 Pensions Act 1995 s 3(3).
- 16 Ibid s 3(4).

## UPDATE

### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see PARA 676A.

### 598-636 The Occupational Pensions Regulatory Authority

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained

by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

#### **604 Prohibition orders**

TEXT AND NOTES--Pensions Act 1995 s 3 substituted; see *infra*.

The Authority may by order prohibit a person from being a trustee of (1) a particular trust scheme, (2) a particular description of trust schemes, or (3) trust schemes in general, if they are satisfied that he is not a fit and proper person to be a trustee of the scheme or schemes to which the order relates<sup>1</sup>. Where a prohibition order is made<sup>2</sup> against a person in respect of one or more schemes of which he is a trustee, the order has the effect of removing him<sup>3</sup>. The Authority may, on the application of any person prohibited under these provisions, by order revoke the order either generally or in relation to a particular scheme or description of schemes<sup>4</sup>. A revocation made at any time under these provisions cannot affect anything done before that time<sup>5</sup>. The Authority must prepare and publish a statement of the policies they intend to adopt in relation to the exercise of their powers under these provisions<sup>6</sup>.

1 Pensions Act 1995 s 3(1) (substituted by Pensions Act 2004 s 33).

2 Under the Pensions Act 1995 s 3(1).

3 *Ibid* s 3(2).

4 *Ibid* s 3(3). An application under s 3(3) may not be made (1) during the period within which the determination to exercise the power to make the prohibition order may be referred to the Tribunal under the Pensions Act 2004 s 96(3) or 99(7) (see PARA 636A.37), and (2) if the determination is so referred, until the reference, and any appeal against the Tribunal's determination, has been finally disposed of: Pensions Act 1995 s 3(4). In s 3 'the Tribunal' means the Pensions Regulator Tribunal established under the Pensions Act 2004 s 102 (see PARA 636A.38): Pensions Act 1995 s 3(8).

5 *Ibid* s 3(5).

6 *Ibid* s 3(6). The Authority may revise any statement published under s 3(6) and must publish any revised statement: s 3(7).

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### **605. Suspension orders.**

The Occupational Pensions Regulatory Authority<sup>1</sup> may by order suspend a trustee of a trust scheme<sup>2</sup>:

- 1354 (1) pending consideration being given to the making of a prohibition order<sup>3</sup> against him<sup>4</sup>;
- 1355 (2) where proceedings have been instituted against him for an offence involving dishonesty or deception and have not been concluded<sup>5</sup>;
- 1356 (3) where a petition has been presented to the court for an order adjudging him bankrupt, or for the sequestration of his estate, and proceedings on the petition have not been concluded<sup>6</sup>;
- 1357 (4) where the trustee is a company, if a petition for the winding up of the company has been presented to the court and proceedings on the petition have not been concluded<sup>7</sup>;
- 1358 (5) where an application has been made to the court for a disqualification order against him under the Company Directors Disqualification Act 1986<sup>8</sup> and proceedings on the application have not been concluded<sup>9</sup>; or
- 1359 (6) where the trustee is a company or Scottish partnership<sup>10</sup> and, if any director or, as the case may be, partner were a trustee, the authority would have power to suspend him under head (2), head (3) or head (5) above<sup>11</sup>.

Such an order:

- 1360 (a) if made by virtue of head (1) above has effect for an initial period not exceeding 12 months<sup>12</sup>; and
- 1361 (b) in any other case, has effect until the proceedings in question are concluded<sup>13</sup>,

but the authority may by order extend the initial period referred to in head (a) above for a further period of 12 months, and any such suspension order suspending a person ceases to have effect if a prohibition order<sup>14</sup> is made against that person<sup>15</sup>.

A suspension order has the effect of prohibiting the person suspended, during the period of his suspension, from exercising any functions as trustee of any trust scheme to which the order applies; and the order may apply to a particular trust scheme, a particular class of trust schemes or trust schemes in general<sup>16</sup>. Such an order may be made on one of the grounds set out in heads (2) to (5) above whether or not the proceedings were instituted, petition presented or application made (as the case may be) before or after 6 April 1997<sup>17</sup>. The authority may, on the application of any person so suspended, by order revoke the order, either generally or in relation to a particular scheme or a particular class of schemes; but a revocation made at any time cannot affect anything done before that time<sup>18</sup>. A suspension order may make provision as respects the period of the trustee's suspension for matters arising out of it, and in particular for enabling any person to execute any instrument in his name or otherwise act for him and for adjusting any rules governing the proceedings of the trustees to take account of the reduction in the number capable of acting<sup>19</sup>.

- 1 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.
- 2 For the meaning of 'trust scheme' see PARA 604 note 2 ante.
- 3 Ie an order under the Pensions Act 1995 s 3: see PARA 604 ante.
- 4 Ibid s 4(1)(a).
- 5 Ibid s 4(1)(b).
- 6 Ibid s 4(1)(c).
- 7 Ibid s 4(1)(d).
- 8 See generally COMPANIES vol 15 (2009) PARA 1578.
- 9 Pensions Act 1995 s 4(1)(e).
- 10 For the meaning of 'Scottish partnership' see PARA 3 note 10 ante.
- 11 Pensions Act 1995 s 4(1)(f).
- 12 Ibid s 4(2)(a).
- 13 Ibid s 4(2)(b).
- 14 Ie an order made under ibid s 3(1): see PARA 604 ante.
- 15 Ibid s 4(2).
- 16 Ibid s 4(3).
- 17 Ibid s 4(4). The date in the text is that of the coming into force of s 4(1): see s 4(4).
- 18 Ibid s 4(5).
- 19 Ibid s 4(6).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to

OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

## **605 Suspension orders**

TEXT AND NOTES 4-11--Add head '(1a) pending consideration being given to the institution of proceedings against him for an offence involving dishonesty or deception;': Pensions Act 1995 s 4(1)(aa) (added by Pensions Act 2004 s 34(a)).

NOTE 9--Pensions Act 1995 s 4(1)(e) amended: SI 2009/1941.

TEXT AND NOTES 12-15--Pensions Act 1995 s 4(2) amended: Pensions Act 2004 s 34(b).

TEXT AND NOTES 16, 18--In Pensions Act 1995 s 4(3) and (5) for 'class' read 'description': Pensions Act 2004 Sch 12 para 35.

TEXT AND NOTE 18--An application under the Pensions Act 1995 s 4(5) may not be made (1) during the period within which the determination to exercise the power to make an order under s 4(1) may be referred to the Tribunal under the Pensions Act 2004 s 96(3) or 99(7) (see PARA 636A.37), and (2) if the determination is so referred, until the reference, and any appeal against the Tribunal's determination, has been finally disposed of: Pensions Act 1995 s 4(5A) (added by Pensions Act 2004 s 34(c)). In the Pensions Act 1995 s 4 'the Tribunal' means the Pensions Regulator Tribunal established under the Pensions Act 2004 s 102 (see PARA 636A.38): Pensions Act 1995 s 4(7) (added by Pensions Act 2004 s 34(d)).

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#### **606. Removal of trustees; notices.**

Before the Occupational Pensions Regulatory Authority<sup>1</sup> makes a prohibition order<sup>2</sup> against a person without his consent, the authority must, unless he cannot be found or has no known address, give him not less than one month's notice of its proposal, inviting representations to be made to it within a time specified in the notice<sup>3</sup>. Where any such notice is given, the authority must take into consideration any representations made to it about the proposals within the time specified in the notice<sup>4</sup>. Before making a prohibition order against a person, the authority must give notice of its intention to do so to each of the trustees of the scheme, except that person (if he is a trustee) and any trustee who cannot be found or has no known address<sup>5</sup>. Where the authority makes a suspension order<sup>6</sup> against a person, it must:

- 1362 (1) immediately give notice of that fact to that person<sup>7</sup>; and
- 1363 (2) as soon as reasonably practicable, give notice of that fact to the other trustees of any trust scheme<sup>8</sup> to which the order applies, except any trustee who cannot be found or has no known address<sup>9</sup>.

Any such notice to be given to any person may be given by delivering it to him or by leaving it at his proper address or by sending it to him by post; and, for these purposes<sup>10</sup>, the proper address of any person is his latest address known to the authority<sup>11</sup>.

1 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 I.e. an order under the Pensions Act 1995 s 3: see PARA 604 ante.

3 Ibid s 5(1).

4 Ibid s 5(2).

5 Ibid s 5(3).

6 I.e. an order under ibid s 4: see PARA 605 ante.

7 Ibid s 5(4)(a).

8 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

9 Pensions Act 1995 s 5(4)(b).

10 I.e. for the purposes of ibid s 5(5) and the Interpretation Act 1978 s 7 (see STATUTES vol 44(1) (Reissue) PARA 1388) in its application to the Pensions Act 1995 s 5(5): see s 5(5).

11 Ibid s 5(5).

#### **UPDATE**

#### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

## **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

## **606 Removal of trustees; notices**

TEXT AND NOTES--Pensions Act 1995 s 5 repealed: Pensions Act 2004 Sch 13 Pt 1.

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### **607. Removal or suspension of trustees; consequences.**

A person who purports to act as trustee of a trust scheme<sup>1</sup> while prohibited<sup>2</sup> from being a trustee of the scheme or suspended<sup>3</sup> in relation to the scheme is guilty of an offence and liable on summary conviction to a fine not exceeding the statutory maximum<sup>4</sup>, and on conviction on indictment to a fine or imprisonment, or to both<sup>5</sup>.

Such an offence may be charged by reference to any day or longer period of time; and a person may be convicted of a second or subsequent such offence by reference to any period of time following the preceding conviction of the offence<sup>6</sup>. Things done by a person purporting to act as trustee of a trust scheme while prohibited<sup>7</sup> from being a trustee of the scheme or suspended<sup>8</sup> in relation to the scheme are not invalid merely because of that prohibition or suspension<sup>9</sup>. Nothing in these provisions<sup>10</sup>, however, affects the liability of any person for things done, or omitted to be done, by him while purporting to act as trustee of a trust scheme<sup>11</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 Ie prohibited under the Pensions Act 1995 s 3: see PARA 604 ante.

3 Ie suspended under ibid s 4: see PARA 605 ante.

4 Ibid s 6(1)(a). As to the statutory maximum see PARA 403 note 2 ante.

5 Ibid s 6(1)(b).

6 Ibid s 6(2).

7 See note 2 supra.

8 See note 3 supra.

9 Pensions Act 1995 s 6(3).

10 Ie the provisions of ibid ss 3, 4 (see PARAS 604-605 ante) or s 6: see s 6(4).

11 Ibid s 6(4).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State,

and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

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### **608. Appointment of trustees.**

Where a trustee of a trust scheme<sup>1</sup> is removed by a prohibition order<sup>2</sup>, or a trustee of such a scheme ceases to be a trustee by reason of his disqualification, the Occupational Pensions Regulatory Authority<sup>3</sup> may by order appoint another trustee in his place<sup>4</sup>. Where a trustee so appointed is appointed to replace an independent trustee<sup>5</sup>, the provisions relating to independent trustees<sup>6</sup> apply to the replacement trustee as they apply to an independent trustee<sup>7</sup>. The authority may also by order appoint a trustee of a trust scheme where it is satisfied that it is necessary to do so in order:

- 1364 (1) to secure that the trustees as a whole have, or exercise, the necessary knowledge and skill for the proper administration of the scheme<sup>8</sup>;
- 1365 (2) to secure that the number of trustees is sufficient for the proper administration of the scheme<sup>9</sup>; or
- 1366 (3) to secure the proper use or application of the assets of the scheme<sup>10</sup>.

The authority may also appoint a trustee of a trust scheme in prescribed<sup>11</sup> circumstances<sup>12</sup>. The power to appoint a trustee by an order under these provisions includes power by such an order:

- 1367 (a) to determine the appropriate number of trustees for the proper administration of the scheme<sup>13</sup>;
- 1368 (b) to require a trustee appointed by the order to be paid fees and expenses out of the scheme's resources<sup>14</sup>;
- 1369 (c) to provide for the removal or replacement of such a trustee<sup>15</sup>.

Regulations<sup>16</sup> may make provision about the descriptions of persons who may or may not be appointed trustees<sup>17</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 Ie an order under the Pensions Act 1995 s 3: see PARA 604 ante.

3 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

4 Pensions Act 1995 s 7(1).

5 Ie a trustee appointed under *ibid* s 23(1)(b): see PARA 795 post. As to independent trustees see s 23(3); and PARA 795 post.

6 Ie the provisions of *ibid* ss 22-26: see PARA 795 post.

7 *Ibid* s 7(2).

8 *Ibid* s 7(3)(a).

9 *Ibid* s 7(3)(b).

10 *Ibid* s 7(3)(c).

11 For the meaning of 'prescribed' see PARA 555 note 1 ante.

- 12 Pensions Act 1995 s 7(4).
- 13 Ibid s 7(5)(a).
- 14 Ibid s 7(5)(b).
- 15 Ibid s 7(5)(c).
- 16 For the meaning of 'regulations' see PARA 600 note 2 ante.
- 17 Pensions Act 1995 s 7(6).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

### **608 Appointment of trustees**

TEXT AND NOTES--An application may be made to the Authority in relation to a trust scheme by (1) the trustees of the scheme, (2) the employer, or (3) any member of the scheme, for the appointment of a trustee of the scheme under the Pensions Act 1995 s 7(3)(a) or (c): s 7(5A) (added by Pensions Act 2004 s 35(1)(b)).

TEXT AND NOTES 4, 7--Pensions Act 1995 s 7(1), (2) amended: Pensions Act 2004 Sch 12 para 36, Sch 13 Pt 1.

TEXT AND NOTES 8-10--Pensions Act 1995 s 7(3) amended: Pensions Act 2008 s 131(1), Sch 11 Pt 6.

TEXT AND NOTE 12--Pensions Act 1995 s 7(4) omitted: Pensions Act 2004 s 35(1)(a), Sch 13 Pt 1.

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### **609. Appointment of trustees; consequences.**

An order appointing a trustee<sup>1</sup> may provide that an amount equal to the amount, if any, which has been paid to the trustee so appointed out of the resources<sup>2</sup> of the pension scheme and has not been reimbursed by the employer<sup>3</sup> is to be treated for all purposes as a debt due from the employer to the trustees<sup>4</sup>. A trustee so appointed must, unless he is the independent trustee<sup>5</sup> and certain circumstances apply<sup>6</sup> in relation to the scheme, have the same powers and duties as the other trustees<sup>7</sup>. Such an order may make provision for restricting the powers or duties of a trustee so appointed<sup>8</sup>, or for powers or duties to be exercisable by a trustee so appointed to the exclusion of other trustees<sup>9</sup>.

1    Ie an order made under the Pensions Act 1995 s 7: see PARA 608 ante.

2    'Resources', in relation to an occupational pension scheme, means the funds out of which the benefits provided by the scheme are payable from time to time, including the proceeds of any policy of insurance taken out, or annuity contract entered into, for the purposes of the scheme: *ibid* s 124(1). For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 post (definition applied by the Pensions Act 1995 s 176).

3    For the meaning of 'employer' see PARA 598 note 4 ante.

4    Pensions Act 1995 s 8(1).

5    As to independent trustees generally see PARA 795 post.

6    Ie the circumstances set out in the Pensions Act 1995 s 22: see PARA 795 post.

7    *Ibid* s 8(3).

8    *Ibid* s 8(4)(a).

9    *Ibid* s 8(4)(b).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained

by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

## **609 Appointment of trustees; consequences**

TEXT AND NOTE 4--An order under the Pensions Act 1995 s 7 appointing a trustee may provide for any fees and expenses of trustees appointed under the order to be paid (1) by the employer, (2) out of the resources of the scheme, or (3) partly by the employer and partly out of those resources: s 8(1) (substituted by Pensions Act 2004 s 35(2)). Such an order may also provide that an amount equal to the amount (if any) paid out of the resources of the scheme by virtue of head (2) or (3) is to be treated for all purposes as a debt due from the employer to the trustees of the scheme: Pensions Act 1995 s 8(2) (as so substituted).

TEXT AND NOTES 8, 9--For 'or for powers' read 'for powers': Pensions Act 1995 s 8(4)(a) (amended by the Welfare Reform and Pensions Act 1999 Sch 2 para 10, Sch 13 Pt I).

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### **610. Removal and appointment of trustees; property.**

Where the Occupational Pensions Regulatory Authority<sup>1</sup> has power under Part I of the Pensions Act 1995<sup>2</sup> to appoint or remove a trustee, it may exercise the same jurisdiction and powers as are exercisable by the High Court or, in relation to a trust scheme<sup>3</sup> subject to the law of Scotland, the Court of Session for vesting any property in, or transferring any property to, trustees in consequence of the appointment or of the removal<sup>4</sup>.

1 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 Ie the Pensions Act 1995 Pt I (ss 1-125): see PARA 598 et seq ante, 611 et seq post.

3 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

4 Pensions Act 1995 s 9.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

**610 Removal and appointment of trustees; property**

TEXT AND NOTES--In Pensions Act 1995 s 9 after 'exercise' add 'by order': Pensions Act 2004 Sch 12 para 37.

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### **611. Civil penalties.**

Where the Occupational Pensions Regulatory Authority<sup>1</sup> is satisfied that by reason of any act or omission the following provisions apply to any person, it may by notice in writing require him to pay, within a prescribed period<sup>2</sup>, a penalty in respect of that act or omission not exceeding the maximum amount<sup>3</sup>. 'The maximum amount' means:

- 1370 (1) £5,000 in the case of an individual and £50,000 in any other case<sup>4</sup>; or
- 1371 (2) such lower amount as may be prescribed in the case of an individual or in any other case<sup>5</sup>,

and the Secretary of State<sup>6</sup> may by order amend head (1) above by substituting higher amounts for the amounts for the time being specified in that head<sup>7</sup>.

Regulations<sup>8</sup> made by virtue of Part I of the Pensions Act 1995<sup>9</sup> may provide for any person who has contravened<sup>10</sup> any provision of such regulations to pay, within a prescribed period, a penalty not exceeding an amount specified in the regulations; and the regulations must specify different amounts in the case of individuals from those specified in other cases and any amount so specified may not exceed the amount for the time being specified in the case of individuals or, as the case may be, others in head (1) above<sup>11</sup>. An order or regulations so made does or do not affect the amount of any penalty recoverable under these provisions by reason of an act or omission occurring before the order is or, as the case may be, the regulations are made<sup>12</sup>.

Where<sup>13</sup> (a) such a penalty is recoverable from a body corporate or Scottish partnership<sup>14</sup> by reason of any act or omission of the body or partnership as a trustee of a trust scheme<sup>15</sup>; and (b) the act or omission was done with the consent or connivance of, or is attributable to any neglect on the part of, any persons mentioned below<sup>16</sup>, these provisions apply to each of those persons who consented to or connived in the act or omission or to whose neglect the act or omission was attributable<sup>17</sup>.

The persons referred to in head (b) above:

- 1372 (i) in relation to a body corporate, are any director, manager, secretary, or other similar officer of the body, or a person purporting to act in any such capacity<sup>18</sup>, and where the affairs of a body corporate are managed by its members, any member in connection with his functions of management<sup>19</sup>; and
- 1373 (ii) in relation to a Scottish partnership, are the partners<sup>20</sup>.

Where the authority requires any person to pay such a penalty it may not also require the body corporate, or Scottish partnership, in question to pay a penalty in respect of the same act or omission<sup>21</sup>. A penalty under these provisions is recoverable by the authority<sup>22</sup> which must pay to the Secretary of State any penalty so recovered<sup>23</sup>.

1 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 The prescribed period is 28 days: see the Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 21. For the meaning of 'prescribed' see PARA 555 note 1 ante.

- 3 Pensions Act 1995 s 10(1).
- 4 Ibid s 10(2)(a).
- 5 Ibid s 10(2)(b).
- 6 As to the Secretary of State see PARA 1 ante.
- 7 Pensions Act 1995 s 10(2).
- 8 For the meaning of 'regulations' see PARA 600 note 2 ante.
- 9 Ie the Pensions Act 1995 Pt I (ss 1-125): see PARA 598 et seq ante, 612 et seq post.
- 10 'Contravention' includes failure to comply: ibid s 124(1).
- 11 Ibid s 10(3).
- 12 Ibid s 10(4).
- 13 Ie apart from ibid s 10(5): see the text and note 15 infra.
- 14 For the meaning of 'Scottish partnership' see PARA 604 note 10 ante.
- 15 Pensions Act 1995 s 10(5)(a).
- 16 Ibid s 10(5)(b).
- 17 Ibid s 10(5).
- 18 Ibid s 10(6)(a)(i).
- 19 Ibid s 10(6)(a)(ii).
- 20 Ibid s 10(6)(b).
- 21 Ibid s 10(7).
- 22 Ibid s 10(8).
- 23 Ibid s 10(9).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator

in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

## **611 Civil penalties**

TEXT AND NOTES--Any penalty recoverable under the Pensions Act 1995 s 10 is, if a county court so orders, recoverable by execution issued from the county court or otherwise as if it were payable under an order of that court: s 10(8A)(a) (added by the Welfare Reform and Pensions Act 1999 Sch 2 para 11).

NOTES 3, 5--See the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.1.

TEXT AND NOTE 15--In the 1995 Act s 10(5)(a) words 'as a trustee of a trust scheme' omitted: Pensions Act 2004 Sch 12 para 38.

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## **612. Powers to wind up schemes.**

Subject to the following provisions, the Occupational Pensions Regulatory Authority<sup>1</sup> may by order direct or authorise an occupational pension scheme<sup>2</sup> to be wound up if it is satisfied that:

- 1374 (1) the scheme, or any part of it, ought to be replaced by a different scheme<sup>3</sup>;
- 1375 (2) the scheme is no longer required<sup>4</sup>; or
- 1376 (3) it is necessary in order to protect the interests of the generality of the members<sup>5</sup> of the scheme that it be wound up<sup>6</sup>.

The authority may not make an order on either of the grounds referred to in head (1) or head (2) above unless it is satisfied that the winding up of the scheme:

- 1377 (a) cannot be achieved otherwise than by means of such an order<sup>7</sup>; or
- 1378 (b) can only be achieved in accordance with a procedure which:
  - 151 205. (i) is liable to be unduly complex or protracted; or
  - 206. (ii) involves the obtaining of consents which cannot be obtained, or can only be obtained with undue delay or difficulty<sup>8</sup>,
  - 152

and that it is reasonable in all the circumstances to make the order<sup>9</sup>.

Such an order made on either of the grounds referred to in head (1) or head (2) above may be made only on the application of the trustees or managers<sup>10</sup> of the scheme<sup>11</sup>, any person other than the trustees or managers who has power to alter any of the rules of the scheme<sup>12</sup>, or the employer<sup>13</sup>.

Such an order authorising a scheme to be wound up must include such directions with respect to the manner and timing of the winding up as the authority thinks appropriate having regard to the purposes of the order<sup>14</sup>. The winding up of a scheme in pursuance of an order of the authority is as effective in law as if it had been made under powers conferred by or under the scheme<sup>15</sup>. An order may be made and complied with in relation to a scheme in spite of any enactment<sup>16</sup> or rule of law, or any rule of the scheme, which would otherwise operate to prevent the winding up<sup>17</sup>, or (except for the purpose of the authority determining whether or not it is satisfied as mentioned above), without regard to any such enactment, rule of law or rule of the scheme as would otherwise require, or might otherwise be taken to require, the implementation of any procedure or the obtaining of any consent, with a view to the winding up<sup>18</sup>.

In the case of a public service pension scheme<sup>19</sup> an order directing or authorising the scheme to be wound up may only be made on the grounds referred to in head (3) above<sup>20</sup>, and such an order may, as the authority thinks appropriate, adapt, amend or repeal any enactment in which the scheme is contained or under which it is made<sup>21</sup>.

<sup>1</sup> As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 post (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

3 Ibid s 11(1)(a).

4 Ibid s 11(1)(b).

5 'Member', in relation to an occupational pension scheme, means any active, deferred or pensioner member: *ibid* s 124(1). 'Active member', in relation to an occupational pension scheme, means a person who is in pensionable service under the scheme: s 124(1). 'Pensioner member', in relation to an occupational pension scheme, means a person who in respect of his pensionable service under the scheme or by reason of transfer credits, is entitled to the present payment of pension or other benefits: s 124(1). 'Deferred member', in relation to an occupational pension scheme, means a person (other than an active or pensioner member) who has accrued rights under the scheme: s 124(1). 'Transfer credits' means rights allowed to a member under the rules of an occupational pension scheme by reference to a transfer to that scheme of his accrued rights from another scheme (including any transfer credits allowed by that scheme): s 124(1). For the meaning of 'accrued rights' see PARA 843 note 6 post; and for the meaning of 'pensionable service' see PARA 782 note 5 post. For any of the purposes of the Pensions Act 1995 Pt I (ss 1-125) (see PARA 598 et seq ante, 613 et seq post), regulations may in relation to occupational pension schemes extend or restrict the meaning of 'member', determine who is to be treated as a prospective member, and determine the times at which a person is to be treated as becoming, or as ceasing to be, a member or prospective member: s 125(4).

6 Ibid s 11(1)(c).

7 Ibid s 11(2)(a).

8 Ibid s 11(2)(b).

9 Ibid s 11(2).

10 'Trustees or managers', in relation to an occupational pension scheme, means in the case of a trust scheme, the trustees of the scheme, and in any other case, the managers of the scheme; and in relation to an occupational pension scheme other than a trust scheme, 'managers' means the persons responsible for the management of the scheme: *ibid* s 124(1). For the meaning of 'trust scheme' see PARA 604 note 2 ante.

11 Ibid s 11(3)(a).

12 Ibid s 11(3)(b).

13 Ibid s 11(3)(c). For the meaning of 'employer' see PARA 598 note 4 ante.

14 Ibid s 11(4).

15 Ibid s 11(5).

16 'Enactment' includes an enactment comprised in subordinate legislation (within the meaning of the Interpretation Act 1978): Pensions Act 1995 s 176. 'Subordinate legislation' is defined by the Interpretation Act 1978 s 21(1): see STATUTES vol 44(1) (Reissue) PARA 138.

17 Pensions Act 1995 s 11(6)(a).

18 Ibid s 11(6)(b).

19 For the meaning of 'public service pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 874 post (definition applied by the Pensions Act 1995 s 176).

20 Ibid s 11(7)(a).

21 Ibid s 11(7)(b).

## UPDATE

### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see PARA 676A.

## 598-636 The Occupational Pensions Regulatory Authority

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

## 612 Powers to wind up schemes

NOTE 5--In definition of 'member' reference to pensioner member is now to pensioner or pension credit member: Pensions Act 1995 s 124(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 para 61(2)). 'Pensioner member' is also not an active member of the scheme: Pensions Act 1995 s 124(1) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 8(3)). After an occupational pension scheme has been wound up, the subsequent acquisition of a cause of action by the trustees will not make the beneficiaries 'members' under the Pensions Act 1995 s 124(1) or the Register of Occupational and Personal Pension Schemes Regulations 1997, SI 1997/371, reg 1(4)(a) (SI 1997/371 replaced: SI 2005/597): *Bus Employees Pension Trustees Ltd v Harrod*; *NBPF Pension Trustees Ltd v Paddock* [1999] 2 All ER 993.

Definition of 'transfer credits' in Pensions Act 1995 s 124(1) amended: Pensions Act 2004 Sch 12 para 69(2).

TEXT AND NOTES 11-13--1995 Act s 11(3) omitted: 2004 Act s 22(a), Sch 13 Pt 1.

The Authority may, during an assessment period (within the meaning of s 132 (meaning of 'assessment period' for the purposes of Pt 2: see PARA 659C.7) in relation to an occupational pension scheme, by order direct the scheme to be wound up if they are satisfied that it is necessary to do so in order (1) to ensure that the scheme's protected liabilities do not exceed its assets, or (2) if those liabilities do exceed its assets, to keep the excess to a minimum: 1995 Act s 11(3A) (added by the 2004 Act s 22(b)). In the 1995 Act s 11(3A) (a) 'protected liabilities' has the meaning given by the

2004 Act s 131 (see PARA 659C.6), and (b) references to the assets of the scheme are references to those assets excluding any assets representing the value of any rights in respect of money purchase benefits (within the meaning of the 2004 Act) under the scheme: 1995 Act s 11(3B) (as so added).

TEXT AND NOTE 14--Ibid s 11(4) is subject to the 2004 Act ss 28, 135 and 219 (winding up order made when freezing order has effect in relation to scheme, during assessment period under Pt 2 etc): 1995 Act s 11(4) (amended by the 2004 Act s 22(c)).

TEXT AND NOTES 17, 18--The 1995 Act s 11(6) does not have effect to authorise the Authority to make an order as mentioned in s 11(6)(a) or (b), if their doing so would be unlawful as a result of the Human Rights Act 1998 s 6(1) (unlawful for public authority to act in contravention of a Convention right: see CONSTITUTIONAL LAW AND HUMAN RIGHTS): 1995 Act s 11(6A) (added by the 2004 Act s 22(d)).

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### **613. Powers to wind up public service schemes exercisable by appropriate authority.**

The appropriate authority<sup>1</sup> may by order direct a public service pension scheme<sup>2</sup> to be wound up if it is satisfied that the scheme, or any part of it, ought to be replaced by a different scheme<sup>3</sup>, or the scheme is no longer required<sup>4</sup>. Such an order must include such directions with respect to the manner and timing of the winding up as that authority thinks appropriate<sup>5</sup>. Such an order may, as that authority thinks appropriate, adapt, amend or repeal any enactment<sup>6</sup> in which the scheme is contained or under which it is made<sup>7</sup>.

1 'The appropriate authority', in relation to a scheme, means such Minister of the Crown or government department as may be designated by the Treasury as having responsibility for the particular scheme: Pensions Act 1995 s 12(3). Section 11(2) (see PARA 612 ante) applies for the purposes of s 12 as it applies for the purposes of s 11, but as if references to the authority were to the appropriate authority: s 12(2).

2 For the meaning of 'public service pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 874 post (definition applied by the Pensions Act 1995 s 176).

3 Ibid s 12(1)(a).

4 Ibid s 12(1)(b).

5 Ibid s 12(4).

6 For the meaning of 'enactment' see PARA 612 note 16 ante.

7 Pensions Act 1995 s 12(5).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to

OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

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#### **614. Injunctions.**

If, on the application of the Occupational Pensions Regulatory Authority<sup>1</sup>, the court is satisfied that:

1379 (1) there is a reasonable likelihood that a particular person will do any act which constitutes a misuse or misappropriation of assets of an occupational pension scheme<sup>2</sup>; or

1380 (2) that a particular person has done any such act and that there is a reasonable likelihood that he will continue or repeat the act in question or do a similar act<sup>3</sup>,

the court may grant an injunction restraining him from doing so<sup>4</sup>.

The jurisdiction so conferred is exercisable by the High Court<sup>5</sup>.

1 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 Pensions Act 1995 s 13(1)(a). For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 post (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

3 Ibid s 13(1)(b).

4 Ibid s 13(1).

5 Ibid s 13(2).

### **UPDATE**

#### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

#### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3).

Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

## **614 Injunctions**

TEXT AND NOTES--Pensions Act 1995 s 13 repealed: Pensions Act 2004 Sch 13 Pt 1.

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### **615. Restitution.**

If, on the application of the Occupational Pensions Regulatory Authority<sup>1</sup>, the court is satisfied:

1381 (1) that a power to make a payment, or distribute any assets, to the employer<sup>2</sup>, has been exercised in contravention of the relevant statutory provisions<sup>3</sup>; or

1382 (2) that any act or omission of the trustees or managers<sup>4</sup> of an occupational pension scheme<sup>5</sup> was in contravention of the statutory restriction on employer-related investments<sup>6</sup>,

the court may order the employer and any other person who appears to the court to have been knowingly concerned in the contravention to take such steps as the court may direct for restoring the parties to the position in which they were before the payment or distribution was made, or the act or omission occurred<sup>7</sup>.

The jurisdiction so conferred is exercisable by the High Court<sup>8</sup>.

1 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 For the meaning of 'employer' see PARA 598 note 4 ante.

3 I.e. in contravention of the provisions of the Pensions Act 1995 s 37 (payment of surplus to employer) (see PARA 860 post); s 76 (excess assets on winding up) (see PARA 851 post); or s 77 (excess assets remaining after winding up: power to distribute) (see PARA 857 post). For the meaning of 'contravention' see PARA 611 note 10 ante.

4 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

5 For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 post (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

6 I.e. in contravention of the provisions of *ibid* s 40 (restriction on employer-related investments): see PARA 806 post.

7 *Ibid* s 14(1).

8 *Ibid* s 14(2).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes

into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

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## **616. Directions.**

Where in the case of any trust scheme<sup>1</sup> the employer<sup>2</sup> fails to comply with any requirement to make payments of benefit into a separate account which is included in relevant regulations<sup>3</sup>, the Occupational Pensions Regulatory Authority<sup>4</sup> may direct the trustees to make arrangements for the payment to the members<sup>5</sup> of the benefit to which the requirement relates<sup>6</sup>. The authority may:

- 1383 (1) where in the case of any trust scheme an annual report is published, direct the trustees to include a statement prepared by the authority in the report<sup>7</sup>; and
- 1384 (2) in the case of any trust scheme, direct the trustees to send to the members a copy of a statement prepared by the authority<sup>8</sup>.

Such a direction must be given in writing<sup>9</sup> and where it is not complied with, the provisions relating to prohibition orders<sup>10</sup> and civil penalties<sup>11</sup> apply to any trustee who has failed to take all such steps as are reasonable to secure compliance<sup>12</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 For the meaning of 'employer' see PARA 598 note 4 ante.

3 Ie by virtue of the Pensions Act 1995 s 49(5): see PARA 798 post. For the meaning of 'regulations' see PARA 600 note 2 ante.

4 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

5 For the meaning of 'member' see PARA 612 note 5 ante.

6 Pensions Act 1995 s 15(1).

7 Ibid s 15(2)(a).

8 Ibid s 15(2)(b).

9 Ibid s 14(3).

10 Ie the provisions of ibid s 3: see PARA 604 ante.

11 Ie the provisions of ibid s 10: see PARA 611 ante.

12 Ibid s 15(4).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

## **616 Directions**

TEXT AND NOTE 12--Pensions Act 1995 s 15(4) amended: Pensions Act 2004 Sch 12 para 39.

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### **(iii) Questioning the Decisions of the Occupational Pensions Regulatory Authority**

#### **A. POWERS TO REVIEW**

##### **617. Review of decisions.**

Subject to the following provisions and to those relating to references and appeals from the Occupational Pensions Regulatory Authority<sup>1</sup>, any determination by the authority of a question which it is within its functions to determine is final<sup>2</sup>. The authority must, on the application of any person ('the applicant') at any time within the prescribed period<sup>3</sup>, review any of its determinations:

- 1385 (1) to make a prohibition order<sup>4</sup> against the applicant<sup>5</sup>;
- 1386 (2) to require the applicant to pay a penalty<sup>6</sup>; or
- 1387 (3) to disqualify<sup>7</sup> the applicant from being a trustee of any trust scheme<sup>8</sup>.

The authority may on the application of a person appearing to it to be interested:

- 1388 (a) at any time review any such other of its determinations as is mentioned above (including a determination given by the authority on a previous review), if it is satisfied that there has been a relevant change of circumstances since the determination was made, or that the determination was made in ignorance of a material fact or based on a mistake as to a material fact or was erroneous in point of law<sup>9</sup>;
- 1389 (b) at any time within a period of six months from the date of the determination, or within such longer period as it may allow in any particular case, review such a determination on any ground<sup>10</sup>.

The authority's powers on such reviews include power:

- 1390 (i) to vary or revoke any determination or order previously made<sup>11</sup>;
- 1391 (ii) to substitute a different determination or order<sup>12</sup>; and
- 1392 (iii) generally to deal with the matters arising on the review as if they had arisen on the original determination<sup>13</sup>,

and also include power to make savings and transitional provisions<sup>14</sup>.

Regulations<sup>15</sup> may make provision with respect to the procedure to be adopted on any application for such reviews under the above provisions or under any corresponding provision in force in Northern Ireland and generally with respect to such applications and reviews<sup>16</sup>.

<sup>1</sup> ie the provisions of the Pensions Act 1995 s 97: see PARA 627 post. As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 Ibid s 96(1). Where the authority makes a determination, it must send to such persons as appear to the authority to be directly affected a notice in writing which contains the determination and the reasons for that determination and which specifies the right to apply for a review of that determination and the time limit for making such an application: Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 2. Any document required or authorised by those regulations to be sent or delivered to any person is duly sent or delivered if it is sent to that person's appropriate address by post or if it is delivered to that person or left at that person's appropriate address: reg 20(1). The appropriate address of any person (except the authority) to whom any such document is to be sent or delivered is the address given by that person, or if none, the last known address of that person or, in the case of an incorporated company or body, the registered or principal office of that company or body: reg 20(3).

3 For these purposes, the prescribed period is 28 days beginning with the date of the notice referred to in ibid reg 2 (see note 2 supra): reg 3(2). The authority may, however, in any particular case extend the time limit so prescribed, or prescribed in any corresponding provision in force in Northern Ireland, whether or not it has already expired: reg 3(4). Where the time prescribed by the 1997 Regulations for doing any act expires on a public holiday, the act is in time if done on the next following day which is not a public holiday: reg 18(2). Subject to the provisions of reg 3(4), where the authority is satisfied that a person to whom the Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, apply (other than the authority) could not reasonably be expected to send any document, or documents of any description, within the time limit imposed in those regulations, the authority may extend the time limit, whether or not it has already expired, in relation to that document or documents of that description: reg 18(1). For the meaning of 'prescribed' see PARA 555 note 1 ante.

4 Ie a prohibition order under the Pensions Act 1995 s 3: see PARA 604 ante.

5 Ibid s 96(2)(a).

6 Ie under ibid s 10 (see PARA 611 ante) or under the Pension Schemes Act 1993 s 168(4) (as substituted) (see PARA 970 post): see the Pensions Act 1995 s 96(2)(b).

7 Ie disqualification under ibid s 29(3) or (4): see PARA 788 post.

8 Ibid s 96(2)(c). For the meaning of 'trust scheme' see PARA 604 note 2 ante.

9 Ibid s 96(3)(a).

10 Ibid s 96(3)(b).

11 Ibid s 96(4)(a).

12 Ibid s 96(4)(b).

13 Ibid s 96(4)(c).

14 Ibid s 96(4).

15 For the meaning of 'regulations' see PARA 600 note 2 ante.

16 Pensions Act 1995 s 96(5). Nothing in s 96(5) is to be taken to prevent such a review being entered upon by the authority without an application being made: s 96(6). In exercise of these powers, the Secretary of State for Social Security has made the Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, which came into force on 6 April 1997 (reg 1(1)) and which, with the exception of regs 3(2), 21, apply to Northern Ireland (reg 1(4)). See PARA 618 et seq post.

## UPDATE

### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see PARA 676A.

### 598-636 The Occupational Pensions Regulatory Authority

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes

into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

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## ***B. PROCEDURE ON REVIEW***

### **618. Application to the Occupational Pensions Regulatory Authority for a review.**

An application to the Occupational Pensions Regulatory Authority for the review of a determination<sup>1</sup> must be made in writing, must be signed by the applicant and must state:

- 1393 (1) the name and address of the applicant;
- 1394 (2) the particulars of the determination in respect of which a review is sought;
- 1395 (3) the grounds on which a review of the determination is sought<sup>2</sup>;
- 1396 (4) the name and address of the applicant's representative (if any) and whether the authority should send replies or notices concerning the application to that representative rather than to the applicant<sup>3</sup>.

The applicant must send<sup>4</sup> with any application, or within 14 days thereafter, a copy of the documents on which he intends to rely for the purposes of the review<sup>5</sup>. Where an application will, or is likely to be, received outside the prescribed time limit<sup>6</sup>, the applicant must include with the application for a review a statement of the reasons on which he relies to justify the delay, and the authority must consider any such statement in deciding whether or not to extend the time limit<sup>7</sup>.

The authority may allow an application for a review to be treated as properly made even if the requirements of heads (1) to (4) above are not met, notwithstanding those requirements<sup>8</sup>.

Where a person dies after a determination of the authority to require that person to pay a penalty<sup>9</sup>, the authority may permit that person's executor or (as the case may be) administrator to make or continue an application for a review as if the personal representative had been substituted for that person<sup>10</sup>.

The applicant may at any time before the date fixed for a review withdraw an application by sending to the authority a notice in writing signed by the applicant which states that he withdraws that application<sup>11</sup>.

1 As to the review of determinations and decisions see PARA 617 ante. As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 The applicant may, at any time before he is notified of the date of the review, or, with the leave of the authority, at any time after he is so notified, amend the grounds referred to in head (3) in the text and submit any documents upon which he wishes to rely in support of those grounds as amended: Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 3(7).

3 Ibid reg 3(1). Where a person acts on behalf of another, that person may take all such steps and do all such things for the purposes of the Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, as that other person is thereby required or authorised to take or do: reg 17.

4 As to the method of sending documents etc see ibid reg 20; and PARA 617 note 2 ante. The appropriate address for the authority is the address of the office of the authority (ie Invicta House, Trafalgar Place, Brighton, East Sussex BN1 4DW): see reg 20(2).

5 Ibid reg 20(3).

6 For the prescribed time limit see PARA 617 note 3 ante.

7 Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 3(5). As to the power to extend the time limit see PARA 617 note 3 ante.

8 Ibid reg 3(6).

9 Ie under the Pensions Act 1995 s 10 (see PARA 611 ante), the Pension Schemes Act 1993 s 168(4) (as substituted) (see PARA 970 post), or under any corresponding provision in force in Northern Ireland: see the Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 10(1).

10 Ibid reg 10(1), (2).

11 Ibid reg 9.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

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### **619. Notification of decision to review or not to review.**

Where the Occupational Pensions Regulatory Authority receives an application for a review<sup>1</sup>, the authority must decide whether to review the determination in question<sup>2</sup>. Where the authority decides to review a determination, whether or not pursuant to an application for a review, it must, within 28 days<sup>3</sup> of making the decision, send<sup>4</sup> to the applicant, if any, and to such other persons as the authority considers the justice of the case may require, a notice in writing containing the following information:

- 1397 (1) the authority's decision to review that determination; and
- 1398 (2) the right to submit<sup>5</sup> written representations<sup>6</sup>.

Where the authority decides not to review a determination it must, within 28 days of making the decision, send to the applicant, and to such other persons as it considers the justice of the case may require, a notice in writing containing the following information:

- 1399 (a) the authority's decision not to review that determination;
- 1400 (b) the reasons for the decision not to review;
- 1401 (c) the applicant's right of appeal to the court on a question of law<sup>7</sup>; and
- 1402 (d) the time limit for making such an appeal<sup>8</sup>.

On an application as a result of which the authority is obliged to review a determination<sup>9</sup>, the authority must within 28 days of receipt of the application send to the applicant, and to such other persons as it considers the justice of the case may require, a notice in writing containing the information referred to in head (2) above<sup>10</sup>.

Any person notified of a review in accordance with these provisions may send written representations to the authority within 21 days of the date of the notice, to give the reasons why that person considers the review should be dealt with by way of an oral hearing, and at any time until that person is notified of the date fixed for the review, or, with the leave of the authority, at any time after he is so notified, in relation to the review generally<sup>11</sup>.

1 'Review' means a review of a determination made by the Occupational Pensions Regulatory Authority: Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 1(2). As to review of determinations see PARA 617 ante. As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 Ibid reg 4(1). An application to which the Pensions Act 1995 s 96(2) applies, however, must result in a review: see PARA 617 ante; and the text and notes 9-10 infra.

3 As to time limits see PARA 617 note 3 ante.

4 As to the manner of sending documents etc see 617 note 2 ante.

5 In accordance with the Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 5: see the text and note 11 infra.

6 Ibid reg 4(2).

7 As to appeals see PARA 627 post.

8 Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 4(3).

9 Ie an application to which the Pensions Act 1995 s 96(2), or any corresponding provision in Northern Ireland, applies: see PARA 617 ante.

10 Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 4(4).

11 Ibid reg 5.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

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## **620. Statement of facts.**

Where the Occupational Pensions Regulatory Authority decides to review a determination, the authority must prepare a statement of facts relating to the review and must send that statement to the applicant<sup>1</sup>, or if none, to such other persons as appear to the authority to be directly affected by that determination<sup>2</sup>. A person so notified must reply to the authority within 28 days<sup>3</sup> of the date of the statement, indicating:

- 1403 (1) whether and in what respect any of the facts are disputed; and
- 1404 (2) any other facts<sup>4</sup> which, in the opinion of the person so notified, are relevant to the review<sup>5</sup>.

1 As to the manner of sending documents etc see PARA 617 note 2 ante. As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 6(1).

3 As to time limits see PARA 617 note 3 ante.

4 Ie subject to the Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 14(2): see PARA 624 post.

5 Ibid reg 6(2).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United

Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

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### **621. Whether or not to hold an oral hearing.**

The Occupational Pensions Regulatory Authority may decide to determine a review<sup>1</sup> without an oral hearing:

- 1405 (1) if the applicant and such other persons as it appears to the authority may be directly affected by the review agree in writing; or
- 1406 (2) after having regard to the specified considerations<sup>2</sup>.

Where the authority has made a prohibition order<sup>3</sup> or a disqualification order<sup>4</sup>, an oral hearing must be held for any review of that determination, unless the person prohibited or (as the case may be) disqualified agrees in writing that the authority may review that determination without an oral hearing<sup>5</sup>.

The authority may hold an oral hearing to determine any question<sup>6</sup>, including any question which the authority initially decided to review without an oral hearing, if it is satisfied that an oral hearing is desirable<sup>7</sup>.

<sup>1</sup> For the meaning of 'review' see PARA 619 note 1 ante. As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

<sup>2</sup> Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 7(1). For these purposes, the specified considerations are: (1) the wishes of the applicant and of such other persons as it appears to the authority may be directly affected by the review; (2) whether an oral hearing would be likely to cause unreasonable delay in the determination of the review and, in particular, whether such delay would be likely to affect adversely the interests of any person; and (3) whether there is, or is likely to be, a conflict of evidence which an oral hearing may help to clarify: reg 7(3).

<sup>3</sup> I.e. an order under the Pensions Act 1995 s 3: see PARA 604 ante.

<sup>4</sup> I.e. an order under *ibid* s 29(3) or (4): see PARA 788 post.

<sup>5</sup> Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 7(2).

<sup>6</sup> I.e. any question to which the Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, apply: see PARA 617 et seq ante, 622 et seq post.

<sup>7</sup> *Ibid* reg 7(4). The requirements of Pt II (regs 2-20) in respect of such hearings apply: reg 7(4). See PARA 622 et seq post.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(iii) Questioning the Decisions of the Occupational Pensions Regulatory Authority/B. PROCEDURE ON REVIEW/622. Notice of date, time, place and manner of review.

## **622. Notice of date, time, place and manner of review.**

The Occupational Pensions Regulatory Authority must fix the date, time and place for the review<sup>1</sup> and whether it is to be dealt with by an oral hearing or not<sup>2</sup>, and, not less than 28 days<sup>3</sup> before that date, send<sup>4</sup> to the applicant, and to such other persons as it considers the justice of the case may require, a notice in writing specifying the date, time, place and manner of the review<sup>5</sup>. Where the authority has decided to deal with a review by way of an oral hearing, the notice must also ask the person notified to confirm within 21 days of the date of the notice:

- 1407 (1) whether that person or any representative of that person will attend the hearing; and, if so,
- 1408 (2) the names, addresses and occupations of the witnesses, if any, that person or his representative intends to call<sup>6</sup>.

The authority may postpone the date of the review (whether it is to be dealt with by way of an oral hearing or not):

- 1409 (a) where both the applicant and the authority agree; or
- 1410 (b) in exceptional circumstances,

provided that the authority sends to persons notified under these provisions a notice specifying the new date, time and place of the review not less than 28 days before that date<sup>7</sup>.

1 For the meaning of 'review' see PARA 619 note 1 ante. As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 See PARA 621 ante.

3 As to time limits see PARA 617 note 3 ante.

4 As to the manner of sending documents etc see PARA 617 note 2 ante.

5 Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 8(1).

6 Ibid reg 8(2). As to witnesses see further PARA 624 post.

7 Ibid reg 8(3).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

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### **623. Review committee.**

When the Occupational Pensions Regulatory Authority decides to review a determination, the authority must appoint three of its members<sup>1</sup> to a committee to dispose of the review (whether it is to be dealt with by way of an oral hearing or not<sup>2</sup>), and none of the members so appointed must be a member who participated in making the determination which is the subject of the review<sup>3</sup>. A committee appointed in accordance with this provision is referred to as 'the review committee'<sup>4</sup>. The authority must nominate a member of the review committee as chairman of that committee<sup>5</sup>.

If, after the commencement of a review, any one member of the review committee other than the chairman is absent, the review may, with the consent of the applicant or, where there is no applicant, with the consent of such other persons as the review committee or its remaining members consider the justice of the case may require, be conducted by those remaining members, and in that event must be deemed to be properly constituted<sup>6</sup>.

A decision of the review committee may be taken by a majority and the decision must record whether it was unanimous or taken by a majority<sup>7</sup>.

The review committee must send<sup>8</sup> to the applicant, and to such other persons as the committee considers the justice of the case may require, a copy of, or sufficient extracts from, or particulars of, any document or other material relevant to the review which the authority has in its possession not less than 28 days<sup>9</sup> before the date fixed for the review<sup>10</sup>.

1 As to the Occupational Pensions Regulatory Authority, and its members, see PARA 598 ante.

2 See PARA 621 ante.

3 Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 11(1).

4 Ibid reg 11(2).

5 Ibid reg 11(3).

6 Ibid reg 11(4).

7 Ibid reg 11(5). Where the review committee is constituted by an even number of members, the chairman of the review committee must have a second or casting vote: reg 11(5) proviso.

8 As to the method of sending documents etc see PARA 617 note 2 ante.

9 As to time limits see PARA 617 note 3 ante.

10 Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 12.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

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#### **624. Oral hearings.**

An oral hearing of a review<sup>1</sup> must be in public, except where the review committee<sup>2</sup> considers that by reason of the disclosure of intimate personal or financial circumstances, commercially sensitive information or information communicated or obtained in confidence, it is just and reasonable for the hearing, or part of it, to be in private<sup>3</sup>. The following persons are entitled to attend, and, in the case of persons listed in heads (1), (5) and (6) below, to be heard, at an oral hearing whether or not it takes place in public:

- 1411 (1) the applicant;
- 1412 (2) a member of the Occupational Pensions Regulatory Authority who is not appointed to the review committee;
- 1413 (3) the chief executive of the authority;
- 1414 (4) a member of the Council on Tribunals or of the Scottish Committee of that Council;
- 1415 (5) a witness called by the applicant or the authority or by any other person entitled to be heard;
- 1416 (6) such other persons as it appears to the authority the justice of the case may require<sup>4</sup>.

The authority may by summons require any person in the United Kingdom<sup>5</sup> to attend as a witness at an oral hearing of a review at such time and place as may be specified in the summons and to answer any questions at the hearing, produce any documents<sup>6</sup> or otherwise furnish any information relating to any matter in question in the review<sup>7</sup>. No person may, however, be compelled to give any evidence or produce any document or other material that he could not be compelled to give or produce in a court of law<sup>8</sup>.

The review committee must conduct the oral hearing of the review in such manner as the committee considers most appropriate for the clarification of the issues before it and generally for the just handling of the proceedings, and, where necessary, may adjourn the proceedings<sup>9</sup>. The applicant, and such other persons as the review committee considers the justice of the case may require, is or are entitled to give evidence, to call witnesses, to question any witnesses, and to address the review committee both on evidence and generally on the subject matter of the review<sup>10</sup>. The review committee may receive evidence of any fact which appears to the committee to be relevant even if such evidence would be inadmissible in proceedings before a court of law, but must not refuse to admit any evidence which is admissible at law and is relevant<sup>11</sup>. It may require evidence to be given on oath or affirmation and for that purpose may administer an oath or affirmation in due form<sup>12</sup>.

The review committee may, if satisfied that it is just and reasonable to do so, permit the applicant to rely on grounds for the review which were not stated in the application<sup>13</sup>.

The review committee may exclude from the hearing, or part of it, any person whose conduct has disrupted or is likely, in the opinion of the review committee, to disrupt the hearing<sup>14</sup>.

If the applicant, or any other person who has notified the authority of his intention to attend or be represented at the hearing, fails to attend or be represented, the review committee may dispose of the review in the absence of that person or may adjourn the hearing to a later date;

provided that before disposing of a review in the absence of any such person the review committee must consider any written representations sent by him<sup>15</sup>, any reply sent by him<sup>16</sup> and, in the case of an applicant, his application<sup>17</sup> and the accompanying documents<sup>18</sup>.

1 For the meaning of 'review' see PARA 619 note 1 ante.

2 As to the review committee see PARA 623 ante.

3 Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 13(1).

4 Ibid reg 13(2). As to the Occupational Pensions Regulatory Authority see PARA 598 ante. As to the Council on Tribunals see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARAS 55-57.

5 For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

6 For these purposes, 'document' includes information recorded in any form, and any reference to production of a document, in relation to information recorded otherwise than in legible form, is to producing a copy of the information in legible form: Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 14(3).

7 Ibid reg 14(1).

8 Ibid reg 14(2).

9 Ibid reg 15(1).

10 Ibid reg 15(2).

11 Ibid reg 15(3).

12 Ibid reg 15(5).

13 Ibid reg 15(4).

14 Ibid reg 15(6).

15 Ie under ibid reg 5: see PARA 619 ante.

16 Ie under ibid reg 6(2): see PARA 620 ante.

17 Ie under ibid reg 3(1): see PARA 618 ante.

18 See ibid reg 15(7). As to the documents which must accompany an application see reg 3(3); and PARA 618 ante.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the

Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

## **624 Oral hearings**

TEXT AND NOTE 4--Head (4) omitted: SI 1997/794, reg 13(2) (amended by SI 2008/2683).

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## **625. Irregularities in the proceedings.**

Any irregularity resulting from failure to comply with any relevant provision<sup>1</sup> before the review committee<sup>2</sup> has reached its decision does not of itself render the proceedings void<sup>3</sup>. Where any such irregularity comes to the attention of the review committee, the review committee may, and if it considers any person may have been prejudiced by the irregularity must, before reaching its decision give such directions as it thinks just to cure or waive the irregularity<sup>4</sup>.

1    le any provision of the Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794: see PARA 617 et seq ante.

2    As to the review committee see PARA 623 ante.

3    Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 19(1).

4    Ibid reg 19(2).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as

in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

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### **C. DECISION ON REVIEW**

#### **626. Notification of decision.**

The decision of the Occupational Pensions Regulatory Authority following a review<sup>1</sup> must be recorded in a document which must also contain a statement:

- 1417 (1) of the reasons for that decision; and
- 1418 (2) of the right of appeal to the court on a question of law and the time limit for making such an appeal<sup>2</sup>,

and must be signed and dated by the chairman of the review committee<sup>3</sup>. The authority must send a copy of the document recording the decision to the applicant, if any, and to such other persons as appear to the authority to be directly affected, as soon as is reasonably practicable after the decision is made<sup>4</sup>.

The authority may publish its decisions as it considers appropriate, but in doing so must have regard to the need to preserve the confidentiality of:

- 1419 (a) any document submitted in relation to an application which the authority has reason to believe is commercially sensitive or confidential for any other reason; and
- 1420 (b) any evidence heard in private,

and for that purpose may make any necessary amendments to the text of a decision<sup>5</sup>.

Clerical mistakes in any written statement of a decision following a review, or errors arising in such a document from an accidental slip or omission, may be corrected by the chairman of the review committee certifying the correction in writing on the document<sup>6</sup>.

<sup>1</sup> For the meaning of 'review' see PARA 619 note 1 ante. As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

<sup>2</sup> As to appeals see PARA 627 post.

<sup>3</sup> Occupational Pensions Regulatory Authority (Determinations and Review Procedure) Regulations 1997, SI 1997/794, reg 16(1). As to the review committee see PARA 623 ante.

<sup>4</sup> Ibid reg 16(2).

<sup>5</sup> Ibid reg 16(3).

<sup>6</sup> Ibid reg 19(3).

### **UPDATE**

#### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

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## ***D. REFERENCES AND APPEALS***

### **627. References and appeals from the Occupational Pensions Regulatory Authority.**

Any question of law arising in connection with:

- 1421 (1) any matter arising under Part I of the Pensions Act 1995<sup>1</sup> for determination<sup>2</sup>; or
- 1422 (2) any matter arising on an application to the Occupational Pensions Regulatory Authority<sup>3</sup> for a review of a determination, or on a review by it entered upon without an application<sup>4</sup>,

may, if the authority thinks fit, be referred for decision to the High Court<sup>5</sup>.

If the authority so determines to refer any question of law to the court, it must give notice in writing of its intention to do so:

- 1423 (a) in a case where the question arises on an application made to the authority, to the applicant<sup>6</sup>; and
- 1424 (b) in any case to such persons as appear to it to be concerned with the question<sup>7</sup>.

Any person who is aggrieved:

- 1425 (i) by a determination of the authority given on a review<sup>8</sup>; or
- 1426 (ii) by the refusal of the authority to review a determination<sup>9</sup>,

where the determination involves a question of law and that question is not so referred by the authority to the court, may on that question appeal from the determination to the court<sup>10</sup>.

The authority is entitled to appear and be heard on any reference or appeal under these provisions<sup>11</sup>. The rules of court must include provision for regulating such references and appeals to the court and for limiting the time within which such appeals may be brought<sup>12</sup>. The decision of the court on such a reference or appeal is final, and this provision overrides any other enactment<sup>13</sup>. On any such reference or appeal the court may order the authority to pay the costs or, in Scotland, the expenses of any other person, whether or not the decision is in that other person's favour and whether or not the authority appear on the reference or appeal<sup>14</sup>.

1    Ie the Pensions Act 1995 Pt I (ss 1-125): see PARA 598 et seq ante, 628 et seq post.

2    Ibid s 97(1)(a).

3    As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

4    Pensions Act 1995 s 97(1)(b). For the meaning of 'review' see PARA 619 note 1 ante.

- 5 Ibid s 97(1), (8).
- 6 Ibid s 97(2)(a).
- 7 Ibid s 97(2)(b).
- 8 Ie under ibid s 96 (see PARA 617 ante): see s 97(3)(a).
- 9 Ibid s 97(3)(b).
- 10 Ibid s 97(3).
- 11 Ibid s 97(4).
- 12 Ibid s 97(5).
- 13 Ibid s 97(6). For the meaning of 'enactment' see PARA 612 note 16 ante.
- 14 Ibid s 97(7).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

### **627-635 References and appeals from the Occupational Pensions Regulatory Authority ... Other permitted disclosure**

Repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(iv) Disclosure of Information/628. Provision of information.

#### **(iv) Disclosure of Information**

##### **628. Provision of information.**

In the case of any occupational pension scheme<sup>1</sup>:

- 1427 (1) a trustee, manager, professional adviser<sup>2</sup> or employer<sup>3</sup>; and
- 1428 (2) any other person appearing to the Occupational Pensions Regulatory Authority<sup>4</sup> to be a person who holds, or is likely to hold, information relevant to the discharge of the authority's functions<sup>5</sup>,

must, if required to do so by notice in writing, produce any document<sup>6</sup> relevant to the discharge of those functions<sup>7</sup>. To comply with the above provision the document must be produced in such a manner, at such a place and within such a period as may be specified in the notice<sup>8</sup>.

1 For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 post (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

2 As to trustees and managers see PARA 612 note 10 ante; and as to professional advisers see PARA 825 note 12 post.

3 Pensions Act 1995 s 98(1)(a). For the meaning of 'employer' see PARA 598 note 4 ante.

4 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

5 Pensions Act 1995 s 98(1)(b).

6 In *ibid* s 98 and ss 99-101 (see PARAS 629-631 post) 'document' includes information recorded in any form, and any reference to production of a document, in relation to information recorded otherwise than in legible form, is to producing a copy of the information in legible form: s 98(3). Where a person claims a lien on a document, its production under s 98 is without prejudice to the lien: s 102(3).

7 *Ibid* s 98(1). Nothing in ss 98-101 requires a person to answer any question or give any information if to do so would incriminate that person or that person's spouse, or requires any person to produce any document to the authority, or to any person acting on their behalf, if he would be entitled to refuse to produce the document in any proceedings in any court on the grounds that it was the subject of legal professional privilege: s 102(1), (2).

8 *Ibid* s 98(2).

#### **UPDATE**

##### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

##### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

#### **627-635 References and appeals from the Occupational Pensions Regulatory Authority ... Other permitted disclosure**

Repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(iv) Disclosure of Information/629. Inspection of premises.

## **629. Inspection of premises.**

An inspector<sup>1</sup> may, for the purposes of investigating whether, in the case of any occupational pension scheme<sup>2</sup>, the regulatory provisions<sup>3</sup> are being, or have been, complied with, at any reasonable time enter premises liable to inspection and, while there:

- 1429 (1) may make such examination and inquiry as may be necessary for such purposes<sup>4</sup>;
- 1430 (2) may require any person on the premises to produce, or secure the production of, any document<sup>5</sup> relevant to compliance with those provisions for his inspection<sup>6</sup>; and
- 1431 (3) may, as to any matter relevant to compliance with those provisions, examine, or require to be examined, either alone or in the presence of another person, any person on the premises whom he has reasonable cause to believe to be able to give information relevant to that matter<sup>7</sup>.

Premises are liable to inspection for these purposes if the inspector has reasonable grounds to believe that:

- 1432 (a) members<sup>8</sup> of the scheme are employed<sup>9</sup> there<sup>10</sup>;
- 1433 (b) documents relevant to the administration of the scheme are being kept there<sup>11</sup>; or
- 1434 (c) the administration of the scheme, or work connected with the administration of the scheme, is being carried out there<sup>12</sup>,

unless the premises are a private dwelling-house not used by, or by permission of, the occupier for the purposes of a trade or business<sup>13</sup>.

An inspector applying for admission to any premises for these purposes must, if so required, produce his certificate of appointment<sup>14</sup>.

1 In the Pensions Act 1995 Pt I (ss 1-125) (see PARA 598 et seq ante, 630 et seq post), 'inspector' means a person appointed by the Occupational Pensions Regulatory Authority as an inspector: s 99(5). As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 post (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

3 In *ibid* s 99(1), 'the regulatory provisions' means provisions made by or under: (1) the provisions of the Pensions Act 1995 Pt I other than ss 51-54 (see PARAS 861-863 post); ss 62-65 (see PARAS 782-785 post); and ss 110-112 (see PARA 657 post); (2) the Pension Schemes Act 1993 s 6 (as amended) (registration): see PARA 660 post; Pt IV Ch IV (ss 93-101) (as amended) (transfer values: see PARAS 951-958 post); s 113 (information) (see PARA 557 ante); or s 175 (as substituted) (levy: see PARA 974 post); or (3) any corresponding provisions in force in Northern Ireland: Pensions Act 1995 s 99(2).

4 *Ibid* s 99(1)(a).

5 For the meaning of 'document' see PARA 628 note 6 ante. Where a person claims a lien on a document, its production under *ibid* s 99 must be without prejudice to the lien: s 102(3).

6 *Ibid* s 99(1)(b).

- 7 Ibid s 99(1)(c). As to savings for certain privileges see PARA 628 note 7 ante.
- 8 For the meaning of 'member' see PARA 612 note 5 ante.
- 9 For the meaning of 'employed' see PARA 560 note 5 ante (definition applied by the Pensions Act 1995 s 124(5)).
- 10 Ibid s 99(3)(a).
- 11 Ibid s 99(3)(b).
- 12 Ibid s 99(3)(c).
- 13 Ibid s 99(3). 'Trade or business', in relation to a public or local authority, includes the exercise and performance of the powers and duties of the authority: Pension Schemes Act 1993 s 181(1) (definition applied by the Pensions Act 1995 s 124(5)).
- 14 Ibid s 99(4).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

### **627-635 References and appeals from the Occupational Pensions Regulatory Authority ... Other permitted disclosure**

Repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(iv) Disclosure of Information/630. Warrants.

### **630. Warrants.**

A justice of the peace may issue a warrant if satisfied on information on oath given by or on behalf of the Occupational Pensions Regulatory Authority<sup>1</sup> that there are reasonable grounds for believing:

- 1435 (1) that there are on any premises documents<sup>2</sup> whose production has been required for certain purposes<sup>3</sup> and which have not been produced in compliance with the requirement<sup>4</sup>;
  - 1436 (2) that there are on any premises documents whose production could be so required and that if their production were so required the documents would not be produced but would be removed from the premises, hidden, tampered with or destroyed<sup>5</sup>; or
  - 1437 (3) that:
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- 207. (a) an offence has been committed under the Pensions Act 1995 Act or the Pension Schemes Act 1993<sup>6</sup>, or any enactment<sup>7</sup> in force in Northern Ireland corresponding to either of them<sup>8</sup>;
  - 208. (b) a person will do any act which constitutes a misuse or misappropriation of the assets of an occupational pension scheme<sup>9</sup>;
  - 209. (c) a person is liable to pay a penalty under the provisions relating to civil penalties<sup>10</sup>; or
  - 210. (d) a person is liable to be prohibited from being a trustee of a trust scheme<sup>11</sup> under the provisions relating to prohibition orders<sup>12</sup>,
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and that there are on any premises documents which relate to whether the offence has been committed, whether the act will be done, or whether the person is so liable, and whose production could be so required<sup>13</sup>.

A warrant under these provisions authorises an inspector<sup>14</sup>:

- 1438 (i) to enter the premises specified in the information, using such force as is reasonably necessary for the purpose<sup>15</sup>;
- 1439 (ii) to search the premises and take possession of any documents appearing to be such documents as are mentioned in head (1) above or to take in relation to such documents any other steps which appear necessary for preserving them or preventing interference with them<sup>16</sup>;
- 1440 (iii) to take copies of any such documents<sup>17</sup>; or
- 1441 (iv) to require any person named in the warrant to provide an explanation of them or to state where they may be found<sup>18</sup>.

Such a warrant continues in force until the end of the period of one month beginning with the day on which it is issued<sup>19</sup>. Any documents of which possession is taken by virtue of such a warrant may be retained for a period of six months<sup>20</sup>, or if within that period proceedings to which the documents are relevant are commenced against any person for any offence under

the Pensions Act 1995 or the Pension Schemes Act 1993, or any enactment in force in Northern Ireland corresponding to either of them, until the conclusion of those proceedings<sup>21</sup>.

- 1 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.
- 2 For the meaning of 'document' see PARA 628 note 6 ante.
- 3 le required under the Pensions Act 1995 s 98(1) (see PARA 628 ante) or s 99(1)(b) (see PARA 629 ante), or any corresponding provisions in force in Northern Ireland: see s 100(1)(a).
- 4 Ibid s 100(1)(a).
- 5 Ibid s 100(1)(b).
- 6 See generally paras 970-971 post.
- 7 For the meaning of 'enactment' see PARA 612 note 16 ante.
- 8 Pensions Act 1995 s 100(1)(c)(i).
- 9 Ibid s 100(1)(c)(ii).
- 10 le the provisions of ibid s 10 (see PARA 611 ante) or the Pension Schemes Act 1993 s 168(4) (as substituted) (see PARA 970 post), or any enactment in force in Northern Ireland corresponding to either of them: see s 100(1)(c)(iii).
- 11 For the meaning of 'trust scheme' see PARA 604 note 2 ante.
- 12 See the Pensions Act 1995 s 100(1)(c)(iv). As to prohibition orders see s 3; and PARA 604 ante.
- 13 Ibid s 100(1)(c); and see note 3 supra. As to savings for certain privileges etc see PARA 628 note 7 ante.
- 14 For the meaning of 'inspector' see PARA 629 note 1 ante.
- 15 Ibid s 100(2)(a).
- 16 Ibid s 100(2)(b).
- 17 Ibid s 100(2)(c).
- 18 Ibid s 100(2)(d).
- 19 Ibid s 100(3).
- 20 Ibid s 100(4)(a).
- 21 Ibid s 100(4)(b).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which

fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

#### **627-635 References and appeals from the Occupational Pensions Regulatory Authority ... Other permitted disclosure**

Repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(iv) Disclosure of Information/631. Information and inspection; penalties.

### **631. Information and inspection; penalties.**

A person who, without reasonable excuse, neglects or refuses to produce a document<sup>1</sup> when required to do so<sup>2</sup> is guilty of an offence<sup>3</sup>, as is a person who without reasonable excuse:

- 1442 (1) intentionally delays or obstructs an inspector<sup>4</sup> exercising any power of inspection<sup>5</sup>;
- 1443 (2) neglects or refuses to produce, or secure the production of, any document when required so to do; or
- 1444 (3) neglects or refuses to answer a question or to provide information when so required<sup>6</sup>.

A person guilty of any such offence is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>7</sup>. Any person who knowingly or recklessly provides the Occupational Pensions Regulatory Authority<sup>8</sup> with information which is false or misleading in a material particular is guilty of an offence if the information:

- 1445 (a) is provided in purported compliance with a requirement as to the inspection of premises<sup>9</sup>; or
- 1446 (b) is provided otherwise than as mentioned in head (a) above but in circumstances in which the person providing the information intends, or could reasonably be expected to know, that it would be used by the authority for the purpose of discharging its functions under the Pensions Act 1995<sup>10</sup>.

Any person who intentionally and without reasonable excuse alters, suppresses, conceals or destroys any document which he is or is liable to be required to produce<sup>11</sup> to the authority is guilty of an offence<sup>12</sup>. Any person guilty of any such offence is liable on summary conviction to a fine not exceeding the statutory maximum<sup>13</sup>, and on conviction on indictment to imprisonment or a fine, or both<sup>14</sup>.

1 For the meaning of 'document' see PARA 628 note 6 ante.

2 Ie under the Pensions Act 1995 s 98: see PARA 628 ante.

3 Ibid s 101(1). An offence under s 101(1) or s 101(2)(b) or (c) may be charged by reference to any day or longer period of time; and a person may be convicted of a second or subsequent offence by reference to any period of time following the preceding conviction of the offence: s 101(4). As to savings for certain privileges etc see PARA 628 note 7 ante.

4 For the meaning of 'inspector' see PARA 629 note 1 ante.

5 Ie under the Pensions Act 1995 s 99: see PARA 629 ante.

6 Ibid s 101(2). See note 3 supra.

7 Ibid s 101(3).

8 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

9 Ie under the Pensions Act 1995 s 99: see PARA 629 ante.

- 10 Ibid s 101(5).
- 11 ie under ibid s 98 or s 99: see PARAS 628-629 ante.
- 12 Ibid s 101(6).
- 13 As to the statutory maximum see PARA 403 note 2 ante.
- 14 Pensions Act 1995 s 101(7).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

### **627-635 References and appeals from the Occupational Pensions Regulatory Authority ... Other permitted disclosure**

Repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(iv) Disclosure of Information/632. Publishing reports.

### **632. Publishing reports.**

The Occupational Pensions Regulatory Authority<sup>1</sup> may, if it considers it appropriate to do so in any particular case, publish in such form and manner as it thinks fit a report of any investigation under Part I of the Pensions Act 1995<sup>2</sup> and of the result of that investigation<sup>3</sup>. For the purposes of the law of defamation, the publication of any matter by the authority is absolutely privileged<sup>4</sup>.

1 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 Ie the Pensions Act 1995 Pt I (ss 1-125): see PARA 598 et seq ante, 633 et seq post.

3 Ibid s 103(1).

4 Ibid s 103(2). As to absolute privilege see LIBEL AND SLANDER vol 28 (Reissue) PARA 94.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

**627-635 References and appeals from the Occupational Pensions Regulatory Authority ... Other permitted disclosure**

Repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(iv) Disclosure of Information/633. Restricted information.

### **633. Restricted information.**

With certain exceptions<sup>1</sup>, restricted information<sup>2</sup> must not be disclosed by the Occupational Pensions Regulatory Authority<sup>3</sup> or by any person who receives the information directly or indirectly from it, except with the consent of the person to whom it relates and (if different) the person from whom the authority obtained it<sup>4</sup>.

Any person who discloses information in contravention<sup>5</sup> of this provision is guilty of an offence and liable on summary conviction to a fine not exceeding the statutory maximum<sup>6</sup>, and on conviction on indictment to a fine or imprisonment, or to both<sup>7</sup>.

1    Ie as provided by the Pensions Act 1995 ss 106-108: see PARAS 634-636 post.

2    For the purposes of ibid s 104 and ss 105-108 (see PARAS 634-636 post), 'restricted information' means any information obtained by the authority (see note 3 infra) in the exercise of its functions which relates to the business or other affairs of any person, except for information: (1) which at the time of the disclosure is or has already been made available to the public from other sources; or (2) which is in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it: s 104(2). Subject to s 105(2), for the purposes of s 104, 'restricted information' includes information which has been supplied to the authority for the purposes of its functions by an authority which exercises functions corresponding to the functions of the authority in a country or territory outside the United Kingdom: s 105(1). Sections 106-108 do not apply to such information as is mentioned in s 105(1), and such information must not be disclosed except: (a) as provided in s 104; (b) for the purpose of enabling or assisting the authority to discharge its functions; or (c) with a view to the institution of, or otherwise for the purposes of, criminal proceedings, whether under the Pensions Act 1995 or otherwise: s 105(2). For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

3    As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

4    Pensions Act 1995 s 104(1).

5    For the meaning of 'contravention' see PARA 611 note 10 ante.

6    As to the statutory maximum see PARA 403 note 2 ante.

7    Pensions Act 1995 s 104(3).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the

Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

**627-635 References and appeals from the Occupational Pensions Regulatory Authority ... Other permitted disclosure**

Repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(iv) Disclosure of Information/634. Disclosure for facilitating discharge of functions by the Occupational Pensions Regulatory Authority and other supervisory authorities.

**634. Disclosure for facilitating discharge of functions by the Occupational Pensions Regulatory Authority and other supervisory authorities.**

The provisions relating to restricted information<sup>1</sup> do not preclude the disclosure of such information in any case in which disclosure is for the purpose of enabling or assisting the Occupational Pensions Regulatory Authority<sup>2</sup> to discharge its functions<sup>3</sup>. If, in order to enable or assist the authority properly to discharge any of its functions, the authority considers it necessary to seek advice from any qualified person on any matter of law, accountancy, valuation or other matter requiring the exercise of professional skill, those provisions do not preclude the disclosure by the authority to that person of such information as appears to the authority to be necessary to ensure that he is properly informed with respect to the matters on which his advice is sought<sup>4</sup>. The provisions relating to restricted information do not preclude the disclosure by the authority of such information to specified persons if the authority considers that the disclosure would enable or assist that person to discharge specified functions in relation to him<sup>5</sup>. The Secretary of State may after consultation with the authority:

- 1447 (1) by order add any person exercising regulatory functions and specify functions in relation to that person, remove any person for the time being so specified, or alter the functions for the time being so specified in relation to any person<sup>6</sup>; or
- 1448 (2) by order restrict the circumstances in which, or impose conditions subject to which, disclosure may be made to any person for the time being so specified<sup>7</sup>.

1 In the provisions of the Pensions Act 1995 s 104: see PARA 633 ante. For the meaning of 'restricted information' see PARA 633 note 2 ante.

2 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

3 See the Pensions Act 1995 s 106(1).

4 See *ibid* s 106(2).

5 See *ibid* s 107(1). The specified persons and functions are:

158 (1) the Secretary of State (see PARA 1 ante) and functions under the Insurance Companies Act 1982, the Companies Act 1985 Pt XIV (ss 431-453) (as amended), the Insolvency Act 1986, the Financial Services Act 1986, the Companies Act 1989 Pt III (ss 60-81) or the Pension Schemes Act 1993 Pt III (ss 7-68) (as amended) (see PARA 878 et seq post);

159 (2) the Treasury and functions under the Financial Services Act 1986;

160 (3) the Bank of England and functions under the Banking Act 1987 or any other functions;

161 (4) the Charity Commissioners and functions under the Charities Act 1993;

162 (5) the Lord Advocate and functions under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 Pt I;

163 (6) the Pensions Ombudsman (see PARA 663 et seq post) and the Registrar of Occupational and Personal Pension Schemes (see PARA 661 post) and functions under the Pension Schemes Act 1993 or the Pension Schemes (Northern Ireland) Act 1993;

- 164 (7) the Pensions Compensation Board (see PARA 637 et seq post) and functions under the Pensions Act 1995 or any corresponding enactment in force in Northern Ireland;
  - 165 (8) the Policyholders Protection Board and functions under the Policyholders Protection Act 1975;
  - 166 (9) the Deposit Protection Board and functions under the Banking Act 1987;
  - 167 (10) the Investor Protection Board and functions under the Building Societies Act 1986;
  - 168 (11) the Friendly Societies Commission and functions under the enactments relating to friendly societies;
  - 169 (12) the Building Societies Commission and functions under the Building Societies Act 1986;
  - 170 (13) the Commissioners of Inland Revenue or their officers and functions under the Income and Corporation Taxes Act 1988 or the Taxation of Chargeable Gains Act 1992;
  - 171 (14) the Official Receiver, or, in Northern Ireland, the Official Receiver for Northern Ireland and functions under the enactments relating to insolvency;
  - 172 (15) an inspector appointed by the Secretary of State and functions under the Companies Act 1985 Pt XIV (ss 431-453) (as amended) or the Financial Services Act 1986 s 94 (as amended) or s 177 (as amended);
  - 173 (16) a person authorised to exercise powers and functions under the Insurance Companies Act 1982 s 43A (as added) or s 44, the Companies Act 1985 s 447 (as amended), the Financial Services Act 1986 s 106 (as amended), the Companies (Northern Ireland) Order 1986, SI 1986/1032, art 440 or the Companies Act 1989 s 84 (as amended);
  - 174 (17) a designated agency or transferee body or the competent authority (within the meaning of the Financial Services Act 1986) and functions under the Financial Services Act 1986;
  - 175 (18) a recognised self-regulating organisation, recognised professional body, recognised investment exchange or recognised clearing house (within the meaning of the Financial Services Act 1986) and functions in its capacity as an organisation, body, exchange or clearing house recognised under the Financial Services Act 1986;
  - 176 (19) a person administering a scheme for compensating investors under the Financial Services Act 1986 s 54 and functions thereunder;
  - 177 (20) a recognised professional body (within the meaning of the Insolvency Act 1986 s 391) and functions in its capacity as such a body under that Act;
  - 178 (21) the Department of Economic Development in Northern Ireland and functions under the Companies (Northern Ireland) Order 1986, SI 1986/1032, Pt XV, the Insolvency (Northern Ireland) Order 1989, SI 1989/2405, or the Companies (No 2) (Northern Ireland) Order 1990, SI 1990/1504 Pt II;
  - 179 (22) the Department of Health and Social Services for Northern Ireland and functions under the Pension Schemes (Northern Ireland) Act 1993 Pt III;
  - 180 (23) an inspector appointed by the Department of Economic Development in Northern Ireland and functions under the Companies (Northern Ireland) Order 1986, SI 1986/1032, Pt XV;
  - 181 (24) a recognised professional body within the meaning of the Insolvency (Northern Ireland) Order 1989, SI 1989/2405, art 350 and functions in its capacity as such a body under that Order.
- 6 Pensions Act 1995 s 107(2)(a).
- 7 Ibid s 107(2)(b).

## UPDATE

### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

### **627-635 References and appeals from the Occupational Pensions Regulatory Authority ... Other permitted disclosure**

Repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(iv) Disclosure of Information/635. Other permitted disclosures.

### **635. Other permitted disclosures.**

The provisions relating to restricted information<sup>1</sup> do not preclude the disclosure by the Occupational Pensions Regulatory Authority<sup>2</sup> of such information to the Secretary of State<sup>3</sup>, or the Department of Health and Social Services for Northern Ireland, if the disclosure appears to the authority to be desirable or expedient in the interests of members<sup>4</sup> of occupational pension schemes<sup>5</sup> or in the public interest<sup>6</sup>.

The provisions relating to restricted information do not preclude the disclosure of such information:

- 1449 (1) with a view to the institution of, or otherwise for the purposes of, criminal proceedings, whether under the Pensions Act 1995 or otherwise<sup>7</sup>;
- 1450 (2) in connection with any other proceedings arising out of the Pensions Act 1995, or the Pension Schemes Act 1993<sup>8</sup>, or any corresponding enactment<sup>9</sup> in force in Northern Ireland or any proceedings for breach of trust in relation to an occupational pension scheme<sup>10</sup>;
- 1451 (3) with a view to the institution of, or otherwise for the purposes of, proceedings under specified statutory provisions relating to the disqualification of company directors<sup>11</sup>;
- 1452 (4) in connection with any insolvency proceedings<sup>12</sup> which the authority has instituted or in which the authority has a right to be heard<sup>13</sup>;
- 1453 (5) with a view to the institution of, or otherwise for the purposes of, any disciplinary proceedings relating to the exercise of his professional duties by a solicitor, an actuary or an accountant<sup>14</sup>;
- 1454 (6) with a view to the institution of, or otherwise for the purposes of, any disciplinary proceedings relating to the discharge by a public servant<sup>15</sup> of his duties<sup>16</sup>;
- 1455 (7) for the purpose of enabling or assisting an authority in a country outside the United Kingdom to exercise functions corresponding to those of the authority under the Pensions Act 1995<sup>17</sup>; or
- 1456 (8) in pursuance of a European Community obligation<sup>18</sup>.

The provisions relating to restricted information do not preclude the disclosure:

- 1457 (a) by any person mentioned above of information obtained by the person by virtue of those provisions, if the disclosure is made with the consent of the authority<sup>19</sup>;
- 1458 (b) by the authority of information to the Director of Public Prosecutions, the Director of Public Prosecutions for Northern Ireland, the Lord Advocate, a procurator fiscal or a constable<sup>20</sup>; or
- 1459 (c) by any specified person<sup>21</sup> of information obtained by the person, if the disclosure is made with the consent of the authority<sup>22</sup>, and for the purpose of enabling or assisting the person to discharge any specified functions in relation to him<sup>23</sup>.

The authority must, before deciding whether to give its consent to such a disclosure as is mentioned in head (a) or head (c) above, take account of any representations made to the authority by the person seeking to make the disclosure as to the desirability of the disclosure or the necessity for it<sup>24</sup>.

1     Ie the provisions of the Pensions Act 1995 s 104: see PARA 633 ante. For the meaning of 'restricted information' see PARA 633 note 2 ante.

2     As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

3     As to the Secretary of State see PARA 1 ante.

4     For the meaning of 'member' see PARA 612 note 5 ante.

5     For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 post (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

6     Ibid s 108(1).

7     Ibid s 108(2)(a).

8     See PARA 660 et seq post.

9     For the meaning of 'enactment' see PARA 612 note 16 ante.

10    Pensions Act 1995 s 108(2)(b).

11    Ie under the Company Directors Disqualification Act 1986 s 7 or 8 (as amended) or the Companies (Northern Ireland) Order 1989, SI 1989/2404, arts 10 or 11: see the Pensions Act 1995 s 108(2)(c).

12    Ie under the Insolvency Act 1986 or the Insolvency (Northern Ireland) Order 1989, SI 1989/2405: see the Pensions Act 1995 s 108(2)(d).

13    Ibid s 108(2)(d).

14    Ibid s 108(2)(e).

15    'Public servant' means an officer or servant of the Crown or of any prescribed authority: ibid s 108(7). For the meaning of 'prescribed' see PARA 555 note 1 ante.

16    Ibid s 108(2)(f).

17    Ibid s 108(2)(g). For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

18    Ibid s 108(2)(h).

19    Ibid s 108(4).

20    Ibid s 108(3).

21    Ie specified in ibid s 107(1): see PARA 634 note 5 ante.

22    Ibid s 108(5)(a).

23    Ibid s 108(5)(b).

24    Ibid s 108(6).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

### **627-635 References and appeals from the Occupational Pensions Regulatory Authority ... Other permitted disclosure**

Repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(1) THE OCCUPATIONAL PENSIONS REGULATORY AUTHORITY/(iv) Disclosure of Information/636. Disclosure of information by the Inland Revenue.

### **636. Disclosure of information by the Inland Revenue.**

The following provisions apply to information held by any person in the exercise of tax functions<sup>1</sup> about any matter relevant, for the purposes of those functions, to tax or duty in the case of an identifiable person ('tax information')<sup>2</sup>. No obligation as to secrecy<sup>3</sup> must prevent the disclosure of tax information to the Occupational Pensions Regulatory Authority<sup>4</sup> for the purpose of enabling or assisting the authority to discharge its functions<sup>5</sup>. Where tax information is so disclosed to the authority, it must be treated for the purposes of the provisions relating to restricted information<sup>6</sup> as such restricted information<sup>7</sup>.

1 'Tax functions' means functions relating to tax or duty (1) of the Inland Revenue Commissioners, the Board and their officers; (2) of any person carrying out the administrative work of any specified tribunal; and (3) of any other person providing, or employed in the provision of, services to any person mentioned in heads (1)-(2) supra: see the Finance Act 1989 s 182 (as amended); and INCOME TAXATION vol 23(2) (Reissue) PARA 1834 (definition applied by the Pensions Act 1995 s 109(5)).

2 Ibid s 109(1).

3 Ie imposed by the Finance Act 1989 s 182 (as amended: see the Pensions Act 1995 s 109(2)).

4 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

5 Pensions Act 1995 s 109(2).

6 Ie the provisions of ibid s 104: see PARA 633 ante. For the meaning of 'restricted information' see PARA 633 note 2 ante.

7 See ibid s 109(3). Sections 106-108 (see PARAS 634-634 ante) do not apply to tax information and such information must not be disclosed except: (1) to, or in accordance with authority duly given by, the Commissioners of Inland Revenue or the Commissioners of Customs and Excise; or (2) with a view to the institution of, or otherwise for the purposes of, criminal proceedings under the Pensions Act 1995 or the Pension Schemes Act 1993 (see generally paras 970-971 post), or any enactment in force in Northern Ireland corresponding to either of them: Pensions Act 1995 s 109(4). For the meaning of 'enactment' see PARA 612 note 16 ante.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the

Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

### **636 Disclosure of information by the Inland Revenue**

TEXT AND NOTES--Pensions Act 1995 s 109 repealed: Pensions Act 2004 Sch 13 Pt 1.

For further amendments to the Finance Act 1989 s 182 see the Tax Credits Act 2002 Sch 5 para 11; the Statute Law (Repeals) Act 2004; the Child Trust Funds Act 2004 s 18; the Public Services Ombudsman (Wales) Act 2005 Sch 6 para 22, Sch 7; and the Work and Families Act 2006 Sch 1 para 2 (Sch 1 para 2 in force 6 April 2010: SI 2010/495). Subject to savings (SI 2003/962), Tax Credits Act 1999 repealed: 2002 Act Sch 6.

The provisions also apply to information held by any person in the exercise of tax credit functions, child trust fund functions or social security functions about any matter relevant, for the purposes of those functions, to a tax credit in respect of any identifiable person, to a child trust fund of any identifiable person, to contributions payable by or in respect of any identifiable person, or to statutory sick pay or statutory maternity pay in respect of any identifiable person: Finance Act 1989 s 182 (amended by the 2002 Act Sch 5 para 11(2); the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 6 para 9; and the Child Trust Funds Act 2004 s 18(1), (2)). 'Tax credit functions' means the functions relating to tax credits of (1) the Board, (2) any person carrying out the administrative work of the General Commissioners or the Special Commissioners, and (3) any other person providing, or employed in the provision of, services to the Board or to any person mentioned in head (2): 1989 Act s 182(2ZA) (added by the 2002 Act Sch 5 para 11(3)). 'Child trust funds functions' means the functions relating to child trust funds of (a) the Board and its officers, (b) any person carrying out the administrative work of the General Commissioners or the Special Commissioners, or (c) of any person providing, or employed in the provision of, services to the Board or any person mentioned in head (2): 1989 Act s 182(2ZB) (added by the Child Trust Funds Act 2004 s 18(1), (3)). 'Social security functions' means (i) the functions relating to contributions, child benefit, guardian's allowance, statutory sick pay, statutory maternity pay, ordinary statutory paternity pay, additional statutory paternity pay or statutory adoption pay of the Inland Revenue and its officers, of any person carrying out the administrative work of the General Commissioners or the Special Commissioners, and of any other person providing, or employed in the provision of, services to any of them; and (ii) the functions under the

Pension Schemes Act 1993 Pt III (ss 7-39) of the Inland Revenue and its officers and any other person providing, or employed in the provision of, services to the Inland Revenue or its officers: 1989 Act s 182(2A) (added by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 6 para 9; and amended by the 2002 Act Sch 5 para 11(4); the Employment Act 2002 Sch 7 para 1(2)(b); and the Work and Families Act 2006 Sch 1 para 2 (Sch 1 para 2 in force 6 April 2010: SI 2010/495)).

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### **636A. The Pensions Regulator.**

The following provisions are partly in force: SI 2004/3350, 2005/275, 2005/695, 2005/1108, 2005/1720, 2005/2447, 2006/560. The Pensions Act 2004 Pt 1 (ss 1-106) establishes the Pensions Regulator, to replace the Occupational Pensions Regulatory Authority.

For general and supplementary provision relating to the Pensions Act 2004 see s 306 (amended by Pensions Act 2008 Sch 9 para 11; and SI 2009/1941) (overriding requirements) (partly in force); s 307 (modification of the Pensions Act 2004 in relation to certain categories of schemes) (in force); s 308 (modification of pensions legislation that refers to employers) (not yet in force); s 309 (offences by bodies corporate and partnerships) (in force); s 310 (admissibility of statements) (in force); s 311 (protected items) (in force); s 312 (liens) (in force); s 313 (Crown application) (in force); s 321 (pre-consolidation amendments) (in force); and s 324 (Northern Ireland) (in force).

For regulations made under s 307 see the Pension Protection Fund (Partially Guaranteed Schemes) (Modification) Regulations 2005, SI 2005/277 (amended by SI 2010/196); the Pension Protection Fund (Multi-employer Schemes) (Modification) Regulations 2005, SI 2005/441 (amended by SI 2005/993, 2005/2113, SI 2008/731); the Pension Protection (Hybrid Schemes) (Modification) Regulations 2005, SI 2005/449; the Register of Occupational and Personal Pension Schemes Regulations 2005, SI 2005/597 (see PARA 661); the Pension Protection Fund (Reviewable Matters) Regulations 2005, SI 2005/600 (amended by SI 2005/2184, SI 2006/685, SI 2007/782, SI 2010/196); and the Pensions Regulator (Financial Support Directions etc) Regulations 2005, SI 2005/2188 (amended by SI 2005/2224, SI 2008/731).

The following provisions are in force unless otherwise stated.

#### **1. Establishment**

A body corporate to be called the Pensions Regulator (in the Pensions Act 2004 referred to as 'the Regulator') is established<sup>1</sup>.

The Regulator is to consist of the following members (1) a chairman appointed by the Secretary of State, (2) the Chief Executive of the Regulator, and (3) at least five other persons appointed by the Secretary of State after consulting the chairman<sup>2</sup>. The chairman must not be appointed from the staff of the Regulator or be the chairman of the Board of the Pension Protection Fund<sup>3</sup>. No member of the staff of the Board of the Pension Protection Fund is eligible for appointment as a member of the Regulator<sup>4</sup>.

Further provision about the Regulator is made, including provision as to (a) the terms of appointment, tenure and remuneration of members; (b) the appointment of the Chief Executive and other staff; (c) the proceedings of the Regulator; (d) its funding and accounts; and (e) the status and liability of the Regulator, its members and staff<sup>5</sup>.

<sup>1</sup> Pensions Act 2004 s 1.

<sup>2</sup> Ibid s 2(1). At least two of the members appointed under head (3) in the text must be appointed from the staff of the Regulator: s 2(3). In appointing persons under head (3) in the text the Secretary of State must secure that a majority of the members of the Regulator are non-executive members: s 2(4). In the Pensions Act 2004 Pt 1 (ss 1-106) (1) references to executive members of the Regulator are to (a) the Chief Executive, and

(b) the members appointed under head (3) in the text from the staff of the Regulator, and (2) references to non-executive members of the Regulator are to members who are not executive members: s 2(6).

3 Ibid s 2(2). As to the Pension Protection Fund see s 108 and PARA 659A.1.

4 Ibid s 2(5).

5 See ibid s 3, Sch 1 (amended by Pensions Act 2008 s 133, Sch 11 Pt 6) (Pensions Act 2004 Sch 1 partly in force). See also Occupational Pension Schemes (Independent Trustee) Regulations 2005, SI 2005/703 (amended by SI 2009/615).

## 2. Regulator's functions

The Regulator<sup>1</sup> has (1) the functions transferred to it from the Occupational Pensions Regulatory Authority<sup>2</sup> by virtue of the Pensions Act 2004 or any provisions in force in Northern Ireland corresponding to the Pensions Act 2004, and (2) any other functions conferred by, or by virtue of, the Pensions Act 2004 or any other enactment<sup>3</sup>.

1 In the Pensions Act 2004, unless the context otherwise requires 'the Regulator' has the meaning given by s 1 (see PARA 636A.1): s 318(1).

2 The Occupational Pensions Regulatory Authority is dissolved: see ibid s 300 and PARA 598-636.

3 Ibid s 4(1). In the Pensions Act 2004, unless the context otherwise requires 'enactment' includes an enactment comprised in subordinate legislation (within the meaning of the Interpretation Act 1978): Pensions Act 2004 s 318(1).

As regards the exercise of the Regulator's functions (1) the non-executive functions listed in s 8(4) (see PARA 636A.6) must, by virtue of s 8(2), be discharged by the committee established under s 8, (2) the functions mentioned in the following provisions are exercisable only by the Determinations Panel (a) s 10(1) (the power in certain circumstances to determine whether to exercise the functions listed in Sch 2 and to exercise them: see 636A.8), and (b) s 99(10) (the functions concerning the compulsory review of certain determinations: see PARA 636A.37), and (3) the exercise of other functions of the Regulator may be delegated by the Regulator under Sch 1 para 20: s 4(2). As to Sch 1 see PARA 636A.1. Section 4(2) is subject to any regulations made by the Secretary of State under Sch 1 para 21 (power to limit or permit delegation of functions): s 4(3). As to regulations under the Pensions Act 2004 Sch 1 para 21, see the Pensions Regulator (Delegation of Powers) Regulations 2009, SI 2009/1888, which permit the Regulator to authorise such persons, in such circumstances and under such arrangements, as the Regulator may determine, to exercise certain powers on the Regulator's behalf. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

## 3. Regulator's objectives

The main objectives of the Regulator in exercising its functions are (1) to protect the benefits under occupational pension schemes<sup>1</sup> of, or in respect of, members<sup>2</sup> of such schemes, (2) to protect the benefits under personal pension schemes of, or in respect of, members of such schemes<sup>3</sup>, (3) to reduce the risk of situations arising which may lead to compensation being payable from the Pension Protection Fund<sup>4</sup>, and (4) to promote, and to improve understanding of, the good administration of work-based pension schemes<sup>5</sup>.

1 In the Pensions Act 2004, unless the context otherwise requires 'occupational pension scheme' has the meaning given by the Pension Schemes Act 1993 s 1 (see PARA 741): Pensions Act 2004 s 318(1).

2 In the Pensions Act 2004, unless the context otherwise requires 'member', in relation to an occupational pension scheme, means any active, deferred, pensioner or pension credit member within the meaning of the Pensions Act 1995 s 124(1) (but see s 318(5)): Pensions Act 2004 s 318(1).

Regulations may for any purpose of any provision of the Pensions Act 2004 (1) prescribe the persons who are to be regarded as members or prospective members of an occupational or personal pension scheme, and (2) make provision as to the times at which and circumstances in which a person is to be treated as becoming, or as ceasing to be, such a member or prospective member: s 318(5). In the Pensions Act 2004, unless the context otherwise requires 'regulations' means regulations made by the Secretary of State: s 318(1). In the Pensions Act

2004, unless the context otherwise requires 'prescribed' means prescribed by regulations: s 318(1). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). In the Pensions Act 2004, unless the context otherwise requires 'personal pension scheme' has the meaning given by the Pension Schemes Act 1993 s 1 (see PARA 710): Pensions Act 2004 s 318(1).

3 Ibid within ibid s 5(2). For the purposes of head (2) in the text the members of personal pension schemes within s 5(2) are (1) the members who are employees in respect of whom direct payment arrangements exist, and (2) where the scheme is a stakeholder pension scheme, any other members: s 5(2). In the Pensions Act 2004, unless the context otherwise requires 'employee' has the meaning given by the Pension Schemes Act 1993 s 181(1) (see PARA 598): Pensions Act 2004 s 318(1). In the Pensions Act 2004, unless the context otherwise requires 'direct payment arrangements', in relation to a personal pension scheme, has the same meaning as in the Pension Schemes Act 1993 s 111A (see PARA 556A): Pensions Act 2004 s 318(1). In s 5 'stakeholder pension scheme' means a personal pension scheme which is or has been registered under the Welfare Reform and Pensions Act 1999 s 2 (register of stakeholder schemes: see PARA 873A.2): Pensions Act 2004 s 5(3).

4 See ibid Pt 2 (ss 107-220); and PARAS 659A-659G.

5 Ibid s 5(1). In s 5 'work-based pension scheme' means (1) an occupational pension scheme, (2) a personal pension scheme where direct payment arrangements exist in respect of one or more members of the scheme who are employees, or (3) a stakeholder pension scheme: s 5(3).

#### **4. Supplementary powers**

The Regulator may do anything (except borrow money) which (1) is calculated to facilitate the exercise of its functions, or (2) is incidental or conducive to their exercise<sup>1</sup>.

1 Pensions Act 2004 s 6.

#### **5. Transfer of OPRA's functions to the Regulator**

Subject to the provisions of the Pensions Act 2004, the functions of the Occupational Pensions Regulatory Authority ('OPRA')<sup>1</sup> conferred by or by virtue of (1) the Pension Schemes Act 1993, (2) the Pensions Act 1995, and (3) the Welfare Reform and Pensions Act 1999, are transferred to the Regulator<sup>2</sup>.

1 As to the Occupational Pensions Regulatory Authority see PARAS 598-636.

2 Pensions Act 2004 s 7(1).

#### **6. Non-executive functions**

Specified functions<sup>1</sup> (in Part 1 of the Pensions Act 2004<sup>2</sup> referred to as 'the non-executive functions') are functions of the Regulator<sup>3</sup>. The Regulator must establish a committee to discharge the non-executive functions on its behalf<sup>4</sup>. Only non-executive members of the Regulator may be members of the committee<sup>5</sup>. The committee established under these provisions must prepare a report on the discharge of the non-executive functions for inclusion in the Regulator's annual report to the Secretary of State<sup>6</sup>. The committee's report must relate to the same period as that covered by the Regulator's report<sup>7</sup>. The committee may establish sub-committees, and the members of any such sub-committee (1) may include persons who are not members of the committee or of the Regulator, but (2) must not include persons who are executive members or other staff of the Regulator<sup>8</sup>. The committee may authorise any of its members or any of its sub-committees to discharge on its behalf (a) any of the non-executive functions; (b) the duty to prepare a report<sup>9</sup>. The committee (or any of its sub-committees) may be authorised<sup>10</sup> to exercise further functions of the Regulator<sup>11</sup>.

1    Ie the functions listed in the Pensions Act 2004 s 8(4).

2    Ie ibid ss 1-106.

3    Ibid s 8(1). The non-executive functions are (1) the duty to keep under review the question whether the Regulator's internal financial controls secure the proper conduct of its financial affairs; (2) the duty to determine under Sch 1 para 8(4)(b) (see PARA 636A.1), subject to the approval of the Secretary of State, the terms and conditions as to remuneration of any Chief Executive appointed under Sch 1 para 8(4)(a): s 8(4).

Section 8 is subject to any regulations made by the Secretary of State under Sch 1 para 21 (power to limit or permit delegation of functions): s 8(10). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

4    Pensions Act 2004 s 8(2).

5    Ibid s 8(3).

6    Under ibid s 11 (see PARA 636A.9): s 8(5).

7    Ibid s 8(6).

8    Ibid s 8(7).

9    Under ibid s 8(5): s 8(8).

10   Under ibid Sch 1 para 20(1) (see PARA 636A.1).

11   Ibid s 8(9).

## **7. The Determinations Panel**

The Regulator must establish and maintain a committee consisting of (1) a chairman, and (2) at least six other persons, (in Part 1 of the Pensions Act 2004<sup>1</sup> referred to as 'the Determinations Panel')<sup>2</sup>. The chairman of the Panel must (a) decide the number of persons to be appointed as the other members of the Panel, and (b) nominate a person suitable for each of those appointments<sup>3</sup>. The Regulator must then appoint as the other members of the Panel the persons nominated by the chairman of the Panel<sup>4</sup>. The following are ineligible for appointment as members of the Panel (i) any member of the Regulator; (ii) any member of the staff of the Regulator; (iii) any member of the Board of the Pension Protection Fund; (iv) any member of the staff of that Board<sup>5</sup>. The Panel may establish sub-committees consisting of members of the Panel<sup>6</sup>. Further provision about the Panel is made including provision as to the terms of appointment, tenure and remuneration of members and as to its procedure<sup>7</sup>.

1    Ie the Pensions Act 2004 ss 1-106, Schs 1-4.

2    Ibid s 9(1). The Regulator must appoint as the chairman of the Panel the person nominated in accordance with Sch 1 para 11 (nomination by a committee established by the chairman of the Regulator): s 9(2).

3    Ibid s 9(3).

4    Ibid s 9(4).

5    Ibid s 9(5).

6    Ibid s 9(6).

7    See ibid s 9(7), Sch 1.

## **8. Functions exercisable by the Determinations Panel**

For transitional modification see SI 2005/695.

The Determinations Panel is to exercise on behalf of the Regulator (1) the power to determine in specified circumstances<sup>1</sup> whether to exercise a reserved regulatory function<sup>2</sup>, and (2) where it so determines to exercise a reserved regulatory function, the power to exercise the function in question<sup>3</sup>. Those circumstances are (a) where the Regulator considers that the exercise of the reserved regulatory function may be appropriate, or (b) where an application is made under, or by virtue of, any of specified listed provisions<sup>4</sup> for the Regulator to exercise the reserved regulatory function<sup>5</sup>. The Panel may be authorised<sup>6</sup> to exercise further functions of the Regulator on behalf of the Regulator<sup>7</sup>.

1 le in the circumstances described in the Pensions Act 2004 s 10(2).

2 For the purposes of ibid Pt 1 (ss 1-106), a function of the Regulator is a 'reserved regulatory function' if it is a function listed in Sch 2 (Sch 2 amended by Pensions Act 2007 s 14(7); and Pensions Act 2008 s 131(2), Sch 9 para 13): Pensions Act 2004 s 10(4). Regulations may amend Sch 2 by (1) adding any function of the Regulator conferred by, or by virtue of, the Pensions Act 2004 or any other enactment, (2) omitting any such function, or (3) altering the description of any such function contained in Sch 2: s 10(5). See Occupational Pension Schemes (Independent Trustee) Regulations 2005, SI 2005/703 (amended by SI 2009/615); Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2005, SI 2005/2113; and Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006, SI 2006/349 (amended by SI 2006/778, SI 2007/814, SI 2009/615, SI 2009/3348). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

3 Pensions Act 2004 s 10(1). Where s 10(1) applies, the powers mentioned in s 10(1) are not otherwise exercisable by or on behalf of the Regulator: s 10(3).

Section 10 is subject to any regulations made by the Secretary of State under Sch 1 para 21 (power to limit or permit delegation of functions: see PARA 636A.1): s 10(10).

4 le any of the provisions listed in ibid s 10(6). The provisions referred to in head (b) in the text are (1) s 20(10) (application to permit payments out of an account that is subject to a restraining order: see PARA 636A.17); (2) s 26(2) (application for order validating action taken in contravention of freezing order: see PARA 636A.19); (3) s 41(7) (application for the issue of a revised contribution notice under s 41(9): see PARA 636A.20); (4) s 50(7) (application for the issue of a revised contribution notice under s 50(9): see PARA 636A.23); (5) s 3(3) (application for revocation of prohibition order: see PARA 604); (6) s 4(5) (application for revocation of a suspension order: see PARA 605); (7) s 7(5A) (application for appointment of a trustee under s 7(3)(a) or (c): see PARA 608); (8) s 29(5) (application for waiver of disqualification: see PARA 788); (9) s 58(7) (power of the Regulator in prescribed circumstances to extend or further extend the period referred to in s 58(6) in relation to a schedule of contributions); (10) s 60(7) (power of the Regulator in prescribed circumstances to extend or further extend the period applicable under s 60(3) in relation to securing an increase in value); (11) s 69(1) (application for order authorising modification or modifying a scheme: see PARA 835); (12) s 71A(2) (application for modifying a scheme to secure winding up: see PARA 835); (13) the Pension Schemes Act 1993 s 99(4A) (application for extension under s 99(4) of a period for compliance: see PARA 958); (14) the Pension Schemes Act 1993 s 101J(6)(a) (application for extension under s 101J(2) of a period for compliance: see PARA 961A); Pensions Act 2004 s 10(6) (amended by SI 2005/2113). Regulations may amend the Pensions Act 2004 s 10(6) by (a) adding any provision of the Pensions Act 2004 or any other enactment to the list in s 10(6), or (b) omitting or altering the description of any provision mentioned in that list: s 10(7). See SI 2005/2113.

5 Pensions Act 2004 s 10(2).

6 Under ibid Sch 1 para 20(4) or (6) (see PARA 636A.1).

7 Ibid s 10(8). The Panel may authorise any of its members or any of its sub-committees to exercise on its behalf (1) any of the functions of the Regulator which are exercisable by the Panel on behalf of the Regulator, or (2) any of the functions of the Panel under s 93(3) (see PARA 636A.37), s 99(11) (see PARA 636A.37) and Sch 1 para 18(2) (procedure): s 10(9).

## 9. Annual reports to Secretary of State

The Regulator must prepare a report for each financial year<sup>1</sup>. The Regulator must send each report to the Secretary of State as soon as practicable after the end of the financial year for which it is prepared<sup>2</sup>. The Secretary of State must lay before each House of Parliament a copy of every report received by him under these provisions<sup>3</sup>.

1 Pensions Act 2004 s 11(1). In s 11 'financial year' means (1) the period beginning with the date on which the Regulator is established and ending with the next following 31 March, and (2) each successive period of 12 months: s 11(6). Each report (a) must deal with the activities of the Regulator in the financial year for which it is prepared, including the matters mentioned in s 11(3), and (b) must include the report prepared under s 8(5) (see PARA 636A.6) by the committee established under s 8: s 11(2). The matters referred to in head (a) are (i) the strategic direction of the Regulator and the manner in which it has been kept under review; (ii) the steps taken to scrutinise the performance of the Chief Executive in securing that the Regulator's functions are exercised efficiently and effectively; (iii) the Regulator's objectives and targets (including its main objectives as set out in s 5 (see PARA 636A.3) or in any corresponding provision in force in Northern Ireland) and the steps taken to monitor the extent to which they are being met: s 11(3).

2 Ibid s 11(4).

3 Ibid s 11(5).

## **10. Provision of information, education and assistance**

The Regulator may provide such information, education and assistance<sup>1</sup> as it considers appropriate to those involved in (1) the administration of work-based pension schemes<sup>2</sup>, or (2) advising the trustees or managers in relation to such schemes as to their operation<sup>3</sup>.

1 In the Pensions Act 2004 s 12 'assistance' does not include financial assistance: s 12(4).

2 In ibid s 12 'work-based pension scheme' has the same meaning as in s 5 (Regulator's objectives: see PARA 636A.3): s 12(4).

3 Ibid s 12(1). To the extent that it is not authorised to do so under s 12(1), the Regulator may also provide such information, education and assistance as it considers appropriate to (1) employers in relation to work-based pension schemes, (2) persons involved in advising such employers as to the operation of such schemes, or (3) persons upon whom duties are imposed by or by virtue of s 238 (information and advice to employees: see PARA 965B.5): s 12(2) (head (3) not yet in force). For the purposes of s 12(2), 'employers in relation to work-based pension schemes' means, in the case of stakeholder pension schemes, the persons upon whom duties are imposed by or by virtue of the Welfare Reform and Pensions Act 1999 s 3 (duty of employers to facilitate access to stakeholder pension schemes: see PARA 873A.3): Pensions Act 2004 s 12(3). In s 12 'stakeholder pension scheme' has the same meaning as in s 5 (Regulator's objectives: see 636A.3): s 12(4).

## **11. New powers in respect of occupational and personal pension schemes: improvement notices**

If the Regulator is of the opinion that a person (1) is contravening<sup>1</sup> one or more provisions of the pensions legislation<sup>2</sup>, or (2) has contravened one or more of those provisions in circumstances that make it likely that the contravention will continue or be repeated, it may issue a notice (an 'improvement notice') to that person directing him to take, or refrain from taking, such steps as are specified in the notice in order to remedy or prevent a recurrence of the contravention<sup>3</sup>. An improvement notice must (a) state that the Regulator is of that opinion and specify the provision or provisions of the pensions legislation in question, (b) contain a statement of the matters which it is asserted constitute the contravention and of the evidence on which that opinion is based, and (c) in respect of each step specified in the notice, state the period (being a period of not less than 21 days beginning with the date of the notice) within which it must be complied with<sup>4</sup>. Directions in an improvement notice (i) may be framed to any extent by reference to a code of practice issued by the Regulator<sup>5</sup>, and (ii) may be framed so as to afford the person to whom the notice is issued a choice between different ways of remedying or preventing the recurrence of the contravention<sup>6</sup>. Directions in an improvement notice may be expressed to be conditional on compliance by a third party with a specified direction, or specified directions, contained in a third party notice<sup>7</sup>. An improvement notice may direct the person to whom it is issued to inform the Regulator, within such period as may be specified in the notice, of how he has complied, or is complying, with the notice<sup>8</sup>. Where a contravention of a provision of the pensions legislation consists of a failure to take action within a time limit, for

the purposes of these provisions the contravention continues until such time as the action is taken<sup>9</sup>. If the trustees or managers<sup>10</sup> of an occupational or personal pension scheme fail to comply with an improvement notice issued to them, the civil penalty provisions in the Pensions Act 1995<sup>11</sup> apply to any trustee or manager who has failed to take all reasonable steps to secure compliance<sup>12</sup>.

1 In the Pensions Act 2004, unless the context otherwise requires 'contravention' includes failure to comply: s 318(1).

2 In *ibid* s 13 'pensions legislation' means any enactment contained in or made by virtue of (1) the Pension Schemes Act 1993, (2) the Pensions Act 1995 Pt 1, other than ss 62-66A (equal treatment), (3) the Welfare Reform and Pensions Act 1999 Pt 1 or s 33, or (4) the Pensions Act 2004: s 13(7).

3 *Ibid* s 13(1).

4 *Ibid* s 13(2).

5 Under *ibid* s 90 (see PARA 636A.36).

6 *Ibid* s 13(3).

7 *Ie* a notice under *ibid* s 14 (see PARA 636A.12): s 13(4).

8 *Ibid* s 13(5).

9 *Ibid* s 13(6).

10 In the Pensions Act 2004, unless the context otherwise requires 'managers', in relation to an occupational or personal pension scheme (other than a scheme established under a trust), means the persons responsible for the management of the scheme: s 318(1).

11 *Ie* the Pensions Act 1995 s 10 (see PARA 611).

12 Pensions Act 2004 s 13(8). The Pensions Act 1995 s 10 also applies to any other person who, without reasonable excuse, fails to comply with an improvement notice issued to him: Pensions Act 2004 s 13(9).

## **12. New powers in respect of occupational and personal pension schemes: third party notices**

Where the Regulator is of the opinion that (1) a person (a) is contravening one or more provisions of the pensions legislation<sup>1</sup>, or (b) has contravened one or more of those provisions in circumstances that make it likely that the contravention will continue or be repeated, (2) the contravention is or was, wholly or partly, a result of a failure of another person ('the third party') to do any thing, and (3) that failure is not itself a contravention of the pensions legislation, the Regulator may issue a notice (a 'third party notice') directing the third party to take, or refrain from taking, such steps as are specified in the notice in order to remedy or prevent a recurrence of his failure<sup>2</sup>. A third party notice must (i) state that the Regulator is of that opinion and specify the provision or provisions of the pensions legislation in question, (ii) contain a statement of (A) the matters which it is asserted constitute the contravention of the provision or provisions, and (B) the matters which it is asserted constitute the failure by the third party, and the evidence on which that opinion is based, and (iii) in respect of each step specified in the notice, state the period (being a period of not less than 21 days beginning with the date of the notice) within which it must be complied with<sup>3</sup>. Directions in a third party notice may be framed so as to afford the third party a choice between different ways of remedying or preventing the recurrence of his failure<sup>4</sup>. A third party notice may direct the third party to inform the Regulator, within such period as may be specified in the notice, of how he has complied, or is complying, with the notice<sup>5</sup>. Where a contravention of a provision of the pensions legislation consists of a failure to take action within a time limit, for the purposes of these provisions the contravention continues until such time as the action is taken<sup>6</sup>. The civil

penalty provisions in the Pensions Act 1995<sup>7</sup> apply to a person who, without reasonable excuse, fails to comply with a third party notice issued to him<sup>8</sup>. No duty to which a person is subject is to be regarded as contravened merely because of anything required to be done in compliance with a third party notice<sup>9</sup>.

1 In the Pensions Act 2004 s 14 'pensions legislation' has the same meaning as in s 13 (see PARA 636A.11): s 14(8).

2 Ibid s 14(1).

3 Ibid s 14(2).

4 Ibid s 14(3).

5 Ibid s 14(4).

6 Ibid s 14(5).

7 In the Pensions Act 1995 s 10 (see PARA 611).

8 Pensions Act 2004 s 14(6).

9 Ibid s 14(7). Section 14(7) is subject to s 311 (protected items: see infra): s 14(7).

The following provisions are not yet in force. A person may not be required under or by virtue of the Pensions Act 2004 to produce, disclose or permit the inspection of protected items: s 311(1). For this purpose 'protected items' means (1) communications between a professional legal adviser and his client or any person representing his client which fall within s 311(3); (2) communications between a professional legal adviser, his client or any person representing his client and any other person which fall within s 311(3) (as a result of head (ii)); (3) items which (a) are enclosed with, or referred to in, such communications, (b) fall within s 311(3), and (c) are in the possession of a person entitled to possession of them: s 311(2). A communication or item falls within s 311(3) if it is made (i) in connection with the giving of legal advice to the client, or (ii) in connection with, or in contemplation of, legal proceedings and for the purpose of those proceedings: s 311(3). A communication or item is not a protected item if it is held with the intention of furthering a criminal purpose: s 311(4).

### **13. New powers in respect of occupational and personal pension schemes: injunctions**

If, on the application of the Regulator, the court is satisfied that (1) there is a reasonable likelihood that a particular person will do any act which constitutes a misuse or misappropriation of any of the assets of an occupational or personal pension scheme, or (2) a particular person has done any such act and there is a reasonable likelihood that he will continue or repeat the act in question or do a similar act, the court may grant an injunction restraining him from doing so<sup>1</sup>.

1 Pensions Act 2004 s 15(1). The jurisdiction conferred by s 15 is exercisable by the High Court: s 15(2).

### **14. New powers in respect of occupational and personal pension schemes: restitution**

If, on the application of the Regulator, the court is satisfied that there has been a misuse or misappropriation of any of the assets of an occupational or personal pension scheme, it may order any person involved<sup>1</sup> to take such steps as the court may direct for restoring the parties to the position in which they were before the misuse or misappropriation occurred<sup>2</sup>.

1 For the purposes of the Pensions Act 2004 s 16 a person is 'involved' if he appears to the court to have been knowingly concerned in the misuse or misappropriation of the assets: s 16(2).

2 Ibid s 16(1). The jurisdiction conferred by s 16 is exercisable by the High Court: s 16(3).

## **15. New powers in respect of occupational and personal pension schemes: power of the Regulator to recover unpaid contributions**

Where any employer contribution<sup>1</sup> payable towards an occupational or personal pension scheme is not paid on or before its due date<sup>2</sup>, the Regulator may, on behalf of the trustees or managers of the scheme, exercise such powers as the trustees or managers have to recover that contribution<sup>3</sup>.

1 In the Pensions Act 2004 s 17 'employer contribution' (1) in relation to an occupational pension scheme, means any contribution payable by or on behalf of the employer towards the scheme in accordance with a schedule of contributions under s 227 (see PARA 824A.7) or a payment schedule under the Pensions Act 1995 s 87 (schedules of payments to money purchase schemes: see PARA 864) whether (a) on the employer's own account (but in respect of one or more employees), or (b) on behalf of an employee out of deductions from the employee's earnings, and (2) in relation to a personal pension scheme, means any contribution payable towards the scheme under direct payment arrangements: Pensions Act 2004 s 17(3). In the Pensions Act 2004, unless the context otherwise requires 'employer' (i) in relation to an occupational pension scheme, means the employer of persons in the description of employment to which the scheme in question relates (but see s 318(4)), and (ii) in relation to a personal pension scheme, where direct payment arrangements exist in respect of one or more members of the scheme who are employees, means an employer with whom those arrangements exist: s 318(1). Regulations may, in relation to occupational pension schemes, extend for the purposes of Pts 1, 2, 4-7, 9 the meaning of 'employer' to include (A) persons who have been the employer in relation to the scheme; (B) such other persons as may be prescribed: s 318(4) (partly in force). See Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590 (amended by SI 2005/993, SI 2005/2113, SI 2005/2153, SI 2005/2224, SI 2006/580, SI 2007/782, SI 2008/731, SI 2008/1810, SI 2009/317, SI 2009/451, SI 2009/1552, SI 2010/196). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). In the Pensions Act 2004, unless the context otherwise requires 'earnings' has the meaning given by the Pension Schemes Act 1993 s 181(1): Pensions Act 2004 s 318(1).

2 In *ibid* s 17 'due date' (1) in relation to employer contributions payable towards an occupational pension scheme in accordance with a schedule of contributions under s 227 (see PARA 824A.7), has the same meaning as in s 228 (see PARA 824A.8), (2) in relation to employer contributions payable in accordance with a payment schedule under the Pensions Act 1995 s 87 (schedules of payments to money purchase schemes: see PARA 864), has the meaning given by s 87(2)(c), and (3) in relation to employer contributions payable towards a personal pension scheme, has the same meaning as in the Pension Schemes Act 1993 s 111A (monitoring of employer payments to personal pension schemes: see PARA 556A): Pensions Act 2004 s 17(3).

3 Ibid s 17(1). For the purposes of s 17(1), any employer contribution payable towards a personal pension scheme which is not paid on or before its due date is, if not a debt due from the employer to the trustees or managers apart from this provision, to be treated as if it were such a debt: s 17(2).

## **16. New powers in respect of occupational and personal pension schemes: pension liberation: court's power to order restitution**

The following provisions<sup>1</sup> apply where money has been liberated from a pension scheme<sup>2</sup>. Where a person acquires the beneficial interest in recoverable property<sup>3</sup> in good faith, for value and without notice that the property is, or (as the case may be) represents, money liberated from a pension scheme (1) the property ceases to be recoverable property, and (2) no property that subsequently represents it is recoverable property<sup>4</sup>. The court, on the application of the Regulator, may make such order as the court thinks just and convenient for the purpose of securing that recoverable property, or money representing its value or proceeds of its sale, is transferred (a) towards a pension scheme, (b) towards an annuity or insurance policy, or (c) to the liberated member<sup>5</sup>. The jurisdiction conferred by the above provisions<sup>6</sup> is exercisable by the High Court<sup>7</sup>.

1 I.e. the Pensions Act 2004 s 19.

2 Ibid s 19(1). 'Pension scheme' means an occupational pension scheme or a personal pension scheme: s 18(1)(a). References to money liberated from a pension scheme are to be read in accordance with s 18(2): s 18(1)(c). Money is to be taken to have been liberated from a pension scheme if (1) the money directly or indirectly represents an amount that, in respect of accrued rights of a member of a pension scheme, has been transferred out of the scheme in pursuance of (a) a relevant statutory provision, or (b) a provision of the applicable rules, other than a relevant statutory provision, (2) the trustees or managers of the scheme transferred the amount out of the scheme on the basis that a third party ('the liberator') would secure that the amount was used in an authorised way, (3) the amount has not been used in an authorised way, and (4) the liberator has not secured, and is not likely to secure, that the amount will be used in an authorised way: s 18(2). The following are 'relevant statutory provisions' for the purposes of s 18(2) (i) the Pension Schemes Act 1993 s 94(1)(a), (aa) or (b) (right to cash equivalent under Pt 4 Ch 4: see PARA 953); (ii) the Pension Schemes Act 1993 s 101AB(1)(a) (right to cash transfer sum under Pt 4 Ch 5: see PARA 961A); (iii) the Pension Schemes Act 1993 s 101F(1) (right to cash equivalent of pension credit benefit: see PARA 961A); Pensions Act 2004 s 18(3). In s 18(2) 'authorised way' means (A) where the amount concerned is transferred out of the scheme in pursuance of a provision mentioned in head (i), a way specified in s 18(2) or, as the case may be, the Pension Schemes Act 1993 s 95(3) (see PARA 954); (B) where that amount is transferred out in pursuance of the provision mentioned in head (ii), a way specified in the Pension Schemes Act 1993 s 101AE(2) (see PARA 961A); (C) where that amount is transferred out in pursuance of the provision mentioned in head (iii), a way specified in the Pensions Act 2004 s 18(2) or, as the case may be, the Pension Schemes Act 1993 s 101F(3) (see PARA 961A); (D) where that amount is transferred out in pursuance of a provision of the kind mentioned in head (b), a way that is authorised by the applicable rules for amounts transferred out in pursuance of that provision: Pensions Act 2004 s 18(4). In s 18 'the applicable rules' has the same meaning as, in the case of the pension scheme concerned, that expression has in the Pension Schemes Act 1993 s 94: Pensions Act 2004 s 18(5).

3 In ibid s 19 'recoverable property' means (subject to s 19(3)) (1) the money or any of it, or (2) property (of any kind and wherever situated) that, directly or indirectly, represents any of the money: s 19(2).

4 Ibid s 19(3).

5 Ibid s 19(4). 'Liberated member', in relation to money liberated from a pension scheme, means the member of the pension scheme who is referred to in s 18(2)(a): s 18(1)(d).

An order under s 19(4) may (in particular) direct a person who holds recoverable property, or has any degree of control over recoverable property, to take steps for the purpose mentioned in s 19(4): s 19(5). Where the court makes an order under head (a) in the text, it may by order direct the trustees or managers of the scheme referred to in that head (1) to take steps for the purpose mentioned in s 19(4); (2) to apply the property or money transferred, in such manner as the court may direct, for the purpose of providing benefits under that scheme to or in respect of the liberated member: s 19(6). Regulations may modify any of the provisions of the Pension Schemes Act 1993 as it applies in relation to cases where an order is made under the Pensions Act 2004 s 19(6): s 19(7). See Occupational and Personal Pension Schemes (Pension Liberation) Regulations 2005, SI 2005/992 (amended by SI 2009/598). In the Pensions Act 2004, unless the context otherwise requires 'modifications' includes additions, omissions and amendments, and related expressions are to be construed accordingly: s 318(1). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

6 I.e. the Pensions Act 2004 s 19.

7 Ibid s 19(8). The generality of the jurisdiction conferred by s 16 (see PARA 636A.14) is not to be taken to be prejudiced by s 19: s 19(9). The generality of the jurisdiction conferred by s 19 is not to be taken to be prejudiced by s 21 (see PARA 636A.18): s 19(10).

## **17. New powers in respect of occupational and personal pension schemes: pension liberation: restraining orders**

The Regulator may make a restraining order in relation to an account with a deposit-taker<sup>1</sup> if (1) it is satisfied that the account contains money which has been liberated from a pension scheme, (2) it is satisfied that the account is held by or on behalf of (a) the liberator, or (b) a person who has to, or in practice is likely to, ensure that the account is operated in accordance with the liberator's directions, and (c) the order is made pending consideration being given to the making of one or more repatriation orders in relation to the account<sup>2</sup>. A restraining order is an order directing that no credit or debit of any amount may be made to the account concerned ('the restrained account') during the period for which the order has effect<sup>3</sup>. A restraining order must (i) specify the name of the deposit-taker in respect of which it is made, (ii) identify the account in respect of which it is made, and (iii) contain such other information as may be prescribed<sup>4</sup>. A restraining order takes effect when the deposit-taker concerned is

notified by the Regulator of the making of the order, and<sup>5</sup> ceases to have effect through expiry of time at the end of the six months beginning with the day when it is made<sup>6</sup>. The Regulator may, at a time when a restraining order has effect, make an order extending (or further extending) the restraining order<sup>7</sup>. A restraining order does not prevent the crediting to the restrained account of an amount representing interest payable by the deposit-taker on any amount which is, or has been, in the account<sup>8</sup>. Where a restraining order has effect, the deposit-taker must return to the payer any money credited to the restrained account in breach of the order<sup>9</sup>. Where a restraining order has effect, the Regulator may, on an application made by or with the consent of the person by whom the restrained account is held, by order permit a payment specified in the order to be made out of the account if the Regulator is satisfied (A) that the payment will be made for the purpose of enabling any individual to meet his reasonable living expenses, or any person to carry on a trade, business, profession or occupation, (B) that the beneficial interest in the money out of which the payment will be made belongs to the individual, or person, concerned, or to a person who consents to the making of the payment, and (C) that the money out of which the payment will be made is not money liberated from a pension scheme<sup>10</sup>. The civil penalty provisions in the Pensions Act 1995<sup>11</sup> apply to a deposit-taker who, without reasonable excuse, fails to comply with any obligation imposed by a restraining order or by the above provisions<sup>12</sup>.

1 'Deposit-taker' has the meaning given by the Pensions Act 1995 s 49(8A) and (8B) (see PARA 798), except that, for the purposes of this definition, s 49(8A)(c) has effect with the omission of the words from 'or' to the end: Pensions Act 2004 s 18(1)(b).

2 Under *ibid* s 21 (see PARA 636A.18): s 20(1).

3 *Ibid* s 20(2).

4 *Ibid* s 20(3) (head (iii) in the text not yet in force).

5 Subject to *ibid* s 20(7).

6 *Ibid* s 20(4). As to the service of notifications and electronic working under the Pensions Act 2004 see ss 303-305.

7 *Ibid* s 20(5). An order under s 20(5) (an 'extension order') takes effect (1) when the deposit-taker concerned is notified by the Regulator of the making of the order, but (2) only if notification under head (1) occurs at a time when the restraining order concerned has effect: s 20(6). Where an extension order takes effect (a) the restraining order concerned does not cease to have effect through expiry of time until the end of the six months beginning with the time when it would have ceased to have effect through expiry of time had it not been extended, but (b) for so long as the extension order has effect, no further extension order can take effect before that time in relation to the restraining order: s 20(7).

8 *Ibid* s 20(8).

9 *Ibid* s 20(9).

10 *Ibid* s 20(10).

11 *Ie* the Pensions Act 1995 s 10 (see PARA 611).

12 *Ie* the Pensions Act 2004 s 20: s 20(11).

## **18. New powers in respect of occupational and personal pension schemes: pension liberation: repatriation orders**

The following provisions<sup>1</sup> apply where (1) a restraining order<sup>2</sup> has effect, and (2) the Regulator is satisfied that the restrained account<sup>3</sup> contains an amount of money liberated from a pension scheme<sup>4</sup>. The Regulator may by order (a) direct the deposit-taker concerned to pay from the account a sum not exceeding that amount (i) towards a pension scheme, (ii) towards an annuity or insurance policy, or (iii) to the liberated member, and (b) where it makes an order

under head (a)(i), direct the trustees or managers of the scheme to apply the sum, in such manner as the Regulator may direct, for the purpose of providing benefits under the scheme to or in respect of the liberated member<sup>5</sup>. If it appears to the Regulator, on taking an overall view of transactions taking place before the restraining order was made, that there are two or more individuals each of whom is a person who is or may be the liberated member in relation to some of the money, the Regulator may determine the sums to be paid from the restrained account<sup>6</sup> on any basis that appears to the Regulator to be just and reasonable<sup>7</sup>. Regulations may modify any of the provisions of the Pension Schemes Act 1993 as it applies in relation to cases where an order is made under head (b) above<sup>8</sup>. The civil penalty provisions in the Pensions Act 1995<sup>9</sup> apply to a deposit-taker who, without reasonable excuse, fails to comply with a direction given to him under head (a) above<sup>10</sup>.

1    Ie the Pensions Act 2004 s 21(2), (3).

2    'Restraining order' means a restraining order under ibid s 20 (see PARA 636A.17): s 18(1)(e).

3    In ibid s 21 'restrained account' has the meaning given by s 20 (see PARA 636A.17): s 21(7).

4    Ibid s 21(1).

5    Ibid s 21(2).

6    Under ibid s 21(2).

7    Ibid s 21(3).

8    Ibid s 21(4). See Occupational and Personal Pension Schemes (Pension Liberation) Regulations 2005, SI 2005/992 (see PARA 636A.16). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

9    Ie the Pensions Act 1995 s 10 (see PARA 611).

10   Pensions Act 2004 s 21(5). If the trustees or managers of a pension scheme fail to comply with a direction given to them under head (b) in the text, the Pensions Act 1995 s 10 applies to any trustee or manager who has failed to take all reasonable steps to secure compliance: Pensions Act 2004 s 21(6).

## **19. Powers in relation to winding up of occupational pension schemes: freezing orders**

The following provisions<sup>1</sup> apply to an occupational pension scheme which is not a money purchase scheme<sup>2</sup>. The Regulator may make a freezing order in relation to such a scheme if and only if (1) the order is made pending consideration being given to the making of an order in relation to the scheme<sup>3</sup>, and (2) the Regulator is satisfied that (a) there is, or is likely to be if the order is not made, an immediate risk to the interests of members under the scheme or the assets of the scheme, and (b) it is necessary to make the freezing order to protect the interests of the generality of the members of the scheme<sup>4</sup>. A freezing order is an order directing that during the period for which it has effect no benefits are to accrue under the scheme rules<sup>5</sup> to, or in respect of, members of the scheme, and winding up of the scheme may not begin<sup>6</sup>. A freezing order may also contain one or more of the following directions which have effect during the period for which the order has effect (i) a direction that no new members, or no specified<sup>7</sup> classes of new member, are to be admitted to the scheme; (ii) a direction that no further contributions or payments, or no further specified contributions or payments, are to be paid towards the scheme by or on behalf of the employer, any members or any specified members of the scheme<sup>8</sup>; (iii) a direction that any amount or any specified amount which corresponds to any contribution which would be due to be paid towards the scheme on behalf of a member but for a direction under head (ii) above, and has been deducted from a payment of any earnings in respect of an employment, is to be repaid to the member in question by the employer; (iv) a direction that no benefits, or no specified benefits, are to be paid to or in

respect of any members or any specified members under the scheme rules<sup>9</sup>; (v) a direction that payments of all benefits or specified benefits under the scheme rules to or in respect of all the members or specified members may only be made from the scheme if they are reduced in a specified manner or by a specified amount<sup>10</sup>; (vi) a direction that no transfers or no specified transfers of, or no transfer payments or no specified transfer payments in respect of, any member's rights under the scheme rules are to be made from the scheme, or no other steps or no specified other steps are to be taken to discharge any liability of the scheme to or in respect of a member of the scheme in respect of pensions or other benefits<sup>11</sup>; (vii) a direction that no statements of entitlement are to be provided to members of the scheme<sup>12</sup>; (viii) a direction that no refunds of, or no specified refunds of, or in respect of, contributions paid by or in respect of a member towards the scheme are to be made from the scheme, or refunds or specified refunds of, or in respect of, contributions paid by or in respect of a member towards the scheme may only be made from the scheme if they are determined in a specified manner and satisfy such other conditions as may be specified<sup>13</sup>. A freezing order may also require the trustees or managers of the scheme to obtain an actuarial valuation<sup>14</sup> within a specified period<sup>15</sup>.

Provision is made with respect to (A) the consequences of a freezing order<sup>16</sup>; (B) the period of effect of a freezing order<sup>17</sup>; (C) validation of action taken in contravention of a freezing order<sup>18</sup>; (D) the effect of a determination to wind up a scheme on a freezing order<sup>19</sup>; (E) the effect of a winding up order on a freezing order<sup>20</sup>; (F) the effect of an assessment period under Part 2 of the Pensions Act 2004<sup>21</sup> on a freezing order<sup>22</sup>; (G) the power to give a direction where a freezing order ceases to have effect<sup>23</sup>; (H) the notification of trustees, managers, employers and members after an order has been made<sup>24</sup>; and (I) supplementary provision<sup>25</sup>.

1    I.e. the Pensions Act 2004 s 23.

2    Ibid s 23(1). In the Pensions Act 2004, unless the context otherwise requires 'money purchase scheme' has the meaning given by the Pension Schemes Act 1993 s 181(1) (see PARA 811); Pensions Act 2004 s 318(1).

3    Under the Pensions Act 1995 s 11(1)(c) (power to wind up schemes where necessary to protect the generality of members: see PARA 612).

4    Pensions Act 2004 s 23(2). But no freezing order may be made in relation to a scheme during an assessment period (within the meaning of s 132: see PARA 659C.7) in relation to the scheme (see s 135(11) and PARA 659C.10): s 23(2).

5    In the Pensions Act 2004, unless the context otherwise requires, references to the scheme rules, in relation to an occupational pension scheme, are references to (1) the rules of the scheme, except so far as overridden by a relevant legislative provision, (2) the relevant legislative provisions, to the extent that they have effect in relation to the scheme and are not reflected in the rules of the scheme, and (3) any provision which the rules of the scheme do not contain but which the scheme must contain if it is to conform with the requirements of the Pension Schemes Act 1993 Pt 4 Ch 1 (preservation of benefit under occupational pension schemes): Pensions Act 2004 s 318(2). As to 'the relevant legislative provision' see s 318(3).

6    Ibid s 23(3).

7    In ibid s 23 'specified' means specified in the freezing order: s 23(11).

8    In head (ii) in the text (1) the references to contributions do not include contributions due to be paid before the order takes effect, and (2) the references to payments towards a scheme include payments in respect of pension credits where the person entitled to the credit is a member of the scheme: ibid s 23(5). In the Pensions Act 2004, unless the context otherwise requires 'pension credit' has the meaning given by the Pensions Act 1995 s 124(1): Pensions Act 2004 s 318(1).

9    See further NOTE 10.

10   A freezing order may not contain a direction under head (iv) or (v) in the text which reduces the benefits payable to or in respect of a member, for the period during which the order has effect, below the level to which the trustees or managers of the scheme would have power to reduce them if a winding up of the scheme had begun at the time when the freezing order took effect: Pensions Act 2004 s 23(6).

11 A direction under head (vi) in the text may, in particular, provide that transfers or specified transfers of, or transfer payments or specified transfer payments in respect of, any member's rights under the scheme rules may not be made from the scheme unless the amounts paid out from the scheme in respect of the transfers or transfer payments are determined in a specified manner and the transfer or transfer payments satisfy such other conditions as may be specified: *ibid* s 23(7).

12 Under the Pension Schemes Act 1993 s 93A (salary related schemes: right to statement of entitlement: see PARA 952).

13 Pensions Act 2004 s 23(4).

14 For the purposes of *ibid* s 23(8) 'an actuarial valuation' means a written valuation of the scheme's assets and liabilities prepared and signed by the actuary; and 'the actuary' means (1) the actuary appointed under the Pensions Act 1995 s 47(1)(b) (professional advisers: see PARA 787) in relation to the scheme, or (2) if no such actuary has been appointed (a) a person with prescribed qualifications or experience, or (b) a person approved by the Secretary of State: Pensions Act 2004 s 23(10). See Pensions Regulator (Freezing Orders and Consequential Amendments) Regulations 2005, SI 2005/686. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

15 Pensions Act 2004 s 23(8). A freezing order containing such a requirement must specify (1) the date by reference to which the assets and liabilities are to be valued, (2) the assets and liabilities which are to be taken into account, (3) the manner in which the valuation must be prepared, (4) the information and statements which it must contain, and (5) any other requirements that the valuation must satisfy: s 23(9).

16 See *ibid* s 24 (amended by SI 2005/2053) and SI 2005/686.

17 See Pensions Act 2004 s 25.

18 See *ibid* s 26.

19 See *ibid* s 27.

20 See *ibid* s 28.

21 *Ie* *ibid* ss 107-220.

22 See *ibid* s 29.

23 See *ibid* s 30 and SI 2005/686.

24 See Pensions Act 2004 s 31. As to the service of notifications and electronic working under the Pensions Act 2004 see ss 303-305.

25 See *ibid* s 32.

## **20. Contribution notices where avoidance of employer debt**

The following provisions<sup>1</sup> apply in relation to an occupational pension scheme other than (1) a money purchase scheme, or (2) a prescribed scheme or a scheme of a prescribed description<sup>2</sup>. The Regulator may issue a notice to a person stating that the person is under a liability to pay the sum specified in the notice (a 'contribution notice') (a) to the trustees or managers of the scheme, or (b) where the Board of the Pension Protection Fund has assumed responsibility for the scheme in accordance with Chapter 3 of Part 2 of the Pensions Act 2004 (pension protection)<sup>3</sup>, to the Board<sup>4</sup>. The Regulator may issue a contribution notice to a person only if (i) the Regulator is of the opinion that the person was a party to an act or a deliberate failure to act which falls within specified provision<sup>5</sup>, (ii) the person was at any time in the relevant period (A) the employer in relation to the scheme, or (B) a person connected with, or an associate of, the employer, (iii) the Regulator is of the opinion that the person, in being a party to the act or failure, was not acting in accordance with his functions as an insolvency practitioner<sup>6</sup> in relation to another person, and (iv) the Regulator is of the opinion that it is reasonable to impose liability on the person to pay the sum specified in the notice, having regard to the extent to which, in all the circumstances of the case, it was reasonable for the person to act, or fail to act, in the way that the person did, and such other matters as the Regulator considers

relevant<sup>7</sup>. But the Regulator may not issue a contribution notice, in such circumstances as may be prescribed, to a person of a prescribed description<sup>8</sup>.

Provision is also made with respect to the sum specified in a contribution notice<sup>9</sup>, the content and effect of a contribution notice<sup>10</sup>, the relationship between contribution notices and employer debt<sup>11</sup>, clearance statements<sup>12</sup> and partnerships and limited partnerships<sup>13</sup>.

1 le the Pensions Act 2004 s 38.

2 Ibid s 38(1). See Pensions Regulator (Contribution Notices and Restoration Orders) Regulations 2005, SI 2005/931 (amended by SI 2005/993, SI 2006/467). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

3 le the Pensions Act 2004 ss 126-181 (see PARA 659C).

4 Ibid s 38(2).

5 le falls within ibid s 38(5). An act or a failure to act falls within s 38(5) if (1) the Regulator is of the opinion that the material detriment test is met in relation to the act or failure (see Pensions Act 2004 s 38A) or that the main purpose or one of the main purposes of the act or failure was (a) to prevent the recovery of the whole or any part of a debt which was, or might become, due from the employer in relation to the scheme under the Pensions Act 1995 s 75 (deficiencies in the scheme assets: see PARA 850), or (b) to prevent such a debt becoming due, to compromise or otherwise settle such a debt, or to reduce the amount of such a debt which would otherwise become due, (2) it is an act which occurred, or a failure to act which first occurred (i) on or after 27 April 2004, and (ii) before any assumption of responsibility for the scheme by the Board in accordance with Pt 2 Ch 3, and (3) it is either (A) an act which occurred during the period of six years ending with the determination by the Regulator to exercise the power to issue the contribution notice in question, or (B) a failure which first occurred during, or continued for the whole or part of, that period: s 38(5) (amended by Pensions Act 2008 Sch 9 paras 2(1), 6, Sch 11 Pt 6). As to the 'material detriment test' see Pensions Act 2004 s 38A (ss 38A, 38B added by Pensions Act 2008 Sch 9 para 2(2)). As to how a person may make out a statutory defence to a contribution notice issued under the material detriment test see Pensions Act 2004 s 38B. For the purposes of s 38 references to a debt due under the Pensions Act 1995 s 75 include a contingent debt under s 75: Pensions Act 2004 s 38(8). Accordingly, in the case of such a contingent debt, the reference in head (b) to preventing a debt becoming due is to be read as including a reference to preventing the occurrence of any of the events specified in the Pensions Act 1995 s 75(4C)(a) or (b) on which the debt is contingent: Pensions Act 2004 s 38(9).

See further Pensions Act 2004 s 38(12), (13) (added by Pensions Act 2008 Sch 9 para 8).

6 For the purposes of the Pensions Act 2004 s 38 'insolvency practitioner', in relation to a person, means (1) a person acting as an insolvency practitioner, in relation to that person, in accordance with the Insolvency Act 1986 s 388, or (2) an insolvency practitioner within the meaning of the Pensions Act 2004 s 121(9)(b) (persons of a prescribed description: see PARA 659B.1): s 38(11).

7 Including (where relevant) the matters falling within the Pensions Act 2004 s 38(7): s 38(3) (amended by Pensions Act 2008 Sch 9 para 7(2)). For the purposes of the Pensions Act 2004 s 38(3) (1) the parties to an act or a deliberate failure include those persons who knowingly assist in the act or failure, and (2) 'the relevant period' means the period which (a) begins with the time when the act falling within s 38(5) occurs or the failure to act falling within s 38(5) first occurs, and (b) ends with the determination by the Regulator to exercise the power to issue the contribution notice in question: s 38(6). The matters within s 38(7) are (i) the degree of involvement of the person in the act or failure to act which falls within s 38(5), (ii) the relationship which the person has or has had with the employer (including, where the employer is a company within the meaning of the Insolvency Act 1986 s 435(11), whether the person has or has had control of the employer within the meaning of s 435(10)), (iii) any connection or involvement which the person has or has had with the scheme, (iv) if the act or failure to act was a notifiable event for the purposes of the Pensions Act 2004 s 69 (duty to notify the Regulator of certain events: see PARA 636A.28), any failure by the person to comply with any obligation imposed on the person by s 69(1) to give the Regulator notice of the event, (v) all the purposes of the act or failure to act (including whether a purpose of the act or failure was to prevent or limit loss of employment), (vi) the value of any benefits which directly or indirectly the person receives, or is entitled to receive, from the employer or under the scheme, (vii) the likelihood of relevant creditors being paid and the extent to which they are likely to be paid, (viii) the financial circumstances of the person, and (ix) such other matters as may be prescribed: s 38(7) (amended by Pensions Act 2008 Sch 9 para 7(3)) (head (vii) not yet in force). For the meaning of 'relevant creditors' see Pensions Act 2004 s 38(7A) (added by Pensions Act 2008 Sch 9 para 7(4)).

8 Pensions Act 2004 s 38(4) (not yet in force).

For the purposes of s 38 (1) the Insolvency Act 1986 s 249 (connected persons) applies as it applies for the purposes of any provision of the first Group of Parts of the Insolvency Act 1986, and (2) the Insolvency Act 1986 s 435 (associated persons) applies as it applies for the purposes of the Insolvency Act 1986: Pensions Act 2004 s 38(10).

9 See *ibid* s 39. See also Pensions Act 2004 ss 39A, 39B (added by Pensions Act 2008 Sch 9 para 9) (section 38 contribution notice: transfer of members of the scheme).

10 See Pensions Act 2004 s 40.

11 See *ibid* s 41 (partly in force).

12 See *ibid* s 42 (partly in force).

13 See *ibid* s 57 (amended by SI 2009/1941).

## 21. Financial support directions: general

The following provisions<sup>1</sup> apply in relation to an occupational pension scheme other than (1) a money purchase scheme, or (2) a prescribed scheme or a scheme of a prescribed description<sup>2</sup>. The Regulator may issue a financial support<sup>3</sup> direction<sup>4</sup> under these provisions in relation to such a scheme if the Regulator is of the opinion that the employer in relation to the scheme (a) is a service company<sup>5</sup>, or (b) is insufficiently resourced<sup>6</sup>, at a time determined by the Regulator which falls within specified provision<sup>7</sup> ('the relevant time')<sup>8</sup>. A financial support direction in relation to a scheme may be issued to one or more persons<sup>9</sup>. But the Regulator may issue such a direction to a person only if (i) the person is at the relevant time a person falling within specified provision<sup>10</sup>, and (ii) the Regulator is of the opinion that it is reasonable to impose the requirements of the direction on that person<sup>11</sup>. A financial support direction must identify all the persons to whom the direction is issued<sup>12</sup>.

Provision is made with respect to the transfer of members of the scheme<sup>13</sup>.

Provision is made with respect to partnerships and limited liability partnerships<sup>14</sup>.

1 *Ie* the Pensions Act 2004 s 43.

2 *Ibid* s 43(1). See Pensions Regulator (Financial Support Directions etc) Regulations 2005, SI 2005/2188 (amended by SI 2005/2224).

3 For the meaning of 'financial support' see Pensions Act 2004 s 45 (amended by SI 2009/1941) and SI 2005/2188.

4 A financial support direction in relation to a scheme is a direction which requires the person or persons to whom it is issued to secure (1) that financial support for the scheme is put in place within the period specified in the direction, (2) that thereafter that financial support or other financial support remains in place while the scheme is in existence, and (3) that the Regulator is notified in writing of prescribed events in respect of the financial support as soon as reasonably practicable after the event occurs: Pensions Act 2004 s 43(3). See SI 2005/2188. As to the service of notifications and electronic working under the Pensions Act 2004 see ss 303-305. For the purposes of s 43(3), a scheme is in existence until it is wound up: s 43(10). No duty to which a person is subject is to be regarded as contravened merely because of any information or opinion contained in a notice given by virtue of head (3): s 43(11). This is subject to s 311 (protected items: see PARA 636A.12): s 43(11).

5 For the meaning of 'service company' see *ibid* s 44 (amended by SI 2009/1941). See further the Pensions Act 2004 s 51 (amended by SI 2009/1941) (interpretation).

6 For the meaning of 'insufficiently resourced' see 2004 Act s 44 (amended by Pensions Act 2008 Sch 9 para 14); and SI 2005/2188.

7 *Ie* falls within the Pensions Act 2004 s 43(9). A time falls within s 43(9) if it is a time which falls within a prescribed period which ends with the determination by the Regulator to exercise the power to issue the financial support direction in question: s 43(9). See SI 2005/2188.

8 Pensions Act 2004 s 43(2).

9 Ibid s 43(4).

10 Ie falling within ibid s 43(6). A person falls within s 43(6) if the person is (1) the employer in relation to the scheme, (2) an individual who (a) is an associate of an individual who is the employer, but (b) is not an associate of that individual by reason only of being employed by him, or (3) a person, other than an individual, who is connected with or an associate of the employer: s 43(6).

11 Ibid s 43(5). The Regulator, when deciding for the purposes of head (ii) in the text whether it is reasonable to impose the requirements of a financial support direction on a particular person, must have regard to such matters as the Regulator considers relevant including, where relevant, the following matters (1) the relationship which the person has or has had with the employer (including, where the employer is a company within the meaning of the Insolvency Act 1986 s 435(11), whether the person has or has had control of the employer within the meaning of s 435(10)), (2) in the case of a person falling within the Pensions Act 2004 s 43(6)(b) or (c) (see NOTE 10, heads (2), (3)), the value of any benefits received directly or indirectly by that person from the employer, (3) any connection or involvement which the person has or has had with the scheme, (4) the financial circumstances of the person, and (5) such other matters as may be prescribed: s 43(7) (head (5) not yet in force).

12 Ibid s 43(8).

13 See Pensions Act 2004 ss 43A, 43B (added by Pensions Act 2008 Sch 9 para 10).

14 See Pensions Act 2004 s 57 (amended by SI 2009/1941).

## **22. Financial support directions: clearance statements**

An application may be made to the Regulator under the following provisions<sup>1</sup> for the issue of a clearance statement<sup>2</sup> in relation to circumstances described in the application and relating to an occupational pension scheme<sup>3</sup>. A clearance statement is a statement, made by the Regulator, that in its opinion in the circumstances described in the application (1) the employer in relation to the scheme would not be a service company<sup>4</sup>, (2) the employer in relation to the scheme would not be insufficiently resourced<sup>5</sup>, or (3) it would not be reasonable to impose the requirements of a financial support direction, in relation to the scheme, on the applicant<sup>6</sup>. Where an application is made under these provisions, the Regulator (a) may request further information from the applicant; (b) may invite the applicant to amend the application to modify the circumstances described<sup>7</sup>. Where an application is made under these provisions, the Regulator must as soon as reasonably practicable (i) determine whether to issue the clearance statement, and (ii) where it determines to do so, issue the statement<sup>8</sup>. A clearance statement issued under these provisions binds the Regulator in relation to the exercise of the power to issue a financial support direction<sup>9</sup> in relation to the scheme to the applicant unless (A) the circumstances in relation to which the exercise of such a power arises are not the same as the circumstances described in the application, and (b) the difference in those circumstances is material to the exercise of the power<sup>10</sup>.

Provision is made with respect to partnerships and limited liability partnerships<sup>11</sup>.

1 Ie under the Pensions Act 2004 s 46.

2 Within head (1), (2) or (3) in the text.

3 Pensions Act 2004 s 46(1).

4 For the purposes of ibid s 43 (see PARA 636A.21).

5 For the purposes of ibid s 43.

6 Ibid s 46(2).

7 Ibid s 46(3).

8 Ibid s 46(4).

9 Under ibid s 43.

10 Ibid s 46(5).

11 See ibid s 57 (amended by SI 2009/1941).

## **23. Financial support directions: contribution notices**

The following provisions<sup>1</sup> apply where there is non-compliance with a financial support direction<sup>2</sup>. The Regulator may issue a notice to any one or more of the persons to whom the direction was issued stating that the person is under a liability to pay to the trustees or managers of the scheme the sum specified in the notice (a 'contribution notice')<sup>3</sup>. The Regulator may issue a contribution notice to a person only if the Regulator is of the opinion that it is reasonable to impose liability on the person to pay the sum specified in the notice<sup>4</sup>. A contribution notice may not be issued under these provisions in respect of non-compliance with a financial support direction in relation to a scheme where the Board of the Pension Protection Fund has assumed responsibility for the scheme in accordance with Chapter 3 of Part 2 of the Pensions Act 2004 (pension protection)<sup>5</sup>.

Provision is also made with respect to the sum specified in a contribution notice<sup>6</sup>, the content and effect of a contribution notice<sup>7</sup>, the relationship between contribution notices and employer debt<sup>8</sup> and partnerships and limited liability partnerships<sup>9</sup>.

1 Ibid the Pensions Act 2004 s 47.

2 Issued in relation to a scheme under ibid s 43 (see PARA 636A.21): s 47(1).

3 Ibid s 47(2).

4 Ibid s 47(3). The Regulator, when deciding for the purposes of s 47(3) whether it is reasonable to impose liability on a particular person to pay the sum specified in the notice, must have regard to such matters as the Regulator considers relevant including, where relevant, the following matters (1) whether the person has taken reasonable steps to secure compliance with the financial support direction, (2) the relationship which the person has or has had with the employer (including, where the employer is a company within the meaning of the Insolvency Act 1986 s 435(11), whether the person has or has had control of the employer within the meaning of s 435(10)), (3) in the case of a person to whom the financial support direction was issued as a person falling within the Pensions Act 2004 s 43(6)(b) or (c) (see PARA 636A.21), the value of any benefits received directly or indirectly by that person from the employer, (4) the relationship which the person has or has had with the parties to any arrangements put in place in accordance with the direction (including, where any of those parties is a company within the meaning of the Insolvency Act 1986 s 435(11), whether the person has or has had control of that company within the meaning of s 435(10)), (5) any connection or involvement which the person has or has had with the scheme, (6) the financial circumstances of the person, and (7) such other matters as may be prescribed: Pensions Act 2004 s 47(4) (head (7) not yet in force).

5 Ibid ss 126-181 (see PARA 659C): s 47(5).

6 See ibid s 48.

7 See ibid s 49.

8 See ibid s 50 (partly in force).

9 See ibid s 57 (amended by SI 2009/1941).

## **24. Restoration orders where transactions at an undervalue**

The following provisions<sup>1</sup> apply in relation to an occupational pension scheme other than (1) a money purchase scheme, or (2) a prescribed scheme or a scheme of a prescribed description<sup>2</sup>. The Regulator may make a restoration order in respect of a transaction involving assets of the

scheme<sup>3</sup> if (a) a relevant event<sup>4</sup> has occurred in relation to the employer in relation to the scheme, and (b) the transaction is a transaction at an undervalue entered into with a person at a time which (i) is on or after 27 April 2004, but (ii) is not more than two years before the occurrence of the relevant event in relation to the employer<sup>5</sup>. The above provisions apply without prejudice to the availability of any other remedy, even in relation to a transaction where the trustees or managers of the scheme or appropriate persons in question had no power to enter into the transaction<sup>6</sup>.

Supplementary provision with respect to restoration orders is made<sup>7</sup>.

1 le the Pensions Act 2004 s 52.

2 Ibid s 52(1). See Pensions Regulator (Contribution Notices and Restoration Orders) Regulations 2005, SI 2005/931 (see PARA 636A.20).

3 A restoration order in respect of a transaction involving assets of a scheme is such an order as the Regulator thinks fit for restoring the position to what it would have been if the transaction had not been entered into: Pensions Act 2004 s 52(3). 'Transaction' includes a gift, agreement or arrangement and references to entering into a transaction are to be construed accordingly: s 52(8). 'Assets' includes future assets: s 52(8).

4 For the purposes of ibid s 52 a relevant event occurs in relation to the employer in relation to a scheme if and when on or after the appointed day (1) an insolvency event occurs in relation to the employer, or (2) the trustees or managers of the scheme make an application under s 129(1) (see PARA 659C.4) or receive a notice from the Board of the Pension Protection Fund under s 129(5)(a) (applications and notifications prior to the Board assuming responsibility for a scheme): s 52(4). For the purposes of s 52(4) (a) the 'appointed day' means the day appointed under s 126(2) (no pension protection under Pt 2 Ch 3 if the scheme begins winding up before the day appointed by the Secretary of State: see PARA 659C.1), (b) s 121 (meaning of 'insolvency event': see PARA 659B.1) applies for the purposes of determining if and when an insolvency event has occurred in relation to the employer, and (c) the reference to an insolvency event in relation to the employer does not include an insolvency event which occurred in relation to him before he became the employer in relation to the scheme: s 52(5).

5 Ibid s 52(2). A transaction involving assets of a scheme is a transaction at an undervalue entered into with a person ('P') if the trustees or managers of the scheme or appropriate persons in relation to the scheme (1) make a gift to P or otherwise enter into a transaction with P on terms that provide for no consideration to be provided towards the scheme, or (2) enter into a transaction with P for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by or on behalf of the trustees or managers of the scheme: s 52(6). In s 52(6) 'appropriate persons' in relation to a scheme means a person who, or several persons each of whom is a person who, at the time at which the transaction in question is entered into, is (a) a person of a prescribed description, and (b) entitled to exercise powers in relation to the scheme: s 52(7). See SI 2005/931, NOTE 2.

6 Pensions Act 2004 s 52(9).

7 See ibid s 53. See further s 54 (content and effect of a restoration order), s 55 (contribution notice where failure to comply with restoration order), s 56 (content and effect of contribution notice) and s 57 (amended by SI 2009/1941) (partnerships and limited liability partnerships).

## 25. Applications under the Insolvency Act 1986

The Regulator may apply for an order<sup>1</sup> in relation to a debtor if (1) the debtor is the employer in relation to an occupational pension scheme, and (2) condition A<sup>2</sup> or condition B<sup>3</sup> is met in relation to the scheme<sup>4</sup>. An application made under these provisions is to be treated as made on behalf of every victim of the transaction who is (a) a trustee or member of the scheme, or (b) the Board<sup>5</sup>.

1 Under the Insolvency Act 1986 s 423 (transactions defrauding creditors).

2 Condition A is that an actuarial valuation under the Pensions Act 2004 s 143 (see PARA 659C.15) obtained by the Board of the Pension Protection Fund in respect of the scheme indicates that the value of the assets of the scheme at the relevant time, as defined by s 143, was less than the amount of the protected liabilities, as defined by s 131 (see PARA 659C.6), at that time: Pensions Act 2004 s 58(3). See further NOTE 3.

3 Condition B is that an actuarial valuation, as defined by *ibid* s 224(2) (see *PARA 824A.4*), obtained by the trustees or managers of the scheme indicates that the statutory funding objective in s 222 (see *PARA 824A.2*) is not met: s 58(4). Section 58 does not apply where the valuation mentioned in s 58(3) or (4) is made by reference to a date that falls before the commencement of s 58 (ie 6 April 2005: see *SI 2005/275*): *Pensions Act 2004* s 58(7).

4 *Ibid* s 58(2). In a case where the debtor (1) has been adjudged bankrupt, (2) is a body corporate which is being wound up or is in administration, or (3) is a partnership which is being wound up or is in administration, s 58(2) does not enable an application to be made under the *Insolvency Act 1986* s 423 except with the permission of the court: *Pensions Act 2004* s 58(5).

5 *Ibid* s 58(6).

Expressions which are defined by the *Insolvency Act 1986* s 423 for the purposes of s 423 have the same meaning when used in the *Pensions Act 2004* s 58: s 58(8).

## 26. Register of occupational and personal pension schemes

The Regulator must compile and maintain a register of occupational pension schemes and personal pension schemes which are, or have been, registrable schemes<sup>1</sup> (referred to in the *Pensions Act 2004* as 'the register')<sup>2</sup>.

Regulations may provide (1) for (a) information recorded in the register, (b) extracts from the register, or (c) copies of the register or of extracts from it, to be provided to prescribed persons in prescribed circumstances, and (2) for the inspection of (i) the register, (ii) extracts from the register, or (iii) copies of the register or of extracts from it, by prescribed persons in prescribed circumstances<sup>3</sup>. The Secretary of State may direct the Regulator to submit to him statistical and other reports concerning information recorded in the register, and the operation of the Regulator's functions in relation to the register<sup>4</sup>.

Further provision relating to the register is made<sup>5</sup>.

1 In the *Pensions Act 2004* s 59 and ss 62-65 'registrable scheme' means an occupational pension scheme, or a personal pension scheme, of a prescribed description: s 59(2). See *Register of Occupational and Personal Pension Schemes Regulations 2005*, *SI 2005/597* (amended by *SI 2006/1733*). As to regulations under the *Pensions Act 2004* see ss 314-317 (s 316 amended by *Pensions Act 2008* ss 124(7)-(10), 125(3), *Sch 9* paras 5, 12).

2 *Pensions Act 2004* s 59(1). In respect of each registrable scheme, the Regulator must record in the register (1) the registrable information most recently provided to it in respect of the scheme, and (2) if the Regulator has received (a) a notice under s 62(5) (scheme which is wound up or ceases to be registrable), (b) a copy of a notice under s 160 (transfer notice: see *PARA 659C.24*), or (c) any notice, or copy of a notice, under any provision in force in Northern Ireland corresponding to a provision mentioned in head (a) or (b), that fact: s 59(3). For the meaning of 'registrable information' see s 60, *SI 2005/597*, and the *Occupational Pension Schemes (Regulatory Own Funds) Regulations 2005*, *SI 2005/3380*, reg 14. In the *Pensions Act 2004* s 59 references to 'registrable information', in relation to a scheme to which any provision in force in Northern Ireland corresponding to s 60(2) ('the corresponding Northern Ireland provision') applies, are to information of any description within the corresponding Northern Ireland provision: s 59(7). In respect of each scheme which has been a registrable scheme, but (i) has been, or is treated as having been, wound up, or (ii) has ceased to be a registrable scheme, the Regulator must maintain in the register the registrable information last provided to it in respect of the scheme: s 59(4). Information recorded in the register must be so recorded in such manner as the Regulator considers appropriate: s 59(5). In particular, the register may consist of more than one part: s 59(6).

3 *Ibid* s 61(1). See further *SI 2005/597*. Regulations under the *Pensions Act 2004* s 61(1) may, in particular (1) confer functions on (a) the Secretary of State, or (b) a person authorised by him for the purposes of the regulations; (2) make provision with respect to the disclosure of information obtained by virtue of the regulations: s 61(2). Regulations which contain any provision made by virtue of head (2) may, in particular, modify s 82 (restricted information: see *PARA 636A.34*): s 61(3).

4 *Ibid* s 61(4). A direction under s 61(4) may specify (1) the form in which, and (2) the times at which, reports required by the direction are to be submitted: s 61(5). The Secretary of State may publish any report submitted to him by virtue of a direction under s 61(4) in such manner as he considers appropriate: s 61(6).

<sup>5</sup> See *ibid* s 62 (duties of trustees or managers), s 63 (duty of the regulator to issue scheme return notices), s 64 (duty of trustees or managers to provide scheme return) and s 65 (scheme returns: supplementary).

## 27. Register of prohibited trustees

The Regulator must keep in such manner as it thinks fit a register of all persons who are prohibited from acting as a trustee (the prohibition register)<sup>1</sup>. Arrangements made by the Regulator for the prohibition register must secure that the contents of the register are not disclosed or otherwise made available to members of the public except in accordance with the provision below<sup>2</sup>.

The Regulator must make arrangements to secure that the prohibition register is open, during its normal working hours, for inspection in person and without notice at (1) the principal office used by it for the carrying out of its functions, and (2) such other of its offices (if any) as it considers to be places where it would be reasonable for a copy of the register to be kept open for inspection<sup>3</sup>. If a request is made to the Regulator (a) to state whether a particular person identified in the request is a person appearing in the prohibition register as prohibited in respect of an occupational trust scheme<sup>4</sup> specified in the request, (b) to state whether a particular person so identified is a person appearing in that register as prohibited in respect of a particular description of occupational trust schemes so specified, or (c) to state whether a particular person so identified is a person appearing in that register as prohibited in respect of all occupational trust schemes, the Regulator must promptly comply with the request in such manner as it considers reasonable<sup>5</sup>. The Regulator may, in such manner as it considers appropriate, publish a summary of the prohibition register if<sup>6</sup> the summary (i) contains all the specified information<sup>7</sup>, (ii) arranges that information in the specified manner<sup>8</sup>, (iii) does not (except by identifying a person as prohibited in respect of all occupational trust schemes, in respect of a particular description of such schemes or in respect of a particular such scheme) identify any of the schemes in respect of which persons named in the summary are prohibited, and (iv) does not disclose any other information contained in the register<sup>9</sup>. The Regulator must ensure, in the case of any published summary, that a person is not identified in the summary as a prohibited person if it appears to the Regulator that the determination by virtue of which that person appears in the register (A) is the subject of any pending reference, review, appeal or legal proceedings which could result in that person's removal from the register, or (B) is a determination which might still become the subject of any such reference, review, appeal or proceedings<sup>10</sup>.

<sup>1</sup> I.e. all persons who are prohibited under the Pensions Act 1995 s 3 (see PARA 604): Pensions Act 2004 s 66(1).

<sup>2</sup> I.e. except in accordance with *ibid* s 67: s 66(2). Nothing in s 66(2) requires the Regulator to exclude any matter from a report published under s 89 (reports of Regulator's consideration of cases: see PARA 636A.35): s 66(3).

<sup>3</sup> *Ibid* s 67(1).

<sup>4</sup> In *ibid* s 67 'occupational trust scheme' means an occupational pension scheme established under a trust: s 67(10).

<sup>5</sup> *Ibid* s 67(2).

<sup>6</sup> Subject to *ibid* s 67(6)-(8).

<sup>7</sup> I.e. all the information described in *ibid* s 67(4). That information is (1) the full names and titles, so far as the Regulator has a record of them, of all the persons appearing in the register as persons who are prohibited, (2) the dates of birth of such of those persons as are persons whose dates of birth are matters of which the Regulator has a record, and (3) in the case of each person whose name is included in the published summary, whether that person appears in the register (a) as prohibited in respect of only one occupational trust scheme, (b) as prohibited in respect of one or more particular descriptions of such schemes, but not in respect of all such

schemes, or (c) as prohibited in respect of all such schemes: s 67(4). In s 67 'name', in relation to a person any of whose names is recorded by the Regulator as an initial, means that initial: s 67(10). For the purposes of head (3), the information in the published register must be arranged in three separate lists, one for each of the descriptions of prohibition specified in heads (a)-(c) of head (3): s 67(5). The Regulator must ensure, in the case of any published summary, that the particulars relating to a person do not appear in a particular list mentioned in s 67(5) if it appears to the Regulator that a determination by virtue of which that person's particulars would appear in that list (i) is the subject of any pending reference, review, appeal or legal proceedings which could result in such a revocation or other overturning of a prohibition of that person as would require his particulars to appear in a different list, or (ii) is a determination which might still become the subject of any such reference, review, appeal or proceedings: s 67(7). Where s 67(7) prevents a person's particulars from being included in a particular list in the published summary, they must be included, instead, in the list (if any) in which they would have been included if the prohibition to which the reference, review, appeal or proceedings relate or might relate had already been revoked or otherwise overturned: s 67(8). For the purposes of s 67 a determination is one which might still become the subject of a reference, review, appeal or proceedings if, and only if, in the case of that determination (A) the time for the making of an application for a review or reference, or for the bringing of an appeal or other proceedings, has not expired, and (B) there is a reasonable likelihood that such an application might yet be made, or that such an appeal or such proceedings might yet be brought: s 67(9).

8 le in the manner described in *ibid* s 67(5).

9 *Ibid* s 67(3).

10 *Ibid* s 67(6).

## **28. Collecting information relevant to the Board of the Pension Protection Fund**

The Regulator may collect any information which appears to it to be relevant to the exercise of the functions of the Board of the Pension Protection Fund<sup>1</sup>.

Except where the Regulator otherwise directs, the appropriate person<sup>2</sup> must give notice of any notifiable event<sup>3</sup> to the Regulator<sup>4</sup>. A notice<sup>5</sup> must be in writing, and<sup>6</sup> must be given as soon as reasonably practicable after the person giving it becomes aware of the notifiable event<sup>7</sup>. Regulations may require a notice to be given before the beginning of the prescribed period ending with the notifiable event in question<sup>8</sup>. No duty to which a person is subject is to be regarded as contravened merely because of any information or opinion contained in a notice under these provisions<sup>9</sup>.

1 Pensions Act 2004 s 68. As to the Board of the Pension Protection Fund see PARA 659A.

2 As to 'the appropriate person' see NOTE 4.

3 For these purposes 'notifiable event' means (1) a prescribed event in respect of an eligible scheme, or (2) a prescribed event in respect of the employer in relation to an eligible scheme: Pensions Act 2004 s 69(2). See Pensions Regulator (Notifiable Events) Regulations 2005, SI 2005/900 (amended by SI 2005/2113). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). In the Pensions Act 2004 s 69 'event' includes a failure to act and 'eligible scheme' has the meaning given by s 126 (see PARA 659C.1): s 69(9).

4 *Ibid* s 69(1). For the purposes of s 69(1) (1) in the case of an event within NOTE 3 head (1), each of the following is 'the appropriate person' (a) the trustees or managers of the scheme, (b) a person of a prescribed description, and (2) in relation to an event within NOTE 3 head (2), each of the following is 'the appropriate person' (i) the employer in relation to the scheme, (ii) a person of a prescribed description: s 69(3).

Where the trustees or managers of a scheme fail to comply with an obligation imposed on them by s 69(1), the Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies in relation to any trustee or manager who has failed to take all reasonable steps to secure compliance with the Pensions Act 2004 s 69(1): s 69(7). The Pensions Act 1995 s 10 also applies to any other person who, without reasonable excuse, fails to comply with an obligation imposed on him by the Pensions Act 2004 s 69(1): s 69(8).

5 Under *ibid* s 69(1).

6 Subject to *ibid* s 69(5).

7 *Ibid* s 69(4).

8 Ibid s 69(5).

9 Ibid s 69(6). This is subject to s 311 (protected items: see PARA 636A.12): s 69(6).

## **29. Duty to report breaches of the law**

Where a person<sup>1</sup> has reasonable cause to believe that (1) a duty which is relevant to the administration of the scheme in question, and is imposed by or by virtue of an enactment or rule of law, has not been or is not being complied with, and (2) the failure to comply is likely to be of material significance to the Regulator in the exercise of any of its functions, he must give a written report of the matter to the Regulator as soon as reasonably practicable<sup>2</sup>.

1 The Pensions Act 2004 s 70(2) imposes a reporting requirement on the following persons (1) a trustee or manager of an occupational or personal pension scheme; (2) a person who is otherwise involved in the administration of such a scheme; (3) the employer in relation to an occupational pension scheme; (4) a professional adviser in relation to such a scheme; (5) a person who is otherwise involved in advising the trustees or managers of an occupational or personal pension scheme in relation to the scheme: s 70(1). In the Pensions Act 2004, unless the context otherwise requires 'professional adviser', in relation to an occupational pension scheme, has the meaning given by the Pensions Act 1995 s 47 (see PARA 825): Pensions Act 2004 s 318(1).

2 Ibid s 70(2). No duty to which a person is subject is to be regarded as contravened merely because of any information or opinion contained in a written report under s 70: s 70(3). This is subject to s 311 (protected items: see PARA 636A.12): s 70(3). The Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to any person who, without reasonable excuse, fails to comply with an obligation imposed on him by the Pensions Act 2004 s 70: s 70(4).

## **30. Reports by skilled persons**

The Regulator may issue a notice (a 'report notice') to (1) the trustees or managers of a work-based pension scheme<sup>1</sup>, (2) any employer in relation to such a scheme, or (3) any person who is otherwise involved in the administration of such a scheme, requiring them or, as the case may be, him to provide the Regulator with a report on one or more specified<sup>2</sup> matters which are relevant to the exercise of any of the Regulator's functions<sup>3</sup>. A report notice must require the person appointed to make the report to be a person (a) nominated or approved by the Regulator, and (b) appearing to the Regulator to have the skills necessary to make a report on the matter or matters concerned<sup>4</sup>. A report notice may require the report to be provided to the Regulator (i) in a specified form; (ii) before a specified date<sup>5</sup>. The costs of providing a report in accordance with a report notice must be met by the person to whom the notice is issued ('the notified person')<sup>6</sup>. But a report notice may require a specified person (other than the Regulator) to reimburse to the notified person the whole or any part of the costs of providing the report<sup>7</sup>. If the trustees or managers of a work-based pension scheme fail to comply with a report notice issued to them, the civil penalty provisions of the Pensions Act 1995<sup>8</sup> apply to any trustee or manager who has failed to take all reasonable steps to secure compliance<sup>9</sup>. Where a report notice is issued, any person who is providing (or who at any time has provided) services to the notified person in relation to a matter on which the report is required must give the person appointed to make the report such assistance as he may reasonably require<sup>10</sup>.

1 In the Pensions Act 2004 s 71 'work-based pension scheme' has the same meaning as in s 5 (Regulator's objectives: see PARA 636A.3): s 71(11).

2 In ibid s 71 'specified', in relation to a report notice, means specified in the notice: s 71(11).

3 Ibid s 71(1).

4 Ibid s 71(2).

5 Ibid s 71(3).

6 Ibid s 71(4).

7 Ibid s 71(5). Where, by virtue of s 71(5), an amount is required to be reimbursed by a specified person to the notified person, that amount is to be treated as a debt due from the specified person to the notified person: s 71(6).

8 Ie the Pensions Act 1995 s 10 (see PARA 611).

9 Pensions Act 2004 s 71(7). The Pensions Act 1995 s 10 also applies to any other person who, without reasonable excuse, fails to comply with a report notice issued to him: Pensions Act 2004 s 71(8).

10 Ibid s 71(9). The duty imposed by s 71(9) is enforceable, on the application of the Regulator, by an injunction: s 71(10).

### 31. Gathering information

The Regulator may, by notice in writing, require any person<sup>1</sup> to produce any document<sup>2</sup>, or provide any other information, which is (1) of a description specified in the notice, and (2) relevant to the exercise of the Regulator's functions<sup>3</sup>.

An inspector<sup>4</sup> may, for the purposes of investigating whether, in the case of any occupational pension scheme, the occupational scheme provisions<sup>5</sup> are being, or have been, complied with, at any reasonable time enter premises liable to inspection<sup>6</sup>. An inspector may, for the purposes of investigating whether, in the case of a stakeholder scheme<sup>7</sup> specified provisions<sup>8</sup> are being, or have been, complied with, at any reasonable time enter premises liable to inspection<sup>9</sup>. An inspector may, for the purposes of investigating whether, in the case of any trust-based personal stakeholder scheme<sup>10</sup>, the trust-based scheme provisions<sup>11</sup> are being, or have been, complied with, at any reasonable time enter premises liable to inspection<sup>12</sup>. Further provision relating to the inspection of premises is made<sup>13</sup>.

1 Ie any person to whom the Pensions Act 2004 s 72(2) applies. Section 72(2) applies to (1) a trustee or manager of an occupational or personal pension scheme, (2) a professional adviser in relation to an occupational pension scheme, (3) the employer in relation to (a) an occupational pension scheme, or (b) a personal pension scheme where direct payment arrangements exist in respect of one or more members of the scheme who are employees, and (4) any other person appearing to the Regulator to be a person who holds, or is likely to hold, information relevant to the exercise of the Regulator's functions: s 72(2).

2 For the purposes of ibid ss 72-78 'document' includes information recorded in any form, and any reference to production of a document, in relation to information recorded otherwise than in a legible form, is to producing a copy of the information (1) in a legible form, or (2) in a form from which it can readily be produced in a legible form: s 79(2).

3 Ibid s 72(1). Where the production of a document, or the provision of information, is required by a notice given under s 72(1), the document must be produced, or information must be provided, in such a manner, at such a place and within such a period as may be specified in the notice: s 72(3).

4 For the purposes of ibid ss 72-78 'inspector' means a person appointed by the Regulator as an inspector: s 79(3).

5 As to the 'occupational scheme provisions' see ibid s 73(2).

6 Ibid s 73(1). Premises are liable to inspection for the purposes of s 73 if the inspector has reasonable grounds to believe that (1) members of the scheme are employed there, (2) documents relevant to the administration of the scheme are being kept there, or (3) the administration of the scheme, or work connected with that administration, is being carried out there: s 73(6).

7 In ibid s 73, 'stakeholder scheme' means an occupational pension scheme or a personal pension scheme which is or has been registered under (1) the Welfare Reform and Pensions Act 1999 s 2 (register of stakeholder schemes), or (2) any corresponding provision in force in Northern Ireland: Pensions Act 2004 s 73(7).

8 le the Welfare Reform and Pensions Act 1999 ss 1 and 2(4) (stakeholder pension schemes: registration etc), or any corresponding provisions in force in Northern Ireland.

9 Pensions Act 2004 s 73(3).

10 For these purposes 'trust-based personal stakeholder scheme' means a personal pension scheme which (1) is a stakeholder scheme, and (2) is established under a trust: *ibid* s 73(5).

11 For these purposes the 'trust-based scheme provisions' means any provisions contained in or made by virtue of (1) any provision which applies in relation to trust-based personal stakeholder schemes by virtue of the Welfare Reform and Pensions Act 1999 Sch 1 para 1, as the provision applies by virtue of Sch 1 para 1, or (2) any corresponding provision in force in Northern Ireland: Pensions Act 2004 s 73(5).

12 *Ibid* s 73(4).

13 See *ibid* s 74 (inspection of premises in respect of employers' obligations), s 75 (powers of inspectors), s 76 (supplementary provision), s 77 (penalties relating to ss 72-75) and s 78 (warrants).

## **32. Offences of providing false or misleading information**

Any person who knowingly or recklessly provides the Regulator with information which is false or misleading in a material particular is guilty of an offence if the information (1) is provided in purported compliance with a requirement under specified provision<sup>1</sup> (2) is provided in applying for registration of a pension scheme<sup>2</sup>, or (3) is provided otherwise than as mentioned in head (1) or (2) above but in circumstances in which the person providing the information intends, or could reasonably be expected to know, that it would be used by the Regulator for the purpose of exercising its functions under the Pensions Act 2004 or the Pensions Act 1995<sup>3</sup>.

1 le under (1) the Pensions Act 2004 s 62 (the register: duties of trustees or managers: see PARA 636A.26), (2) s 64 (duty of trustees or managers to provide scheme return: see PARA 636A.26), (3) s 72 (provision of information: see PARA 636A.31), or (4) s 75 (inspection of premises: powers of inspectors: see PARA 636A.31).

2 Under the Welfare Reform and Pensions Act 1999 s 2 (registration of stakeholder pension schemes: see PARA 873A.2).

3 Pensions Act 2004 s 80(1). Any person guilty of an offence under s 80(1) is liable (1) on summary conviction, to a fine not exceeding the statutory maximum; (2) on conviction on indictment, to a fine or imprisonment for a term not exceeding two years, or both: s 80(2). As to the statutory maximum see PARA 403.

## **33. Use of information**

Information (1) contained in the register, or (2) otherwise held by the Regulator in the exercise of any of its functions, may be used by the Regulator for the purposes of, or for any purpose connected with or incidental to, the exercise of its functions<sup>1</sup>.

1 Pensions Act 2004 s 81.

## **34. Disclosure of information**

Restricted information<sup>1</sup> must not be disclosed (1) by the Regulator, or (2) by any person who receives the information directly or indirectly from the Regulator<sup>2</sup>. Restricted information may be disclosed with the consent of the person to whom it relates and (if different) the person from whom the Regulator obtained it<sup>3</sup>. Any person who discloses information in contravention of these provisions<sup>4</sup> is guilty of an offence and liable (a) on summary conviction, to a fine not exceeding the statutory maximum<sup>5</sup> or imprisonment for a term not exceeding 12 months, or both; (b) on conviction on indictment, to a fine or imprisonment for a term not exceeding two years, or both<sup>6</sup>.

Further provision relating to the disclosure on information is made<sup>7</sup>.

1 For the purposes of the Pensions Act 2004 s 82 and ss 83-87, 'restricted information' means any information obtained by the Regulator in the exercise of its functions which relates to the business or other affairs of any person, except for information (1) which at the time of the disclosure is or has already been made available to the public from other sources, or (2) which is in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it: s 82(4).

2 Ibid s 82(1). Section 82(1) is subject to (1) s 82(3), and (2) ss 71(9) (see PARA 636A.30), 83-88 and 235 (see PARA 965B.2): s 82(2).

3 Ibid s 82(3). Section 82(3) is subject to s 88(5) (tax information): s 82(3) (amended by Pensions Act 2008 s 62(2)).

4 I.e. the Pensions Act 2004 s 82.

5 As to the statutory maximum see PARA 403.

6 Pensions Act 2004 s 82(5) (amended by Pensions Act 2008 s 64(1)). See also Pensions Act 2004 s 82(6) (added by Pensions Act 2008 s 64(2)).

7 See the Pensions Act 2004 s 83 (information supplied to the Regulator by corresponding overseas authorities); s 84 (amended by Pensions Act 2008 s 83) (disclosure for facilitating exercise of functions by the Regulator); Pensions Act 2004 s 85 (disclosure for facilitating the exercise of functions by the Board of the Pension Protection Fund); s 86, Sch 3 (amended by SI 2006/2937; SI 2009/1941) (disclosure for facilitating the exercise of functions by other supervisory authorities); s 87 (amended by SI 2009/1941) (other permitted disclosures); and the Pensions Act 2004 s 88 (substituted by Pensions Act 2008 s 62(1)) (tax information).

### **35. Publishing reports etc**

The Regulator may, if it considers it appropriate to do so in any particular case, publish a report of the consideration given by it to the exercise of its functions in relation to that case and the results of that consideration<sup>1</sup>. For the purposes of the law of defamation, the publication of any matter by the Regulator is privileged unless the publication is shown to be made with malice<sup>2</sup>.

1 Pensions Act 2004 s 89(1). The publication of a report under s 89(1) may be in such form and manner as the Regulator considers appropriate: s 89(2).

2 Ibid s 89(3).

### **36. Codes of practice**

The Regulator may issue codes of practice (1) containing practical guidance in relation to the exercise of functions under the pensions legislation<sup>1</sup>, and (2) regarding the standards of conduct and practice expected from those who exercise such functions<sup>2</sup>. The Regulator may from time to time revise the whole or any part of a code of practice issued under these provisions<sup>3</sup> and issue that revised code<sup>4</sup>. A failure on the part of any person to observe any provision of a code of practice does not of itself render that person liable to any legal proceedings<sup>5</sup>. A code of practice issued under these provisions is admissible in evidence in any legal proceedings and, if any provision of such a code appears to the court or tribunal concerned to be relevant to any question arising in the proceedings, it must be taken into account in determining that question<sup>6</sup>.

Provision is made about the procedure to be followed when a code of practice is issued or revoked<sup>7</sup>.

1 In the Pensions Act 2004 s 90 'the pensions legislation' means any enactment contained in or made by virtue of (1) the Pension Schemes Act 1993, (2) the Pensions Act 1995 Pt 1, other than ss 62-66A (equal treatment), (3) the Welfare Reform and Pensions Act 1999 Pt 1 or s 33, or (4) the Pensions Act 2004: s 90(6).

2 Ibid s 90(1). The Regulator must issue one or more such codes of practice relating to the following matters (1) what constitutes a 'reasonable' period for the purposes of any provision of the pensions legislation (other than any enactment contained in or made by virtue of Pt 2 (ss 107-220) which requires any action to be taken within such a period; (2) the circumstances in which the Regulator expects to issue contribution notices under s 38 (see PARA 636A.20) as a result of being of the opinion that the material detriment test is met in relation to an act or failure; (3) the discharge of the duty imposed by s 69 (duty to notify Regulator of certain events: see PARA 636A.28); (4) the discharge of the duty imposed by s 70 (duty to report breaches of the law: see PARA 636A.29); (5) the discharge of duties imposed on trustees or managers of occupational pension schemes by, or by virtue of, Pt 3 (scheme funding (ss 221-233)); (6) the discharge of the duties imposed by ss 241 and 242 (member-nominated trustees and directors: see PARA 794A); (7) the obligations imposed by ss 247 and 248 (requirements for knowledge and understanding: individual and corporate trustees: see PARA 800A); (8) the discharge of the duty imposed by the Pensions Act 1995 s 49(9)(b) (duty of trustees or managers of occupational pension schemes to report material failures by employers to pay contributions deducted from employee's earnings timeously: see PARA 798); (9) the discharge of the duties imposed by ss 67-67I (the subsisting rights provisions: see PARA 833A); (10) the discharge of the duty imposed by s 88(1) (duties of trustees and managers of money purchase schemes to report failures to pay employer contributions etc timeously: see PARA 864); (11) the discharge of the duty imposed by the Pension Schemes Act 1993 s 111A(7A) (duty of trustees or managers of personal pension schemes to report material failures to pay employer contributions timeously: see PARA 556A); (12) such other matters as are prescribed for the purposes of the Pensions Act 2004 s 90: s 90(2) (amended by Pensions Act 2008 Sch 9 para 3). The discharge of the duty imposed by the Pensions Act 2004 s 249A(1) (see PARA 800A.3) is a prescribed matter for the purposes of head (12): Occupational Pension Schemes (Internal Controls) Regulations 2005, SI 2005/3379, reg 3.

3 In Pensions Act 2004 s 90.

4 Ibid s 90(3).

5 Ibid s 90(4). This is subject to s 13(3)(a) and (8) (power for improvement notice to direct that person complies with code of practice and civil penalties for failure to comply: see PARA 636A.11): s 90(4). In s 90 'legal proceedings' includes proceedings of the Pensions Ombudsman, proceedings of the Ombudsman for the Board of the Pension Protection Fund and proceedings of the Board of the Pension Protection Fund under s 207 (see PARA 659F.1) or 208 (see PARA 659F.2): s 90(6).

6 Ibid s 90(5).

7 See ibid ss 90(7), 91, 92. See further the Pensions Act 2004 (Commencement No 4 and Amendment) Order 2005, SI 2005/1108; the Pensions Act 2004 (Commencement No 6, Transitional Provisions and Savings) Order 2005, SI 2005/1720; the Pensions Act 2004 (Funding Defined Benefits) Appointed Day Order 2006, SI 2006/337; the Pensions Act 2004 (Codes of Practice) (Early Leavers, Late Payment of Contributions and Trustee Knowledge and Understanding) Appointed Day Order 2006, SI 2006/1383; the Pensions Act 2004 (Codes of Practice) (Member-nominated Trustees and Directors and Internal Controls) Appointed Day Order 2006, SI 2006/3079; the Pensions Act 2004 (Code of Practice) (Modification of subsisting rights) Appointed Day Order 2007, SI 2007/76; the Pensions Act 2004 (Code of Practice) (Dispute Resolution) Appointed Day Order 2008, SI 2008/1882; and the Pensions Act 2004 (Code of Practice) (Material Detriment Test) Appointed Day Order 2009, SI 2009/1565.

### **37. Exercise of regulatory functions**

The Regulator must determine the procedure that it proposes to follow in relation to the exercise of its regulatory functions<sup>1</sup>. The Determinations Panel<sup>2</sup> must determine the procedure to be followed by it in relation to any exercise by it on behalf of the Regulator of (1) the power to determine whether to exercise a regulatory function, and (2) where the Panel so determines to exercise a regulatory function, the power to exercise the function in question<sup>3</sup>. The procedure determined under these provisions<sup>4</sup> (a) must provide for the procedure required under the standard procedure<sup>5</sup> and the special procedure<sup>6</sup> and (b) may include such other procedural requirements as the Regulator or, as the case may be, the Panel considers appropriate<sup>7</sup>.

The Regulator must issue a statement of the procedure determined under the above provisions<sup>8</sup>.

Detailed provision is made with respect to the standard procedure and the special procedure<sup>9</sup>. In addition provision is made relating to the compulsory review of a determination to take regulatory action<sup>10</sup>, the duty to have regard to the interests of members of the scheme<sup>11</sup>, and powers to vary or revoke orders, notices or directions<sup>12</sup>.

1 Pensions Act 2004 s 93(1). For the purposes of Pt 1 (ss 1-106, Schs 1-4) the 'regulatory functions' of the Regulator are (1) the power to issue an improvement notice under s 13 (see PARA 636A.11), (2) the power to issue a third party notice under s 14 (see PARA 636A.12), (3) the reserved regulatory functions (see Sch 2 and PARA 636A.8), (4) the power to issue a clearance statement under s 42 (see PARA 636A.20), (5) the power to issue a notice under s 45(1) approving the details of arrangements (see PARA 636A.21), (6) the power to issue a clearance statement under s 46 (see PARA 636A.22), (7) the power to vary or revoke under s 101 (to the extent that it does not fall within head (3)), (8) the power to make an order under s 154(8) (see PARA 659C.23), (9) the power to make an order under s 219(4) (see PARA.659G.1), (10) the power to grant or revoke authorisation under s 288 (see PARA 969A.2), (11) the power to grant or revoke approval under s 289 (see PARA 969A.3), (12) the power to issue a notice under s 293(5) (see PARA 969A.7), (13) the power by direction under the Welfare Reform and Pensions Act 1999 s 2(3)(a) to refuse to register a scheme under s 2 (see PARA 873A.2), (14) the power to make an order under the Pensions Act 1995 s 7 appointing a trustee (see PARA 608) (to the extent that it does not fall within head (3)), (15) the power to make an order under the Pensions Act 1995 s 23 appointing an independent trustee (see PARA 795), (16) the power to give directions under the Pensions Act 1995 s 72B (directions facilitating winding up: see PARA 842-852), and (17) such other functions of the Regulator as may be prescribed: Pensions Act 2004 s 93(2). See Occupational Pension Schemes (Independent Trustee) Regulations 2005, SI 2005/703 (amended by SI 2009/615). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

2 See PARA 636A.7.

3 Pensions Act 2004 s 93(3).

4 *Ie* under *ibid* s 93.

5 *Ie* the standard procedure under s 96.

6 *Ie* the special procedure under s 98.

7 *Ibid* s 93(4).

Section 93 is subject to (1) ss 99-104 (the remaining provisions concerning the procedure in relation to the regulatory functions), and (2) any regulations made by the Secretary of State under Sch 1 para 19: s 93(5). As to Sch 1 see PARA 636A.1

8 *Ie* determined under *ibid* s 93: s 94(1). The Regulator must arrange for the statement to be published in the way appearing to it to be appropriate: s 94(2). The Regulator may charge a reasonable fee for providing a person with a copy of the statement: s 94(3). If the procedure determined under s 93 is changed in a material way, the Regulator must publish a revised statement: s 94(4). The Regulator must, without delay, give the Secretary of State a copy of any statement which it issues under s 94: s 94(5).

9 See *ibid* s 95 (application of standard and special procedure) (partly in force) (and see Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006, SI 2006/349 (amended by SI 2007/814, SI 2009/615)); s 96 (amended by Pensions Act 2008 Sch 9 para 4) (standard procedure) (Pensions Act 2004 s 96 partly in force); s 97 (amended by Pensions Act 2007 s 14(6)) (special procedure: applicable cases) (and see Occupational Pension Schemes (Independent Trustee) Regulations 2005, SI 2005/703 (amended by SI 2009/615); and the Pensions Act 2004 s 98 (special procedure).

10 See *ibid* s 99.

11 See *ibid* s 100.

12 See *ibid* s 101 (partly in force).

### **38. The Pensions Regulator Tribunal**

A tribunal to be known as the Pensions Regulator Tribunal (in the Pensions Act 2004 referred to as 'the Tribunal') is established<sup>1</sup>. The Tribunal has the functions conferred on it by the Pensions Act 2004<sup>2</sup>. The Lord Chancellor may by rules make such provision as appears to him to be

necessary or expedient in respect of the conduct of proceedings before the Tribunal<sup>3</sup>. Provision as respects the Tribunal and its proceedings is made<sup>4</sup>.

Provision is also made relating to references to the Tribunal<sup>5</sup>, appeal on a point of law<sup>6</sup>, and redetermination by the Tribunal<sup>7</sup>.

1 Pensions Act 2004 s 102(1).

2 Ibid s 102(2).

3 Ibid s 102(3). See Pensions Regulator Tribunal Rules 2005, SI 2005/690.

4 See Pensions Act 2004 s 102(4), Sch 4 (Sch 4 amended by Tribunals, Courts and Enforcement Act 2007 Sch 10 para 40; Lord Chancellor (Transfer of Functions and Supplementary Provisions (No 2) Order 2006, SI 2006/1016). But the 2004 Act Sch 4 does not limit the Lord Chancellor's powers under s 102: s 102(5). See further Constitutional Reform Act 2005 s 85, Sch 14 Pt 3 (amended by Judicial Appointments and Discipline (Modification of Offices) Order 2006, SI 2006/678).

5 See 2004 Act s 103.

6 See ibid s 104 and SI 2005/690.

7 See Pensions Act 2004 s 105.

### **39. Legal assistance scheme**

The Lord Chancellor may by regulations establish a scheme governing the provision of legal assistance in connection with proceedings before the Tribunal<sup>1</sup>. The legal assistance scheme<sup>2</sup> may, in particular, make provision as to (1) the kinds of legal assistance that may be provided; (2) the persons by whom legal assistance may be provided; (3) the manner in which applications for legal assistance are to be made; (4) the criteria on which eligibility for legal assistance is to be determined; (5) the persons or bodies by whom applications are to be determined; (6) appeals against refusals of applications; (7) the revocation or variation of decisions; (8) its administration and the enforcement of its provisions<sup>3</sup>. Legal assistance under the scheme may be provided subject to conditions or restrictions<sup>4</sup>. Those conditions may include conditions as to the making of contributions by the person to whom the assistance is provided<sup>5</sup>. The Lord Chancellor must fund, out of money provided by Parliament, the costs of the scheme including the costs of legal assistance provided under it<sup>6</sup>.

1 Pensions Act 2004 s 106(1). In the Pensions Act 2004, unless the context otherwise requires 'the Tribunal' has the meaning given by s 102(1) (see PARA 636A.38): s 318(1). See Pensions Regulator Tribunal (Legal Assistance Scheme) Regulations 2005, SI 2005/781 and Pensions Regulator Tribunal (Legal Assistance Scheme-Costs) Regulations 2005, SI 2005/782. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

2 In the Pensions Act 2004 Pt 1 (ss 1-106) 'the legal assistance scheme' means any scheme in force by virtue of s 106(1): s 106(6).

3 Ibid s 106(2).

4 Ibid s 106(3).

5 Ibid s 106(4).

6 Ibid s 106(5).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **598-636 The Occupational Pensions Regulatory Authority**

The Occupational Pensions Regulatory Authority ('OPRA') is dissolved: Pensions Act 2004 s 300(1). An order under s 322 which appoints the day on which s 300(1) comes into force (ie 6 April 2005: see SI 2005/695) may provide (1) for all property, rights and liabilities to which OPRA is entitled or subject immediately before that day to become the property, rights and liabilities of the Pensions Regulator or the Secretary of State, and (2) for any function of OPRA falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Regulator, the Secretary of State or the Department for Social Development in Northern Ireland: Pensions Act 2004 s 300(2). Subject to s 300(4), information obtained by the Regulator by virtue of s 300(2) is to be treated for the purposes of ss 82-87 (disclosure of information: see PARA 636A.34) as having been obtained by the Regulator in the exercise of its functions from the person from whom OPRA obtained it: s 300(3). Information obtained by the Regulator by virtue of s 300(2) which was supplied to OPRA for the purposes of its functions by an authority exercising functions corresponding to the functions of OPRA in a country or territory outside the United Kingdom (the 'overseas authority') is to be treated for the purposes mentioned in s 300(3) as having been supplied to the Regulator for the purposes of its functions by the overseas authority: s 300(4). Where tax information disclosed to OPRA is obtained by the Regulator by virtue of s 300(2), s 300(3) does not apply and s 88(3) and (4) (see PARA 636A.34) applies as if that information had been disclosed to the Regulator by virtue of s 88(2): s 300(5). For this purpose 'tax information' has the same meaning as in s 88: s 300(5). For provision relating to the transfer of employees from OPRA to the Regulator see s 301.

As to the Pensions Regulator see Pensions Act 2004 Pt 1 (ss 1-106, Schs 1-4); and PARA 636A.

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REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/637.  
Establishment of the Pensions Compensation Board.

## **(2) THE PENSIONS COMPENSATION BOARD**

### **637. Establishment of the Pensions Compensation Board.**

There is a body corporate called the Pensions Compensation Board ('the board')<sup>1</sup>. The board consists of not less than three members appointed by the Secretary of State<sup>2</sup>, one of whom must be so appointed as chairman<sup>3</sup>. In addition to the chairman, the board comprises:

- 1460 (1) a member appointed after the Secretary of State has consulted:  
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- 211. (a) organisations appearing to him to be representative of employers<sup>4</sup>; and
- 212. (b) the chairman<sup>5</sup>;  
156
- 1461 (2) a member appointed after the Secretary of State has consulted:  
157
- 213. (a) organisations appearing to him to be representative of employees<sup>6</sup>; and
- 214. (b) the chairman<sup>7</sup>,  
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and such other member or members as the Secretary of State may appoint after consultation with the chairman<sup>8</sup>.

Payments made by the board may be made on such terms (including terms requiring repayment in whole or in part) and on such conditions as the board thinks appropriate<sup>9</sup>. The board may borrow from an institution authorised under the Banking Act 1987<sup>10</sup> such sums as it may from time to time require for exercising any of its functions<sup>11</sup> provided that the aggregate amount outstanding in respect of the principal of any money so borrowed by the board must not exceed the prescribed<sup>12</sup> amount<sup>13</sup>.

Neither the board nor any person who is a member or employee of the board may be liable in damages for anything done or omitted in the discharge or purported discharge of the functions of the board under Part I of the Pensions Act 1995<sup>14</sup>, or any corresponding provisions in force in Northern Ireland, unless it is shown that the act or omission was in bad faith<sup>15</sup>.

The board is not to be regarded as the servant or agent of the Crown, or as enjoying any status, privilege or immunity of the Crown; and its property is not to be regarded as property of, or property held on behalf of, the Crown<sup>16</sup>. The board may do anything which is calculated to facilitate the discharge of its functions, or is incidental or conducive to their discharge, including in particular giving guarantees or indemnities in favour of any person, or making any other agreement or arrangement with or for the benefit of any person<sup>17</sup>.

A person holds and vacates office as chairman or other member of the board in accordance with the terms of the instrument appointing him<sup>18</sup>. If, however, a member of the board becomes or ceases to be chairman, the Secretary of State may vary the terms of the instrument appointing him to be a member so as to alter the date on which he is to vacate office<sup>19</sup>.

A person may at any time resign office as chairman or other member of the board by giving written notice of his resignation signed by him to the Secretary of State<sup>20</sup>. The chairman or any other member of the board may at any time be removed from office by notice in writing given to him by the Secretary of State<sup>21</sup>.

The board may pay, or make provision for paying, to or in respect of the chairman or any other member such salaries or other remuneration, and such pensions, allowances, fees, expenses or gratuities, as the Secretary of State may determine<sup>22</sup>. Where a person ceases to be a member of the board otherwise than on the expiration of his term of office and it appears to the Secretary of State that there are circumstances which make it right for that person to receive compensation, the board may make to that person a payment of such amount as the Secretary of State may determine<sup>23</sup>.

All members of the board are disqualified for membership of the House of Commons<sup>24</sup>. The board is subject to investigation by the Parliamentary Commissioner for Administration<sup>25</sup>.

- 1 Pensions Act 1995 s 78(1).
- 2 As to the Secretary of State see PARA 1 ante.
- 3 Pensions Act 1995 s 78(2).
- 4 For the meaning of 'employer' see PARA 598 note 4 ante.
- 5 Pensions Act 1995 s 78(3)(a).
- 6 For the meaning of 'employee' see PARA 598 note 5 ante.
- 7 Pensions Act 1995 s 78(3)(b).
- 8 Ibid s 78(3).
- 9 Ibid s 78(4).
- 10 See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 791 et seq.
- 11 Pensions Act 1995 s 78(5).
- 12 For the meaning of 'prescribed' see PARA 555 note 1 ante.
- 13 Pensions Act 1995 s 78(6). The prescribed amount is £15 million: Occupational Pension Schemes (Pensions Compensation Board Limit on Borrowing) Regulations 1996, SI 1996/1976, reg 2.
- 14 Ie the Pensions Act 1995 Pt I (ss 1-125): see PARA 598 et seq ante, 638 et seq post.
- 15 Ibid s 78(7).
- 16 Ibid s 78(8), Sch 2 para 1.
- 17 Ibid Sch 2 para 2.
- 18 Ibid Sch 2 para 3 .
- 19 Ibid Sch 2 para 4.
- 20 Ibid Sch 2 para 5.
- 21 Ibid Sch 2 para 6.
- 22 Ibid Sch 2 para 7(1).
- 23 Ibid Sch 2 para 7(2).
- 24 See ibid Sch 2 para 8; and PARLIAMENT vol 78 (2010) PARA 908.
- 25 See ibid Sch 2 para 9; and ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARAS 41-44.

## UPDATE

## **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

## **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: s 302(1). An order under s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see 2004 Pt 2 (ss 107-220); and PARAS 659A-659G.

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### **638. Staff.**

The Pensions Compensation Board<sup>1</sup> may (with the approval of the Secretary of State<sup>2</sup> as to numbers) appoint such persons to be its employees<sup>3</sup> as the board thinks fit, on such terms and conditions as to remuneration and other matters as the board may with the approval of the Secretary of State determine<sup>4</sup>. The Secretary of State may, on such terms as to payment by the board as he thinks fit, make available to the board such additional staff and such other facilities as he thinks fit<sup>5</sup>. The Pensions Ombudsman<sup>6</sup> may, on such terms as to payment by the board as he thinks fit, make available to the board such of his employees as he thinks fit<sup>7</sup>.

1 As to the Pensions Compensation Board see PARA 637 ante.

2 As to the Secretary of State see PARA 1 ante.

3 For the meaning of 'employee' see PARA 598 note 5 ante.

4 Pensions Act 1995 s 78(8), Sch 2 para 10(1). Employment with the board is included among the kinds of employment to which a scheme under the Superannuation Act 1972 s 1 (as amended; see PARA 785 post; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 567) applies: Pensions Act 1995 Sch 2 para 11(1). The board must pay to the Treasury, at such times as the Treasury may direct, such sums as the Treasury may determine in respect of the increase attributable to Sch 2 para 11 in the sums payable out of money provided by Parliament under the Superannuation Act 1972: Pensions Act 1995 Sch 2 para 11(2).

5 Ibid Sch 2 para 10(2).

6 As to the Pensions Ombudsman see PARA 663 et seq post.

7 Pensions Act 1995 Sch 2 para 10(3).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having

been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/639. Proceedings.

### **639. Proceedings.**

The Secretary of State<sup>1</sup> may make regulations<sup>2</sup> generally as to the procedure to be followed by the Pensions Compensation Board<sup>3</sup> in the exercise of its functions and the manner in which its functions are to be exercised<sup>4</sup>. The board must meet at least once in the first 12 months of its existence, and at least once in each succeeding period of 12 months<sup>5</sup>. The board may (subject to the following exceptions) authorise any of its members to exercise such of the board's functions as the board may determine<sup>6</sup>. The board may not authorise any of its members to:

- 1462 (1) determine whether the provisions applying the compensation provisions<sup>7</sup> apply to an application for compensation<sup>8</sup> in respect of any occupational pension scheme<sup>9</sup>;
- 1463 (2) determine the amount of any compensation payment<sup>10</sup>;
- 1464 (3) determine whether any payment should be made in anticipation<sup>11</sup> or the amount of any such payment<sup>12</sup>; or
- 1465 (4) Exercise such functions of the board as may be prescribed<sup>13</sup>.

The quorum of the board is such as it may determine, and the board may regulate its own procedure<sup>14</sup>. The decisions of the board must be taken by agreement of a majority of the members of the board who are present at the meeting where the decision is taken<sup>15</sup>. Where the board notifies any person of a decision on any matter dealt with by it by means of a formal hearing, or on review, it must furnish a written statement of the reasons for the decision<sup>16</sup>. Any statement by the board of its reasons for a decision, whether the statement is given by it in pursuance of this provision or otherwise, must be taken to form part of the decision, and accordingly to be incorporated in the record<sup>17</sup>.

The validity of any proceedings of the board is not affected by any vacancy among the members or by any defect in the appointment of any member<sup>18</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 For the meaning of 'regulations' see PARA 600 note 2 ante.

3 As to the Pensions Compensation Board see PARA 637 ante.

4 Pensions Act 1995 s 78(8), Sch 2 para 12.

5 Ibid Sch 2 para 13.

6 Ibid Sch 2 para 14(1). Schedule 2 para 14 is subject to regulations made by virtue of Sch 2 para 12: Sch 2 para 14(5).

7 I.e the provisions of ibid s 81: see PARA 643 post.

8 I.e under ibid s 82: see PARA 644 post.

9 Ibid Sch 2 para 14(2)(a). For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 post (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

10 I.e a compensation payment under ibid s 83 (see PARA 644 post): see Sch 2 para 14(2)(b).

11 I.e under ibid s 84: see PARA 646 post.

- 12 Ibid Sch 2 para 14(2)(c).
- 13 Ibid Sch 2 para 14(2)(d). For the meaning of 'prescribed' see PARA 555 note 1 ante.
- 14 Ibid Sch 2 para 14(3).
- 15 Ibid Sch 2 para 14(4).
- 16 Ibid Sch 2 para 15(1).
- 17 Ibid Sch 2 para 15(2).
- 18 Ibid Sch 2 para 16.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15.  
REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/640.  
Accounts and other expenses.

#### **640. Accounts and other expenses.**

The Pensions Compensation Board<sup>1</sup> must:

- 1466 (1) keep proper accounts and proper records in relation to the accounts<sup>2</sup>;
- 1467 (2) prepare in respect of each financial year<sup>3</sup> of the board a statement of accounts<sup>4</sup>; and
- 1468 (3) send copies of the statement to the Secretary of State<sup>5</sup> and to the Comptroller and Auditor General before the end of the month of August next following the financial year to which the statement relates<sup>6</sup>.

The statement of accounts must comply with any directions given by the Secretary of State with the approval of the Treasury as to:

- 1469 (a) the information to be contained in it<sup>7</sup>;
- 1470 (b) the manner in which the information contained in it is to be presented<sup>8</sup>; or
- 1471 (c) the methods and principles according to which the statement is to be prepared<sup>9</sup>,

and must contain such additional information as the Secretary of State may with the approval of the Treasury require to be provided for the information of Parliament<sup>10</sup>.

The Comptroller and Auditor General must examine, certify and report on each statement received by him in pursuance of this provision and must lay copies of each statement and of his report before each House of Parliament<sup>11</sup>.

The board may:

- 1472 (i) pay to persons attending meetings of the board at the request of the board such travelling and other allowances (including compensation for loss of remunerative time) as the board may determine<sup>12</sup>; and
- 1473 (ii) pay to persons from whom the board may decide to seek advice, as being persons considered by the board to be specially qualified to advise them on particular matters, such fees as the board may determine<sup>13</sup>.

Such a determination<sup>14</sup> requires the approval of the Secretary of State<sup>15</sup>.

1 As to the Pensions Compensation Board see PARA 637 ante.

2 Pensions Act 1995 s 78(8), Sch 2 para 17(1)(a).

3 'Financial year' means the period beginning with the date on which the board is established and ending with the next following 5 April, and each successive period of 12 months: *ibid* Sch 2 para 17(4).

4 *Ibid* Sch 2 para 17(1)(b).

5 As to the Secretary of State see PARA 1 ante.

6 Pensions Act 1995 Sch 2 para 17(1)(c).

- 7 Ibid Sch 2 para 17(2)(a).
- 8 Ibid Sch 2 para 17(2)(b).
- 9 Ibid Sch 2 para 17(2)(c).
- 10 Ibid Sch 2 para 17(2).
- 11 Ibid Sch 2 para 17(3).
- 12 Ibid Sch 2 para 18(1)(a).
- 13 Ibid Sch 2 para 18(1)(b).
- 14 ie a determination under head (i) or head (ii) in the text.
- 15 Pensions Act 1995 Sch 2 para 18(2).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15.  
REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/641.  
Application of seal and proof of instruments.

#### **641. Application of seal and proof of instruments.**

The fixing of the common seal of the Pensions Compensation Board<sup>1</sup> must be authenticated by the signature of the chairman of the board or some other person authorised by it to act for that purpose<sup>2</sup>. A document purporting to be duly executed under the seal of the board must be received in evidence and must, unless the contrary is proved, be deemed to be so executed<sup>3</sup>.

1 As to the Pensions Compensation Board see PARA 637 ante.

2 Pensions Act 1995 s 78(8), Sch 2 para 19(1). Schedule 2 para 19(1) does not apply in relation to any document which is or is to be signed in accordance with the law of Scotland: Sch 2 para 19(2).

3 Ibid Sch 2 para 20.

### **UPDATE**

#### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

#### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/642. Reports to the Secretary of State.

#### **642. Reports to the Secretary of State.**

The Pensions Compensation Board<sup>1</sup> must prepare a report for the first 12 months of its existence, and a report for each succeeding period of 12 months, and must send each report to the Secretary of State<sup>2</sup> as soon as practicable after the end of the period for which it is prepared<sup>3</sup>. A report so prepared for any period must deal with the activities of the board in the period<sup>4</sup>. The Secretary of State must lay before each House of Parliament a copy of every report so received by him<sup>5</sup>.

1 As to the Pensions Compensation Board see PARA 637 ante.

2 As to the Secretary of State see PARA 1 ante.

3 Pensions Act 1995 s 79(1).

4 Ibid s 79(2).

5 Ibid s 79(3).

#### **UPDATE**

#### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

#### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies

was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15.  
REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/643.  
Cases where compensation provisions apply.

### **643. Cases where compensation provisions apply.**

Subject to the following exceptions, an application for compensation<sup>1</sup> in respect of an occupational pension scheme<sup>2</sup> may be made if all the following conditions are met:

- 1474 (1) the scheme is a trust scheme<sup>3</sup>;
- 1475 (2) the employer<sup>4</sup> is insolvent<sup>5</sup>;
- 1476 (3) the value of the assets of the scheme has been reduced, and there are reasonable grounds for believing that the reduction was attributable to an act or omission constituting a prescribed<sup>6</sup> offence<sup>7</sup>;
- 1477 (4) in the case of a salary-related trust scheme<sup>8</sup>, immediately before the date of the application<sup>9</sup> the value of the assets of the scheme is less than 90 per cent of the amount of the liabilities of the scheme<sup>10</sup>; and
- 1478 (5) it is reasonable in all the circumstances that the members<sup>11</sup> of the scheme should be assisted by the Pensions Compensation Board<sup>12</sup> paying to the trustees of the scheme, out of funds for the time being held by it, an amount determined in accordance with the compensation provisions<sup>13</sup>.

The compensation provisions do not apply in respect of a trust scheme falling within a prescribed class or description<sup>14</sup>; and head (3) above applies only to reductions in value since the appointed day<sup>15</sup>. Where these provisions apply to an application for compensation, the trustees must obtain any recoveries of value<sup>16</sup>, to the extent that they may do so without disproportionate cost and within a reasonable time<sup>17</sup>.

1    Ie under the Pensions Act 1995 s 82: see PARA 644 post.

2    For the meaning of 'occupational pension scheme' see PARA 741 post (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

3    Ibid s 81(1)(a). For the meaning of 'trust scheme' see PARA 604 note 2 ante.

4    For the meaning of 'employer' see PARA 598 note 4 ante.

5    Pensions Act 1995 s 81(1)(b). As to when an employer is taken to be insolvent see the Pension Schemes Act 1993 s 123(1); and PARA 853 note 5 post (definition applied by the Pensions Act 1995 s 81(8)). Section 81(1)(b) is modified in relation to multi-employer schemes: see the Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, reg 8(1)(a).

6    For the meaning of 'prescribed' see PARA 555 note 1 ante.

7    Pensions Act 1995 s 81(1)(c). The prescribed offence for these purposes is any offence involving dishonesty, and for the avoidance of doubt dishonesty includes an intent to defraud: Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, reg 3.

8    For the purposes of the Pensions Act 1995 Pt I (ss 1-125) (see PARA 598 et seq ante, 644 et seq post), an occupational pension scheme is salary-related if the scheme is not a money purchase scheme and the scheme does not fall within a prescribed class or description, and 'salary-related trust scheme' is to be read accordingly: s 125(1). For the meaning of 'money purchase scheme' see the Pension Schemes Act 1993 s 181(1); and PARA 811 note 2 post (definition applied by the Pensions Act 1995 s 124(5)).

9    'The application date' means the date of the application for compensation under ibid s 82 (see PARA 644 post): s 81(3)(a).

10 Ibid s 81(1)(d). Section 81(1)(d) is substituted in relation to (1) a money purchase scheme (ie an occupational pension scheme under which all the benefits that may be provided other than death benefits are money purchase benefits); and (2) an ear-marked scheme (ie an occupational pension scheme which is a money purchase scheme under which all the benefits are secured by one or more policies of insurance or annuity contracts and such policies or contracts are specifically allocated to the provision of benefits for individual members or any other person who has a right to benefits under the scheme): see the Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, regs 1(2), 10(1)(a)(i), (2)(a)(i)-(iii).

11 For the meaning of 'member' see PARA 612 note 5 ante.

12 As to the Pensions Compensation Board see PARA 637 ante.

13 Pensions Act 1995 s 81(1)(e). In the Pensions Act 1995 Pt I (see PARA 598 et seq ante, 644 et seq post), the 'compensation provisions' means the provisions of ss 81-85: s 81(3). As to ss 82-85 see PARAS 644-647 post. Section 56(3), (4) applies for the purposes of the compensation provisions as it applies for the purposes of ss 56-61 (see PARA 811 et seq post): s 81(7). Regulations may modify the compensation provisions in their application to trust schemes falling within a prescribed class or description: s 86. For the meaning of 'regulations' see PARA 600 note 2 ante. For the meaning of 'modify' see the Pension Schemes Act 1993 s 181(1); and PARA 664 note 10 post (definition applied by the Pensions Act 1995 s 124(5)).

14 The compensation provisions do not apply to: (1) a scheme which has fewer than two members and no beneficiaries; (2) a scheme the only benefits provided by which are death benefits and under the provisions of which no member has accrued rights; (3) a scheme which provides relevant benefits within the meaning of the Income and Corporation Taxes Act 1988 s 612(1) (see PARA 741 note 6 post), but is neither an approved scheme (ie a scheme approved or formerly approved under s 590 or s 591 (as amended), or in respect of which an application for such an approval has been duly made which has not been determined: see PARA 747 et seq post) nor a relevant statutory scheme within the meaning of s 611A (as added) (see PARA 756 note 2 post); (4) a scheme whose members are fewer than 12, all of whom are trustees and under the rules of which all trustee decisions must be made by unanimous agreement, save that the non-participation of a pensioner trustee in any such decision must be disregarded; (5) a public service pension scheme within the meaning of the Pension Schemes Act 1993 s 1 (see PARA 874 post); (6) a relevant lump sum retirement benefits scheme; (7) a scheme in respect of which any Minister of the Crown has given a guarantee or made any other arrangements for the purpose of securing that the assets of the scheme are sufficient to meet its liabilities; or (8) a scheme with such a superannuation fund as is mentioned in the Income and Corporation Taxes Act 1988 s 615(6) (certain overseas pensions): see the Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, regs 1(2), 2(1), (2). For these purposes, 'scheme' means an occupational pension scheme which is a trust scheme (reg 1(2)); 'lump sum benefits' does not include benefits paid by way of commuted retirement pension (reg 2(2)); 'pensioner trustee' has the meaning given in the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Small Self-administered Schemes) Regulations 1991, SI 1991/1614 (see PARA 751 note 24 post) (Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, reg 2(2)); 'relevant benefits' has the meaning given in the Income and Corporation Taxes Act 1988 s 612(1) (see PARA 741 note 6 post) (Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, reg 2(2)); and 'relevant lump sum retirement benefits scheme' means an approved scheme (a) which has been categorised by the Board of Inland Revenue for the purposes of its approval as a centralised scheme for non-associated employers; (b) which is not contracted-out; and (c) under the provisions of which the only benefits which may be provided on or after retirement (other than money purchase benefits derived from the payment of additional contributions by any person) are lump sum benefits which are not calculated by reference to any member's salary (reg 2(2)).

15 Pensions Act 1995 s 81(2). 'The appointed day' means the day appointed under s 180 for the commencement of s 81 (ie 6 April 1997): s 81(3)(b).

16 'Recovery of value' means any increase in the value of the assets of the scheme, being an increase attributable to any payment received (otherwise than from the board) by the trustees of the scheme in respect of any act or omission: (1) which there are reasonable grounds for believing constituted a prescribed offence; and (2) to which any reduction in value falling within ibid s 81(1)(c) was attributable: s 81(3)(f). It is for the board to determine whether anything received by the trustees of the scheme is to be treated as a payment received for any such act or omission as is referred to in s 81(3)(f); and in s 81 'payment' includes any money or money's worth: s 81(4).

17 Ibid s 81(5). If s 81(5) is not complied with, s 3 (prohibition orders: see PARA 604 ante) applies to any trustee who has failed to take all such steps as are reasonable to secure compliance: s 81(6).

## UPDATE

### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

### **643 Cases where compensation provisions apply**

NOTES--SI 1997/665 further amended: SI 2001/3649, SI 2004/3350.

NOTES 7, 15--See the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/644. Application for and amount of compensation payments.

#### **644. Application for and amount of compensation payments.**

Compensation may be paid under the following provisions only on an application<sup>1</sup> made within the qualifying period<sup>2</sup> by a prescribed<sup>3</sup> person<sup>4</sup>. Such an application must be made in the manner, and give the information, required by the Pensions Compensation Board<sup>5</sup>. The board may extend, or further extend, the qualifying period<sup>6</sup>.

Where in the opinion of the board the compensation provisions apply<sup>7</sup> to such an application for compensation in respect of a trust scheme<sup>8</sup>, and the board has determined the settlement date<sup>9</sup>, the board may make a payment or payments to the trustees of the scheme in accordance with the following provisions<sup>10</sup>.

The amount of any payment must be determined in accordance with regulations<sup>11</sup> and must take account of any payment already made in anticipation<sup>12</sup>, and the board must give written notice of its determination to the person who made the application and (if different) to the trustees<sup>13</sup>. The amount of the payment or (if there is more than one) the aggregate:

- 1479 (1) must not exceed 90 per cent of the shortfall at the application date<sup>14</sup>, together with interest at the prescribed rate for the prescribed period on the shortfall or (if the shortfall comprises more than one reduction in value) on each of the reductions<sup>15</sup>; and also
- 1480 (2) in the case of a salary-related scheme<sup>16</sup>, must not exceed the amount which, on the settlement date, is required to be paid to the trustees of the scheme in order to secure that the value on that date of the assets of the scheme is equal to 90 per cent of the amount on that date of the liabilities of the scheme<sup>17</sup>.

1    le one to which the Pensions Act 1995 s 81 applies: see PARA 643 ante.

2    For the purposes of *ibid* s 82, the 'qualifying period', subject to s 82(5), is the period expiring with the period of 12 months mentioned in s 82(4): s 82(3). The period of 12 months referred to in s 82(3) is that beginning with the later of the following times: (1) the insolvency date; (2) when the auditor or actuary of the scheme, or the trustees, knew or ought reasonably to have known that a reduction of value falling within s 81(1)(c) had occurred, being, in each case, a time after the appointed day (see PARA 643 note 15 ante): s 82(4). 'The insolvency date' means the date on which the employer became insolvent (s 81(3)(c)) or, where a scheme applies to earners in employments under different employers, the date on which the last employer became insolvent (see the Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, reg 8(1)(b)). For the meaning of 'employer' see PARA 598 note 4 ante. As to when an employer is taken to be insolvent see the Pension Schemes Act 1993 s 123(1); and PARA 853 note 5 post (definition applied by the Pensions Act 1995 s 81(8)). As to the auditor and the actuary see PARA 825 post; and as to 'the appointed day' see PARA 643 note 14 ante.

3    For the meaning of 'prescribed' see PARA 555 note 1 ante.

4    Pensions Act 1995 s 82(1). An application for compensation in respect of a scheme may only be made by (1) the trustees of a scheme, or their representative; (2) a person concerned with the administration of, or the provision of benefits under, the scheme, or his representative; or (3) a member of, or beneficiary under, the scheme, or his representative: Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, reg 4. As to the procedure on determination of an application see PARA 645 post; and as to review of determinations see PARA 648 et seq post.

5    Pensions Act 1995 s 82(2). As to the Pensions Compensation Board see PARA 637 ante.

6    *Ibid* s 82(5).

7 le the provisions of *ibid* s 81: see PARA 643 ante.

8 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

9 'The settlement date' means the date determined by the board, after consulting the trustees, to be the date after which further recoveries of value (see PARA 643 note 16 ante) are unlikely to be obtained without disproportionate cost or within a reasonable time: Pensions Act 1995 s 81(3)(d).

10 *Ibid* s 83(1).

11 For the meaning of 'regulations' see PARA 600 note 2 ante. Regulations may modify the compensation provisions in their application to trust schemes falling within a prescribed class or description: *ibid* s 86. For the meaning of 'modify' see the Pension Schemes Act 1993 s 181(1); and PARA 664 note 10 post (definition applied by the Pensions Act 1995 s 124(5)).

As to the amount of compensation see the Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, reg 5, which is modified in relation to money purchase schemes by reg 10(1)(b) and in relation to ear-marked schemes by reg 10(2)(b). For the meaning of 'money purchase scheme' and 'ear-marked scheme' see PARA 643 note 10 ante; and as to general modifications of the compensation provisions see PARA 656 post.

12 le under the Pensions Act 1995 s 84 (see PARA 646 post): see s 83(2).

13 *Ibid* s 83(2).

14 As to 'the application date' see PARA 643 note 9 ante. 'The shortfall at the application date' means the amount of the reduction falling within *ibid* s 81(1)(c) or (if there was more than one such reduction) the aggregate of the reductions, being the amount or aggregate immediately before the application date: s 81(3)(e).

15 *Ibid* s 83(3)(a).

16 For the meaning of 'salary-related scheme' see PARA 643 note 8 ante.

17 Pensions Act 1995 s 83(3)(b).

## UPDATE

### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see PARA 676A.

### 637-659 The Pensions Compensation Board

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had

been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

#### **644 Application for and amount of compensation payments**

NOTE 11--SI 1997/665 reg 5 amended: SI 2001/1218, SI 2004/3350. SI 1997/665 reg 10 revoked: SI 2004/3350.

NOTES 13, 15--See the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.1.

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REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/645.  
Procedure on determination of application for payment.

#### **645. Procedure on determination of application for payment.**

The Pensions Compensation Board must, within 14 days of receipt of an application<sup>1</sup>, send to the applicant a written notice acknowledging receipt of the application and setting out the steps to be taken by the board in determining the application<sup>2</sup>. After an application has been sent or delivered to the board at its proper address it may not be withdrawn without the board's consent in writing, but that consent must not be unreasonably refused<sup>3</sup>.

Where an applicant dies or is unable or unwilling to continue with an application, the board may appoint such other person as it thinks fit as a successor to the applicant, if that other person consents in writing, and the application must be carried on by that other person in substitution for the applicant<sup>4</sup>.

The board may hold an oral hearing in respect of any question which it is within its functions to determine<sup>5</sup>. Where the board so decides, it must fix the date, time and place for the hearing and, not less than 28 days<sup>6</sup> before that date, send to the applicant, and to such other persons as it appears to the board the justice of the case may require, a notice in writing specifying the date, time and place of the hearing, and the manner in which it is to be conducted<sup>7</sup>. The notice must also ask the person notified to confirm within 14 days of receipt of the notice whether or not that person or his representative, if any, will attend the hearing, and if so, the names and addresses of the witnesses, if any, that person or his representative intends to call<sup>8</sup>.

An oral hearing must be in public except where the board is satisfied that, by reason of the disclosure of intimate personal or financial circumstances, commercially sensitive information, or information communicated or obtained in confidence, it is just and reasonable for the hearing, or part of it, to be in private<sup>9</sup>. The board may exclude from the hearing, or part of it, any person whose conduct has disrupted or is likely, in the opinion of the board, to disrupt the hearing<sup>10</sup>. The following persons are entitled to attend, and, in the case of persons listed in heads (1) to (3) and (6) below, to be heard, at an oral hearing whether or not it takes place in public:

- 1481 (1) the applicant;
- 1482 (2) a witness called by the applicant or the board or by any other person entitled to be heard;
- 1483 (3) the trustees of the scheme to which the application relates;
- 1484 (4) a member of the Council on Tribunals or of the Scottish Committee of that Council;
- 1485 (5) the secretary to the board;
- 1486 (6) such other persons as it appears to the board the justice of the case may require<sup>11</sup>.

If the applicant or any other person entitled to be heard fails to attend or be represented at an oral hearing, the board may, unless it is satisfied that there is sufficient reason for that absence, hear and determine the application in the absence of that person or may adjourn the hearing<sup>12</sup>.

The board must conduct the oral hearing in such manner as it considers most suitable to the clarification of the issues before it, and generally as to the just handling of the proceedings<sup>13</sup>. The applicant and any other person entitled to be heard is entitled to give evidence, to call

witnesses, to question any witnesses and to address the board both on evidence and generally on the subject matter of the hearing<sup>14</sup>. The board may receive evidence of any fact which appears to the board to be relevant even if such evidence would be inadmissible in proceedings before a court of law, but must not refuse to admit any evidence which is admissible at law and is relevant<sup>15</sup>.

If the board is satisfied that it is just and reasonable to do so, it may permit the applicant to rely on grounds for the compensation claim which were not set out in the application, whether or not amended<sup>16</sup>.

The board must, within 14 days of making a determination as to whether to make a payment or payments to the trustees of the scheme to which the application relates, send written notice of its decision to the applicant, and, if different, to the trustees<sup>17</sup>. The written notice must contain:

- 1487 (a) a statement of reasons for the board's decision;
- 1488 (b) where a decision is made to award compensation, details of the terms and conditions, if any, subject to which the payment or payments will be made;
- 1489 (c) a statement that there is a right to request a review of the board's determination<sup>18</sup>.

The notice must be signed by the chairman of the board<sup>19</sup>.

1 For these purposes, 'application' means an application to the Pensions Compensation Board for compensation under the Pensions Act 1995 s 82 (see PARA 644 ante) or, as the case may be, under the corresponding Northern Ireland legislation; and the word 'applicant' must be construed accordingly: Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 2. As to the Pensions Compensation Board see PARA 637 ante.

2 Ibid reg 3. Any document required or authorised by the Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, to be sent or delivered to any person is duly sent or delivered if sent to that person's proper address by post or if delivered to that person or left at that person's proper address: reg 28(1). The proper address for the board, or the review board, is the address of the office of the board; and the proper address of any other person to whom any such document is to be sent or delivered is the address given by that person, or, if none, the last known address of that person, or, in the case of an incorporated company or body, the registered or principal office of that company or body: reg 28(2).

3 Ibid reg 4(1).

4 Ibid reg 4(2).

5 Ibid reg 5. The requirements of Pt II (regs 2-9) apply in respect of such hearings: reg 5. Any irregularity resulting from failure to comply with any of those provisions does not, however, of itself render the application in question or the proceedings in question void: reg 27(1). Clerical mistakes in any written statement of a determination or errors arising in such a document from an accidental slip or omission may be corrected by the chairman of the board certifying the correction in writing on the document: reg 27(2).

6 The time appointed by the Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, for the doing of any act or the taking of any step by any person may be extended by the board upon such terms, if any, as it appears to the board the justice of the case may require, and such extension may be granted although the request therefor is not made until after the expiration of the time appointed: reg 26.

7 Ibid reg 6(1).

8 Ibid reg 6(2). Where a person acts on behalf of another, that person may take all such steps and do all such things for the purposes of the Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, as that other person is thereby required or authorised to take or do: reg 25.

9 Ibid reg 7(1).

10 Ibid reg 7(2).

- 11 Ibid reg 7(3). As to the Council on Tribunals see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARAS 55-57.
- 12 Ibid reg 7(4).
- 13 Ibid reg 8(1).
- 14 Ibid reg 8(2).
- 15 Ibid reg 8(3).
- 16 Ibid reg 8(4).
- 17 Ibid reg 9(1).
- 18 Ibid reg 9(2). As to review of determinations see the Pensions Act 1995 s 80(2); and PARA 648 post.
- 19 Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 9(2). As to the chairman see PARA 637 ante.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

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REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/646.  
Payments made in anticipation.

#### **646. Payments made in anticipation.**

The Pensions Compensation Board<sup>1</sup> may, on an application for compensation<sup>2</sup>, make a payment or payments to the trustees of a trust scheme<sup>3</sup> where in its opinion:

- 1490 (1) the compensation provisions apply<sup>4</sup>, or may apply, to the application<sup>5</sup>; and
- 1491 (2) the trustees would not otherwise be able to meet liabilities falling within a prescribed class<sup>6</sup>,

but the board has not determined the settlement date<sup>7</sup>. Amounts payable under these provisions must be determined in accordance with regulations<sup>8</sup>. Where any such payment is made, the board may, except in prescribed circumstances<sup>9</sup>:

- 1492 (a) if it subsequently forms the opinion that the compensation provisions do not apply to the application for compensation in respect of the scheme<sup>10</sup>; or
- 1493 (b) if it subsequently forms the opinion that the amount of the payment was excessive,

recover so much of the payment as it considers appropriate<sup>11</sup>.

1 As to the Pensions Compensation Board see PARA 637 ante.

2 Ie under the Pensions Act 1995 s 82: see PARA 644 ante.

3 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

4 Ie where the Pensions Act 1995 s 81 (see PARA 643 ante) applies: see s 84(1)(a).

5 Ibid s 84(1)(a).

6 For the meaning of 'prescribed' see PARA 555 note 1 ante. The prescribed class of liabilities are (1) any liability for payment of pensions which has arisen at the application date; (2) any liability which arises between the application date and the settlement date for payment of (a) guaranteed minimum pensions; (b) pensions, other than guaranteed minimum pensions, payable to persons reaching normal pension age; (c) pensions payable to beneficiaries; (d) ill-health retirement pensions; (3) in the case of a scheme where some or all of the benefits that may be provided are money purchase benefits, any specified liability: Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, reg 6(1). The specified liability referred to is the approximate amount of any monthly pension that would have been payable in respect of money purchase benefits prior to the settlement date but for the loss: reg 6(2). Except where any liability for payment of a pension arises in connection with terminal illness, such liability does not for these purposes include any liability for payment of a lump sum, whether or not deriving from the commutation of pension rights; and a person is regarded as terminally ill where his expectation of life is less than one year, and the expression terminal illness is to be construed accordingly: reg 6(3), (4).

7 Pensions Act 1995 s 84(1)(b). As to the settlement date see PARA 644 note 9 ante.

8 Ibid s 84(2). For the meaning of 'regulations' see PARA 600 note 2 ante. Regulations may modify the compensation provisions in their application to trust schemes falling within a prescribed class or description: s 86. For the meaning of 'modify' see the Pension Schemes Act 1993 s 181(1); and PARA 664 note 10 post (definition applied by the Pensions Act 1995 s 124(5)). Payments made in anticipation must be calculated: (1) so that, so far as the board is reasonably able to achieve, the extent to which liabilities specified in the Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, reg 6(1) (see note 6 supra) are satisfied after the board has made a payment under the Pensions Act 1995 s 83 (see

PARA 644 ante) is undiminished; (2) so as to counter-balance any payments in anticipation made previously which were too great or too small; (3) so as not to exceed the amount required to enable the trustees of the scheme, prior to the settlement date, to meet such liabilities as are so specified; and (4) so as not to exceed 90% of the shortfall at the application date: Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, reg 6(5).

9 For these purposes, the prescribed circumstances in which any payment made under the Pensions Act 1995 s 84(1) may not be recovered, in whole or in part, are where such recovery would cause pensions in payment to be reduced: Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, reg 6(6).

10 Pensions Act 1995 s 84(3)(a).

11 Ibid s 84(3)(b).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

### **646 Payments made in anticipation**

NOTES 7-11--See the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.1.

NOTE 8--Head (4) revoked: SI 2004/3350.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/647. Surplus funds.

#### **647. Surplus funds.**

If the Secretary of State<sup>1</sup>, after consultation with the Pensions Compensation Board<sup>2</sup>, considers that the funds for the time being held by the board exceed what is reasonably required for the purpose of exercising its functions under Part I of the Pensions Act 1995<sup>3</sup>, he may by order require it to distribute any of those funds appearing to him to be surplus to its requirements among occupational pension schemes<sup>4</sup>. Such a distribution must be made in the prescribed<sup>5</sup> manner and subject to the prescribed conditions<sup>6</sup>. The board may invest any funds for the time being held by it which appear to it to be surplus to its requirements:

- 1494 (1) in any investment for the time being falling within Part I, Part II or Part III of Schedule 1 to the Trustee Investments Act 1961<sup>7</sup>; or
- 1495 (2) in any prescribed investment<sup>8</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 As to the Pensions Compensation Board see PARA 637 ante.

3 Ie the Pensions Act 1995 Pt I (ss 1-125): see PARA 598 et seq ante, 648 et seq post.

4 Ibid s 85(1). For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 post (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

5 For the meaning of 'prescribed' see PARA 555 note 1 ante. Regulations may modify the compensation provisions in their application to trust schemes falling within a prescribed class or description: ibid s 86. For the meaning of 'modify' see the Pension Schemes Act 1993 s 181(1); and PARA 664 note 10 post (definition applied by the Pensions Act 1995 s 124(5)). For the meaning of 'trust schemes' see PARA 604 note 2 ante.

6 Ibid s 85(2).

7 Ibid s 85(3)(a).

8 Ibid s 85(3)(b).

#### **UPDATE**

#### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

#### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be

exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

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REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/648.  
Review of decisions.

#### **648. Review of decisions.**

Subject to the following provisions, any determination by the Pensions Compensation Board<sup>1</sup> of a question which it is within its functions to determine is final<sup>2</sup>. The board may on the application of a person appearing to it to be interested:

- 1496 (1) at any time review any such determination (including a determination given by it on a previous review), if it is satisfied that there has been a relevant change of circumstances since the determination was made, or that the determination was made in ignorance of a material fact or based on a mistake as to a material fact or was erroneous in point of law<sup>3</sup>; and
- 1497 (2) at any time within a period of three months from the date of the determination, or within such longer period as it may allow in any particular case, review such a determination on any ground<sup>4</sup>.

The board's powers on such a review include power:

- 1498 (a) to vary or revoke any determination previously made<sup>5</sup>;
- 1499 (b) to substitute a different determination<sup>6</sup>; and
- 1500 (c) generally to deal with the matters arising on the review as if they had arisen on the original determination<sup>7</sup>,

and also include power to make savings and transitional provisions<sup>8</sup>.

Regulations<sup>9</sup> may make provision with respect to the procedure to be adopted on any application for a review under these provisions, or under any corresponding provision in force in Northern Ireland, and generally with respect to such applications and reviews<sup>10</sup>.

1 As to the Pensions Compensation Board see PARA 637 ante.

2 Pensions Act 1995 s 80(1).

3 Ibid s 80(2)(a).

4 Ibid s 80(2)(b).

5 Ibid s 80(3)(a).

6 Ibid s 80(3)(b).

7 Ibid s 80(3)(c).

8 Ibid s 80(3).

9 For the meaning of 'regulations' see PARA 600 note 2 ante.

10 Pensions Act 1995 s 80(4). Nothing in s 80(4) may be taken to prevent such a review being entered upon by the board without an application being made: s 80(5).

#### **UPDATE**

## **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

## **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

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REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/649.  
Applications for review.

#### **649. Applications for review.**

An application<sup>1</sup> must be made in writing, signed by the applicant and must state:

- 1501 (1) the name and address of the applicant and the nature of his connection with the scheme, if any;
- 1502 (2) the name and address of the applicant's representative<sup>2</sup>, if any, and whether the Pensions Compensation Board should send replies or notices concerning the application to that representative rather than to the applicant;
- 1503 (3) the grounds upon which a review of the determination is sought;
- 1504 (4) the particulars of the determination in respect of which a review is sought;
- 1505 (5) whether the applicant wishes to be heard on the application<sup>3</sup>.

The applicant must submit with the application, or within 28 days<sup>4</sup> thereafter, any documents upon which he wishes to rely in support of his application for review<sup>5</sup>.

The board must, within 14 days of receipt of an application, send to the applicant a written notice acknowledging receipt of the application and setting out the steps to be taken by the board in determining the application<sup>6</sup>.

The applicant may, at any time before receiving notice of the date of the review and after receiving notice of that date, with the leave of the board amend the grounds upon which a review of the determination is sought and submit any documents upon which he wishes to rely in support of those grounds as amended<sup>7</sup>.

The applicant may withdraw an application at any time by sending or delivering to the office of the board a written notice, signed by the applicant, stating that the application is withdrawn<sup>8</sup>. Where an applicant dies or is unable to continue with an application, the board may appoint as a successor to the applicant a person appearing to the board to be interested, if that person consents in writing, and the application for a review must be carried on by that person in substitution for the applicant<sup>9</sup>.

1 For these purposes, 'application' means, in relation to a determination by the Pensions Compensation Board of a question which it is within its functions to determine, an application to the board for a review of that determination, and the word 'applicant' must be construed accordingly: Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 10. As to the Pensions Compensation Board see PARA 637 et seq ante.

2 As to representatives see PARA 645 note 8 ante.

3 Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 11(1). Where the applicant wishes to be heard on the application, the board must not refuse to hear him unless it appears to the board that the application may be disposed of fairly without so doing: reg 11(2).

4 As to extension of time limits generally see PARA 645 note 6 ante.

5 Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 12.

6 Ibid reg 13.

7 Ibid reg 14.

8 Ibid reg 15(1).

9 Ibid reg 15(2).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

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REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/650.  
Notification of decision to review or refusal to review.

#### **650. Notification of decision to review or refusal to review.**

Upon receipt of an application<sup>1</sup> for a review, the Pensions Compensation Board<sup>2</sup> must decide whether to review the determination in relation to which the review is sought and within 56 days<sup>3</sup> of receipt of the application send to the applicant, and to such other persons as it appears to the board the justice of the case may require, a notice in writing containing the specified information<sup>4</sup>. The specified information is, in the case of a decision to review the determination, that decision together with a statement of:

- 1506 (1) the right to send written representations to the board at any time until they receive notification of the date fixed for the review or until such later date as the board may permit, in relation to the review generally;
- 1507 (2) the right, upon request being made within 28 days of receipt of the written notice, to have the review conducted by means of an oral hearing;
- 1508 (3) the procedure to be followed in relation to the review, whether or not it is conducted by means of an oral hearing<sup>5</sup>,

and, in the case of a decision to refuse to review the determination, that decision together with a statement of:

- 1509 (a) the reasons for the board's decision; and
- 1510 (b) the right to seek a review<sup>6</sup> of the decision<sup>7</sup>.

The board may not authorise any of its members individually to decide whether to review a previous determination to which these provisions apply<sup>8</sup>.

1 For the meaning of 'application' see PARA 649 note 1 ante.

2 As to the Pensions Compensation Board see PARA 637 ante.

3 Where in any particular case it is not reasonably practicable for the board to give such notice within the prescribed period, the board must within that period notify the persons entitled to receive such notice of the date by which it will be given and of the reasons for the delay: Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 16(4). As to the extension of time limits generally see PARA 645 note 6 ante.

4 Ibid reg 16(1).

5 Ibid reg 16(2).

6 Ie as specified under the Pensions Act 1995 s 80(2) or the corresponding Northern Ireland legislation: see PARA 648 ante.

7 Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 16(3).

8 Ibid reg 18.

#### **UPDATE**

#### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

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REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/651.  
Reviews initiated by the Pensions Compensation Board.

### **651. Reviews initiated by the Pensions Compensation Board.**

Where the Pensions Compensation Board<sup>1</sup> decides to review a determination without an application<sup>2</sup> having been made, it must within 14 days<sup>3</sup> of making such a decision send to such persons as it appears to the board the justice of the case may require a notice in writing containing the specified information<sup>4</sup> and a statement of facts relating to the review<sup>5</sup>. A person who receives such a statement of facts must reply to the board within 28 days of receipt of that statement, indicating whether and in what respect any of the facts are disputed and any further facts which, in the opinion of that person, are relevant to the review<sup>6</sup>.

The board may not authorise any of its members individually to decide whether to review a previous determination to which these provisions apply<sup>7</sup>.

1 As to the Pensions Compensation Board see PARA 637 ante.

2 For the meaning of 'application' for these purposes see PARA 649 note 1 ante.

3 As to the extension of time limits see PARA 645 note 6 ante.

4 Ie the information specified in the Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 16(2): see PARA 650 ante.

5 Ibid reg 17(1).

6 Ibid reg 17(2).

7 Ibid reg 18.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its

functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

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REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/652.  
Notice of date, time, place and manner of review; documentation.

## **652. Notice of date, time, place and manner of review; documentation.**

The Pensions Compensation Board must fix the date, time and place for the review<sup>1</sup> and, not less than 28 days<sup>2</sup> before that date, send to the applicant (if any), and to such other persons as it appears to the board the justice of the case may require, a notice in writing specifying the date, time and place of the review, and the manner in which it is to be conducted<sup>3</sup>. Where the board is to deal with a review by way of an oral hearing, the notice must also ask the person notified to confirm within 14 days of receipt of the notice whether that person or his representative<sup>4</sup>, if any, will attend the hearing, and if so, the names and addresses of the witnesses, if any, that person or his representative intends to call<sup>5</sup>.

The board may, upon the request of the applicant or otherwise, postpone the date of the review (whether or not it is to be dealt with by way of an oral hearing), in the interests of disposing fairly of the matter at issue<sup>6</sup>.

Not less than 28 days before the date fixed for the review, the board must send to the applicant (if any) and to such other persons as it appears to the board the justice of the case may require, a copy of or sufficient extracts from, or particulars of, any document or other material relevant to the review which the board has in its possession<sup>7</sup>.

1 'Review' means a review of a determination by the Pensions Compensation Board of a question which it is within its functions to determine: Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 1(2). As to the Pensions Compensation Board see PARA 637 ante.

2 As to time limits see PARA 645 note 6 ante.

3 Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 19(1).

4 As to representatives see PARA 645 note 8 ante.

5 Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 19(2).

6 Ibid reg 19(3).

7 Ibid reg 20.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property,

rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

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### **653. Procedure on a review.**

The Pensions Compensation Board<sup>1</sup> may not authorise any of its members individually to review a determination to which these provisions apply<sup>2</sup>. The person who acts as chairman of the review board<sup>3</sup> must not be the member of the board who acted as chairman of the proceedings at which the determination the subject of the review was made<sup>4</sup>.

In the event that the votes of members of the review board are equally divided, the chairman of the review board has a second and casting vote<sup>5</sup>.

An oral hearing of a review must be in public except where the review board is satisfied that, by reason of the disclosure of intimate personal or financial circumstances, commercially sensitive information, or information communicated or obtained in confidence, it is just and reasonable for the hearing, or part of it, to be in private<sup>6</sup>. The review board may exclude from the hearing, or part of it, any person whose conduct has disrupted or is likely, in the opinion of the board, to disrupt the hearing<sup>7</sup>. The following persons are entitled to attend, and, in the case of persons listed in heads (1), (4), (5) and (7) below, to be heard at, an oral hearing of a review whether or not it takes place in public:

- 1511 (1) the applicant (if any);
- 1512 (2) a member of the board who is not appointed to the review board;
- 1513 (3) a member of the Council on Tribunals or of the Scottish Committee of that Council;
- 1514 (4) a witness called by the applicant (if any) or the board or by any other person entitled to be heard;
- 1515 (5) the trustees of the scheme to which the application relates;
- 1516 (6) the secretary to the board;
- 1517 (7) such other person as it appears to the board the justice of the case may require<sup>8</sup>.

If the applicant or any other person entitled to be heard fails to attend or be represented at an oral hearing of a review, the review board may, unless it is satisfied that there is sufficient reason for such absence, hear and determine the review in the absence of that person or may adjourn the hearing<sup>9</sup>.

The review board must conduct the oral hearing of the review in such manner as the review board considers most suitable to the clarification of the issues before it and generally as to the just handling of the proceedings, including where necessary adjournment of the proceedings<sup>10</sup>. The applicant (if any) and any other person entitled to be heard is entitled to give evidence, to call witnesses, to question any witnesses and to address the review board both on evidence and generally on the subject matter of the hearing<sup>11</sup>. The review board may receive evidence of any fact which appears to the board to be relevant, even if such evidence would be inadmissible in proceedings before a court of law, but must not refuse to admit any evidence which is admissible at law and is relevant<sup>12</sup>.

The review board may, if it is satisfied that it is just and reasonable to do so, permit the applicant to rely on grounds for the review which were not stated in the application, whether or not amended<sup>13</sup>.

Any irregularity resulting from failure to comply with any of these provisions does not of itself render the proceedings void<sup>14</sup>.

- 1 As to the Pensions Compensation Board see PARA 637 ante.
- 2 Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 21(1).
- 3 The Pensions Compensation Board, when constituted for the purposes of carrying out a review, is referred to as 'the review board': see *ibid* reg 21(2).
- 4 *Ibid* reg 21(3).
- 5 *Ibid* reg 21(4).
- 6 *Ibid* reg 22(1).
- 7 *Ibid* reg 22(2).
- 8 *Ibid* reg 22(3). As to the Council on Tribunals see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARAS 55-57.
- 9 *Ibid* reg 22(4).
- 10 *Ibid* reg 23(1).
- 11 *Ibid* reg 23(2).
- 12 *Ibid* reg 23(3).
- 13 *Ibid* reg 23(4).
- 14 See *ibid* reg 27(1).

## UPDATE

### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see PARA 676A.

### 637-659 The Pensions Compensation Board

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had

been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/654. Notification of decision of review board.

#### **654. Notification of decision of review board.**

The decision of the review board<sup>1</sup> must be recorded in a document which must also contain a statement of the reasons for that decision and of the right to request a review<sup>2</sup> and must be signed and dated by the chairman of the review board<sup>3</sup>.

The Pensions Compensation Board<sup>4</sup> must, within 14 days<sup>5</sup> of making the decision, send a copy of the document recording the decision to the applicant (if any), and, if different, to the trustees<sup>6</sup>. Clerical mistakes in any written statement of a determination or errors arising in such a document from an accidental slip or omission may be corrected by the chairman of the review board certifying the correction in writing on the document<sup>7</sup>.

1 For the meaning of 'review board' see PARA 653 note 3 ante.

2 Ie as specified under the Pensions Act 1995 s 80(2): see PARA 648 ante.

3 Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 24(1).

4 As to the Pensions Compensation Board see PARA 637 ante.

5 As to time limits see PARA 645 note 6 ante.

6 Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 24(2).

7 Ibid reg 27(2).

### **UPDATE**

#### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

#### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its

functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/655. Publication of decisions.

### **655. Publication of decisions.**

The Pensions Compensation Board<sup>1</sup> may publish its decisions as it considers appropriate, but in doing so must have regard to the need to preserve the confidentiality of any documentary evidence submitted in relation to the application<sup>2</sup> which the board has reason to believe is commercially sensitive or confidential for some other reason, and of any evidence heard in private, and for that purpose may make any necessary amendments to the text of a decision<sup>3</sup>.

<sup>1</sup> As to the Pensions Compensation Board see PARA 637 ante.

<sup>2</sup> For the meaning of 'application' see PARA 649 note 1 ante.

<sup>3</sup> Pensions Compensation Board (Determinations and Review Procedure) Regulations 1997, SI 1997/724, reg 29.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/656. Modification of compensation provisions in relation to mixed benefit, multi-employer and partially approved schemes.

**656. Modification of compensation provisions in relation to mixed benefit, multi-employer and partially approved schemes.**

Where some, but not all, of the benefits that may be provided under a pension scheme<sup>1</sup> are money purchase benefits<sup>2</sup> and the assets out of which money purchase benefits are provided are distinct from the assets out of which other benefits are provided, and cannot be used for the purposes of providing any other benefits, then the compensation provisions and the relevant regulations<sup>3</sup> apply as if the assets out of which money purchase benefits are provided, and the proportion of the liabilities which is attributable to the provision of money purchase benefits, were the assets and liabilities of a separate scheme<sup>4</sup>. Where, however, the assets out of which money purchase benefits are provided are not distinct from the assets out of which other benefits are provided, or are so distinct but can be used for the purposes of providing other benefits, then those provisions apply as if the proportion of the liabilities which, in the opinion of the Pensions Compensation Board<sup>5</sup>, is attributable to the provision of money purchase benefits, and a like proportion of the assets, were the liabilities and assets of a separate scheme<sup>6</sup>.

Where a scheme in relation to which there is more than one employer is divided into two or more sections and the provisions of the scheme are such that:

- 1518 (1) different sections of the scheme apply to different employers or groups of employers (whether or not more than one section applies to any particular employer or groups including any particular employer);
- 1519 (2) contributions payable to the scheme by an employer, or by a member in employment under that employer, are allocated to that employer's section (or, if more than one section applies to the employer, the section which is appropriate in respect of the employment in question); and
- 1520 (3) a specified part or proportion of the assets of the scheme is attributable to each section and cannot be used for the purposes of any other section;

or where:

- 1521 (a) a scheme which has been such a scheme as is mentioned in heads (1) to (3) above is divided into two or more sections some or all of which apply only to members who are not in pensionable service under the section;
- 1522 (b) the provisions of the scheme have not been amended so as to prevent the conditions mentioned in those heads being satisfied in relation to two or more sections; but
- 1523 (c) those conditions have ceased to be satisfied in relation to one or more sections by reason only of there being no members in pensionable service under the section and no contributions which are to be allocated to it,

the compensation provisions apply<sup>7</sup> as if each section of the scheme were a separate scheme<sup>8</sup>.

Where a scheme is not an approved scheme<sup>9</sup> but contains a section which is treated<sup>10</sup> by the Board of Inland Revenue as an approved scheme, the compensation provisions apply to that section as if it were a separate scheme<sup>11</sup>.

- 1 As to the schemes to which these provisions apply see PARA 643 ante.
- 2 Ie within the meaning of the Pension Schemes Act 1993 s 181(1): see PARA 811 note 2 post.
- 3 For the meaning of 'the compensation provisions' see PARA 643 note 13 ante. The regulations referred to are the Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665: see PARA 643 et seq ante.
- 4 Ibid reg 7(1), (2).
- 5 As to the Pensions Compensation Board see PARA 637 ante.
- 6 Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, reg 7(3). For modifications in respect of money purchase and ear-marked schemes see reg 10; and PARA 644 note 11 ante.
- 7 For other modifications in respect of multi-employer schemes see ibid reg 8(1); and PARA 646 ante.
- 8 Ibid reg 7(2). For these purposes, there must be disregarded (1) any provisions of the scheme by virtue of which contributions or transfers of assets may be made to make provision for death benefits; and where reg 7(2) applies and contributions or transfers so made to a section ('the death benefits section'), the assets of which may only be applied for the provision of death benefits, the death benefits section must also be treated as if it were a separate scheme for the purposes of the compensation provisions (reg 7(3)); (2) any provisions of the scheme by virtue of which, on the winding up of the scheme or a section, assets attributable to one section may be used for the purposes of another section (reg 7(4)).
- 9 For the meaning of 'approved scheme' see PARAS 643 note 14 ante, 741 post.
- 10 Ie by virtue of the Income and Corporation Taxes Act 1988 s 611(3): see PARA 741 post.
- 11 Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, reg 9.

## UPDATE

### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see PARA 676A.

### 637-659 The Pensions Compensation Board

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had

been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

**656 Modification of compensation provisions in relation to mixed benefit, multi-employer and partially approved schemes**

TEXT AND NOTES--SI 1997/665 reg 7 revoked: SI 2004/3350.

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REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/657.  
Provision of information to the Pensions Compensation Board.

### **657. Provision of information to the Pensions Compensation Board.**

In the case of any trust scheme<sup>1</sup>:

- 1524 (1) a trustee, professional adviser<sup>2</sup> or employer<sup>3</sup>; and
- 1525 (2) any other person appearing to the Pensions Compensation Board<sup>4</sup> to be a person who holds, or is likely to hold, information relevant to the discharge of the board's functions<sup>5</sup>,

must, if required to do so by the board by notice in writing, produce any document<sup>6</sup> relevant to the discharge of those functions<sup>7</sup>.

To comply with this provision the document must be produced in such a manner, at such a place and within such a period as may be specified in the notice<sup>8</sup>.

A person who without reasonable excuse neglects or refuses to produce a document when required to do so under these provisions is guilty of an offence<sup>9</sup> and liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>10</sup>. Such an offence may be charged by reference to any day or longer period of time; and a person may be convicted of a second or subsequent offence by reference to any period of time following the preceding conviction of the offence<sup>11</sup>.

Any person who knowingly or recklessly provides the board with information which is false or misleading in a material particular is guilty of an offence if the information is provided in circumstances in which the person providing the information intends, or could reasonably be expected to know, that it would be used by the board for the purpose of discharging its functions under the Pensions Act 1995 or any corresponding enactment in force in Northern Ireland<sup>12</sup>. Any person who intentionally and without reasonable excuse alters, suppresses, conceals or destroys any document which he is or is liable to be required so to produce to the board is also guilty of an offence<sup>13</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 As to professional advisers see PARA 825 et seq post.

3 Pensions Act 1995 s 110(1)(a). For the meaning of 'employer' see PARA 598 note 4 ante.

4 As to the Pensions Compensation Board see PARA 637 ante.

5 Pensions Act 1995 s 110(1)(b).

6 In *ibid* ss 110, 111, 'document' includes information recorded in any form, and any reference to production of a document, in relation to information recorded otherwise than in legible form, is to producing a copy of the information in legible form: s 110(3).

7 *Ibid* s 110(1). Nothing in ss 110, 111 requires a person: (1) to answer any question or give any information if to do so would incriminate that person or that person's spouse; or (2) to produce any document if he would be entitled to refuse to produce the document in any proceedings in any court on the grounds that it was the subject of legal professional privilege or, in Scotland, that it contained a confidential communication made by or to an advocate or solicitor in that capacity: s 112.

8 *Ibid* s 110(2).

9 Ibid s 111(1). As to savings for certain privileges see note 7 supra.

10 Ibid s 111(2). As to the standard scale see PARA 172 note 3 ante.

11 Ibid s 111(3).

12 Ibid s 111(4). Any person guilty of an offence under s 111(4) or s 111(5) is liable on summary conviction to a fine not exceeding the statutory maximum, and on conviction on indictment, to imprisonment or a fine, or both: s 111(6). As to the statutory maximum see PARA 403 note 2 ante.

13 Ibid s 111(5); and see note 12 supra.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

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## **658. Publishing reports.**

The Pensions Compensation Board<sup>1</sup> may, if it considers it appropriate to do so in any particular case, publish in such form and manner as it thinks fit a report of any investigation under Part I of the Pensions Act 1995<sup>2</sup> and of the result of that investigation<sup>3</sup>. For the purposes of the law of defamation, the publication of any matter by the board is absolutely privileged<sup>4</sup>.

1 As to the Pensions Compensation Board see PARA 637 ante.

2 Ie the Pensions Act 1995 Pt I (ss 1-125): see PARA 598 et seq ante, 659 et seq post.

3 Ibid s 113(1).

4 Ibid s 113(2). As to absolute privilege see LIBEL AND SLANDER vol 28 (Reissue) PARA 94 et seq.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

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REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/659.  
Disclosure of information.

### **659. Disclosure of information.**

A person to whom the following provisions apply<sup>1</sup> may disclose to the Pensions Compensation Board<sup>2</sup> any information received by him under or for the purposes of any enactment<sup>3</sup> if the disclosure is made by him for the purpose of enabling or assisting the board to discharge any of its functions<sup>4</sup>. In the case of information which a person holds or has held in the exercise of functions of the Commissioners of Inland Revenue or their officers<sup>5</sup>, and relating to any tax within the general responsibility of the commissioners<sup>6</sup>, the above provision does not authorise any disclosure unless made in accordance with an authorisation given by the commissioners<sup>7</sup>.

The board may disclose to a person to whom these provisions apply any information received by the board under or for the purposes of any enactment, where the disclosure is made by the board:

- 1526 (1) for any purpose connected with the discharge of its functions<sup>8</sup>; or
- 1527 (2) for the purpose of enabling or assisting that person to discharge any of his functions<sup>9</sup>.

In the case of any such information<sup>10</sup>, the above provision does not authorise any disclosure of that information by the board unless made:

- 1528 (a) to, or in accordance with authority duly given by, the Commissioners of Inland Revenue or the Commissioners of Customs and Excise<sup>11</sup>; or
- 1529 (b) with a view to the institution of, or otherwise for the purposes of, criminal proceedings under the Pensions Act 1995 or the Pension Schemes Act 1993<sup>12</sup>, or any enactment in force in Northern Ireland corresponding to either of them<sup>13</sup>.

1 The Pensions Act 1995 s 114 applies to the following (and, accordingly, in s 114 'person' must be construed as including any of them): (1) any department of the government (including the government of Northern Ireland); (2) the Director of Public Prosecutions; (3) the Director of Public Prosecutions for Northern Ireland; (4) the Lord Advocate; (5) any constable; (6) any designated agency or recognised self-regulating organisation (within the meaning of the Financial Services Act 1986); (7) a recognised professional body (within the meaning of the Insolvency Act 1986 s 391: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 48; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 14); (8) the Pensions Ombudsman (see PARA 663 post); (9) the Policyholders Protection Board; (10) the Occupational Pensions Regulatory Authority (see PARA 637 ante); (11) the Registrar of Occupational and Personal Pension Schemes (see PARA 661 post); (12) the Official Receiver, or, in Northern Ireland, the Official Receiver for Northern Ireland; and (13) such other persons as may be prescribed: Pensions Act 1995 s 114(7).

2 As to the Pensions Compensation Board see PARA 637 ante.

3 For the meaning of 'enactment' see PARA 612 note 16 ante.

4 Pensions Act 1995 s 114(1). Nothing in s 114 must be construed as affecting any power of disclosure exercisable apart from s 114: s 114(6).

5 Ibid s 114(2)(a).

6 Ibid s 114(2)(b).

7 Ibid s 114(2).

- 8 Ibid s 114(3)(a).
- 9 Ibid s 114(3)(b). Where any information disclosed to the board under s 114 is so disclosed subject to any express restriction on the disclosure of the information by the board, the board's power of disclosure under s 114(3) is, in relation to the information, exercisable by it subject to any such restriction: s 114(4).
- 10 Ie as is mentioned in ibid s 114(2): see s 114(5).
- 11 Ibid s 114(5)(a).
- 12 As to offences generally see PARAS 869-870, 970-971 post.
- 13 Pensions Act 1995 s 114(5)(b). For the meaning of 'prescribed' see PARA 555 note 1 ante.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

### **659 Disclosure of information**

NOTE 1--The Policyholders Protection Board ceases to exist: Financial Services and Markets Act 2000 s 416(3)(b).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/659A. The Board of the Pension Protection Fund: general.

### **659A. The Board of the Pension Protection Fund: general.**

The following provisions are partly in force: SI 2004/3350, SI 2005/275, SI 2005/1720, SI 2005/2447, SI 2005/3331, SI 2006/560, SI 2006/2272. The Pensions Act 2004 Pt 2 Ch 1 (ss 107-119) makes provision relating to the Board.

For general and supplementary provision relating to the Pensions Act 2004 see PARA 636A.

The following provisions are in force unless otherwise stated.

#### **1. Establishment**

A body corporate to be called the Board of the Pension Protection Fund (in the Pensions Act 2004 referred to as 'the Board') is established<sup>1</sup>.

The Board is to consist of the following members (1) a chairman, (2) the Chief Executive of the Board, and (3) at least five other persons ('ordinary members')<sup>2</sup>. The chairman must not be appointed from the staff of the Board or be the chairman of the Regulator<sup>3</sup>. The number of ordinary members must not exceed any maximum number which may be prescribed<sup>4</sup>. At least two ordinary members must be appointed from the staff of the Board<sup>5</sup>. No member of the Determinations Panel established by the Regulator<sup>6</sup>, or member of the staff of the Regulator, is eligible for appointment as a member of the Board<sup>7</sup>. Any power to appoint ordinary members must be exercised so as to secure that a majority of the members of the Board are non-executive members<sup>8</sup>.

Further provision about the Board is made, including provision as to (a) the appointment of members, (b) the terms of appointment, tenure and remuneration of members, (c) the appointment of the Chief Executive and other staff, (d) the proceedings of the Board, (e) its accounts, and (f) the status and liability of the Board, its members and staff<sup>9</sup>.

1 Pensions Act 2004 s 107.

2 Ibid s 108(1).

3 Ibid s 108(2). For the meaning of 'the Regulator' see PARA 636A.2.

4 Ibid s 108(3) (not yet in force). For the meaning of 'prescribed' see PARA 636A.3. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

5 Pensions Act 2004 s 108(4).

6 Is established under ibid s 9 (see PARA 636A.7).

7 Ibid s 108(5).

8 Ibid s 108(6). In Pt 2 (ss 107-220) (1) references to executive members of the Board are to (a) the Chief Executive, and (b) the ordinary members appointed from the staff of the Board, and (2) references to non-executive members of the Board are to members who are not executive members: s 108(7).

9 See ibid s 109, Sch 5 (partly in force). See also the Pension Protection Fund (Appointment of Ordinary Members) Regulations 2005, SI 2005/616; and the Pension Protection Fund (Valuation of the Assets and Liabilities of the Pension Protection Fund) Regulations 2006, SI 2006/597.

## 2. Board's functions

The Board<sup>1</sup> must hold, manage and apply, in accordance with Part 2 of the Pensions Act 2004<sup>2</sup> and any provision in force in Northern Ireland corresponding to it (1) a fund to be known as the Pension Protection Fund, and (2) a fund to be known as the Fraud Compensation Fund<sup>3</sup>. The Board also has such other functions as are conferred on it by, or by virtue of, the Pensions Act 2004 or any other enactment<sup>4</sup>.

The Board may do anything which (a) is calculated to facilitate the exercise of its functions, or (b) is incidental or conducive to their exercise<sup>5</sup>.

1 In the Pensions Act 2004, unless the context otherwise requires 'the Board' has the meaning given by s 107 (see PARA 659A.1): s 318(1).

2 Ie *ibid* ss 107-220.

3 *Ibid* s 110(1). Sections 175 (see PARA 659C.38) and 189 (see PARA 659D.6) make provision for contributions to those funds to be levied by the Board: s 110(2).

4 *Ibid* s 110(3). For the meaning of 'enactment' see PARA 636A.2.

5 *Ibid* s 111.

## 3. Non-executive functions

Specified functions<sup>1</sup> (in Part 2 of the Pensions Act 2004<sup>2</sup> referred to as 'the non-executive functions') are functions of the Board<sup>3</sup>. The Board must establish a committee to discharge the non-executive functions on its behalf<sup>4</sup>. Only non-executive members of the Board may be members of that committee<sup>5</sup>. The committee established under these provisions must prepare a report on the discharge of the non-executive functions for inclusion in the Board's annual report to the Secretary of State<sup>6</sup>. The committee's report must relate to the same period as that covered by the Board's report<sup>7</sup>. The members of any sub-committee of the committee<sup>8</sup> (1) may include persons who are not members of the committee, but (2) must not include persons who are executive members or other staff of the Board<sup>9</sup>. The committee may authorise any of its sub-committees to discharge on its behalf (a) any of the non-executive functions; (b) the duty to prepare a report<sup>10</sup>.

1 Ie the functions listed in the Pensions Act 2004 s 112(4).

2 Ie *ibid* ss 107-220.

3 *Ibid* s 112(1). The non-executive functions are (1) the duty to keep under review the question whether the Board's internal financial controls secure the proper conduct of its financial affairs; (2) the duty to determine under Sch 5 para 12(5)(a), subject to the approval of the Secretary of State, the terms and conditions as to remuneration of any Chief Executive appointed under Sch 5 para 12(4); (3) the duty to determine under Sch 5 para 13(3)(a), subject to the approval of the Secretary of State, the terms and conditions as to remuneration of any member of the staff who is also to be an executive member of the Board; (4) the duty to determine under Sch 5 para 13(3)(b), the terms and conditions as to remuneration of any member of the staff of a description prescribed for the purposes of that provision: s 112(4). As to Sch 5 see PARA 659A.1.

4 *Ibid* s 112(2).

5 *Ibid* s 112(3).

6 Under *ibid* s 119 (see PARA 659A.10): s 112(5).

7 *Ibid* s 112(6).

8 Established by virtue of *ibid* Sch 5 para 15(2).

9 *Ibid* s 112(7).

10 Under *ibid* s 112(5): s 112(8).

#### **4. Investment of funds**

The Board may invest for the purposes of the prudent management of its financial affairs<sup>1</sup>. For these purposes<sup>2</sup> there must be at least two fund managers<sup>3</sup>.

1 Pensions Act 2004 s 113(1). When exercising the power conferred by s 113(1) in relation to the Pension Protection Fund, the Board must have regard to (1) the interests of persons who are or may become entitled to compensation under the pension compensation provisions (see s 162 and PARA 659C.26) and (2) the effect of the exercise of the power on the rate of any levy which may be imposed under s 174 (see PARA 659C.37) or 175 (see PARA 659C.38) and the interests which persons have in the rate of any such levy: s 113(2). When exercising the power conferred by s 113(1) in relation to the Fraud Compensation Fund, the Board must have regard to (a) the interests of members of occupational pension schemes in relation to which s 189(1) (see PARA 695D.6), applies, and (b) the effect of the exercise of the power on the level of any levy which may be imposed under s 189 and the interests which persons have in the rate of any such levy: s 113(3). For the meaning of 'member' and 'occupational pension scheme' see PARA 636A.3.

2 *Ie* for the purposes of *ibid* s 113(1).

3 *Ibid* s 113(4). For this purpose 'fund manager' means an individual who or firm which is appointed by the Board to manage the fund maintained under s 173 (the Pension Protection Fund: see PARA 659C.36): s 113(5). The Board must not appoint an individual or firm as a fund manager unless it is satisfied (1) in the case of an individual, that the individual has the appropriate knowledge and experience for managing the investments of the Pension Protection Fund, or (2) in the case of a firm, that arrangements are in place to secure that any individual who will exercise functions which the firm has as fund manager will, at the time he exercises those functions, have the appropriate knowledge and experience for managing the investments of that Fund: s 113(6).

#### **5. Investment principles**

The Board must secure (1) that a statement of investment principles<sup>1</sup> is prepared and maintained, and (2) that the statement is reviewed at such intervals, and on such occasions, as may be prescribed and, if necessary, revised<sup>2</sup>. Before preparing or revising a statement of investment principles, the Board must comply with any prescribed requirements<sup>3</sup>. A statement of investment principles must be in the prescribed form and cover, among other things, the prescribed matters<sup>4</sup>.

1 In the Pensions Act 2004 s 114 'statement of investment principles' means a written statement of the investment principles governing determinations about investments made by or on behalf of the Board: s 114(2).

2 *Ibid* s 114(1). See Pension Protection Fund (Statement of Investment Principles) Regulations 2005, SI 2005/675. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

3 Pensions Act 2004 s 114(3). See SI 2005/675.

4 Pensions Act 2004 s 114(4). See SI 2005/675.

#### **6. Borrowing**

The Board may (1) borrow from a deposit-taker<sup>1</sup> such sums as it may from time to time require for exercising any of its functions; (2) give security for any money borrowed by it<sup>2</sup>. The Board may not borrow if the effect would be (a) to take the aggregate amount outstanding in respect

of the principal of sums borrowed by it over its borrowing limit<sup>3</sup>, or (b) to increase the amount by which the aggregate amount so outstanding exceeds that limit<sup>4</sup>.

1 In the Pensions Act 2004 s 115 'deposit-taker' means (1) a person who has permission under the Financial Services and Markets Act 2000 Pt 4 to accept deposits, or (2) an EEA firm of the kind mentioned in the Financial Services and Markets Act 2000 Sch 3 para 5(b) which has permission under Sch 3 para 15 (as a result of qualifying for authorisation under Sch 3 para 12) to accept deposits: Pensions Act 2004 s 115(3). The definition of 'deposit-taker' in s 115(3) must be read with (a) the Financial Services and Markets Act 2000 s 22, (b) any relevant order under s 22, and (c) Sch 2: Pensions Act 2004 s 115(4). See further FINANCIAL SERVICES AND INSTITUTIONS.

2 Ibid s 115(1).

3 In ibid s 115 'borrowing limit' means such limit as the Secretary of State may specify by order: s 115(3). See Pension Protection Fund (Limit on Borrowing) Order 2005, SI 2005/339.

4 Pensions Act 2004 s 115(2).

## 7. Grants

The Secretary of State may pay the Board out of money provided by Parliament such sums as he may determine towards any of its expenses, other than expenditure which<sup>1</sup> is payable out of (1) the Pension Protection Fund, or (2) the Fraud Compensation Fund<sup>2</sup>.

1 By virtue of the Pensions Act 2004 s 173(3) (see PARA 659C.36) or 188(3) (see PARA 659D.5).

2 Ibid s 116.

## 8. Administration levy

Regulations may provide for the imposition of a levy ('administration levy') in respect of eligible schemes<sup>1</sup> for the purpose of meeting (1) expenditure of the Secretary of State relating to the establishment of the Board; (2) any expenditure of the Secretary of State relating to grants<sup>2</sup>. An administration levy is payable to the Secretary of State by or on behalf of (a) the trustees or managers<sup>3</sup> of an eligible scheme, or (b) any other prescribed person<sup>4</sup>. An administration levy is payable at the prescribed rate and at prescribed times<sup>5</sup>. An amount payable by a person on account of an administration levy is a debt due from him to the Secretary of State<sup>6</sup>. An amount so payable is recoverable by the Secretary of State or, if he so determines, by the Regulator on his behalf<sup>7</sup>.

1 See the Pensions Act 2004 s 126 and PARA 659C.1.

2 Ie any expenditure of the Secretary of State under ibid s 116 (see PARA 659A.7): s 117(1). See Occupational Pension Schemes (Levies) Regulations 2005, SI 2005/842 (amended by SI 2006/935, SI 2007/994, SI 2008/910). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). See further NOTE 7.

3 For the meaning of 'managers' see PARA 636A.11.

4 Pensions Act 2004 s 117(2) (head (b) in the text not yet in force).

5 Ibid s 117(3). See SI 2005/842. Before prescribing a rate under the Pensions Act 2004 s 117(3), the Secretary of State must consult the Board: s 117(4).

6 Ibid s 117(5). See further NOTE 7.

7 Ibid s 117(6).

Without prejudice to the generality of s 117(1), (5) and (6), regulations under s 117 may include provision relating to (1) the collection and recovery of amounts payable by way of levy under s 117; (2) the circumstances in which any such amount may be waived: s 117(7). See SI 2005/842.

## **9. Fees**

The following provisions are not yet in force.

Regulations may authorise the Board (1) to charge prescribed fees; (2) to charge fees sufficient to meet prescribed costs<sup>1</sup>. Such regulations may prescribe, or authorise the Board to determine, the time at which any fee is due<sup>2</sup>. Any fee which is owed to the Board by virtue of regulations under these provisions may be recovered as a debt due to the Board<sup>3</sup>.

1 Pensions Act 2004 s 118(1).

2 Ibid s 118(2).

3 Ibid s 118(3).

## **10. Annual reports to Secretary of State**

The Board must prepare a report for each financial year<sup>1</sup>. Each report (1) must deal with the activities of the Board in the financial year for which it is prepared<sup>2</sup>, and (2) must include the committee's report<sup>3</sup>. The Board must send each report to the Secretary of State as soon as practicable after the end of the financial year for which it is prepared<sup>4</sup>. The Secretary of State must lay before each House of Parliament a copy of every report received by him under the above provisions<sup>5</sup>.

1 Pensions Act 2004 s 119(1). In s 119 'financial year' means (1) the period beginning with the date on which the Board is established and ending with the next following 31 March, and (2) each successive period of 12 months: s 119(6).

2 Including the matters mentioned in ibid s 119(3). Those matters are (1) the strategic direction of the Board and the manner in which it has been kept under review; (2) the steps taken to scrutinise the performance of the Chief Executive in securing that the Board's functions are exercised efficiently and effectively; (3) the Board's objectives and targets and the steps taken to monitor the extent to which they are being met: s 119(3).

3 I.e. the report prepared under ibid s 112(5) (see PARA 659A.3) by the committee established under s 112: s 119(2).

4 Ibid s 119(4).

5 Ibid s 119(5).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property,

rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/659B. The Board of the Pension Protection Fund; information relating to employer's insolvency etc.

## **659B. The Board of the Pension Protection Fund; information relating to employer's insolvency etc.**

### **1. Insolvency events**

The following provisions are in force unless otherwise stated: SI 2005/275, SI 2005/1720.

The following provisions<sup>1</sup> apply where, in the case of an occupational pension scheme<sup>2</sup>, an insolvency event<sup>3</sup> occurs in relation to the employer<sup>4</sup>. The insolvency practitioner<sup>5</sup> in relation to the employer must give a notice to that effect within the notification period<sup>6</sup> to (1) the Board<sup>7</sup>, (2) the Regulator<sup>8</sup>, and (3) the trustees or managers<sup>9</sup> of the scheme<sup>10</sup>. A notice under these provisions must be in such form and contain such information as may be prescribed<sup>11</sup>.

1    Ie the Pensions Act 2004 s 120.

2    For the meaning of 'occupational pension scheme' see PARA 636A.3.

3    For the meaning of 'insolvency event' see Pensions Act 2004 s 121(1)-(7) (s 121(4) amended by the Pension Protection Fund (Insolvent Partnerships) (Amendment of Insolvency Events) Order 2005, SI 2005/2893) which sets out when an insolvency event occurs in relation to an individual, a company and a partnership.

4    s 120(1). For the meaning of 'employers' see PARA 636A.15.

5    For the meaning of 'insolvency practitioner' see *ibid* s 121(9), (11) (s 121(9) partly in force).

6    For the purposes of *ibid* s 120(2) the 'notification period' is the prescribed period beginning with the later of (1) the insolvency date, and (2) the date the insolvency practitioner becomes aware of the existence of the scheme: s 120(3). See Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590; and PARA 636A.15. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). For the meaning of 'insolvency date' see Pensions Act 2004 s 121(8).

7    For the meaning of 'the Board' see PARA 659A.2.

8    For the meaning of 'the Regulator' see PARA 636A.2.

9    For the meaning of 'managers' see PARA 636A.11.

10   Pensions Act 2004 s 120(2).

11   *Ibid* s 120(4). See SI 2005/590; and PARA 636A.15. For the meaning of 'prescribed' see PARA 636A.3.

### **2. Status of scheme**

The following provisions<sup>1</sup> apply where an insolvency event has occurred in relation to the employer in relation to an occupational pension scheme<sup>2</sup>. An insolvency practitioner in relation to the employer must (1) if he is able to confirm that a scheme rescue is not possible, issue a notice to that effect (a 'scheme failure notice'), or (2) if he is able to confirm that a scheme rescue has occurred, issue a notice to that effect (a 'withdrawal notice')<sup>3</sup>. If a person who was acting as an insolvency practitioner in relation to the employer immediately before this provision<sup>4</sup> applies<sup>5</sup> has not been able to confirm in relation to the scheme (a) that a scheme rescue is not possible, or (b) that a scheme rescue has occurred, he must issue a notice to that effect<sup>6</sup>. Where an insolvency practitioner or former insolvency practitioner in relation to the

employer issues a notice under these provisions, he must give a copy of that notice to (i) the Board, (ii) the Regulator, and (iii) the trustees or managers of the scheme<sup>7</sup>. Regulations may require notices issued under these provisions (A) to be in a prescribed form; (B) to contain prescribed information<sup>8</sup>.

The following provisions<sup>9</sup> apply where the Board receives a notice<sup>10</sup> ('the section 122 notice')<sup>11</sup>. The Board must determine whether to approve the section 122 notice<sup>12</sup>. The Board must approve the section 122 notice if, and only if, it is satisfied that the insolvency practitioner or former insolvency practitioner who issued the notice was required to issue it<sup>13</sup>, and that the notice complies with any requirements imposed<sup>14</sup>.

1    Ie the Pensions Act 2004 s 122.

2    Ibid s 122(1).

3    Ibid s 122(2). For the purposes of s 122 (1) a person is able to confirm that a scheme rescue has occurred in relation to an occupational pension scheme if, and only if, he is able to confirm such matters as are prescribed for the purposes of this provision, and (2) a person is able to confirm that a scheme rescue is not possible, in relation to such a scheme if, and only if, he is able to confirm such matters as are prescribed for the purposes of this provision: s 122(5). See Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590; and PARA 636A.15. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). See further NOTE 7.

4    Ie the Pensions Act 2004 s 122(4).

5    Ibid s 122(4) applies where (1) in prescribed circumstances, insolvency proceedings in relation to the employer are stayed or come to an end, or (2) a prescribed event occurs: s 122(3). See SI 2005/590; and PARA 636A.15.

6    Pensions Act 2004 s 122(4). See further NOTE 7.

7    Ibid s 122(6). A person must comply with an obligation imposed on him by s 122(2), (4) or (6) as soon as reasonably practicable: s 122(7).

8    Ibid s 122(8). See SI 2005/590; and PARA 636A.15.

9    Ie the Pensions Act 2004 s 123.

10   Ie a notice under ibid s 122(6).

11   Ibid s 123(1).

12   Ibid s 123(2). Where the Board makes a determination for the purposes of s 123(2), it must issue a determination notice and give a copy of that notice to (1) the Regulator, (2) the trustees or managers of the scheme, (3) the insolvency practitioner or the former insolvency practitioner who issued the section 122 notice, (4) any insolvency practitioner in relation to the employer (who does not fall within head (3)), and (5) if there is no insolvency practitioner in relation to the employer, the employer: s 123(4). In s 123(4) 'determination notice' means a notice which is in the prescribed form and contains such information about the determination as may be prescribed: s 123(5). See SI 2005/590; and PARA 636A.15.

13   Under the Pensions Act 2004 s 122.

14   By virtue of ibid s 122(8): s 123(3).

### **3. Board's duties**

The following provisions<sup>1</sup> apply where in relation to an occupational pension scheme (1) the Board determines<sup>2</sup> not to approve a notice issued<sup>3</sup> by an insolvency practitioner or former insolvency practitioner in relation to the employer, or (2) an insolvency practitioner or former insolvency practitioner in relation to the employer fails to issue a notice<sup>4</sup> and the Board is satisfied that such a notice ought to have been issued<sup>5</sup>. The obligations on the insolvency practitioner or former insolvency practitioner<sup>6</sup> are to be treated as obligations imposed on the

Board and the Board must accordingly issue a notice<sup>7</sup>. Where a notice is issued<sup>8</sup> by the Board<sup>9</sup>, it has effect as if it were a notice issued<sup>10</sup> by an insolvency practitioner or, as the case may be, former insolvency practitioner in relation to the employer<sup>11</sup>.

For the purposes of Part 2 of the Pensions Act 2004<sup>12</sup>, a notice<sup>13</sup> is not binding until (a) the Board issues a determination notice<sup>14</sup> approving the notice, (b) the period within which the issue of the determination notice may be reviewed by virtue of Chapter 6 of Part 2 of the Pensions Act 2004<sup>15</sup> has expired, and (c) if the issue of the determination notice is so reviewed (i) the review and any reconsideration, (ii) any reference to the PPF Ombudsman<sup>16</sup> in respect of the issue of the notice, and (iii) any appeal against his determination or directions, has been finally disposed of and the determination notice has not been revoked, varied or substituted<sup>17</sup>. Where a notice becomes binding, the Board must as soon as reasonably practicable give a notice to that effect together with a copy of the binding notice to (A) the Regulator, (B) the trustees or managers of the scheme, (C) the insolvency practitioner or former insolvency practitioner who issued the notice<sup>18</sup> or, where that notice was issued by the Board<sup>19</sup>, the insolvency practitioner or former insolvency practitioner<sup>20</sup>, (D) any insolvency practitioner in relation to the employer (who does not fall within head (C)), and (E) if there is no insolvency practitioner in relation to the employer, the employer<sup>21</sup>.

1    Ie the Pensions Act 2004 s 124.

2    Under *ibid* s 123 (see PARA 659B.2).

3    Under *ibid* s 122 (see PARA 659B.2).

4    Under *ibid* s 122.

5    *Ibid* s 124(1).

6    Imposed by s 122(2) and (4).

7    As required under *ibid* s 122: s 124(2).

8    Under *ibid* s 122.

9    By virtue of *ibid* s 124.

10   Under *ibid* s 122.

11   *Ibid* s 124(3). Section 124(3) is subject to s 124(4) and (5): s 124(3). Where a notice is issued under s 122 by virtue of s 124, s 122(6) does not apply and the Board must, as soon as reasonably practicable, give a copy of the notice to (1) the Regulator, (2) the trustees or managers of the scheme, (3) the insolvency practitioner or former insolvency practitioner mentioned in s 124(1), (4) any insolvency practitioner in relation to the employer (who does not fall within head (3)), and (5) if there is no insolvency practitioner in relation to the employer, the employer: s 124(4). Where the Board (a) is required to issue a notice under s 122 by virtue of s 124, and (b) is satisfied that the notice ought to have been issued at an earlier time, it must specify that time in the notice and the notice is to have effect as if it had been issued at that time: s 124(5).

12   Ie *ibid* ss 107-220.

13   Issued under *ibid* s 122 (see PARA 659B.2).

14   Under *ibid* s 123 (see PARA 659B.2).

15   Ie *ibid* ss 206-218, Sch 9 (see PARA 659F).

16   In the Pensions Act 2004, unless the context otherwise requires 'the PPF Ombudsman' has the meaning given by s 209(1) (see PARA 659F.3): s 318(1).

17   *Ibid* s 125(1). Section 125(1) is subject to s 125(2): s 125(1). Where a notice is issued under s 122 by the Board by virtue of s 124, the notice is not binding until (1) the period within which the issue of the notice may be reviewed by virtue of Pt 2 Ch 6 has expired, and (2) if the issue of the notice is so reviewed (a) the review and any reconsideration, (b) any reference to the PPF Ombudsman in respect of the issue of the notice, and (c)

any appeal against his determination or directions, has been finally disposed of and the notice has not been revoked, varied or substituted: s 125(2).

18 Under ibid s 122.

19 By virtue of ibid s 124.

20 Mentioned in ibid s 124(1).

21 Ibid s 125(3). A notice under s 125(3) (1) must be in the prescribed form and contain such information as may be prescribed, and (2) where it is given in relation to a withdrawal notice issued under s 122(2)(b) which has become binding, must state the time from which the Board ceases to be involved with the scheme (see s 149 and PARA 659C.19): s 125(4).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

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## **659C. The Board of the Pension Protection Fund: Pension Protection.**

### **1. Eligible schemes**

In Part 2 of the Pensions Act 2004<sup>1</sup> references to an 'eligible scheme' are to an occupational pension scheme<sup>2</sup> which (1) is not a money purchase scheme<sup>3</sup>, and (2) is not a prescribed<sup>4</sup> scheme or a scheme of a prescribed description<sup>5</sup>. A scheme is not an eligible scheme if it is being wound up immediately before the day appointed<sup>6</sup> by the Secretary of State by order for the purposes of this provision<sup>7</sup>. Regulations may provide that where (a) an assessment period begins in relation to an eligible scheme<sup>8</sup>, and (b) after the beginning of that period, the scheme ceases to be an eligible scheme, the scheme is, in such circumstances as may be prescribed, to be treated as remaining an eligible scheme for the purposes of such of the provisions specified<sup>9</sup> as may be prescribed<sup>10</sup>.

1 le in the Pensions Act 2004 ss 107-220.

2 For the meaning of 'occupational pension scheme' see PARA 636A.3.

3 For the meaning of 'money purchase scheme' see PARA 636A.19.

4 For the meaning of 'prescribed' see PARA 636A.3.

5 Pensions Act 2004 s 126(1). See Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590 (see PARA 636A.15); Occupational Pension Schemes (Levies) Regulations 2005, SI 2005/842 (see PARA 659A.8). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). The Pensions Act 2004 s 126(1) is subject to s 126(2)-(5): s 126(1).

6 The appointed day for these purposes is 6 April 2005: SI 2005/599.

7 Pensions Act 2004 s 126(2).

8 See *ibid* s 132; and PARA 659C.7.

9 le the provisions mentioned in *ibid* s 126(4). Those provisions are (1) any provision of Pt 2, and (2) any other provision of the Pensions Act 2004 in which 'eligible scheme' has the meaning given by s 126: s 126(4).

10 *Ibid* s 126(3). See SI 2005/590; and PARA 636A.15.

Regulations may also provide that a scheme which would be an eligible scheme in the absence of the Pensions Act 2004 s 126(5) is not an eligible scheme in such circumstances as may be prescribed: s 126(5). See SI 2005/590; and PARA 636A.15.

### **2. Duty to assume responsibility for schemes following insolvency event**

The following provisions<sup>1</sup> apply where a qualifying insolvency event<sup>2</sup> has occurred in relation to the employer<sup>3</sup> in relation to an eligible scheme<sup>4</sup>. The Board<sup>5</sup> must assume responsibility for the scheme in accordance with Chapter 3 of Part 2 of the Pensions Act 2004<sup>6</sup> if (1) the value of the assets of the scheme<sup>7</sup> at the relevant time<sup>8</sup> was less than the amount of the protected liabilities at that time<sup>9</sup>, (2) after the relevant time a scheme failure notice is issued<sup>10</sup> in relation to the scheme and that notice becomes binding, and (3) a withdrawal event has not occurred in relation to the scheme in respect of a withdrawal notice which has been issued during the period (a) beginning with the occurrence of the qualifying insolvency event, and (b) ending immediately before the issuing of the scheme failure notice<sup>11</sup>, and the occurrence of such a

withdrawal event in respect of a withdrawal notice issued during that period is not a possibility<sup>12</sup>. The above provisions<sup>13</sup> are subject to provision dealing with cases where the Board must refuse to assume responsibility for a scheme<sup>14</sup>.

1    Ie the Pensions Act 2004 s 127.

2    For the purposes of ibid s 127, in relation to an eligible scheme an insolvency event ('the current event') in relation to the employer is a qualifying insolvency event if (1) it occurs on or after the day appointed under s 126(2) (see PARA 659C.1), and (2) it (a) is the first insolvency event to occur in relation to the employer on or after that day, or (b) does not occur within an assessment period (see s 132 and PARA 659C.7) in relation to the scheme which began before the occurrence of the current event: s 127(3). As to eligible schemes see PARA 659C.1.

3    For the meaning of 'employers' see PARA 636A.15.

4    Pensions Act 2004 s 127(1).

5    For the meaning of 'the Board' see PARA 659A.2.

6    Ie the Pensions Act 2004 ss 126-181.

7    For the purposes of ibid s 127 the reference in head (1) in the text to the assets of the scheme is a reference to those assets excluding any assets representing the value of any rights in respect of money purchase benefits under the scheme rules: s 127(4)(a). In the Pensions Act 2004, unless the context otherwise requires 'money purchase benefit' has the meaning given by the Pension Schemes Act 1993 s 181(1): Pensions Act 2004 s 318(1). As to the scheme rules see PARA 636A.19.

8    For the purposes of ibid s 127 'the relevant time' means the time immediately before the qualifying insolvency event occurs: s 127(4)(b).

9    See ibid ss 131 and 143 and PARAS 659C.6, 659C.15.

10   Under ibid s 122(2)(a) (see PARA 659B.2).

11   Under ibid s 122(2)(a).

12   Ibid s 127(2) (see s 149 and PARA 659C.19). See Case C-278/05 *Robins v Secretary of State for Work and Pensions* [2007] All ER (EC) 649, ECJ.

13   Ie Pensions Act 2004 s 127.

14   Ie subject to ibid ss 146 and 147 (see PARAS 659C.16, 659C.17): s 127(5).

### **3. Duty to assume responsibility for schemes following application or notification**

The following provisions<sup>1</sup> apply where, in relation to an eligible scheme, the trustees or managers<sup>2</sup> of the scheme (1) make an application<sup>3</sup> (a 'section 129 application'), or (2) receive a notice from the Board<sup>4</sup> (a 'section 129 notification')<sup>5</sup>. The Board must assume responsibility for the scheme in accordance with Chapter 3 of Part 2 of the Pensions Act 2004<sup>6</sup> if (a) the value of the assets of the scheme<sup>7</sup> at the relevant time<sup>8</sup> was less than the amount of the protected liabilities at that time<sup>9</sup>, (b) after the relevant time the Board issues a scheme failure notice<sup>10</sup> in relation to the scheme and that notice becomes binding, and (c) a withdrawal event has not occurred in relation to the scheme in respect of a withdrawal notice which has been issued during the period (i) beginning with the making of the section 129 application or, as the case may be, the receipt of the section 129 notification, and (ii) ending immediately before the issuing of the scheme failure notice<sup>11</sup>, and the occurrence of such a withdrawal event in respect of a withdrawal notice issued during that period is not a possibility<sup>12</sup>. The above provisions<sup>13</sup> are subject to provision dealing with cases where the Board must refuse to assume responsibility for a scheme<sup>14</sup>.

- 1    le the Pensions Act 2004 s 128.
- 2    For the meaning of 'managers' see PARA 636A.11.
- 3    Under the Pensions Act 2004 s 129(1) (see PARA 659C.4).
- 4    Under *ibid* s 129(5)(a).
- 5    *Ibid* s 128(1). An application under section 129(1) or notification under section 129(5)(a) is to be disregarded for the purposes of s 128(1) if it is made or given during an assessment period (see s 132 and PARA 659C.7) in relation to the scheme which began before the application was made or notification was given: s 128(4).
- 6    le *ibid* ss 126-181.
- 7    In *ibid* s 128(2) the reference in head (a) in the text to the assets of the scheme is a reference to those assets excluding any assets representing the value of any rights in respect of money purchase benefits under the scheme rules: s 128(3)(a).
- 8    In *ibid* s 128(2) 'the relevant time' means the time immediately before the section 129 application was made or, as the case may be, the section 129 notification was received: s 128(3)(b).
- 9    See *ibid* ss 131 and 143 and PARAS 659C.6, 659C.15.
- 10   Under *ibid* s 130(2) (see PARA 659C.5).
- 11   Under *ibid* s 130(2).
- 12   *Ibid* s 128(2) (see s 149 and PARA 659C.19).
- 13   le *ibid* s 128.
- 14   le subject to *ibid* ss 146 and 147 (see PARAS 659C.16, 659C.17): s 128(5).

#### **4. Applications and notifications**

Where the trustees or managers of an eligible scheme become aware that (1) the employer in relation to the scheme is unlikely to continue as a going concern, and (2) the prescribed requirements are met in relation to the employer, they must make an application to the Board for it to assume responsibility for the scheme<sup>1</sup>. Where the Board receives such an application, it must give a copy of the application to (a) the Regulator<sup>2</sup>, and (b) the employer<sup>3</sup>. An application must (i) be in the prescribed form and contain the prescribed information, and (ii) be made within the prescribed period<sup>4</sup>. Where the Regulator becomes aware that (A) the employer in relation to an eligible scheme is unlikely to continue as a going concern, and (B) the requirements mentioned in head (2) above are met in relation to the employer, it must give the Board a notice to that effect<sup>5</sup>. Regulations may require notices under the above provisions to be in the prescribed form and contain the prescribed information<sup>6</sup>.

1    Under the Pensions Act 2004 s 128 (see PARA 659C.3): s 129(1). See Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590; and PARA 636A.15. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

2    For the meaning of 'the Regulator' see PARA 636A.2.

3    Pensions Act 2004 s 129(2).

4    *Ibid* s 129(3). See SI 2005/590; and PARA 636A.15.

5    Pensions Act 2004 s 129(4). Where the Board receives a notice under s 129(4), it must (1) give the trustees or managers of the scheme a notice to that effect, and (2) give the employer a copy of that notice: s 129(5). The duty imposed by s 129(1) does not apply where the trustees or managers of an eligible scheme become aware as mentioned in s 129(1) by reason of a notice given to them under s 129(5): s 129(6). The duty imposed by s 129(4) does not apply where the Regulator becomes aware as mentioned in s 129(4) by reason of

a copy of an application made by the trustees or managers of the eligible scheme in question given to the Regulator under s 129(2): s 129(7).

6 Ibid s 129(8). See SI 2005/590; and PARA 636A.15.

## 5. Board's duty where application or notification received

The following provisions<sup>1</sup> apply where the Board receives an application<sup>2</sup>, or is notified by the Regulator<sup>3</sup>. If the Board is able to confirm that a scheme rescue is not possible, it must as soon as reasonably practicable issue a notice to that effect (a 'scheme failure notice')<sup>4</sup>. If the Board is able to confirm that a scheme rescue has occurred, it must as soon as reasonably practicable issue a notice to that effect (a 'withdrawal notice')<sup>5</sup>. The Board must, as soon as reasonably practicable, give a copy of any notice issued<sup>6</sup> to (1) the Regulator, (2) the trustees or managers of the scheme, and (3) the employer<sup>7</sup>. For the purposes of Part 2 of the Pensions Act 2004<sup>8</sup> a notice issued<sup>9</sup> is not binding until (a) the period within which the issue of the notice may be reviewed<sup>10</sup> has expired, and (b) if the issue of the notice is so reviewed (i) the review and any reconsideration, (ii) any reference to the PPF Ombudsman<sup>11</sup> in respect of the issue of the notice, and (iii) any appeal against his determination or directions, has been finally disposed of and the notice has not been revoked, varied or substituted<sup>12</sup>. Where such a notice becomes binding, the Board must as soon as reasonably practicable give a notice to that effect together with a copy of the binding notice to (A) the Regulator, (B) the trustees or managers of the scheme, and (C) the employer<sup>13</sup>. Notices under the above provisions must be in the prescribed form and contain such information as may be prescribed<sup>14</sup>.

1 Ibid the Pensions Act 2004 s 130.

2 Under ibid s 129(1) (see PARA 659C.4) and is satisfied that s 129(1)(a) and (b) are satisfied in relation to the application.

3 Under ibid s 129(4): s 130(1).

4 Ibid s 130(2). See further NOTE 5.

5 Ibid s 130(3). For the purposes of s 130 (1) the Board is able to confirm that a scheme rescue has occurred in relation to an occupational pension scheme if, and only if, it is able to confirm such matters as are prescribed for the purposes of this provision, and (2) the Board is able to confirm that a scheme rescue is not possible in relation to such a scheme if, and only if, it is able to confirm such matters as are prescribed for the purposes of this provision: s 130(5). See Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590; and PARA 636A.15. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

6 Ibid under the Pensions Act 2004 s 130(2) or (3).

7 Ibid s 130(4).

8 Ibid ss 107-220.

9 Ibid under ibid s 130(2) or (3).

10 By virtue of ibid Pt 2 Ch 6 (ss 206-218).

11 For the meaning of 'the PPF Ombudsman' see PARA 659B.3.

12 Pensions Act 2004 s 130(6).

13 Ibid s 130(7). A notice given under s 130(7) in relation to a withdrawal notice under s 130(3) which has become binding must state the time from which the Board ceases to be involved with the scheme (see s 149 and PARA 659.19): s 130(9).

14 Ibid s 130(8). See SI 2005/590; and PARA 636A.15.

## 6. Protected liabilities

For the purposes of Chapter 3 of Part 2 of the Pensions Act 2004<sup>1</sup> the protected liabilities, in relation to an eligible scheme, at a particular time ('the relevant time') are (1) the cost of securing benefits for and in respect of members<sup>2</sup> of the scheme which correspond to the compensation which would be payable, in relation to the scheme, in accordance with the pension compensation provisions<sup>3</sup> if the Board assumed responsibility for the scheme in accordance with Chapter 3 of Part 2 of the Pensions Act 2004, (2) liabilities of the scheme which are not liabilities to, or in respect of, its members, and (3) the estimated cost of winding up the scheme<sup>4</sup>.

1    Ie the Pensions Act 2004 ss 126-181.

2    For the meaning of 'member' see PARA 636A.3.

3    See Pensions Act 2004 s 162 and PARA 659C.26.

4    Ibid s 131(1). For the purposes of determining the cost of securing benefits within head (1) in the text, references in ss 140-142 and Sch 7 (pension compensation provisions: see PARAS 659C.13, 659C.14) to the assessment date are to be read as references to the date on which the time immediately after the relevant time falls: s 131(2).

## **7. Assessment periods**

In Part 2 of the Pensions Act 2004<sup>1</sup> references to an assessment period are to be construed in accordance with the following provisions<sup>2</sup>. Where, in relation to an eligible scheme, a qualifying insolvency event<sup>3</sup> occurs in relation to the employer, an assessment period (1) begins with the occurrence of that event, and (2) ends when (a) the Board ceases to be involved with the scheme<sup>4</sup>, (b) the trustees or managers of the scheme receive a transfer notice<sup>5</sup>, or (c) conditions<sup>6</sup> are satisfied in relation to the scheme, whichever first occurs<sup>7</sup>. Where, in relation to an eligible scheme, an application is made<sup>8</sup> or a notification is received<sup>9</sup>, an assessment period (i) begins when the application is made or the notification is received, and (ii) ends when (A) the Board ceases to be involved with the scheme<sup>10</sup>, (B) the trustees or managers of the scheme receive a transfer notice<sup>11</sup>, or (C) conditions<sup>12</sup> are satisfied in relation to the scheme, whichever first occurs<sup>13</sup>.

1    Ie the Pensions Act 2004 ss 107-220.

2    Ie in accordance with ibid s 132: s 132(1).

3    In ibid s 132(2) 'qualifying insolvency event' has the meaning given by s 127(3) (see PARA 659C.2): s 132(3).

4    See ibid s 149 and PARA 659C.19.

5    Under ibid s 160 (see PARA 659C.24).

6    Ie the conditions in ibid s 154(2) (no scheme rescue but sufficient assets to meet protected liabilities etc: see PARA 659C.23).

7    Ibid s 132(2).

8    Under ibid s 129(1) (see PARA 659C.4).

9    Under ibid s 129(5)(a) (see PARA 659C.4).

10   See ibid s 149 and PARA 659C.19.

11   Under ibid s 160 (see PARA 659C.24).

12 le the conditions in *ibid* s 154(2).

13 *Ibid* s 132(4). For the purposes of s 132(4) an application under s 129(1) or notification under s 129(5)(a) is to be disregarded if it is made or given during an assessment period in relation to the scheme which began before the application was made or notification was given: s 132(5).

Section 132 is subject to s 159 (which provides for further assessment periods to begin in certain circumstances where schemes are required to wind up or continue winding up under s 154: see *PARA* 659C.22): s 132(6).

## **8. Admission of new members, payment of contributions etc**

The following provisions<sup>1</sup> apply where there is an assessment period in relation to an eligible scheme<sup>2</sup>. No new members of any class may be admitted to the scheme during the assessment period<sup>3</sup>. Except in prescribed circumstances and subject to prescribed conditions, no further contributions (other than those due to be paid before the beginning of the assessment period) may be paid towards the scheme during the assessment period<sup>4</sup>. No benefits may accrue under the scheme rules to, or in respect of, members of the scheme during the assessment period<sup>5</sup>. Where a person is entitled to a pension credit<sup>6</sup> derived from another person's shareable rights<sup>7</sup> under the scheme, nothing in these provisions<sup>8</sup> prevents the trustees or managers of the scheme discharging their liability in respect of the credit under the Welfare Reform and Pensions Act 1999 Pt 4 Ch 1 (sharing of rights under pension arrangements) by conferring appropriate rights<sup>9</sup> under the scheme on that person<sup>10</sup>. Any action taken in contravention<sup>11</sup> of the above provisions is void<sup>12</sup>.

1 le the Pensions Act 2004 s 133.

2 *Ibid* s 133(1).

3 *Ibid* s 133(2).

4 *Ibid* s 133(3). See Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590; and *PARA* 636A.15. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

Any obligation to pay contributions towards the scheme during the assessment period (including any obligation under the Pensions Act 1995 s 49(8) (see *PARA* 798) to pay amounts deducted corresponding to such contributions) is to be read subject to the Pensions Act 2004 s 133(3) and s 150 (obligation to pay contributions when assessment period ends: see *PARA* 659C.20): s 133(4).

5 *Ibid* s 133(5). Section 133(5) does not prevent any increase, in a benefit, which would otherwise accrue in accordance with the scheme or any enactment: s 133(6). For the meaning of 'enactment' see *PARA* 636A.2. Section 133(6) is subject to s 138 (which limits the scheme benefits payable during an assessment period: see *PARA* 659C.12): s 133(6). Section 133(5) does not prevent the accrual of money purchase benefits to the extent that they are derived from income or capital gains arising from the investment of payments which are made by, or in respect of, a member of the scheme: s 133(7).

6 For the meaning of 'pension credit' see *PARA* 636A.19.

7 In the Pensions Act 2004 s 133(8) 'shareable rights' has the same meaning as in the Welfare Reform and Pensions Act 1999 Pt 4 Ch 1 (sharing of rights under pension arrangements): Pensions Act 2004 s 133(9).

8 le *ibid* s 133.

9 In *ibid* s 133(8) 'appropriate rights' has the same meaning as in the Welfare Reform and Pensions Act 1999 Sch 5 para 5 (pension credits: mode of discharge): Pensions Act 2004 s 133(9).

10 *Ibid* s 133(8).

11 For the meaning of 'contravention' see *PARA* 636A.11.

12 Pensions Act 2004 s 133(10). Disregarding s 133(10), the Pensions Act 1995 s 10 (civil penalties: see *PARA* 611) applies to any trustee or manager of a scheme who fails to take all reasonable steps to secure compliance with the Pensions Act 2004 s 133: s 133(11).

## 9. Directions

The following provisions<sup>1</sup> apply where there is an assessment period in relation to an eligible scheme<sup>2</sup>. With a view to ensuring that the scheme's protected liabilities do not exceed its assets or, if they do exceed its assets, that the excess is kept to a minimum, the Board may give a relevant person in relation to the scheme directions regarding the exercise during that period of his powers in respect of (1) the investment of the scheme's assets, (2) the incurring of expenditure, (3) the instigation or conduct of legal proceedings, and (4) such other matters as may be prescribed<sup>3</sup>. The Board may revoke or vary any direction under these provisions<sup>4</sup>. Where a direction under these provisions given to the trustees or managers of a scheme is not complied with, the civil penalty provisions in the Pensions Act 1995<sup>5</sup> apply to any such trustee or manager who has failed to take all reasonable steps to secure compliance with the direction<sup>6</sup>.

1    Ie the Pensions Act 2004 s 134.

2    Ibid s 134(1).

3    Ibid s 134(2). In s 134(2) (1) 'relevant person' in relation to a scheme means (a) the trustees or managers of the scheme, (b) the employer in relation to the scheme, or (c) such other persons as may be prescribed, and (2) the reference to the assets of the scheme is a reference to those assets excluding any assets representing the value of any rights in respect of money purchase benefits under the scheme rules: s 134(3). See Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590; and PARA 636A.15. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

4    Pensions Act 2004 s 134(4).

5    Ie the Pensions Act 1995 s 10: see PARA 611.

6    Pensions Act 2004 s 134(5). The Pensions Act 1995 s 10 also applies to any other person who, without reasonable excuse, fails to comply with a direction given to him under the Pensions Act 2004 s 134: s 134(6).

## 10. Restrictions on winding up, discharge of liabilities etc

The following provisions<sup>1</sup> apply where there is an assessment period in relation to an eligible scheme<sup>2</sup>. The winding up of the scheme must not begin during the assessment period<sup>3</sup>. During the assessment period, except in prescribed circumstances and subject to prescribed conditions (1) no transfers of, or transfer payments in respect of, any member's rights under the scheme rules are to be made from the scheme, and (2) no other steps may be taken to discharge any liability of the scheme to or in respect of a member of the scheme in respect of (a) pensions or other benefits, or (b) such other liabilities as may be prescribed<sup>4</sup>. Any action taken in contravention of these provisions<sup>5</sup> is void, except to the extent that the Board validates the action<sup>6</sup>. The Regulator may not make a freezing order<sup>7</sup> in relation to the scheme during the assessment period<sup>8</sup>.

1    Ie the Pensions Act 2004 s 135.

2    Ibid s 135(1).

3    Ibid s 135(2). Section 135(2) is subject to s 135(3): s 135(2). Section 135(2) does not apply to the winding up of the scheme in pursuance of an order by the Regulator under the Pensions Act 1995 s 11(3A) (Regulator's powers to wind up occupational pension schemes to protect Pension Protection Fund: see PARA 612) directing the scheme to be wound up (and the Pensions Act 2004 s 219 (see PARA 659G.1) makes provision for the backdating of the winding up): s 135(3).

4    Ibid s 135(4). See Pension Protection Fund (Hybrid Schemes) (Modification) Regulations 2005, SI 2005/449, Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590 (see PARA 636A.15); Pension Protection

Fund (Contributions Equivalent Premium) Regulations 2007, SI 2007/834. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). The Pensions Act 2004 s 135(4) (1) is subject to s 138 (see PARA 659C.12), and (2) applies whether or not the scheme was being wound up immediately before the assessment period or began winding up by virtue of s 135(3): s 135(5).

Section 135(7) applies where, on the commencement of the assessment period (a) a member's pensionable service terminates, and (b) he becomes a person to whom the Pension Schemes Act 1993 Pt 4 Ch 5 (early leavers: cash transfer sums and contribution refunds) applies: Pensions Act 2004 s 135(6). Section 150(5) (retrospective accrual of benefits in certain circumstances: see PARA 659C.20) is to be disregarded for the purposes of determining whether a member falls within head (a) or (b): s 135(6). Where s 135(7) applies, during the assessment period (i) no right or power conferred by the Pension Schemes Act 1993 Pt 4 Ch 5 may be exercised, and (ii) no duty imposed by the Pension Schemes Act 1993 Pt 4 Ch 5 may be discharged: Pensions Act 2004 s 135(7). Where a person is entitled to a pension credit derived from another person's shareable rights (within the meaning of the Welfare Reform and Pensions Act 1999 Pt 4 Ch 1 (sharing of rights under pension arrangements)) under the scheme, nothing in the Pensions Act 2004 s 135(4) prevents the trustees or managers of the scheme discharging their liability in respect of the credit in accordance with the Welfare Reform and Pensions Act 1999 Pt 4 Ch 1: Pensions Act 2004 s 135(8).

5    Ibid s 135.

6    Ibid s 135(9). As to the power to validate contraventions of s 135 see s 136. Disregarding s 135(9), where there is a contravention of s 135, the Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to any trustee or manager who has failed to take all reasonable steps to secure compliance with the Pensions Act 2004 s 135: s 135(10).

7    See *ibid* s 23 and PARA 636A.19.

8    Ibid s 135(11).

## **11. Board to act as creditor of the employer**

The following provision<sup>1</sup> applies where there is an assessment period in relation to an eligible scheme<sup>2</sup>. During the assessment period, the rights and powers of the trustees or managers of the scheme in relation to any debt (including any contingent debt) due to them by the employer<sup>3</sup> are exercisable by the Board to the exclusion of the trustees or managers<sup>4</sup>.

1    Ibid the Pensions Act 2004 s 137(2).

2    Ibid s 137(1).

3    Whether by virtue of the Pensions Act 1995 s 75 (see PARA 850) or otherwise.

4    Ibid s 137(2). Where, by virtue of s 137(2), any amount is paid to the Board in respect of such a debt, the Board must pay that amount to the trustees or managers of the scheme: s 137(3).

## **12. Payment of scheme benefits**

Where there is an assessment period in relation to an eligible scheme<sup>1</sup> the benefits payable to or in respect of any member under the scheme rules during the assessment period must be reduced to the extent necessary to ensure that they do not exceed the compensation which would be payable to or in respect of the member in accordance with Chapter 3 of Part 2 of the Pensions Act 2004<sup>2</sup> if (1) the Board assumed responsibility for the scheme in accordance with Chapter 3 of Part 2 of the Pensions Act 2004, and (2) the assessment date<sup>3</sup> were the date on which the assessment period began<sup>4</sup>.

Further provision relating to scheme benefits is made<sup>5</sup>.

1    Pensions Act 2004 s 138(1).

2    Ibid ss 126-181.

3 Referred to in *ibid* Sch 7 (see PARA 659C.26).

4 *Ibid* s 138(2). But where, on the commencement of the assessment period (1) a member's pensionable service terminates, and (2) he becomes a person to whom the Pension Schemes Act 1993 Pt 4 Ch 5 (early leavers: cash transfer sums and contribution refunds) applies, no benefits are payable to or in respect of him under the scheme during the assessment period: s 138(3). Section 150(5) (retrospective accrual of benefits in certain circumstances: see PARA 659C.20) is to be disregarded for the purposes of determining whether a member falls within head (1) or (2): s 138(4). Nothing in s 138(3) prevents the payment of benefits attributable (directly or indirectly) to a pension credit, during the assessment period, in accordance with s 138(2): s 138(5). Where at any time during the assessment period the scheme is being wound up, subject to any reduction required under s 138(2) and to s 138(3), the benefits payable to or in respect of any member under the scheme rules during that period are the benefits that would have been so payable in the absence of the winding up of the scheme: s 138(6). Section 138(2), (3) and (6) are subject to s 150(1)-(3) and 154(13) (which provide for the adjustment of amounts paid during an assessment period when that period ends other than as a result of the Board assuming responsibility for the scheme: see PARAS 659C.20, 659C.23): s 138(7). For the purposes of s 138(2) and (3) the trustees or managers of the scheme may take such steps as they consider appropriate (including steps adjusting future payments under the scheme rules) to recover any overpayment or pay any shortfall: s 138(8). The Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to a trustee or manager of a scheme who fails to take all reasonable steps to secure compliance with the Pensions Act 2004 s 138(2) and (3): s 138(9).

Regulations may provide that, where there is an assessment period in relation to an eligible scheme (1) in such circumstances as may be prescribed s 138(2) does not operate to require the reduction of benefits payable to or in respect of any member; (2) the commencement of a member's pension or payment of a member's lump sum or other benefits is, in such circumstances and on such terms and conditions as may be prescribed, to be postponed for the whole or any part of the assessment period for which he continues in employment after attaining normal pension age: s 138(10) (head (1) not yet in force). See Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590; and PARA 636A.15. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). For the purposes of the Pensions Act 2004 s 138(10) (a) 'normal pension age', in relation to an eligible scheme and any pension or other benefit under it, means the age specified in the scheme rules as the earliest age at which the pension or other benefit becomes payable without actuarial adjustment (disregarding any scheme rule making special provision as to early payment on the grounds of ill health), and (b) where different ages are so specified in relation to different parts of a pension or other benefit (i) s 138(10) has effect as if those parts were separate pensions or, as the case may be, benefits, and (ii) in relation to a part of a pension or other benefit, the reference in s 138(10) to normal pension age is to be read as a reference to the age specified in the scheme rules as the earliest age at which that part becomes so payable: s 138(11). Regulations may provide that, in prescribed circumstances, where (A) a member of the scheme died before the commencement of the assessment period, and (B) during the assessment period, a person becomes entitled under the scheme rules to a benefit of a prescribed description in respect of the member, the benefit, or any part of it, is, for the purposes of s 138(2), to be treated as having become payable before the commencement of the assessment period: s 138(12). See SI 2005/590; and PARA 636A.15. Nothing in the Pensions Act 2004 s 138(2) or (3) applies to money purchase benefits: s 138(13).

5 See *ibid* s 139 (loans to pay scheme benefits). See further SI 2005/590; and PARA 636A.15.

### 13. III health pensions: general

The following provisions<sup>1</sup> apply where there is an assessment period in relation to an eligible scheme<sup>2</sup>. The Board may review a reviewable ill health pension<sup>3</sup> in respect of a member if (1) the member would be entitled to compensation<sup>4</sup> in respect of the pension if the Board assumed responsibility for the scheme<sup>5</sup>, (2) the member did not attain normal pension age in respect of the pension before the assessment date, and (3) the pension is attributable to the member's pensionable service<sup>6</sup>. An ill health pension in respect of a member is reviewable<sup>7</sup> if the member is entitled to the pension by reason of an award under the scheme rules ('the award') which was made (a) in the period of three years ending immediately before the assessment date, or (b) before the end of the prescribed period beginning with the assessment date, in response to an application made before that date<sup>8</sup>. Where (i) before the assessment date, an application was made under the scheme for the award of a pension before normal pension age by virtue of any provision of the scheme rules making special provision as to early payment of pension on grounds of ill health, and (ii) the trustees or managers of the scheme failed to decide the application before the end of the period mentioned in head (b) above, the civil penalty provisions in the Pensions Act 1995<sup>9</sup> apply to any trustee or manager who has failed to take all

reasonable steps to secure that the application was decided before the end of that period<sup>10</sup>. Where (A) the award was made in response to an application which was made on or after the assessment date, or was made before that date but not decided by the trustees or managers of the scheme before the end of the period mentioned in head (b) above, and (B) in the absence of this provision, the award would take effect before the assessment date, the award is, for the purposes of determining the compensation payable under Chapter 3 of Part 2 of the Pensions Act 2004 in a case where the Board assumes responsibility for the scheme, to be treated as taking effect after the date on which the decision to make the award was made<sup>11</sup>. Regulations must prescribe the procedure to be followed in relation to the review of a pension under the above provisions<sup>12</sup> and any subsequent decision<sup>13</sup>.

1    Ie the Pensions Act 2004 s 140.

2    Ibid s 140(1).

3    For these purposes 'ill health pension', in relation to a scheme, means a pension which, immediately before the assessment date, is a pension to which a person is entitled under the admissible rules in circumstances where that entitlement arose before normal pension age by virtue of any provision of the admissible rules making special provision as to early payment of pension on grounds of ill health: *ibid* s 142(1). 'Assessment date' means the date on which the assessment period begins: s 142(1). 'Admissible rules' is to be construed in accordance with Sch 7 (see *PARA 659C.26*): s 142(1). 'Normal pension age', in relation to a scheme and any pension under it, means the age specified in the admissible rules as the earliest age at which the pension becomes payable without actuarial adjustment (disregarding any admissible rule making special provision as to early payment on the grounds of ill health) and Sch 7 para 34(2) and (3) apply in relation to s 142 as they apply in relation to Sch 7: s 142(1). Schedule 7 para 37(4) (references to 'ill health' to be construed in accordance with regulations) applies in relation to ss 140-142 as if, in that provision, the reference to Sch 7 included a reference to ss 140-142: s 142(3).

4    Under *ibid* Sch 7 para 3.

5    Disregarding *ibid* s 141 (see *PARA 659C.14*). In ss 140-142 references to the Board assuming responsibility for the scheme are to the Board assuming responsibility for the scheme in accordance with Pt 2 Ch 3 (ss 126-181, Schs 6, 7) at the time the assessment period in question comes to an end: s 142(4).

6    Ibid s 140(2). 'Pensionable service' is to be construed in accordance with Sch 7: s 142(1).

7    For the purposes of *ibid* s 140(2).

8    Ibid s 140(3). See Pension Protection Fund (Reviewable Ill Health Pensions) Regulations 2005, SI 2005/652 (amended by SI 2005/993). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

9    Ie the Pensions Act 1995 s 10 (see *PARA 611*).

10   Pensions Act 2004 s 140(4). For the purposes of s 140(4) (1) the definition of 'normal pension age' in s 142(1), and (2) Sch 7 para 34(2) and (3) as it applies by virtue of that definition, have effect as if the references in those provisions to the admissible rules were references to the scheme rules: s 142(2).

11   Ibid s 140(5).

12   Ie *ibid* s 140.

13   Under *ibid* s 141 (see *PARA 659C.14*): s 140(6). See SI 2005/652.

#### **14.    Ill health pensions: effect of a review**

The following provisions<sup>1</sup> apply where, during an assessment period in relation to an eligible scheme, the Board reviews an ill health pension<sup>2</sup>. Where specified conditions<sup>3</sup> are satisfied, the Board may determine that the compensation payable in respect of the pension, in a case where the Board assumes responsibility for the scheme, is to be determined in the prescribed manner on and after the relevant date<sup>4</sup>.

- 1    Ie the Pensions Act 2004 s 141.
- 2    By virtue of *ibid* s 140 (see PARA 659C.13): s 141(1).
- 3    Ie the conditions of *ibid* s 141(3).

The conditions are (1) that the annual rate of compensation which would be payable under Pt 2 (ss 107-220) in respect of the pension at the assessment date, if the Board assumed responsibility for the scheme, exceeds the notional reviewed rate of compensation in respect of the pension, (2) that the Board is satisfied (a) that the decision to make the award was made in ignorance of, or was based upon a mistake as to, a material fact relevant to the decision, (b) that, at the time that decision was made, the member knew or could reasonably have been expected to know of that fact and that it was relevant to the decision, and (c) that, had the trustees or managers known about, or not been mistaken as to, that fact, they could not reasonably have decided to make the award, and (3) that the Board is not satisfied that the criteria in the admissible rules governing entitlement to early payment of pension on grounds of ill health were satisfied in respect of the member at any time after that decision but before the assessment date: s 141(3). 'Notional reviewed rate of compensation', in respect of an ill health pension, means (i) the annual rate of compensation which would be payable in respect of the pension at the assessment date, if the Board assumed responsibility for the scheme and the compensation so payable at that date was determined in accordance with regulations under s 141(2), or (ii) if no such compensation would have been so payable at that date, nil: s 142(1).

4    *Ibid* s 141(2). See Pension Protection Fund (Reviewable Ill Health Pensions) Regulations 2005, SI 2005/652 (see PARA 659B.13). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). For the purposes of the Pensions Act 2004 s 141(2) 'the relevant date' means the date during the assessment period on which a scheme valuation in relation to the scheme becomes binding: s 141(4). 'Scheme valuation', in relation to a scheme, means a valuation under s 143 (see PARA 659C.15) of the assets and protected liabilities of the scheme as at the time immediately before the assessment period begins: s 142(1).

The power to make a decision in respect of the pension under s 141(2) may only be exercised at a time which falls (1) during the assessment period but before the time the Board first approves a scheme valuation under s 144 (see PARA 659C.15) in relation to the scheme, and (2) within a reasonable period beginning with the assessment date or, where the decision to make the award was made at a later date, that date: s 141(5). Regulations made for the purposes of s 141(2) may, in particular, include provision applying any provision of Sch 7 (see PARA 659C.26) with such modifications as may be prescribed: s 141(6). See SI 2005/652. For the meaning of 'modifications' see PARA 636A.16.

## 15. Valuation of assets and liabilities

For the purposes of the following provisions<sup>1</sup>, regulations may prescribe how (1) the assets<sup>2</sup> and the protected liabilities of eligible schemes, and (2) their amount or value, are to be determined, calculated and verified<sup>3</sup>. Regulations<sup>4</sup> may provide, in particular, that when calculating the amount or value of assets or protected liabilities of an eligible scheme at the relevant time which consist of any of the following (a) a debt (including any contingent debt) due to the trustees or managers of the scheme from the employer<sup>5</sup>, (b) a debt due to the trustees or managers of the scheme by virtue of a contribution notice<sup>6</sup>, (c) an obligation arising under financial support for the scheme<sup>7</sup> put in place in accordance with a financial support direction<sup>8</sup>, or (d) an obligation imposed by a restoration order<sup>9</sup> in respect of a transaction involving assets of the scheme, account must be taken in the prescribed manner of prescribed events which occur during the pre-approval period<sup>10</sup>. The matters mentioned in heads (1) and (2) above are to be determined, calculated and verified in accordance with guidance issued by the Board<sup>11</sup>. In calculating the amount of any liabilities for the purposes of these provisions, a provision of the scheme rules which limits the amount of the scheme's liabilities by reference to the value of its assets is to be disregarded<sup>12</sup>.

Provision is made with respect to the approval of a valuation<sup>13</sup> and binding valuations<sup>14</sup>.

1    Ie for the purposes of the Pensions Act 2004 s 143.

2    For the purposes of *ibid* s 143 references to 'assets' do not include assets representing the value of any rights in respect of money purchase benefits under the scheme rules: s 143(11)(d).

3 Ibid s 143(4). See Pension Protection Fund (Valuation) Regulations 2005, SI 2005/672 (amended by SI 2005/993, SI 2005/2113, SI 2006/580, SI 2007/782, SI 2009/451). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). The Pensions Act 2004 s 143 applies in a case within s 127(1) (see PARA 659C.2) or 128(1) (see PARAS 659C.3): s 143(1). For the purposes of determining whether the condition in s 127(2)(a) or 128(2)(a) is satisfied, the Board must, as soon as reasonably practicable, obtain an actuarial valuation of the scheme as at the relevant time: s 143(2). For the purposes of s 143 'actuarial valuation', in relation to the scheme, means a written valuation of the assets and protected liabilities of the scheme which (1) is in the prescribed form and contains the prescribed information, and (2) is prepared and signed by (a) a person with prescribed qualifications or experience, or (b) a person approved by the Secretary of State: s 143(11)(a). See SI 2005/672 above. For the purposes of the Pensions Act 2004 s 143 'the relevant time' (i) in a case within s 127(1), has the meaning given in s 127(4)(b), and (ii) in a case within s 128(1), has the meaning given in s 128(3)(b): s 143(11)(c). For the purposes of determining whether the condition in s 127(2)(a) or 128(2)(a) is satisfied regulations may provide that any of the following are to be regarded as assets or protected liabilities of the scheme at the relevant time if prescribed requirements are met (A) a debt due to the trustees or managers of the scheme by virtue of a contribution notice issued under s 38, 47 or 55 (see PARAS 636A.20, 636A.23, 636A.24) during the pre-approval period; (B) an obligation arising under financial support for the scheme (within the meaning of s 45: see PARA 636A.21) put in place during the pre-approval period in accordance with a financial support direction issued under s 43 (see PARA 636A.21); (C) an obligation imposed by a restoration order made under s 52 (see PARA 636A.24) during the pre-approval period in respect of a transaction involving assets of the scheme: s 143(3). See SI 2005/672 above. For the purposes of the Pensions Act 2004 s 143 'the pre-approval period', in relation to the scheme, means the period which begins immediately after the relevant time, and ends immediately before the time the Board first approves a valuation of the scheme under s 144 after the relevant time: s 143(11)(b).

The duty imposed by s 143(2) ceases to apply if and when the Board ceases to be involved with the scheme: s 143(8). Nothing in s 143(2) requires the actuarial valuation to be obtained during any period when the Board considers that an event may occur which, by virtue of regulations under s 143(3) or (4) or by virtue of s 143(5B), may affect the value of the assets or the amount of the protected liabilities of the scheme for the purposes of the valuation: s 143(9) (amended by the Occupational Pension Schemes (Modification of Pension Protection Provisions) Regulations 2005, SI 2005/705). In a case where there are one or more reviewable ill health pensions (within the meaning of the Pensions Act 2004 s 140: see PARA 659C.13), nothing in s 143(2) requires the actuarial valuation to be obtained during the period mentioned in s 141(5)(b) (period during which Board may exercise its power to make a decision following a review: see PARA 659C.14) relating to any such pension: s 143(10).

4 Under ibid s 143(4).

5 Under the Pensions Act 1995 s 75 (deficiencies in the scheme assets: see PARA 850).

6 Issued under the Pensions Act 2004 s 38, 47 or 55.

7 Within the meaning of ibid s 45.

8 Issued under ibid s 43.

9 Made under ibid s 52.

10 Ibid s 143(5). See SI 2005/672, NOTE 3.

The Pensions Act 2004 s 143(5B) applies if (1) during the pre-approval period any liability to provide pensions or other benefits to or in respect of any member or members under the scheme is discharged by virtue of regulations under s 135(4) (see PARA 659C.10) or the Board validating any action mentioned in s 135(9), and (2) at the relevant time the protected liabilities of the scheme include any cost within s 131(1)(a) (see PARA 659C.6) relating to compensation in respect of those pensions or other benefits: s 143(5A) (s 143 (5A), (5B) added by SI 2005/705). If the Pensions Act 2004 s 143 (5B) applies, for the purposes mentioned in s 143(2) (a) in determining that cost the effect of the discharge on the compensation payable in respect of those pensions or other benefits under Sch 7 para 23A (see PARA 659C.26) must be taken into account, (b) in a case where assets of the scheme at the relevant time were transferred from the scheme during the pre-approval period in consideration for the discharge, those assets are not to be regarded as assets of the scheme at the relevant time, and (c) in a case where assets that were not assets of the scheme at that time ('later-acquired assets') were so transferred, the value of the assets of the scheme at that time is to be reduced by the value of the later-acquired assets at the time of the discharge: s 143(5B).

11 Ibid s 143(6). This is subject to any provision made under s 143(4): s 143(6).

12 Ibid s 143(7).

13 See ibid s 144.

14 See *ibid* s 145 and SI 2005/672, NOTE 3.

## **16. Refusal to assume responsibility: schemes which become eligible schemes**

Regulations may provide that where the Board is satisfied that an eligible scheme was not such a scheme throughout such period as may be prescribed, the Board must refuse to assume responsibility for the scheme under Chapter 3 of Part 2 of the Pensions Act 2004<sup>1</sup>. Where<sup>2</sup> the Board is required to refuse to assume responsibility for a scheme, it (1) must issue a notice to that effect (a 'withdrawal notice'), and (2) give a copy of that notice to (a) the Regulator, (b) the trustees or managers of the scheme, and (c) any insolvency practitioner in relation to the employer or, if there is no such insolvency practitioner, the employer<sup>3</sup>. For the purposes of Part 2 of the Pensions Act 2004<sup>4</sup> a withdrawal notice issued by virtue of these provisions is not binding until (i) the period within which the issue of the notice may be reviewed by virtue of Chapter 6 of Part 2<sup>5</sup> has expired, and (ii) if the issue of the notice is so reviewed (A) the review and any reconsideration, (B) any reference to the PPF Ombudsman in respect of the issue of the notice, and (C) any appeal against his determination or directions, has been finally disposed of and the notice has not been revoked, varied or substituted<sup>6</sup>. Where a withdrawal notice issued by virtue of these provisions becomes binding, the Board must as soon as reasonably practicable give a notice to that effect together with a copy of the binding notice to the Regulator, the trustees or managers of the scheme, and any insolvency practitioner in relation to the employer or, if there is no such insolvency practitioner, the employer<sup>7</sup>. Notices under the above provisions must be in the prescribed form and contain such information as may be prescribed<sup>8</sup>.

1 *Ie* the Pensions Act 2004 ss 126-181, Schs 6, 7: s 146(1). See Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590; and para 636A.15. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

2 By virtue of the Pensions Act 2004 s 146(1).

3 *Ibid* s 146(2).

4 *Ie* *ibid* ss 107-220, Schs 5-9.

5 *Ie* *ibid* ss 206-218, Sch 9 (see PARA 659F).

6 *Ibid* s 146(3).

7 *Ibid* s 146(4). A notice given under s 146(4) must state the time from which the Board ceases to be involved with the scheme (see s 149 and PARA 659C.19): s 146(6).

8 *Ibid* s 146(5). See SI 2005/590; and para 636A.15.

## **17. Refusal to assume responsibility: new schemes created to replace existing schemes**

The Board must refuse to assume responsibility for a scheme ('the new scheme') under Chapter 3 of Part 2 of the Pensions Act 2004<sup>1</sup> where it is satisfied that (1) the new scheme was established during such period as may be prescribed, (2) the employer in relation to the new scheme was, at the date of establishment of that scheme, also the employer in relation to a scheme established before the new scheme (the 'old scheme'), (3) a transfer or transfers of, or a transfer payment or transfer payments in respect of, any rights of members under the old scheme has or have been made to the new scheme, and (4) the main purpose or one of the main purposes of establishing the new scheme and making the transfer or transfers, or transfer payment or transfer payments, was to enable those members to receive compensation under the pension compensation provisions in respect of their rights under the new scheme in circumstances where, in the absence of the transfer or transfers, regulations<sup>2</sup> would have

operated to prevent such payments in respect of their rights under the old scheme<sup>3</sup>. Where<sup>4</sup> the Board is required to refuse to assume responsibility for a scheme, it (a) must issue a notice to that effect (a 'withdrawal notice'), and (b) give a copy of that notice to (i) the Regulator, (ii) the trustees or managers of the scheme, and (iii) any insolvency practitioner in relation to the employer or, if there is no such insolvency practitioner, the employer<sup>5</sup>. For the purposes of Part 2 of the Pensions Act 2004<sup>6</sup> a withdrawal notice issued under these provisions is not binding until (A) the period within which the issue of the notice may be reviewed by virtue of Chapter 6 of Part 2<sup>7</sup> has expired, and (B) if the issue of the notice is so reviewed the review and any reconsideration, any reference to the PPF Ombudsman in respect of the issue of the notice, and any appeal against his determination or directions, has been finally disposed of and the notice has not been revoked, varied or substituted<sup>8</sup>. Where a withdrawal notice issued under these provisions becomes binding, the Board must as soon as reasonably practicable give a notice to that effect together with a copy of the binding notice to the Regulator, the trustees or managers of the scheme, and any insolvency practitioner in relation to the employer or, if there is no such insolvency practitioner, the employer<sup>9</sup>. Notices under the above provisions must be in the prescribed form and contain such information as may be prescribed<sup>10</sup>.

1    Ie the Pensions Act 2004 ss 126-181.

2    Ie regulations under *ibid* s 146 (see PARA 659C.16).

3    *Ibid* s 147(1). See Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590; and PARA 636A.15. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

4    Under the Pensions Act 2004 s 147(1).

5    *Ibid* s 147(2).

6    Ie *ibid* ss 107-220.

7    Ie *ibid* ss 206-218 (see PARA 659F).

8    *Ibid* s 147(3).

9    *Ibid* s 147(4). A notice given under s 147(4) must state the time from which the Board ceases to be involved with the scheme (see s 149 and PARA 659C.19): s 147(6).

10   *Ibid* s 147(5). See SI 2005/590; and PARA 636A.15.

## **18.   Refusal to assume responsibility: withdrawal following issue of notice**

The following provisions<sup>1</sup> apply where (1) a notice<sup>2</sup> is issued in relation to an eligible scheme and becomes binding, and (2) a withdrawal event has not occurred in relation to the scheme in respect of a withdrawal notice which has been issued during the period (a) beginning with the occurrence of the last insolvency event in relation to the employer, and (b) ending immediately before the notice<sup>3</sup> becomes binding, and the occurrence of such a withdrawal event in respect of a withdrawal notice issued during that period is not a possibility<sup>4</sup>. The Board must determine whether any insolvency event (i) has occurred in relation to the employer since the issue of the notice<sup>5</sup>, or (ii) is likely to so occur before the end of the period of six months beginning with the date on which these provisions<sup>6</sup> apply<sup>7</sup>. If the Board determines<sup>8</sup> that no insolvency event has occurred or is likely to occur<sup>9</sup> it must issue a notice to that effect (a 'withdrawal notice')<sup>10</sup>. Where the Board is required to issue a withdrawal notice, it must give a copy of the notice to the Regulator, the trustees or managers of the scheme, and the employer<sup>11</sup>. For the purposes of Part 2 of the Pensions Act 2004<sup>12</sup>, a withdrawal notice issued under these provisions is not binding until (A) the period within which the issue of the notice may be reviewed by virtue of Chapter 6 of Part 2<sup>13</sup> has expired, and (B) if the issue of the notice is so reviewed the review and any reconsideration, any reference to the PPF Ombudsman in respect of the issue of the notice,

and any appeal against his determination or directions, has been finally disposed of and the notice has not been revoked, varied or substituted<sup>14</sup>. Where a withdrawal notice issued under these provisions becomes binding, the Board must as soon as reasonably practicable give a notice to that effect together with a copy of the binding notice to the Regulator, the trustees or managers of the scheme, and the employer<sup>15</sup>. Notices under these provisions must be in the prescribed form and contain such information as may be prescribed<sup>16</sup>.

1    Ie the Pensions Act 2004 s 148.

2    Ie a notice under ibid s 122(4) (inability to confirm status of scheme) (see PARA 659B.2).

3    Under ibid s 122(4).

4    Ibid s 148(1) (see s 149 and PARA 659C.19).

5    Under ibid s 122(4).

6    Ie ibid s 148.

7    Ibid s 148(2).

8    Under ibid s 148(2).

9    As mentioned in ibid s 148(2).

10   Ibid s 148(3). Where (1) no withdrawal notice is issued under s 148(3) before the end of the period mentioned in head (ii) in the text, and (2) no further insolvency event occurs in relation to the employer during that period, the Board must issue a notice to that effect (a 'withdrawal notice'): s 148(4).

11   Ibid s 148(5).

12   Ie ibid ss 107-220.

13   Ie ibid ss 206-218 (see PARA 659F).

14   Ibid s 148(6).

15   Ibid s 148(7). A notice given under s 148(7) must state the time from which the Board ceases to be involved with the scheme (see s 149 and PARA 659C.19): s 148(9).

16   Ibid s 148(8). See Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590; and PARA 636A.15. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

## **19.    Circumstances in which Board ceases to be involved with an eligible scheme**

Where an assessment period begins in relation to an eligible scheme, the Board ceases to be involved with the scheme, for the purposes of Part 2 of the Pensions Act 2004<sup>1</sup>, on the occurrence of the first withdrawal event<sup>2</sup> after the beginning of that period<sup>3</sup>. For the purposes of Chapter 3 of Part 2 of the Pensions Act 2004 (1) the occurrence of a withdrawal event in relation to a scheme in respect of a withdrawal notice issued during a particular period ('the specified period') is a possibility until each of the following are no longer reviewable (a) any withdrawal notice which has been issued in relation to the scheme during the specified period, (b) any failure to issue such a withdrawal notice during the specified period, (c) any notice which has been issued by the Board under Chapter 2 of Part 2 of the Pensions Act 2004<sup>4</sup> or Chapter 3 of Part 2 which is relevant to the issue of a withdrawal notice in relation to the scheme during the specified period or to such a withdrawal notice which has been issued during that period becoming binding, (d) any failure to issue such a notice as is mentioned in head (c) above, and (2) the issue of, or failure to issue, a notice is to be regarded as reviewable (i) during the period within which it may be reviewed by virtue of Chapter 6 of Part 2 of the Pensions Act 2004<sup>5</sup>, and (ii) if the matter is so reviewed, until (A) the review and any

reconsideration, (b) any reference to the PPF Ombudsman in respect of the matter, and (c) any appeal against his determination or directions, has been finally disposed of<sup>6</sup>.

1 le the Pensions Act 2004 ss 107-220.

2 For this purpose the following are withdrawal events in relation to a scheme (1) a withdrawal notice issued under ibid s 122(2)(b) (scheme rescue has occurred: see PARA 659B.2) becoming binding; (2) a withdrawal notice issued under s 130(3) (scheme rescue has occurred: see PARA 659C.5) becoming binding; (c) a withdrawal notice issued under or by virtue of s 146 or 147 (refusal to assume responsibility: see PARAS 659C.16, 659C.17) becoming binding; (4) a withdrawal notice issued under s 148 (no insolvency event has occurred or is likely to occur: see PARA 659C.18) becoming binding; and references in Pt 2 Ch 3 (ss 126-181) to a 'withdrawal event' are to be construed accordingly: s 149(2). See further NOTE 3.

3 Ibid s 149(1).

Section 149(4) applies where a withdrawal notice mentioned in s 149(2) is issued in relation to a scheme and becomes binding and (1) an insolvency event in relation to the employer occurs during the interim period and, if s 149(4) did not apply, the event would not be a qualifying insolvency event within the meaning given by s 127(3) (see PARA 659C.2) solely because the condition in s 127(3)(b)(ii) would not be satisfied, or (2) an application under s 129(1) (see PARA 659C.4) is made, or a notification under s 129(5)(a) is given, in relation to the scheme during the interim period and, if s 149(4) did not apply, the application or notification would be disregarded for the purposes of (a) s 128(1) (see PARA 659C.3) by virtue of s 128(4), and (b) s 132(4) (see PARA 659C.7) by virtue of s 132(5): s 149(3). For the purposes of s 149(3), the 'interim period' in relation to a scheme means the period beginning with the issuing of the withdrawal notice in relation to the scheme and ending with that notice becoming binding: s 149(5). In such a case, the withdrawal notice is to be treated for the purposes of s 149(1) and (2), as if the time when it became binding was the time immediately before (i) in a case falling within head (1), the occurrence of the insolvency event, and (ii) in a case falling within head (2), the making of the application under s 129(1) or, as the case may be, the giving of the notification under s 129(5)(a): s 149(4).

4 le ibid ss 120-125 (see PARA 659B).

5 le ibid ss 206-218 (see PARA 659F).

6 Ibid s 149(6).

## **20. Consequences of the Board ceasing to be involved with a scheme**

Where (1) an assessment period comes to an end by virtue of the Board ceasing to be involved with an eligible scheme, and (2) during the assessment period any amount of any benefit payable to a member, or to a person in respect of a member, under the scheme rules was not paid<sup>1</sup>, that amount falls due to the member, or as the case may be, person at the end of that period<sup>2</sup>. Where (a) an assessment period comes to an end by virtue of the Board ceasing to be involved with an eligible scheme, and (b) during the assessment period the amount of benefit paid to a member, or to a person in respect of a member, under the scheme rules exceeded the amount that would have been payable<sup>3</sup>, the trustees or managers of the scheme must, at the end of that period, take such steps as they consider appropriate (including steps to adjust future payments under the scheme rules) to recover an amount equal to the excess from the person to whom it was paid<sup>4</sup>.

1 By reason of the Pensions Act 2004 s 138 (requirement to pay benefits in accordance with the pension compensation provisions: see PARA 659C.12).

2 Ibid s 150(1). Where the winding up of the scheme began before the end of the assessment period (whether by virtue of s 219 (backdating the winding up of eligible schemes: see PARA 659G.1) or otherwise), the reference in head (2) in the text to the amount of any benefit payable to a member, or to a person in respect of a member, under the scheme rules is a reference to the amount so payable taking account of any reduction required by virtue of the Pensions Act 1995 ss 73-73B (provisions relating to the winding up of certain schemes: see PARA 845A): Pensions Act 2004 s 150(2). See further NOTE 4.

Regulations may provide that, in cases within head (1) in the text, benefits are to accrue under the scheme rules, in such circumstances as may be prescribed, to or in respect of members of the scheme in respect of any specified period of service being service in employment which, but for s 133(5) (see PARA 659C.8), would have

qualified the member in question for those benefits under the scheme rules: s 150(5). See Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590; and PARA 636A.15. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). Regulations under the Pensions Act 2004 s 150(5) may in particular make provision (1) for benefits not to accrue to, or in respect of, a member unless contributions are paid by or on behalf of the member towards the scheme within a prescribed period; (2) for contributions towards the scheme which, but for s 133, would have been payable by or on behalf of the employer (otherwise than on behalf of an employee) during the assessment period, to fall due; (3) requiring that such contributions as are mentioned in head (1) or (2) are accepted for the assessment period or any part of that period; (4) modifying the Welfare Reform and Pensions Act 1999 s 31 (reduction of benefit where a person's shareable rights are subject to a pension debit: see PARA 961A.4), in its application in relation to cases where benefits accrue under the scheme by virtue of regulations under the Pensions Act 2004 s 150(5): s 150(6) (head (4) not yet in force). See SI 2005/590; and PARA 636A.15. In the Pensions Act 2004 s 150 'contributions' means, in relation to an eligible scheme, contributions payable towards the scheme by or on behalf of the employer or the active members of the scheme in accordance with the schedule of contributions maintained under s 227 (see PARA 824A.7) in respect of the scheme: s 150(7). In the Pensions Act 2004, unless the context otherwise requires, 'active member' has the meaning given by the Pensions Act 1995 s 124(1) (see PARA 612): Pensions Act 2004 s 318(1). For the meaning of 'employee' see PARA 636A.3.

3 In the absence of *ibid* s 138(6) (requirement to disregard winding up when paying benefits during assessment period: see PARA 659C.12).

4 *Ibid* s 150(3). Section 150(1)-(3) are without prejudice to the Pensions Act 1995 s 73A(2)(b) (requirement to adjust benefits paid to reflect liabilities which can be met on winding up) (see PARA 845A): Pensions Act 2004 s 150(4).

## 21. Reconsideration

Where specified provision<sup>1</sup> applies<sup>2</sup> in relation to an eligible scheme, the trustees or managers of the scheme may make an application to the Board for it to assume responsibility for the scheme in accordance with Chapter 3 of Part 2 of the Pensions Act 2004<sup>3</sup>. An application under these provisions must be in the prescribed form, contain the prescribed information and be accompanied by (1) a protected benefits quotation<sup>4</sup> in the prescribed form, and (2) audited scheme accounts for a period which (a) begins with such date as may be determined in accordance with regulations, and (b) ends with a date which falls within the prescribed period ending with the day on which the application is made<sup>5</sup>. An application under these provisions must be made within the authorised period<sup>6</sup>. Where the Board receives an application<sup>7</sup>, it must give a copy of the application to the Regulator<sup>8</sup>.

The circumstances in which the Board will assume responsibility for a scheme on reconsideration are set out<sup>9</sup>.

1 *Ie* the Pensions Act 2004 s 151(2) or (3).

2 Section 151(2) applies where (1) a scheme failure notice has been issued under s 122(2)(a) (see PARA 659B.2) in relation to the scheme, that notice has become binding and the trustees or managers have received a copy of the binding notice under s 125(3) (see PARA 659B.3), (2) the valuation obtained by the Board under s 143 (see PARA 659C.15) in respect of the scheme has become binding, and (3) the Board would have been required to assume responsibility for the scheme under s 127 (see PARA 659C.2) but for the fact that the condition in s 127(2)(a) was not satisfied: s 151(2). Section 151(3) applies where (a) the Board has issued a scheme failure notice under s 130(2) (see PARA 659C.5) in relation to the scheme, that notice has become binding and the trustees or managers have received a copy of the binding notice under s 130(7), (b) the valuation obtained by the Board under s 143 in respect of the scheme has become binding, and (c) the Board would have been required to assume responsibility for the scheme under s 128 (see PARA 659C.3) but for the fact that the condition in s 128(2)(a) was not satisfied: s 151(3).

3 *Ibid* s 15(1) referring to Pt 2 Ch 3 (ss 126-181).

4 For the purposes of *ibid* s 151 'protected benefits quotation', in relation to a scheme, means a quotation for one or more annuities from one or more insurers, being companies willing to accept payment in respect of the members from the trustees or managers of the scheme, which would provide in respect of each member of the scheme from the reconsideration time (1) benefits for or in respect of the member corresponding to the compensation which would be payable to or in respect of the member in accordance with the pension

compensation provisions if the Board assumed responsibility for the scheme by virtue of s 151, or (2) benefits in accordance with the member's entitlement or accrued rights (including pension credit rights within the meaning of the Pensions Act 1995 s 124(1)) under the scheme rules (other than his entitlement or rights in respect of money purchase benefits), whichever benefits can, in the case of that member, be secured at the lower cost: Pensions Act 2004 s 151(8). 'The reconsideration time', in relation to an application under s 151, means the time immediately before the end of the period to which the audited scheme accounts mentioned in head (2) in the text relate: s 151(8). For the purposes of s 151 'audited scheme accounts', in relation to a scheme, means (a) accounts obtained by the trustees or managers of the scheme ('the scheme accounts') which are prepared in accordance with s 151(9)-(11) and audited by the auditor in relation to the scheme, and (b) a report by the auditor, in the prescribed form, as to whether or not such requirements as may be prescribed are satisfied in relation to the scheme accounts: s 151(8). See Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590; and PARA 636A.15. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). 'Auditor', in relation to a scheme, has the meaning given by the Pensions Act 1995 s 47 (see PARA 787): Pensions Act 2004 s 151(8).

For the purposes of s 151 (i) regulations may prescribe how the cost of securing the benefits mentioned in head (1) of the definition of 'protected benefits quotation' in s 151(8) is to be determined, calculated and verified, and (ii) subject to any provision made under head (i), that cost is to be determined, calculated and verified in accordance with guidance issued by the Board: s 151(12) (partly in force). Where the scheme is being wound up, for the purposes of determining the benefits which fall within head (2) of the definition of 'protected benefits quotation' in s 151(8) no account is to be taken of the winding up of the scheme: s 151(13).

The scheme accounts are prepared in accordance with s 151(9) if, subject to s 151(10) and (11), they (A) include a statement of the assets of the scheme (excluding any assets representing the value of any rights in respect of money purchase benefits under the scheme rules) as at the reconsideration time, and (B) are prepared in accordance with such other requirements as may be prescribed: s 151(9). See SI 2005/590; and PARA 636A.15. Subject to the Pensions Act 2004 s 151(11), regulations under s 143(4) (see PARA 659C.15) (other than regulations made by virtue of s 143(5)), and guidance under s 143(6), apply to the scheme accounts as they apply for the purposes of a valuation under s 143: s 151(10). Regulations may provide that, where an asset of a prescribed description has been acquired during the assessment period, the value assigned to the asset as at the reconsideration time is to be determined, for the purposes of the scheme accounts, in the prescribed manner: s 151(11).

5 Ibid s 151(4). See SI 2005/590; and PARA 636A.15.

6 Pensions Act 2004 s 151(5). In s 151 'the authorised period' means the prescribed period which begins (1) where s 151(2) applies, with the later of (a) the day on which the trustees or managers received the copy of the binding notice mentioned in s 151(2)(a), and (b) the day on which they received a copy of the binding valuation mentioned in s 151(2)(b), and (2) where s 151(3) applies, with the later of (i) the day on which the trustees or managers received the copy of the binding notice mentioned in s 151(3)(a), and (ii) the day on which they received a copy of the binding valuation mentioned in s 151(3)(b): s 151(6). See SI 2005/590; and PARA 636A.15.

7 Ie under the Pensions Act 2004 s 151(1).

8 Ibid s 151(7).

9 See ibid s 152.

## 22. Closed schemes

If the trustees or managers of the scheme are unable to obtain a full buy-out quotation<sup>1</sup>, they must, within the authorised period, apply to the Board for authority to continue as a closed scheme<sup>2</sup>. For the purposes of determining whether they must make an application<sup>3</sup>, the trustees or managers of the scheme must take all reasonable steps to obtain a full buy-out quotation in respect of the scheme<sup>4</sup>. Where the Board receives an application<sup>5</sup>, if it is satisfied that the trustees or managers have complied with their obligation<sup>6</sup> but were unable to obtain a full buy-out quotation, it must authorise the scheme to continue as a closed scheme<sup>7</sup>. Where the Board determines an application in respect of a scheme, it must issue a determination notice<sup>8</sup> and give a copy of that notice to (1) the trustees or managers of the scheme, and (2) the Regulator<sup>9</sup>. If the trustees or managers of the scheme fail to comply with the above provisions<sup>10</sup> the civil penalty provisions in the Pensions Act 1995<sup>11</sup> apply to any trustee or manager who has failed to take all reasonable steps to secure compliance<sup>12</sup>.

Provision is made relating to the treatment of closed schemes<sup>13</sup> and valuations of closed schemes<sup>14</sup>. In addition, provision is made with respect to the reconsideration of closed schemes<sup>15</sup>.

1 In the Pensions Act 2004 s 153 'full buy-out quotation', in relation to a scheme, means a quotation for one or more annuities from one or more insurers (being companies willing to accept payment in respect of the members from the trustees or managers of the scheme) which would provide in respect of each member of the scheme, from a relevant date, benefits in accordance with the member's entitlement or accrued rights, including pension credit rights, under the scheme rules (other than his entitlement or rights in respect of money purchase benefits): s 153(7). 'Relevant date' means a date within the authorised period: s 153(7). 'Authorised period' has the same meaning as in s 151 (see PARA 659C.21): s 153(7). 'Pension credit rights' has the meaning given by the Pensions Act 1995 s 124(1): Pensions Act 2004 s 153(7).

2 Ibid s 153(2). Section 153 applies where s 151(2) or (3) (scheme rescue not possible but scheme has sufficient assets to meet the protected liabilities) applies in relation to an eligible scheme: s 153(1).

3 Under ibid s 153(2).

4 Ibid s 153(3). An application must (1) be in the prescribed form and contain the prescribed information, and (2) be accompanied by evidence in the prescribed form which shows that the trustees or managers of the scheme have complied with the obligation under s 153(3) but were unable to obtain a full buy-out quotation: s 153(4). As to applications under s 153 see the Pension Protection Fund (Closed Schemes) Regulations 2007, SI 2007/865, reg 2(1), (2).

5 Under ibid s 153(2).

6 Ie their obligation under ibid s 153(3).

7 Ibid s 153(5).

8 In ibid s 153 'determination notice' means a notice which is in the prescribed form and contains such information about the determination as may be prescribed: s 153(7). As to determination notices under s 153 see SI 2007/865 (NOTE 4) reg 2(3).

9 Ibid s 153(6).

10 Ie ibid s 153(2) or (3).

11 Ie the Pensions Act 1995 s 10 (see PARA 611).

12 Pensions Act 2004 s 153(8).

13 See ibid s 155.

14 See ibid s 156. As to the obtaining of actuarial valuations of closed schemes, valuation of the assets and liabilities of closed schemes and prescribed qualifications for the purpose of s 156 see SI 2007/865 (NOTE 4) regs 3-5.

15 See ibid s 157 (applications and notifications where closed schemes have insufficient assets) and SI 2007/865 (NOTE 4) reg 6, s 158 (amended by Occupational Pension Schemes (Modification of Pension Protection Provisions) Regulations 2005, SI 2005/705) (duty to assume responsibility for closed schemes) and Pensions Act 2004 s 159 (closed schemes: further assessment periods).

## **23. Requirement to wind up schemes with sufficient assets to meet protected liabilities**

Where, in relation to an eligible scheme, an assessment period<sup>1</sup> comes to an end because specified conditions<sup>2</sup> are satisfied, the trustees or managers of the scheme must (1) wind up the scheme, or (2) where the winding up of the scheme began before the assessment period<sup>3</sup>, continue the winding up of the scheme<sup>4</sup>. Where, in relation to an eligible scheme, an assessment period<sup>5</sup> comes to an end because specified conditions<sup>6</sup> are satisfied, the trustees or managers of the scheme must continue the winding up of the scheme begun (whether in accordance with these provisions or otherwise) before that assessment period<sup>7</sup>. The Board may

give the trustees or managers of the scheme directions relating to the manner of the winding up of the scheme under these provisions (and may vary or revoke any such direction given by it)<sup>8</sup>. The winding up of a scheme under these provisions is as effective in law as if it had been made under powers conferred by or under the scheme<sup>9</sup>. These provisions must be complied with in relation to a scheme (a) in spite of any enactment or rule of law, or any rule of the scheme, which would otherwise operate to prevent the winding up, and (b) without regard to any such enactment, rule of law or rule of the scheme as would otherwise require or might otherwise be taken to require the implementation of any procedure or the obtaining of any consent with a view to the winding up<sup>10</sup>. Where a public service pension scheme is required to be wound up under these provisions, the appropriate authority<sup>11</sup> may by order make provision modifying any enactment in which the scheme is contained or under which it is made<sup>12</sup>.

1 Within the Pensions Act 2004 s 132(2) or (4) (see PARA 659C.7).

2 In the conditions in *ibid* s 154(2). The conditions are (1) that s 151(2) or (3) (scheme rescue not possible but scheme has sufficient assets to meet the protected liabilities: see PARA 659C.21) applies in relation to the scheme, (2) that (a) the trustees or managers did not make an application under s 151 or s 153(2) (see PARA 659C.22) within the authorised period (within the meaning of s 151(6)) (or any such application has been withdrawn), or (b) if such an application was made, it has been finally determined, and (3) that, if an application was made under s 151, the Board is not required to assume responsibility for the scheme by virtue of s 152(2) (see PARA 659C.21): s 154(2). For the purposes of head (b) an application is not finally determined until (i) the Board has issued a determination notice in respect of the application under s 152 or, as the case may be, s 153, (ii) the period within which the issue of the notice may be reviewed by virtue of Pt 2 Ch 6 (ss 206-218) has expired, and (iii) if the issue of the notice is so reviewed (A) the review and any reconsideration, (B) any reference to the PPF Ombudsman in respect of the issue of the notice, and (C) any appeal against his determination or directions, has been finally disposed of: s 154(3). See further NOTE 6.

3 Whether by virtue of *ibid* s 219 (see PARA 659G.1) or otherwise.

4 *Ibid* s 154(1). Where a scheme is wound up in accordance with head (1) in the text, the winding up is to be taken as beginning immediately before the assessment period: s 154(6).

5 Within *ibid* s 159(3) (see PARA 659C.22).

6 In the conditions in *ibid* s 154(5). The conditions are (1) that an application is made by, or notice is given to, the trustees or managers of the scheme under s 157 (applications and notifications where closed schemes have insufficient assets: see PARA 659C.22), (2) that the valuation obtained by the Board in respect of the scheme under s 158(3) (see PARA 659C.22) has become binding, and (3) that the Board is not required to assume responsibility for the scheme by virtue of s 158(1) (duty to assume responsibility for closed scheme): s 154(5).

Where an assessment period in relation to an eligible scheme comes to an end by virtue of the conditions in s 154(2) or (5) being satisfied, s 150(1)-(4) (see PARA 659C.20) applies as it applies where an assessment period comes to an end by virtue of the Board ceasing to be involved with the scheme, except that in s 150(2) the reference to s 219 is to be read as a reference to s 154(6): s 154(13).

7 *Ibid* s 154(4).

8 *Ibid* s 154(7). Section 154(7) is without prejudice to the power to give directions under s 134 (see PARA 659C.9), but subject to any order made under s 154(8): s 154(7). The Regulator may by order direct any person specified in the order (1) to take such steps as are so specified as it considers are necessary as a result of (a) the winding up of the scheme beginning, by virtue of s 154(6), immediately before the assessment period, or (b) the winding up of the scheme being continued under head (2) in the text, and (2) to take those steps within a period specified in the order: s 154(8). If the trustees or managers of a scheme fail to comply with a direction to them under s 154(7), or contained in an order under s 154(8), the Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to any trustee or manager who has failed to take all reasonable steps to secure compliance: Pensions Act 2004 s 154(9). The Pensions Act 1995 s 10 also applies to any other person who, without reasonable excuse, fails to comply with a direction to him contained in an order under the Pensions Act 2004 s 154(8): s 154(10).

9 *Ibid* s 154(11).

10 *Ibid* s 154(12).

11 In *ibid* s 154(14) 'the appropriate authority', in relation to a scheme, means such Minister of the Crown or government department as may be designated by the Treasury as having responsibility for the particular scheme: s 154(15).

12 *Ibid* s 154(14).

## **24. Assumption of responsibility for a scheme: transfer notice**

The following provisions<sup>1</sup> apply where the Board is required to assume responsibility for a scheme<sup>2</sup>. The Board must give the trustees or managers a notice (a 'transfer notice')<sup>3</sup>. A transfer notice may not be given in relation to a scheme during any period when the issue of, or failure to issue, a withdrawal notice<sup>4</sup> is reviewable<sup>5</sup>. The Board must give a copy of any notice<sup>6</sup> to (1) the Regulator, and (2) any insolvency practitioner in relation to the employer or, if there is no such insolvency practitioner, the employer<sup>7</sup>.

1 *Ie* the Pensions Act 2004 s 160.

2 Under *ibid* s 127 (see PARA 659C.2), 128 (see PARA 659C.3), 152 (see PARA 659C.21) or 158 (see PARA 659C.22): s 160(1).

3 *Ibid* s 160(2). In a case to which s 127 or 128 applies, a transfer notice may not be given until the valuation obtained under s 143 (see PARA 659C.15) is binding: s 160(3). In a case to which s 158 applies, a transfer notice may not be given until the valuation obtained under s 158(3) is binding: s 160(4).

4 Under or by virtue of *ibid* s 146 or 147 (refusal to assume responsibility: see PARAS 659C.16, 659C.17).

5 *Ibid* s 160(5) (see s 149(6)(b) and PARA 659C.19).

6 Given under *ibid* s 160(2).

7 *Ibid* s 160(6).

Section 160 is subject to s 172(1) and (2) (no transfer notice within first 12 months of assessment period or when fraud compensation application is pending: see PARA 659C.35): s 160(7).

## **25. Effect of Board assuming responsibility for a scheme**

Where a transfer notice is given to the trustees or managers of an eligible scheme, the Board assumes responsibility for the scheme in accordance with Chapter 3 of Part 2 of the Pensions Act 2004<sup>1</sup>. The effect of the Board assuming responsibility for a scheme is that (1) the property, rights and liabilities of the scheme<sup>2</sup> are transferred to the Board, without further assurance, with effect from the time the trustees or managers receive the transfer notice, (2) the trustees or managers of the scheme are discharged from their pension obligations<sup>3</sup> from that time, and (3) from that time the Board is responsible for securing that compensation is (and has been) paid in accordance with the pension compensation provisions, and, accordingly, the scheme is to be treated as having been wound up immediately after that time<sup>4</sup>. Provision is made in respect of the transfer of the property, rights and liabilities of a scheme under head (1) above<sup>5</sup>. Regulations may make further provision regarding such transfers<sup>6</sup>.

1 *Ie* the Pensions Act 2004 ss 126-181: s 161(1).

2 In head (1) in the text the reference to liabilities of the scheme does not include any liability to, or in respect of, any member of the scheme, other than (1) liabilities in respect of money purchase benefits, and (2) such other liabilities as may be prescribed: *ibid* s 161(3) (head (2) not yet in force).

3 In head (2) in the text 'pension obligations' in relation to the trustees or managers of the scheme means (1) their obligations to provide pensions or other benefits to or in respect of persons (including any obligation to provide guaranteed minimum pensions within the meaning of the Pension Schemes Act 1993), and (2) their obligations to administer the scheme in accordance with the scheme rules and the Pensions Act 2004 or any other enactment: s 161(4).

4 Ibid s 161(2).

5 See ibid s 161(5), Sch 6.

6 Ibid s 161(6). See Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006, SI 2006/580 (amended by SI 2007/782, SI 2009/451). Without prejudice to the generality of the 2004 Act s 161(6), regulations may authorise the Board to modify a term of a relevant contract of insurance if (1) any rights or liabilities under the contract are transferred to the Board by virtue of head (1) in the text, and (2) as a result of the transfer, the Board is required, by reason of that term, to pay a specified amount or specified amounts to a specified person who, immediately before the time mentioned in head (1) in the text, was a member of the scheme or a person entitled to benefits in respect of such a member: s 161(7). In s 161(7) 'relevant contract of insurance' means a contract of insurance which (a) is entered with a view to securing the whole or part of the scheme's liability for (i) any pension or other benefit payable to or in respect of one particular person whose entitlement to payment of a pension or other benefit has arisen, and (ii) any benefit which will be payable in respect of that person on his death, and (b) is a contract (A) which may not be surrendered, or (B) in respect of which the amount payable on surrender does not exceed the liability secured: s 161(8). 'Specified' means specified in, or determined in accordance with, the contract of insurance: s 161(8).

## 26. The pension compensation provisions

Provision is made for compensation to be paid in relation to a scheme for which the Board assumes responsibility in accordance with Chapter 3 of Part 2 of the Pensions Act 2004<sup>1</sup>, including provision for (1) periodic compensation to be paid to or in respect of members, (2) lump sum compensation to be paid to members, (3) a cap to be imposed on the periodic compensation and lump sum compensation payable, and (4) annual increases to be made to periodic compensation<sup>2</sup>.

1 I.e. the Pensions Act 2004 ss 126-181, Schs 6, 7. Compensation payable is intended to compensate members for scheme benefits which they have lost and in no sense can the statutory right be described as an asset of a pension scheme: *Independent Trustee Services Ltd v Hope* [2009] EWHC 2810 (Ch), [2010] ICR 553, [2009] All ER (D) 234 (Nov).

2 See Pensions Act 2004 s 162(1), Sch 7 (Sch 7 amended by Statistics and Registration Service Act 2007 Sch 3 para 15; Pensions Act 2008 Sch 2 paras 4-7, Sch 8; and SI 2005/705). In the Pensions Act 2004 Pt 2 (ss 107-220) references to the pension compensation provisions are to the provisions of, and the provisions made by virtue of, s 162 (See PARA 659C.13), ss 140-142 (see PARA 659C.14), 161(2)(c) (see PARA 659C.25), 164 (see PARA 659C.28) and 168 (see PARA 659C.32) and Sch 7: s 162(2). (Those references do not include any provision of, or made by virtue of, s 170 (discharge of liabilities in respect of money purchase benefits) (see PARA 659C.33): s 162(2).

See Pension Protection Fund (Compensation) Regulations 2005, SI 2005/670 (amended by SI 2005/993, SI 2005/2113, SI 2006/580, SI 2007/782, SI 2009/451) and the Pension Protection Fund (Pension Compensation Cap) Order 2010, SI 2010/667. As to regulations and orders under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

## 27. Adjustments to be made where the Board assumes responsibility for a scheme

The following provisions<sup>1</sup> apply where the Board assumes responsibility for an eligible scheme in accordance with Chapter 3 of Part 2 of the Pensions Act 2004<sup>2</sup>. Any benefits (other than money purchase benefits) which (1) were payable under the scheme rules to any member, or to any person in respect of any member, during the period beginning with the assessment date<sup>3</sup> and ending with the receipt by the trustees or managers of the transfer notice, and (2) have been paid before the trustees or managers receive the transfer notice, are to be regarded as going towards discharging any liability of the Board to pay compensation to the member or, as the case may be, person in accordance with the pension compensation provisions<sup>4</sup>. Regulations may provide that, in prescribed circumstances, where a member of the scheme died before the commencement of the assessment period, and during the period mentioned in head (1) above, a person became entitled under the scheme rules to a benefit of a prescribed description in respect of the member, the benefit, or any part of it, is<sup>5</sup> to be treated as having

become payable before the assessment date<sup>6</sup>. The Board must (a) if any amount paid, during the period mentioned in head (1) above, by the trustees or managers of the scheme to a member, or to a person in respect of a member, exceeded the entitlement of that member or person under the pension compensation provisions, take such steps as it considers appropriate (including adjusting future compensation payments made in accordance with those provisions) to recover an amount equal to the aggregate of (i) the amount of the excess, and (ii) interest on that amount, at the prescribed rate, for the period which begins when the excess was paid by the trustees or managers and ends with the recovery of the excess, and (b) if any amount so paid was less than that entitlement (or no amount was paid in respect of that entitlement), pay an amount to the member or person concerned equal to the aggregate of (A) the amount of the shortfall, and (B) interest on that amount, at the prescribed rate, for the period which begins when the shortfall ought to have been paid by the trustees or managers and ends with the payment of the shortfall by the Board<sup>7</sup>.

1    Ie the Pensions Act 2004 s 163.

2    Ie *ibid* ss 126-181: s 163(1).

3    In *ibid* s 163 'assessment date' is to be construed in accordance with Sch 7 (see PARA 659C.26): s 163(7).

4    *Ibid* s 163(2).

5    For the purposes of *ibid* s 163(2).

6    *Ibid* s 163(3). See Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006, SI 2006/580 (amended by SI 2010/196).

7    2004 Act s 163(4). In s 163(4) references to an amount paid do not include (1) an amount paid in respect of any money purchase benefit, or (2) any other amount of a prescribed description: s 163(5) (head (2) not yet in force). Nothing in s 163(4) requires the Board (a) to recover any amount from a person in such circumstances as may be prescribed, or (b) to recover from any person any amount which it considers to be trivial: s 163(6). See further SI 2006/580.

## **28.    Postponement of compensation entitlement for the assessment period**

Regulations may provide that, where the Board assumes responsibility for an eligible scheme, the entitlement of any member of the scheme to compensation under Chapter 3 of Part 2 of the Pensions Act 2004<sup>1</sup> is, in such circumstances as may be prescribed, postponed for the whole or any part of the assessment period for which he continued in employment after attaining normal pension age<sup>2</sup>. Such regulations may provide that the postponement is on such terms and conditions (including those relating to increments) as may be prescribed<sup>3</sup>.

1    Ie the Pensions Act 2004 ss 126-181.

2    *Ibid* s 164(1). In s 164(1) the reference to 'normal pension age' is to normal pension age, within the meaning of Sch 7 para 34, in relation to the pension or lump sum in respect of which the entitlement to compensation arises: s 164(3). As to Sch 7 see PARA 659C.26.

3    *Ibid* s 164(2).

## **29.    Guaranteed minimum pensions**

The Board must notify the Commissioners of Inland Revenue where, by reason of it assuming responsibility for an eligible scheme in accordance with Chapter 3 of Part 2 of the Pensions Act 2004<sup>1</sup>, the trustees or managers of the scheme are discharged from their liability to provide a guaranteed minimum pension (within the meaning of the Pension Schemes Act 1993) to or in respect of a member of the scheme<sup>2</sup>.

1    Ie the Pensions Act 2004 ss 126-181.

2    Ibid s 165(1). Notification under s 165(1) must be given as soon as reasonably practicable: s 165(2). As to the service of notifications and electronic working under the Pensions Act 2004 see ss 303-305.

### **30.    Duty to pay scheme benefits unpaid at assessment date etc**

The following provisions<sup>1</sup> apply where the Board assumes responsibility for a scheme in accordance with Chapter 3 of Part 2 of the Pensions Act 2004<sup>2</sup>. The Board must pay any amount by way of pensions or other benefits which a person had become entitled to payment of under the scheme rules before the assessment date<sup>3</sup> but which remained unpaid at the time the transfer notice was received by the trustees or managers of the scheme<sup>4</sup>. Regulations may provide that, in prescribed circumstances, where (1) a member of the scheme died before the commencement of the assessment period, and (2) during the period beginning with the assessment date and ending with the receipt by the trustees or managers of the transfer notice, a person became entitled under the scheme rules to a benefit of a prescribed description in respect of the member, that person's entitlement to the benefit, or to any part of it, is<sup>5</sup> to be treated as having arisen before the assessment date<sup>6</sup>. Regulations may make provision requiring the Board, in such circumstances as may be prescribed, to take such steps (including making payments) as may be prescribed in respect of rights of prescribed descriptions to which members of the scheme were entitled immediately before the commencement of the assessment period<sup>7</sup>.

1    Ie the Pensions Act 2004 s 166.

2    Ie ibid ss 126-181: s 166(1).

3    In ibid s 166 'assessment date' is to be construed in accordance with Sch 7 (see PARA 659C.26): s 166(8).

4    Ibid s 166(2). Section 166(2) is subject to s 166(4): s 166(2). If, immediately before the assessment date, the person is entitled to the amount but has postponed payment of it, s 166(2) does not apply: s 166(3). Section 166(2) does not apply in relation to the amount of (1) any transfer payment, or (2) any payment in respect of a refund of contributions: s 166(4).

5    For the purposes of ibid s 166(2).

6    Ibid s 166(5). See Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006, SI 2006/580 (amended by SI 2010/196).

7    2004 Act s 166(6). For the purposes of regulations made under s 166(6) (1) Pt 2 Ch 3 (other than s 166(7)), and (2) the scheme rules (including any relevant legislative provision within the meaning of s 318(3) (see PARA 636A.19)), have effect subject to such modifications as may be prescribed: s 166(7).

### **31.    Modification of Chapter where liabilities discharged during assessment period**

Regulations may modify any of the provisions of Chapter 3 of Part 2 of the Pensions Act 2004<sup>1</sup> as it applies to cases (1) where any liability to provide pensions or other benefits to or in respect of any member or members under a scheme is discharged during an assessment period in relation to the scheme by virtue of (a) regulations<sup>2</sup>, or (b) the Board validating any action<sup>3</sup>, or (2) where, in prescribed circumstances, any such liability of a prescribed description is discharged on the assessment date<sup>4</sup> but before the commencement of the assessment period<sup>5</sup>.

1    Ie the Pensions Act 2004 ss 126-181.

2    Under ibid s 135(4) (see PARA 659C.10).

3 Mentioned in *ibid* s 135(9).

4 In *ibid* s 167 'assessment date' is to be construed in accordance with Sch 7 (see PARA 659C.26): s 167(2).

5 *Ibid* s 167(1). See Occupational Pension Schemes (Modification of Pension Protection Provisions) Regulations 2005, SI 2005/705. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

## **32. Administration of compensation**

The day appointed for the coming into force of the Pensions Act 2004 s 168 as modified by regulations made under s 286(3)(j) (financial assistance scheme for members of certain pension schemes: see PARA 850A) is the day after the day on which the first regulations under s 286 are made: SI 2005/1436. For further commencement provision see SI 2005/3331.

Regulations may make further provision regarding the operation and administration of Chapter 3 of Part 2 of the Pensions Act 2004<sup>1</sup>. Such regulations may, in particular, make provision (1) prescribing the manner in which and time when compensation<sup>2</sup> is to be paid (including provision requiring periodic compensation to be paid by instalments); (2) for calculating the amounts of compensation according to a prescribed scale or otherwise adjusting them to avoid fractional amounts or facilitate computation; (3) prescribing the circumstances and manner in which compensation to which a person ('the beneficiary') is entitled may be made to another person on behalf of the beneficiary for any purpose (including the discharge in whole or in part of an obligation of the beneficiary or any other person); (4) for the payment or distribution of compensation to or among persons claiming to be entitled on the death of any person and for dispensing with strict proof of their title; (5) for the recovery of amounts of compensation paid by the Board in excess of entitlement (together with interest on such amounts for the period from payment until recovery); (6) specifying the circumstances in which payment of compensation can be suspended<sup>3</sup>.

1 In the Pensions Act 2004 ss 126-181: s 168(1). See Financial Assistance Scheme (Provision of Information and Administration of Payments) Regulations 2005, SI 2005/2189 (amended by SI 2005/3256, SI 2008/1903, SI 2009/792, SI 2009/1851, SI 2010/1145). See also Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006, SI 2006/580 (amended by SI 2010/196).

2 In the Pensions Act 2004 s 168 'compensation' means compensation payable under Sch 7 (see PARA 659C.26) or under s 141(2) (see PARA 659C.14): s 168(3).

3 *Ibid* s 168(2). See SI 2005/2189 and SI 2006/580.

## **33. Discharge of Board's liabilities**

Where the Board assumes responsibility for an eligible scheme in accordance with Chapter 3 of Part 2 of the Pensions Act 2004<sup>1</sup>, the Board may provide for the discharge of any liability imposed by Chapter 3 of Part 2 to provide compensation (1) by the taking out of a policy of insurance or a number of such policies; (2) by the entry into an annuity contract or a number of such contracts; (3) by the transfer of the benefit of such a policy or policies or such a contract or contracts; (4) in prescribed circumstances, by the payment of a cash sum calculated in the prescribed manner<sup>2</sup>.

Where (a) the Board assumes responsibility for an eligible scheme in accordance with Chapter 3 of Part 2 of the Pensions Act 2004, and (b) one or more members are entitled, or have accrued rights<sup>3</sup>, under the scheme rules to money purchase benefits<sup>4</sup>, regulations must make provision<sup>5</sup> requiring the Board to secure that liabilities in respect of such benefits transferred to the Board<sup>6</sup> are discharged by it in the prescribed manner<sup>7</sup>.

1    Ie the Pensions Act 2004 ss 126-181.

2    Ibid s 169(1), (2) (s 169(2) partly in force).

3    In ibid s 170 'accrued rights', under the scheme rules of a scheme, include pension credit rights within the meaning of the Pensions Act 1995 s 124(1): Pensions Act 2004 s 170(4).

4    Ibid s 170(1).

5    In respect of cases to which s 170(1) applies.

6    Under ibid s 161 (see PARA 659C.25).

7    Ibid s 170(2). The provision made under s 170(2) must include provision prescribing the manner in which protected rights are to be given effect to: s 170(3). 'Protected rights' has the meaning given by the Pension Schemes Act 1993 s 10 (protected rights and money purchase benefits: see PARA 883): Pensions Act 2004 s 170(4). See Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006, SI 2006/580 (amended by SI 2010/196).

### **34.    Equal treatment**

The following provisions<sup>1</sup> apply where (1) a woman has been employed on like work with a man in the same employment, (2) a woman has been employed on work rated as equivalent with that of a man in the same employment, or (3) a woman has been employed on work which, not being work in relation to which head (1) or (2) above applies, was, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment, and service in that employment was pensionable service<sup>2</sup> under an occupational pension scheme<sup>3</sup>. If, apart from this provision<sup>4</sup>, any of the payment functions<sup>5</sup> so far as it relates (directly or indirectly) to that pensionable service (a) is or becomes less favourable to the woman than it is to the man, or (b) is or becomes less favourable to the man than it is to the woman, that function has effect with such modifications<sup>6</sup> as are necessary to ensure that the provision is not less favourable<sup>7</sup>.

The above provisions have effect in relation to the exercise of any payment function in so far as it relates (directly or indirectly) to any pensionable service on or after 17 May 1990<sup>8</sup>.

1    Ie the Pensions Act 2004 s 171.

2    In ibid s 171 'pensionable service' has the meaning given by the Pensions Act 1995 s 124(1): Pensions Act 2004 s 171(6).

3    Ibid s 171(1).

4    Ie apart from ibid s 171(2).

5    In ibid s 171 'payment function' means any function conferred on the Board by or by virtue of Pt 2 Ch 3 (ss 126-181) which relates to a person's entitlement to or the payment of any amount under or by virtue of (1) the pension compensation provisions (see PARA 659C.26), (2) s 166 (duty to pay scheme benefits unpaid at assessment date etc: see PARA 659C.30), (3) s 169 (discharge of liabilities in respect of compensation: see PARA 659C.33), or (4) s 170 (discharge of liabilities in respect of money purchase benefits: see PARA 659C.33): s 171(6).

6    For the meaning of 'modifications' see PARA 636A.16.

7    Pensions Act 2004 s 171(2). Section 171(2) does not operate in relation to any difference as between a woman and a man in the operation of any of the payment functions if the Board proves that the difference is genuinely due to a material factor which (1) is not the difference of sex, but (2) is a material difference between the woman's case and the man's case: s 171(3). Section 171(2) does not apply in such circumstances as may be prescribed: s 171(4). See Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006, SI 2006/580 (amended by SI 2010/196).

8    2004 Act s 171(5).

### 35. Relationship with fraud compensation regime

No transfer notice may be given in respect of a scheme within the first 12 months of an assessment period in relation to the scheme<sup>1</sup>. Where an application has been made<sup>2</sup>, no transfer notice may be given until (1) the Board has determined the application, (2) the period within which the Board's determination may be reviewed by virtue of Chapter 6 of Part 2 of the Pensions Act 2004<sup>3</sup> has expired, and (3) if the determination is so reviewed (a) the review and any reconsideration, (b) any reference to the PPF Ombudsman in respect of the determination, and (c) any appeal against his determination or directions, has been finally disposed of<sup>4</sup>. The provision below<sup>5</sup> applies where during an assessment period in relation to a scheme the Board determines to make one or more fraud compensation payments ('the fraud compensation') to the trustees or managers of the scheme under Chapter 4 of Part 2 of the Pensions Act 2004<sup>6</sup>. For the purposes of determining whether specified conditions<sup>7</sup> are satisfied, any fraud compensation payment which becomes payable after the relevant time<sup>8</sup> is, to the extent that it relates to a loss incurred by the scheme before that time, to be regarded as an asset of the scheme at that time<sup>9</sup>.

1 Pensions Act 2004 s 172(1).

2 Under ibid s 182 (application for fraud compensation payment: see PARA 659D.1).

3 Ie ibid ss 206-218 (see PARA 659F).

4 Ibid s 172(2).

5 Ie ibid s 172(4).

6 Ie ibid ss 182-189 (see PARA 659D): s 172(3).

7 Ie the condition in ibid s 127(2)(a) (see PARA 659C.2), 128(2)(a) (see PARA 659C.3), 152(2) (see PARA 659C.21) or 158(1) (see PARA 659C.22).

8 For the purposes of ibid s 172(4) 'the relevant time' (1) in the case of s 127(2)(a), has the same meaning as in that provision, (2) in the case of s 128(2)(a), has the same meaning as in that provision, (3) in the case of s 152(2) means the reconsideration time (within the meaning of s 151 (see PARA 659C.21)), and (4) in the case of s 158(1), has the same meaning as in that provision: s 172(5).

9 Ibid s 172(4). Section 172(4) does not apply to the extent that the fraud compensation is payable in respect of a reduction in the value of money purchase assets of the scheme: s 172(6). For this purpose 'money purchase assets' means assets representing the value of any rights in respect of money purchase benefits under the scheme rules: s 172(6).

### 36. Pension Protection Fund

The Pension Protection Fund must consist of (1) property and rights transferred to the Board<sup>1</sup>, (2) contributions levied<sup>2</sup>, (2a) interest paid<sup>3</sup>, (3) money borrowed by the Board<sup>4</sup>, (4) any income or capital gain credited<sup>5</sup>, (5) any amount paid to the Board<sup>6</sup>, (6) amounts recovered<sup>7</sup>, (7) any amount paid to the Board in respect of a debt due to the Board<sup>8</sup>, (8) any property transferred or amounts paid to the Board as required by a restoration order<sup>9</sup>, (9) any amount paid to the Board in respect of a debt due to the Board<sup>10</sup>, (10) amounts transferred from the Fraud Compensation Fund<sup>11</sup>, and (11) amounts of a prescribed description (other than amounts paid, directly or indirectly, to the Board by the Crown)<sup>12</sup>. The Board must credit to the Pension Protection Fund any income or capital gain arising from the assets in the Fund<sup>13</sup>. The following are to be paid or transferred out of the Pension Protection Fund (a) any sums required to meet liabilities transferred to the Board<sup>14</sup>, (b) any sums required to make payments in accordance with the pension compensation provisions, (c) any sums required for the repayment of, and the payment of interest on, money within head (3) above, (d) any sums required to make loans<sup>15</sup>, (e) any sums required to make payments relating to underpayments during the assessment

period<sup>16</sup>, (f) any sums required to make payments relating to payment of unpaid scheme benefits etc<sup>17</sup>, (g) any sums required to discharge liabilities<sup>18</sup>, (h) any sums required to meet any liabilities arising from obligations imposed on the Board by a restoration order<sup>19</sup>, (i) any property (other than sums) required to meet any liabilities (A) transferred to the Board as mentioned in head (a) and arising from obligations imposed by a restoration order, or (B) arising from obligations imposed on the Board by such an order, (j) any sums required to meet expenditure<sup>20</sup>, and (k) sums required for prescribed purposes<sup>21</sup>. No other amounts are to be paid or transferred out of the Pension Protection Fund<sup>22</sup>.

1 Under the Pensions Act 2004 s 161(2)(a) (see PARA 659C.25).

2 Under *ibid* s 174 or 175 (initial and pension protection levies: see PARAS 659C.37, 659C.38).

3 By virtue of the Pensions Act 2004 s 181A (interest for late payment of pension protection levy: see PARA 659C.38).

4 Under *ibid* s 115 (see PARA 659A.6) for the purposes of Pt 2 Ch 3 (ss 126-181).

5 Under *ibid* s 173(2).

6 By virtue of *ibid* s 139 (repayment of loans to trustees or managers and payment of interest: see PARA 659C.12).

7 Under *ibid* s 163(4)(a) (see PARA 659C.27) or by virtue of s 168(2)(e) (overpayments) (see PARA 659C.32).

8 Under *ibid* s 40(7) (see PARA 636A.20) by virtue of a contribution notice under s 38 (see PARA 636A.20).

9 Under *ibid* s 52 (see PARA 636A.24).

10 Under *ibid* s 56(7) (see PARA 636A.24) by virtue of a contribution notice under s 55 (see PARA 636A.24).

11 Under *ibid* s 187 (fraud compensation transfer payments: see PARA 659D.4).

12 *Ibid* s 173(1) (amended by Pensions Act 2008 Sch 10 para 4) (head (10) in the text in force on 6 April 2010 (SI 2010/443), head (11) in the text not yet in force). See further NOTE 21.

13 Pensions Act 2004 s 173(2).

14 Under *ibid* s 161(2)(a).

15 Under *ibid* s 139 (loans to trustees or managers).

16 Under *ibid* s 163(4)(b) (underpayments during the assessment period).

17 Under *ibid* s 166 (payment of unpaid scheme benefits etc: see PARA 659C.30).

18 Under *ibid* s 169 or 170 (discharge of liabilities in respect of compensation or money purchase benefits: see PARA 659C.33).

19 Under *ibid* s 52.

20 Incurred by virtue of *ibid* s 161(5) and Sch 6 para 7 (expenditure associated with transfer of property, rights and liabilities to the Board: see PARA 659C.25).

21 *Ibid* s 173(3). See the Pension Protection Fund (Payments to meet Investment Costs) Regulations 2005, SI 2005/1610; and the Pension Protection Fund (Prescribed Payments) Regulations 2008, SI 2008/664.

In the Pensions Act 2004 s 173(1) (other than head (4) in the text) and s 173(3) (other than head (c) in the text) any reference to a provision of the Pensions Act 2004 is to be read as including a reference to any provision in force in Northern Ireland corresponding to that provision: s 173(5).

22 *Ibid* s 173(4).

### 37. Initial levy

Regulations must make provision for imposing a levy ('the initial levy') in respect of eligible schemes for the period ('the initial period') which (1) begins with the day appointed for this purpose by the regulations, and (2) ends on the following 31 March or, if the regulations so provide, 12 months after the day referred to in head (1) above<sup>1</sup>. The regulations must prescribe (a) the factors by reference to which the initial levy is to be assessed, (b) the rate of the levy, and (c) the time or times during the initial period when the levy, or any instalment of the levy, becomes payable<sup>2</sup>. Regulations under the above provisions may only be made with the approval of the Treasury<sup>3</sup>.

1 Pensions Act 2004 s 174(1). See Occupational Pension Schemes (Levies) Regulations 2005, SI 2005/842 (see PARA 659A.8). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

2 Pensions Act 2004 s 174(2). See SI 2005/842.

3 Pensions Act 2004 s 174(3).

### **38. Pension Protection levies**

For each financial year<sup>1</sup> falling after the initial period<sup>2</sup>, the Board must impose both of the following (1) a risk-based pension protection levy<sup>3</sup> in respect of all eligible schemes; (2) a scheme-based pension protection levy<sup>4</sup> in respect of eligible schemes<sup>5</sup>. In Chapter 3 of Part 2 of the Pensions Act 2004<sup>6</sup> 'pension protection levy' means a levy imposed in accordance with these provisions<sup>7</sup>. The Board must, before the beginning of each financial year, determine in respect of that year (a) the factors by reference to which the pension protection levies are to be assessed, (b) the time or times by reference to which those factors are to be assessed, (c) the rate of the levies, and (d) the time or times during the year when the levies, or any instalment of levy, becomes payable<sup>8</sup>. Different risk factors, scheme factors or rates may be determined in respect of different descriptions of scheme<sup>9</sup>. The rate determined in respect of a description of scheme may be nil<sup>10</sup>. The Board's duty to impose pension protection levies in respect of any financial year is subject to provision relating to the amounts to be raised by the pension protection levies<sup>11</sup> and transitional provision<sup>12</sup>.

The Secretary of State is required to specify a levy ceiling before the beginning of each financial year<sup>13</sup>.

Provision is made setting out the way in which valuations will determine scheme underfunding for the purpose of calculating the risk-based pension protection levy<sup>14</sup>.

Provision relating to the calculation, collection and recovery of levies is made<sup>15</sup>.

Regulations may make provision for interest to be charged at the prescribed rate in the case of late payment of a pension protection levy<sup>16</sup>.

1 In the Pensions Act 2004 s 175 and ss 176-181 'financial year' means a period of 12 months ending with 31 March: s 175(9).

2 In *ibid* s 175 'initial period' is to be construed in accordance with s 174 (see PARA 659C.37): s 175(8).

3 For the purposes of *ibid* s 175 a risk-based pension protection levy is a levy assessed by reference to (1) the difference between the value of a scheme's assets (disregarding any assets representing the value of any rights in respect of money purchase benefits under the scheme rules) and the amount of its protected liabilities, (2) except in relation to any prescribed scheme or scheme of a prescribed description, the likelihood of an insolvency event occurring in relation to the employer in relation to a scheme, and (3) if the Board considers it appropriate, one or more other risk factors mentioned in s 175(3): s 175(2)(a). The other risk factors referred to in head (3) are factors which the Board considers indicate one or more of the following (a) the risks associated with the nature of a scheme's investments when compared with the nature of its liabilities; (b) such other matters as may be prescribed: s 175(3).

Matters which have been prescribed for these purposes are the nature of and any risks associated with any arrangements which the Board considers may reduce the risk of compensation being payable from the Pension Protection Fund in the event of an insolvency event occurring in respect of an employer in relation to the scheme: Pension Protection Fund (Risk-based Pension Protection Levy) Regulations 2006, SI 2006/672.

4 For the purposes of the Pensions Act 2004 s 175 a scheme-based pension protection levy is a levy assessed by reference to (1) the amount of a scheme's liabilities to or in respect of members (other than liabilities in respect of money purchase benefits), and (2) if the Board considers it appropriate, one or more other scheme factors mentioned in s 175(4): s 175(2)(b). The other scheme factors referred to in head (2) are (a) the number of persons who are members, or fall within any description of member, of a scheme; (b) the total annual amount of pensionable earnings of active members of a scheme; (c) such other factors as may be prescribed: s 175(4) (partly in force). In s 175 'pensionable earnings', in relation to an active member under a scheme, means the earnings by reference to which a member's entitlement to benefits would be calculated under the scheme rules if he ceased to be an active member at the time by reference to which the factor within head (b) is to be assessed: s 175(8). For the meaning of 'earnings' see PARA 636A.15.

5 Ibid s 175(1).

6 Ie ibid ss 126-181, Schs 6, 7.

7 Ibid s 175(1).

8 Ibid s 175(5). See further s 176 which makes supplementary provision relating to s 175(5); and Pension Protection Fund (Pension Protection Levies Consultation) Regulations 2005, SI 2005/1440.

9 Pensions Act 2004 s 175(6).

10 Ibid s 175(7).

11 See ibid s 177, and the Occupational Pension Schemes (Levy Ceiling) Order 2010, SI 2010/666, which sets out restrictions on the amounts to be raised by the pension protection levies.

12 See 2004 Act s 180 (partly in force) which allows for regulations to modify the provisions relating to the pension protection levies for the transitional period: s 175(10). See the Occupational Pension Schemes (Pension Protection Levies) (Transitional Period and Modification for Multi-employer Schemes) Regulations 2006, SI 2006/566.

13 See 2004 Act s 178; the Occupational Pension Schemes (Levy Ceiling--Earnings Percentage Increase) Order 2006, SI 2006/3105; the Occupational Pension Schemes (Levy Ceiling--Earnings Percentage Increase) Order 2008, SI 2008/217; the Occupational Pension Schemes (Levy Ceiling--Earnings Percentage Increase) Order 2009, SI 2009/200; the Occupational Pension Schemes (Levy Ceiling--Earnings Percentage Increase) Order 2010, SI 2010/1, and the Occupational Pension Schemes (Levy Ceiling) Order 2010, SI 2010/666.

14 See 2004 Act s 179 (partly in force); and the Pension Protection Fund (Valuation) Regulations 2005, SI 2005/672; and PARA 659C.15.

15 See Pensions Act 2004 s 181 (partly in force); the Occupational Pension Schemes (Levies) Regulations 2005, SI 2005/842 (see PARA 659A.8); the Pension Protection Fund (General and Miscellaneous Amendments) Regulations 2006, SI 2006/580 (amended by SI 2010/196); and the Pension Protection Fund (Waiver of Pension Protection Levy and Consequential Amendments) Regulations 2007, SI 2007/771.

16 Pensions Act 2004 s 181A(1) (s 181A added by Pensions Act 2008 Sch 10 para 5). Interest is payable by or on behalf of the person or persons by or on behalf of whom the levy is payable: Pensions Act 2004 s 181A(2). Interest payable by a person by virtue of s 181A is a debt due from the person to the Board: s 181A(3). Interest is recoverable by the Board or, if the Board so determines, by the Regulator on its behalf: s 181A(4). Without prejudice to the generality of s 181A(1), regulations under s 181A may include provision relating to (1) the collection and recovery of interest; (2) the circumstances in which interest may be waived: s 181A(5).

### **39. Pension protection on transfer of employment**

These provisions<sup>1</sup> apply in relation to a person ('the employee') where (1) there is a relevant transfer within the meaning of the TUPE Regulations<sup>2</sup>, (2) by virtue of the transfer the employee ceases to be employed by the transferor<sup>3</sup> and becomes employed by the transferee, and (3) at the time immediately before the employee becomes employed by the transferee (a) there is an occupational pension scheme ('the scheme') in relation to which the transferor is the employer, and (b) one of specified provisions<sup>4</sup> applies<sup>5</sup>.

In a case where the above provisions<sup>6</sup> apply, it is a condition of the employee's contract of employment with the transferee that specified requirements<sup>7</sup> are complied with<sup>8</sup>. This does not apply in relation to a contract if or to the extent that the employee and the transferee so agree at any time after the time when the employee becomes employed by the transferee<sup>9</sup>.

1    Ie the Pensions Act 2004 s 257.

2    In *ibid* s 257 the 'TUPE Regulations' means the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246: Pensions Act 2004 s 257(8) (amended by SI 2006/246).

3    In Pensions Act 2004 s 257 references to the transferor include any associate of the transferor, and the Insolvency Act 1986 s 435 applies for the purposes of the Pensions Act 2004 s 257 as it applies for the purposes of the Insolvency Act 1986: Pensions Act 2004 s 257(8).

4    Ie one of *ibid* s 257(2), (3) and (4).

5    *Ibid* s 257(1). For the purposes of s 257, the condition in head (3) in the text is to be regarded as satisfied in any case where it would have been satisfied but for any action taken by the transferor by reason of the transfer: s 257(5).

Section 257(2) applies where (1) the employee is an active member of the scheme, and (2) if any of the benefits that may be provided under the scheme are money purchase benefits (a) the transferor is required to make contributions to the scheme in respect of the employee, or (b) the transferor is not so required but has made one or more such contributions: s 257(2). Section 257(3) applies where (i) the employee is not an active member of the scheme but is eligible to be such a member, and (ii) if any of the benefits that may be provided under the scheme are money purchase benefits, the transferor would have been required to make contributions to the scheme in respect of the employee if the employee had been an active member of it: s 257(3). Section 257(4) applies where (A) the employee is not an active member of the scheme, nor eligible to be such a member, but would have been an active member of the scheme or eligible to be such a member if, after the date on which he became employed by the transferor, he had been employed by the transferor for a longer period, and (B) if any of the benefits that may be provided under the scheme are money purchase benefits, the transferor would have been required to make contributions to the scheme in respect of the employee if the employee had been an active member of it: s 257(4).

In the case of a scheme which is contracted-out by virtue of the Pension Schemes Act 1993 s 9 (see *PARA* 882), the references in heads (2), (ii) and (B) to contributions mean contributions other than minimum payments (within the meaning of the Pension Schemes Act 1993): Pensions Act 2004 s 257(7). As from the abolition date (see *PARA* 880) 2004 Act s 257(7) repealed: Pensions Act 2007 Sch 4 para 41, Sch 7 Pt 6. For savings see 2007 Act Sch 4 Pt 3.

6    Ie the 2004 Act s 257.

7    Ie the requirements in *ibid* s 258(2) or the requirement in s 258(3).

8    *Ibid* s 258(1).

The requirements in s 258(2) are that (1) the transferee secures that, as from the relevant time, the employee is, or is eligible to be, an active member of an occupational pension scheme in relation to which the transferee is the employer, and (2) in a case where the scheme is a money purchase scheme, as from the relevant time (a) the transferee makes relevant contributions to the scheme in respect of the employee, or (b) if the employee is not an active member of the scheme but is eligible to be such a member, the transferee would be required to make such contributions if the employee were an active member, and (3) in a case where the scheme is not a money purchase scheme, as from the relevant time the scheme (i) satisfies the statutory standard referred to in the Pension Schemes Act 1993 s 12A (see *PARA* 887), or (ii) if regulations so provide, complies with such other requirements as may be prescribed: Pensions Act 2004 s 258(2). See Transfer of Employment (Pension Protection) Regulations 2005, SI 2005/649. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). In the Pensions Act 2004 s 258 'the relevant time' means (A) in a case where s 257 applies by virtue of the application of s 257(2) or (3), the time when the employee becomes employed by the transferee; (B) in a case where s 257 applies by virtue of the application of s 257(4), the time at which the employee would have been a member of the scheme referred to in s 257(1)(c)(i) (head (a) in the text) or (if earlier) would have been eligible to be such a member: s 258(7). 'Relevant contributions' means such contributions in respect of such period or periods as may be prescribed: s 258(7). See SI 2005/649.

The requirement in the Pensions Act 2004 s 258(3) is that, as from the relevant time, the transferee makes relevant contributions to a stakeholder pension scheme of which the employee is a member: s 258(3). In s 258 'stakeholder pension scheme' means a pension scheme which is registered under the Welfare Reform and Pensions Act 1999 s 2 (see *PARA* 873A.2): Pensions Act 2004 s 258(7). The requirement in s 258(3) is for the

purposes of s 258 to be regarded as complied with by the transferee during any period in relation to which the condition in s 258(5) is satisfied: s 258(4). The condition in s 258(5) is that the transferee has offered to make relevant contributions to a stakeholder pension scheme of which the employee is eligible to be a member (and the transferee has not withdrawn the offer): s 258(5).

9 Ibid s 258(6).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/659D. Fraud compensation.

## **659D. Fraud compensation.**

### **1. Cases where fraud compensation payments can be made**

The Board<sup>1</sup> must, in accordance with the following provisions<sup>2</sup>, make one or more payments (in Part 2 of the Pensions Act 2004<sup>3</sup> referred to as 'fraud compensation payments') in respect of an occupational pension scheme<sup>4</sup> if (1) the scheme is not a prescribed<sup>5</sup> scheme or a scheme of a prescribed description, (2) the value of the assets of the scheme has been reduced since the relevant date<sup>6</sup> and the Board considers that there are reasonable grounds for believing that the reduction was attributable to an act or omission constituting a prescribed offence, (3) certain specified provision<sup>7</sup> applies<sup>8</sup>, (4) an application is made which meets certain requirements<sup>9</sup>, and (5) the application is made within the authorised period<sup>10</sup>.

Provision is made setting out the Board's duties in respect of certain applications under the above provisions<sup>11</sup>.

1 For the meaning of 'the Board' see PARA 659A.2.

2 Ie in accordance with the Pensions Act 2004 s 182.

3 Ie ibid ss 107-220.

4 For the meaning of 'occupational pension scheme' see PARA 636A.3.

5 For the meaning of 'prescribed' see PARA 636A.3.

6 In the Pensions Act 2004 s 182 'the relevant date' means (1) in the case of an occupational pension scheme established under a trust, 6 April 1997, and (2) in any other case, the day appointed by the Secretary of State by order for the purposes of s 182: s 182(10).

7 Ie ibid s 182(2), (3) or (4).

8 Ibid s 182(2) applies where (1) a qualifying insolvency event has occurred in relation to the employer in relation to the scheme, (2) after that event, a scheme failure notice has been issued under s 122(2)(a) (see PARA 659B.2) in relation to the scheme and that notice has become binding, and (3) a cessation event has not occurred in relation to the scheme in respect of a cessation notice which has been issued during the period beginning with the occurrence of the insolvency event, and ending immediately before the issuing of the scheme failure notice under s 122(2)(a), and the occurrence of such a cessation event in respect of a cessation notice issued during that period is not a possibility: s 182(2). As to references to a qualifying insolvency event see s 182(8). For the meaning of 'employer' see PARA 636A.15. As to a cessation event and a cessation notice see s 182(9).

Section 182(3) applies where (a) in relation to the scheme, an application has been made under s 182(1), or a notification has been given under s 129(5)(a) (see PARA 659C.4), and (b) in response to that application, or the notice given by the Regulator under s 129(4), the Board has issued a scheme failure notice under s 130(2) (see PARA 659C.5) in relation to the scheme and that notice has become binding: s 182(3). For the meaning of 'the Regulator' see PARA 636A.2.

Section 182(4) applies where (i) the scheme is not an eligible scheme, (ii) the employer in relation to the scheme is unlikely to continue as a going concern, (iii) the prescribed requirements are met in relation to the employer, (iv) the application under s 182 states that the case is one in relation to which heads (ii) and (iii) apply, and (v) in response to that application the Board has issued a notice under s 183(2) confirming that a scheme rescue is not possible in relation to the scheme and that notice has become binding: s 182(4). See Occupational Pension Schemes (Fraud Compensation Payments and Miscellaneous Amendments) Regulations 2005, SI 2005/2184 (amended by SI 2007/814, SI 2010/196).

9 le the requirements of the Pensions Act 2004 s 182(5). An application meets the requirements of s 182(5) if (1) it is made by a prescribed person, and (2) it is made in the prescribed manner and contains the prescribed information: s 182(5). See SI 2005/2184, NOTE 8.

10 Pensions Act 2004 s 182(1). See SI 2005/2184, NOTE 8. Subject to the Pensions Act 2004 s 182(7) an application is made within the authorised period if it is made within the period of 12 months beginning with the later of (1) the time of the relevant event, or (2) the time when the auditor or actuary of the scheme, or the trustees or managers, knew or ought reasonably to have known that a reduction of value falling within head (2) in the text had occurred, or within such longer period as the Board may determine in any case: s 182(6). 'The relevant event' means (a) in a case where s 182(2) applies in relation to an eligible scheme, the event within s 182(2)(a), (b) in any other case where s 182(2) applies, the issue of the scheme failure notice under s 122(2)(a) mentioned in s 122(2)(b), (c) in a case where s 182(3) applies, the event within s 182(3)(a), and (d) in a case where s 182(4) applies, the trustees or managers becoming aware that s 182(4)(b) and (c) apply in relation to the scheme: s 182(10). 'Auditor' and 'actuary', in relation to an occupational pension scheme, have the meaning given by the Pensions Act 1995 s 47 (see PARA 787): Pensions Act 2004 s 182(10). For the meaning of 'managers' see PARA 636A.11. No application for fraud compensation may be made under s 182 in respect of a scheme once a transfer notice is given in relation to the scheme under s 160 (see PARA 659C.24): s 182(7).

Section 182 is subject to s 184(2) (no fraud compensation payments to be made until settlement date determined: see PARA 659D.2): s 182(11).

11 See *ibid* s 183 and SI 2005/2184 (see NOTE 8).

## 2. Recovery of value

Where an application for a fraud compensation payment is made, the trustees or managers must obtain any recoveries of value<sup>1</sup>, to the extent that they may do so without disproportionate cost and within a reasonable time<sup>2</sup>. No fraud compensation payment may be made until the date ('the settlement date') determined by the Board, after consulting the trustees or managers of the scheme in question, as the date after which further recoveries of value are unlikely to be obtained without disproportionate cost or within a reasonable time<sup>3</sup>. It is for the Board to determine whether anything received by the trustees or managers of the scheme is to be treated as a payment<sup>4</sup> received in respect of any such act or omission<sup>5</sup>.

1 In Pensions Act 2004 s 184 'recovery of value' means any increase in the value of the assets of the scheme, being an increase attributable to any payment received (otherwise than from the Board) by the trustees or managers of the scheme in respect of any act or omission (1) which there are reasonable grounds for believing constituted an offence prescribed for the purposes of s 182(1)(b) (see PARA 659D.1), and (2) to which any reduction in value falling within s 182(1)(b) was attributable: s 184(3).

1 Pensions Act 2004 s 184(1).

3 *Ibid* s 184(2).

4 For this purpose 'payment' includes any money or money's worth: *ibid* s 184(4).

5 *Ibid* s 184(4).

## 3. Fraud compensation payments

Where the Board determines to make one or more fraud compensation payments, it must make the payment or payments to the trustees or managers of the scheme in accordance with these provisions<sup>1</sup>. A fraud compensation payment may be made on such terms (including terms requiring repayment in whole or in part) and on such conditions as the Board considers appropriate<sup>2</sup>. The amount of the payment (or, if there is more than one, the aggregate) must not exceed the difference between (1) the amount of the reduction (or, if more than one, the aggregate amount of the reductions)<sup>3</sup>, and (2) the amount of any recoveries of value obtained before the settlement date<sup>4</sup>. Subject to the above provision<sup>5</sup>, the Board (a) must determine the amount of any fraud compensation payment in accordance with regulations made for these purposes, and (b) must take account of any interim payment already made<sup>6</sup>.

The Board may make interim payments where it appears that specified conditions<sup>7</sup> are satisfied and the trustees or managers would not otherwise be able to meet liabilities of a prescribed description<sup>8</sup>.

1 Pensions Act 2004 s 185 s 185(1).

2 Ibid s 185(2).

3 Ie within the meaning of ibid s 182(1)(b): see PARA 659D.1.

4 Ibid s 185(3), referring to the settlement date within the meaning of s 184(2) (see PARA 659D.2).

5 Ie subject to ibid s 185(3).

6 Ibid s 185(4), referring to any interim payment already made under s 186. See Occupational Pension Schemes (Fraud Compensation Payments and Miscellaneous Amendments) Regulations 2005, SI 2005/2184 (see PARA 659D.1). The Board must give written notice of its determination under the Pensions Act 2004 s 185(4) to (1) the Regulator, (2) the trustees or managers of the scheme, (3) if the trustees or managers did not make the application under s 182 (fraud compensation payments: see PARA 659D.1), the person who made that application, and (4) any insolvency practitioner in relation to the employer or, if there is no such insolvency practitioner, the employer: s 185(5). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

7 Ie the conditions in the Pensions Act 2004 s 182(1).

8 See ibid s 186; and SI 2005/2184 (see PARA 659D.1).

#### **4. Board's powers to make fraud compensation transfer payments**

The following provisions are in force for the purpose of conferring power to make regulations on 25 February 2010 and for all other purposes on 6 April 2010: SI 2010/443.

The following provisions<sup>1</sup> apply where (1) the Board assumes responsibility for a scheme<sup>2</sup>, (2) the value of the assets of the scheme was reduced after the relevant date<sup>3</sup> but before the transfer notice<sup>4</sup> was received by the trustees or managers of the scheme and there are reasonable grounds for believing that the reduction was attributable to an act or omission constituting an offence<sup>5</sup>, and (3) no application was made<sup>6</sup> in respect of that reduction (or any such application was withdrawn before it was determined)<sup>7</sup>. The Board may transfer an amount from the Fraud Compensation Fund to the Pension Protection Fund ('fraud compensation transfer payment') in respect of the reduction in value, subject to these provisions<sup>8</sup>. The Board must obtain any recoveries of value<sup>9</sup>, to the extent that it may do so without disproportionate cost and within a reasonable time<sup>10</sup>. No fraud compensation transfer payment may be made until the date determined by the Board as the date after which further recoveries of value are unlikely to be obtained without disproportionate cost and within a reasonable time<sup>11</sup>. It is for the Board to determine whether anything received by it is to be treated as a payment<sup>12</sup> received in respect of any such act or omission<sup>13</sup>. The amount of any fraud compensation transfer payment (or, if there is more than one, the aggregate) must not exceed the difference between (a) the amount of the reduction (or, if more than one, the aggregate amount of the reductions) within head (2) above, and (b) the amount of any recoveries of value obtained by the Board before the date determined by the Board<sup>14</sup>. Subject to the above provision<sup>15</sup> the Board must determine the amount of any fraud compensation transfer payment in accordance with regulations made for these purposes<sup>16</sup>.

1 Ie the Pensions Act 2004 s 187.

2 In accordance with ibid Pt 2 Ch 3 (ss 126-181).

3 In ibid s 187 'the relevant date' has the meaning given by s 182(10) (see PARA 659D.1): s 187(9).

4 Within the meaning of *ibid* s 160 (see PARA 659C.24).

5 Prescribed for the purposes of *ibid* s 182(1)(b) (see PARA 659D.1).

6 Under *ibid* s 182.

7 *Ibid* s 187(1).

8 *Ie* subject to *ibid* s 187: s 187(2).

9 In *ibid* s 187 'recovery of value' means any increase in the value of the Pension Protection Fund, being an increase attributable to any payment received (otherwise than under s 187) by the Board in respect of any act or omission (1) which there are reasonable grounds for believing constituted an offence prescribed for the purposes of s 182(1)(b), and (2) to which any reduction in value falling within head (2) in the text was attributable: s 187(5).

10 *Ibid* s 187(3).

11 *Ibid* s 187(4).

12 For this purpose 'payment' includes any money or money's worth: *ibid* s 187(6).

13 *Ibid* s 187(6).

14 Under *ibid* s 187(4): s 187(7).

15 *Ie* subject to *ibid* s 187(7).

16 *Ibid* s 187(8). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

## 5. Fraud Compensation Fund

The following provisions are all in force by 6 April 2010: SI 2005/1720, SI 2010/443.

The Fraud Compensation Fund must consist of (1) any property and rights transferred<sup>1</sup> which the Board designates as assets of the Fund, (2) contributions levied under the fraud compensation levy<sup>2</sup>, (3) money borrowed by the Board<sup>3</sup> for the purposes of Chapter 4 of Part 2 of the Pensions Act 2004<sup>4</sup>, (4) amounts recovered with respect to interim payments<sup>5</sup>, and (5) any income or capital gain credited under the provision below<sup>6</sup>. The Board must credit to the Fraud Compensation Fund any income or capital gain arising from the assets in the Fund<sup>7</sup>. The following are payable out of the Fraud Compensation Fund (a) sums required to meet liabilities transferred to the Board<sup>8</sup> which the Board designates as liabilities of the Fund, (b) fraud compensation payments<sup>9</sup>, (c) interim payments<sup>10</sup>, (d) amounts required to be transferred to the Pension Protection Fund<sup>11</sup>, (e) money required for the repayment of, and the payment of interest on, money within head (3) above<sup>12</sup>. No other amounts are payable out of the Fraud Compensation Fund<sup>13</sup>.

1 *Ie* under the Pensions Act 2004 s 302: see PARA 637-659.

2 *Ie* under *ibid* s 189: see PARA 659D.6.

3 *Ie* under *ibid* s 115: see PARA 659A.6.

4 *Ie* *ibid* ss 182-189.

5 *Ie* under *ibid* s 186: see PARA 659D.3.

6 *Ie* under *ibid* s 188(2): s 188(1). See further NOTE 12.

7 *Ibid* s 188(2).

8 *Ie* under *ibid* s 302.

9     Ie under ibid s 185: see PARA 659D.3.

10    Ie under ibid s 186(1).

11    Ie under ibid s 187: see PARA 659D.4.

12    Ibid s 188(3).

13    Ibid s 188(4).

## 6.    **Fraud compensation levy**

For the purposes of meeting expenditure payable out of the Fraud Compensation Fund, regulations may provide for the imposition of a levy ('fraud compensation levy') in respect of occupational pension schemes<sup>1</sup>. A fraud compensation levy imposed in respect of a scheme is payable to the Board by or on behalf of (1) the trustees or managers of the scheme, or (2) any other prescribed person<sup>2</sup>. A fraud compensation levy is so payable at prescribed times and at a rate, not exceeding the prescribed rate, determined by the Board<sup>3</sup>. In determining the amount of expenditure in respect of which a fraud compensation levy is to be imposed, the Board may take one year with another (and, in doing so, must have regard to expenditure estimated to be incurred in current or future periods and to actual expenditure incurred in previous periods)<sup>4</sup>. The Board must in respect of any fraud compensation levy imposed under these provisions (a) determine the schemes in respect of which it is imposed, (b) calculate the amount of the levy in respect of each of those schemes, and (c) notify any person liable to pay the levy in respect of the scheme of the amount of the levy in respect of the scheme and the date or dates on which it becomes payable<sup>5</sup>. An amount payable by a person on account of a fraud compensation levy is a debt due from him to the Board<sup>6</sup>. An amount so payable may be recovered (i) by the Board, or (ii) if the Board so determines, by the Regulator on its behalf<sup>7</sup>. Regulations may include provision relating to (A) the collection and recovery of amounts payable by way of levy under these provisions; (B) the circumstances in which any such amount may be waived<sup>8</sup>.

1     Pensions Act 2004 s 189(1). Section 189(1) does not apply in relation to any scheme which is prescribed or of a description prescribed under s 182(1)(a) (schemes not eligible for fraud compensation: see PARA 659D.1): s 189(2). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). In exercise of his powers under the Pensions Act 2004 s 189(1) the Secretary of State has made the Occupational Pension Schemes (Fraud Compensation Levy) Regulations 2006, SI 2006/558 (amended by SI 2009/615, SI 2010/196).

2     2004 Act s 189(3) (head (2) in the text not yet in force).

3     Ibid s 189(4). Notice of the rates determined by the Board under s 189(4) must be given to prescribed persons in the prescribed manner: s 189(6).

4     Ibid s 189(5).

5     Ibid s 189(7). The Board may require the Regulator to discharge, on the Board's behalf, its functions under s 189(7) in respect of the levy: s 189(8). As to the service of notifications and electronic working under the Pensions Act 2004 see ss 303-305.

6     Ibid s 189(9).

7     Ibid s 189(10).

8     Ibid s 189(11). See Occupational Pension Schemes (Levies) Regulations 2005, SI 2005/842 (see PARA 659A.8). The Pensions Act 2004 s 189(11) is without prejudice to the generality of s 189(1), (9) or (10): s 189(11).

## **UPDATE**

## **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

## **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

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## **659E. Gathering Information.**

The following provisions are in force: SI 2004/3350, 2005/275, 2005/3331, 2006/560. The Pensions Act 2004 Pt 2 Ch 5 (ss 190-205) makes provision relating to the gathering of information.

For general and supplementary provision relating to the Pensions Act 2004 see PARA 636A.

### **1. Information to be provided to the Board etc**

Regulations may require such persons as may be prescribed to provide (1) to the Board<sup>1</sup>, or (2) to a person (a) with whom the Board has made arrangements<sup>2</sup>, and (b) who is authorised by the Board for the purposes of the regulations, information of a prescribed description at such times, or in such circumstances, as may be prescribed<sup>3</sup>.

1 For the meaning of 'the Board' see PARA 659A.2.

2 Ie under the Pensions Act 2004 Sch 5 para 18 (see PARA 659A.1).

3 Ibid s 190(1). For the meaning of 'prescribed' see PARA 636A.3. See Pension Protection Fund (Valuation) Regulations 2005, SI 2005/672 (see PARA 659C.15); Pension Protection Fund (Provision of Information) Regulations 2005, SI 2005/674 (amended by SI 2005/2113, 2005/2184, SI 2006/595, SI 2010/196); Financial Assistance Scheme (Provision of Information and Administration of Payments) Regulations 2005, SI 2005/2189 (amended by SI 2005/3256, SI 2008/1903, SI 2009/792, SI 2009/1851, SI 2010/1145); Occupational Pension Schemes (Fraud Compensation Payments and Miscellaneous Amendments) Regulations 2005, SI 2005/2184 (see PARA 659D.1). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

Regulations under the Pensions Act 2004 s 190(1) may in particular make provision for requiring such persons as may be prescribed to provide any information or evidence needed for a determination of entitlement to compensation under Pt 2 Ch 3 (ss 126-181): s 190(2). Regulations made by virtue of head (2) in the text must make provision regarding the manner in which the persons required to provide information are to be notified of the identity of the person authorised as mentioned in head (b) in the text: s 190(3). As to the service of notifications and electronic working under the Pensions Act 2004 see ss 303-305.

### **2. Notices requiring provision of information**

Any person<sup>1</sup> may be required by a notice in writing to produce any document<sup>2</sup>, or provide any other information, which is (1) of a description specified in the notice, and (2) relevant to the exercise of the Board's functions in relation to an occupational pension scheme<sup>3</sup>. Such a notice may be given by (a) the Board, or (b) a person authorised by the Board for the purposes of these provisions in relation to the scheme<sup>4</sup>. Where the production of a document, or the provision of information, is required by a notice<sup>5</sup>, the document must be produced, or information must be provided, in such a manner, at such a place and within such a period as may be specified in the notice<sup>6</sup>.

Provision is made with respect to penalties relating to the above provisions<sup>7</sup>.

1 Ie any person to whom the Pensions Act 2004 s 191(3) applies. Section 191(3) applies to (1) a trustee or manager of the scheme, (2) a professional adviser in relation to the scheme, (3) the employer in relation to the scheme, (4) an insolvency practitioner in relation to the employer, and (5) any other person appearing to the

Board, or person giving the notice, to be a person who holds, or is likely to hold, information relevant to the discharge of the Board's functions in relation to the scheme: s 191(3). For the meaning of 'managers' see PARA 636A.11. For the meaning of 'professional adviser' see PARA 636A.29. For the meaning of 'employer' see PARA 636A.15.

Where the Board has assumed responsibility for a scheme (a) any reference to the Board's functions in relation to the scheme includes a reference to the functions which it has by virtue of having assumed responsibility for the scheme, and (b) any reference to a trustee, manager, professional adviser or employer in relation to the scheme is to be read as a reference to a person who held that position in relation to the scheme before the Board assumed responsibility for it: s 204(1), (3).

2 In ibid ss 190-203 'document' includes information recorded in any form, and any reference to production of a document, in relation to information recorded otherwise than in a legible form, is to producing a copy of the information (1) in a legible form, or (2) in a form from which it can readily be produced in a legible form: s 204(1), (2).

3 Ibid s 191(1). For the meaning of 'occupational pension scheme' see PARA 636A.3.

4 Ibid s 191(2).

5 Ie given under ibid s 191(1).

6 Ibid s 191(4).

7 See ibid s 193.

### 3. Entry of premises

An appointed person<sup>1</sup> may, for the purpose of enabling or facilitating the performance of any function of the Board in relation to an occupational pension scheme, at any reasonable time enter scheme premises<sup>2</sup> and, while there (1) may make such examination and inquiry as may be necessary for such purpose, (2) may require any person on the premises to produce, or secure the production of, any document relevant to that purpose for inspection by the appointed person, (3) may take copies of any such document, (4) may take possession of any document appearing to be such a document or take in relation to any such document any other steps which appear necessary for preserving it or preventing interference with it, (5) may, in the case of any such document which consists of information which is stored in electronic form and is on, or accessible from, the premises, require the information to be produced in a form (a) in which it can be taken away, and (b) in which it is legible or from which it can readily be produced in a legible form, and (6) may, as to any matter relevant to the exercise of the Board's functions in relation to the scheme, examine, or require to be examined, either alone or in the presence of another person, any person on the premises whom he has reasonable cause to believe to be able to give information relevant to that matter<sup>3</sup>. An appointed person applying for admission to any premises for the purposes of these provisions must, if so required, produce his certificate of appointment<sup>4</sup>. When exercising a power under these provisions an appointed person may be accompanied by such persons as he considers appropriate<sup>5</sup>. Any document of which possession is taken under these provisions may be retained until the end of the period comprising (i) the period of 12 months beginning with the date on which possession was taken of the document, and (ii) any extension of that period<sup>6</sup>.

Provision is made with respect to penalties relating to the above provisions<sup>7</sup>.

1 In the Pensions Act 2004 s 192 'appointed person' means a person appointed by the Board for the purposes of s 192 in relation to the scheme: s 192(7).

2 Premises are scheme premises for the purposes of ibid s 192(1) if the appointed person has reasonable grounds to believe that (1) they are being used for the business of the employer, (2) an insolvency practitioner in relation to the employer is acting there in that capacity, (3) documents relevant to (a) the administration of the scheme, or (b) the employer, are being kept there, or (4) the administration of the scheme, or work connected with the administration of the scheme, is being carried out there, unless the premises are a private dwelling-house not used by, or by permission of, the occupier for the purposes of a trade or business: s 192(2).

3 Ibid s 192(1).

4 Ibid s 192(3).

5 Ibid s 192(4).

6 Under ibid s 192(6): s 192(5). The Board may before the end of the period mentioned in s 192(5) (including any extension of it under this provision) extend it by such period not exceeding 12 months as the Board considers appropriate: s 192(6).

7 See ibid s 193.

#### 4. Warrants

A justice of the peace may issue a warrant under these provisions<sup>1</sup> if satisfied on information on oath given by or on behalf of the Board that there are reasonable grounds for believing (1) that there is on, or accessible from, any premises any document (a) whose production has been required<sup>2</sup>, and (b) which has not been produced in compliance with that requirement, (2) that there is on, or accessible from, any premises any document relevant to the exercise of the Board's functions in relation to an occupational pension scheme whose production could be so required and, if its production were so required, the document (i) would not be produced, but (ii) would be removed, or made inaccessible, from the premises, hidden, tampered with or destroyed, or (3) that a person will do any act which constitutes a misuse or misappropriation of the assets of an occupational pension scheme and that there is on, or accessible from, any premises any document (A) which relates to whether the act will be done, and (B) whose production could be required<sup>3</sup>. A warrant under these provisions must authorise an inspector<sup>4</sup> (aa) to enter the premises specified in the information, using such force as is reasonably necessary for the purpose, (bb) to search the premises and take possession of any document appearing to be such a document as is mentioned above<sup>5</sup>, or take in relation to such a document any other steps which appear necessary for preserving it or preventing interference with it, (cc) to take copies of any such document, (dd) to require any person named in the warrant to provide an explanation of any such document or to state where it may be found or how access to it may be obtained, and (ee) in the case of any such document which consists of information which is stored in electronic form and is on, or accessible from, the premises, to require the information to be produced in a form in which it can be taken away, and in which it is legible or from which it can readily be produced in a legible form<sup>6</sup>. When executing a warrant under these provisions, an inspector may be accompanied by such persons as he considers appropriate<sup>7</sup>. A warrant under these provisions continues in force until the end of the period of one month beginning with the day on which it is issued<sup>8</sup>. Any document of which possession is taken under these provisions may be retained until the end of the period comprising the period of 12 months beginning with the date on which possession was taken of the document, and any extension of that period<sup>9</sup>.

1 I.e. under the Pensions Act 2004 s 194.

2 Under ibid s 191 or 192 (see PARAS 659E.2. 659E.3), or any corresponding provision in force in Northern Ireland.

3 Under ibid s 191 or 192: s 194(1).

4 In ibid s 194 'inspector' means a person appointed by the Board as an inspector: s 194(7).

5 I.e. as mentioned in ibid s 194(1).

6 Ibid s 194(2).

7 Ibid s 194(3).

8 Ibid s 194(4).

9 Under ibid s 194(6): s 194(5). The Board may before the end of the period mentioned in s 194(5) (including any extension of it under this provision) extend it by such period not exceeding 12 months as the Board considers appropriate: s 194(6).

## **5. Offence of providing false or misleading information to the Board**

Any person who knowingly or recklessly provides information which is false or misleading in a material particular is guilty of an offence if the information (1) is provided in purported compliance with a requirement<sup>1</sup>, or (2) is provided otherwise than as mentioned in head (1) above but in circumstances in which the person providing the information intends, or could reasonably be expected to know, that it would be used by the Board for the purposes of exercising its functions under the Pensions Act 2004<sup>2</sup>. Any person guilty of an offence under the above provision is liable (a) on summary conviction, to a fine not exceeding the statutory maximum<sup>3</sup>; (b) on conviction on indictment, to a fine or imprisonment for a term not exceeding two years, or both<sup>4</sup>.

1 Under the Pensions Act 2004 (1) s 190 (information to be provided to the Board etc: see PARA 659E.1), (2) s 191 (notices requiring provision of information: see PARA 659E.2), or (3) s 192 (entry of premises: see PARA 659E.3).

2 Ibid s 195(1).

3 As to the statutory maximum see PARA 403.

4 Pensions Act 2004 s 195(2).

## **6. Use of information**

Information held by the Board in the exercise of any of its functions may be used by the Board for the purposes of, or for any purpose connected with or incidental to, the exercise of its functions<sup>1</sup>.

1 Pensions Act 2004 s 196.

## **7. Disclosure of information**

Restricted information<sup>1</sup> must not be disclosed (1) by the Board, or (2) by any person who receives the information directly or indirectly from the Board<sup>2</sup>. Restricted information may be disclosed with the consent of the person to whom it relates and (if different) the person from whom the Board obtained it<sup>3</sup>. Any person who discloses information in contravention<sup>4</sup> of these provisions is guilty of an offence and liable (a) on summary conviction, to a fine not exceeding the statutory maximum<sup>5</sup>; (b) on conviction on indictment, to a fine or imprisonment for a term not exceeding two years, or both<sup>6</sup>.

Restricted information may be disclosed for certain purposes<sup>7</sup>.

Provision is also made relating to the disclosure of information by the Inland Revenue<sup>8</sup>.

1 For the purposes of the Pensions Act 2004 s 197 and ss 198-203, 'restricted information' means any information obtained by the Board in the exercise of its functions which relates to the business or other affairs of any person, except for information (1) which at the time of the disclosure is or has already been made available to the public from other sources, or (2) which is in the form of a summary or collection of information so framed as not to enable information relating to any particular person to be ascertained from it: s 197(4).

2 Pensions Act 2004 s 197(1). Section 197(1) is subject to (1) s 197(3), and (2) ss 198-203 and 235 (see PARA 965B.2): s 197(2). See further NOTE 3.

3 Pensions Act 2004 s 197(3). Section 197(3) is subject to s 202(4): s 197(3). Information which (1) is obtained under s 191 (see PARA 659E.2) by a person authorised under s 191(2)(b), but (2) if obtained by the Board, would be restricted information, is treated for the purposes of s 197(1) and (3) and ss 198-203 as restricted information which the person has received from the Board: s 197(6).

4 For the meaning of 'contravention' see PARA 636A.11.

5 As to the statutory maximum see PARA 403.

6 Pensions Act 2004 s 197(5).

7 See Pensions Act 2004 s 198 (disclosure for facilitating the exercise of functions by the Board), s 199 (disclosure for facilitating the exercise of functions by the Regulator), s 200, Sch 8 (amended by SI 2006/2937, SI 2009/1941) (disclosure for facilitating exercise of functions by other supervisory authorities), Pensions Act 2004 s 201 (amended by SI 2009/1941) (other permitted disclosures).

8 See Pensions Act 2004 s 202.

## **8. Provision of information to members of schemes etc**

Regulations may (1) require the Board to provide information of prescribed descriptions to such persons as may be prescribed at prescribed times, or (2) require trustees or managers of occupational pension schemes to provide such information (a) relating to the exercise of the Board's functions in relation to any scheme of which they are trustees or managers, (b) relating to any notice issued or application or determination made under Chapter 2, 3 or 4 of Part 2 of the Pensions Act 2004<sup>1</sup> which relates to any such scheme, or (c) otherwise relating to the Board's involvement with any such scheme, as may be prescribed to prescribed persons at prescribed times or in prescribed circumstances<sup>2</sup>. Provision relating to restricted information<sup>3</sup> does not preclude the disclosure of restricted information by the Board which relates to the entitlement of a particular individual to compensation under Chapter 3 of Part 2 of the Pensions Act 2004 if the disclosure is made to that individual or to a person authorised by him<sup>4</sup>. Provision relating to restricted information<sup>5</sup> does not preclude the disclosure of restricted information by the Board if (i) the information relates to the exercise of the Board's functions in relation to an occupational pension scheme, (ii) the disclosure is made to (A) all affected persons<sup>6</sup>, or (B) all affected persons of a particular description, and (iii) the Board is satisfied that, in all the circumstances, it is reasonable to make the disclosure<sup>7</sup>. In the case of an occupational pension scheme, provision relating to restricted information<sup>8</sup> does not preclude the disclosure of restricted information by the Board if (aa) the disclosure is made to any of the following in relation to the scheme: a trustee or manager, any professional adviser, the employer, the insolvency practitioner in relation to the employer, (bb) the information is relevant to the exercise of that person's functions in relation to the scheme, and (cc) the Board considers that it is reasonable in all the circumstances to make the disclosure for the purpose of facilitating the exercise of those functions<sup>9</sup>.

1 See PARAS 659B, 659C, 659D.

2 Pensions Act 2004 s 203(1). See Pension Protection Fund (Provision of Information) Regulations 2005, SI 2005/674 (see PARA 659E.1); Financial Assistance Scheme (Provision of Information and Administration of Payments) Regulations 2005, SI 2005/2189 (see PARA 659C.32); and Occupational Pension Schemes (Fraud Compensation Payments and Miscellaneous Amendments) Regulations 2005, SI 2005/2184 (see PARA 659D.1). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

3 See the Pensions Act 2004 s 197: see PARA 659E.7.

4 Ibid s 203(2).

5    Ibid s 197.

6    In *ibid* s 203(3) 'affected person', in relation to an occupational pension scheme, means a person (1) who is a member of the scheme, or (2) who is for the time being nominated by a member of the scheme for the purposes of s 203(3): s 203(4). For the meaning of 'member' see *PARA 636A.3*. A nomination by a member of the scheme under head (2) (a) may be made by notice in writing given by the member, (b) becomes effective when the notice is received by the Board, and (c) ceases to be effective when the Board receives a further notice from the member withdrawing the nomination: s 203(5).

7    Ibid s 203(3).

8    Ibid s 197.

9    Ibid s 203(6).

## 9. Publishing reports etc

The Board may, if it considers it appropriate to do so in any particular case, publish a report of the exercise of, or any matter arising out of or connected with the exercise of, any of its functions in that case<sup>1</sup>. For the purposes of the law of defamation, the publication of any matter by the Board is privileged unless the publication is shown to be made with malice<sup>2</sup>.

1    Pensions Act 2004 s 205(1). The publication of a report under s 205(1) may be in such form and manner as the Board considers appropriate: s 205(2).

2    Ibid s 205(3).

## UPDATE

### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see *PARA 676A*.

### 637-659 The Pensions Compensation Board

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see *SI 2005/1720*) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see *PARA 659A*), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see *PARAS 659E.7, 659E.8*) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see *PARA 659E.7*) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see *PARA 659*) of information to which the Pensions Act 2004 s 302(3) applies

was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION BOARD/659F. Reviews, Appeals and Maladministration.

## **659F. Reviews, Appeals and Maladministration.**

The following provisions are partly in force: SI 2004/3350, 2005/275, 2005/1720, 2005/2447, 2010/443. The Pensions Act 2004 Pt 2 Ch 6 (ss 206-218) relates to reviews, appeals and maladministration.

For general and supplementary provision relating to the Pensions Act 2004 see PARA 636A.

### **1. Review and reconsideration by the Board of reviewable matters**

Regulations must (1) provide for the Board<sup>1</sup>, on the written application of an interested person<sup>2</sup>, to give a decision ('a review decision') on any reviewable matter, and (2) require a committee of the Board constituted for the purposes of these provisions (the 'Reconsideration Committee'), on the written application of an interested person following a review decision, to reconsider the reviewable matter and give a decision ('a reconsideration decision')<sup>3</sup>.

Regulations<sup>4</sup> may (a) permit a review decision in respect of a reviewable matter of a prescribed<sup>5</sup> description to be made otherwise than on an application, and (b) permit a reconsideration decision in respect of such a matter to be made otherwise than on an application<sup>6</sup>. Regulations must provide for the Board's powers on making a review decision or reconsideration decision to include power (i) to vary or revoke the determination, direction or other decision already made by the Board in respect of the reviewable matter, (ii) to substitute a different determination, direction or decision, (iii) to provide for such variations, revocations or substitutions, or any determinations, directions or other decisions made as a result of the review decision or reconsideration decision, to be treated as if they were made at such time (which may be a time prior to the making of the review decision or reconsideration decision) as the Board considers appropriate, (iv) to provide for any notice varied, substituted, issued or given by the Board as a result of the review decision or reconsideration decision, to be treated as if it were issued or given at such time (which may be a time prior to the making of the review decision or reconsideration decision) as the Board considers appropriate, (v) generally to deal with the matters arising on the review decision or reconsideration decision as if they had arisen on the original determination, direction or decision, (vi) to pay such compensation as the Board considers appropriate to such persons as it may determine, and (vii) to make savings and transitional provision<sup>7</sup>. Regulations must include provision (A) about applications under the regulations for a review decision or reconsideration decision in respect of a reviewable matter, including the times by which they are to be made, (B) requiring notice of such applications, or of a decision of the Board or the Reconsideration Committee<sup>8</sup> to give a review decision or reconsider a reviewable matter otherwise than on such an application, to be given to interested persons in relation to the matter, (C) with a view to securing that individuals concerned in giving a reconsideration decision were not concerned in the reviewable matter in respect of which the decision is to be made, (D) as to the procedure for reaching and giving decisions under the regulations, including rights of interested persons to make representations to the Reconsideration Committee on a reconsideration<sup>9</sup>, and the times by which decisions are to be given, and (E) requiring notice of the review decision or the reconsideration decision in respect of a reviewable matter to be given to interested persons in relation to the matter<sup>10</sup>.

1 For the meaning of 'the Board' see PARA 659A.2.

2 In the Pensions Act 2004 s 207(1), 'interested person' in relation to a reviewable matter, means a person of a description prescribed in relation to reviewable matters of that description: s 207(2). See Pension Protection Fund (Review and Reconsideration of Reviewable Matters) Regulations 2005, SI 2005/669 (amended by SI 2005/993, SI 2005/2113, SI 2005/2184, SI 2006/685, SI 2007/771, SI 2008/2683). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

For the purposes of the Pensions Act 2004 Pt 2 Ch 6 (ss 206-218), 'reviewable matter' means a matter mentioned in Sch 9 (amended by SI 2006/685, SI 2007/771): s 206(1). Regulations may provide, in relation to any reference in Sch 9 to a failure by the Board to do any act or make any determination, that (1) the reference is to be construed as a reference to a failure by the Board to do the act or make the determination within a prescribed period, and (2) the reference is to be construed as not including a failure to do the act or make the determination which first occurs after a prescribed time: Pensions Act 2004 s 206(2). See Pension Protection Fund (Reviewable Matters) Regulations 2005, SI 2005/600 (See PARA 636A); and Occupational Pension Schemes (Fraud Compensation Payments and Miscellaneous Amendments) Regulations 2005, SI 2005/2184 (see PARA 659D.1). Regulations may make provision suspending the effect of any determination, direction or other act of the Board, or any notice given or issued by it, which relates to a reviewable matter until (a) the period within which the matter may be reviewed by virtue of the Pensions Act 2004 Pt 2 Ch 6 has expired, and (b) if the matter is so reviewed (i) the review and any reconsideration, (ii) any reference to the PPF Ombudsman in respect of the matter, and (iii) any appeal against his determination or directions, has been finally disposed of: s 206(3). See SI 2005/2184 above. For the meaning of 'the PPF Ombudsman' see PARA 659F.3. Regulations may amend the Pensions Act 2004 Sch 9 by (A) adding to it any other description of determination, act or failure of, or matter determined or for determination by, the Board, or (B) removing from it any such determination, act, failure or matter for the time being mentioned in it: s 206(4). See SI 2005/600 and Occupational Pension Schemes (Miscellaneous Amendments) Regulations 2005, SI 2005/2113; and the Pension Protection Fund (Waiver of Pension Protection Levy and Consequential Amendments) Regulations 2007, SI 2007/771. Regulations under the Pensions Act 2004 s 206(4) may also modify any provision of Pt 2 (ss 107-220) in consequence of provision made by virtue of head (A) or (B): s 206(5). For the meaning of 'modifications' see PARA 636A.16.

3 Ibid s 207(1). See SI 2005/669 and SI 2005/2184.

4 Under the Pensions Act 2004 s 207(1).

5 For the meaning of 'prescribed' see PARA 636A.3.

6 Pensions Act 2004 s 207(3). See SI 2005/669.

7 Pensions Act 2004 s 207(4). See SI 2005/669.

8 By virtue of the Pensions Act 2004 s 207(3).

9 Under regulations made under ibid s 207(1)(b).

10 Ibid s 207(5). See SI 2005/669. Provision required by head (c) in the text may modify the Pensions Act 2004 Sch 5 paras 15 and 16 (membership and procedure of committees of the Board see PARA 659A.1): s 207(6).

## **2. Investigation by the Board of complaints of maladministration**

Regulations must make provision for dealing with relevant complaints<sup>1</sup>. Such regulations must (1) provide for the Board to investigate and give decisions on matters complained of in relevant complaints, and (2) provide for a committee of the Board, on applications following such decisions, to investigate matters complained of and give decisions on them<sup>2</sup>. Such regulations may, in particular, make provision (a) about the making of relevant complaints and applications under the regulations, including the times by which they are to be made, (b) with a view to securing that individuals concerned in giving a decision were not concerned in the matter which is the subject of the relevant complaint in question, (c) as to the procedure for reaching and giving decisions under the regulations, including (i) rights of prescribed persons to make representations to the Board, on an investigation under regulations made under head (2), and (ii) the times by which decisions are to be given, and (d) requiring notice (A) of a relevant complaint under the regulations, or (B) of a decision under the regulations in respect of the complaint, to be given to prescribed persons in relation to the matter<sup>3</sup>. Regulations<sup>4</sup> may confer

power on the Board to pay such compensation as it considers appropriate to such persons as it considers have sustained injustice in consequence of the matters complained of<sup>5</sup>.

1 Pensions Act 2004 s 208(1). See Pension Protection Fund (Maladministration) Regulations 2005, SI 2005/650. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). For the purposes of the Pensions Act 2004 Pt 2 Ch 6 (ss 206-218), 'relevant complaint' means a complaint (1) by a person who is or might become entitled to compensation under the pension compensation provisions, or (2) by a person who has or may make an application under s 182 (fraud compensation: see PARA 659D.1), alleging that he has sustained injustice in consequence of maladministration in connection with any act or omission by the Board or any person exercising functions on its behalf: s 208(2).

2 Ibid s 208(3). See SI 2005/650.

3 Pensions Act 2004 s 208(4). See SI 2005/650. The power conferred by head (b) in the text includes power to modify the Pensions Act 2004 Sch 5 paras 15 and 16 (membership and procedure of committees of the Board: see PARA 659A.1): s 208(6).

4 Under ibid s 208(1).

5 Ibid s 208(5). See SI 2005/650.

### 3. The Ombudsman for the Board of the Pension Protection Fund

There is to be a commissioner to be known as the Ombudsman for the Board of the Pension Protection Fund (in the Pensions Act 2004 referred to as 'the PPF Ombudsman')<sup>1</sup>. The PPF Ombudsman is to be appointed by the Secretary of State on such terms and conditions as are determined by the Secretary of State<sup>2</sup>. The PPF Ombudsman (1) is to hold and vacate office in accordance with the terms and conditions of his appointment, and (2) may resign or be removed from office in accordance with those terms and conditions<sup>3</sup>. The Secretary of State may by order make provision (a) about the payment, or provision for payment, of remuneration, compensation for loss of office, pension, allowances or gratuities to or in respect of the PPF Ombudsman; (b) about the reimbursement of the PPF Ombudsman in respect of any expenses incurred by him in the performance of his functions; (c) about the staff of the PPF Ombudsman and the provision of facilities (including additional staff) to him; (d) about the delegation of the functions of the PPF Ombudsman to his staff or to any such additional staff; (e) authorising the PPF Ombudsman (i) to charge such fees as are specified in the order; (ii) to charge fees sufficient to meet such costs as are specified in the order; (f) conferring powers to enable the PPF Ombudsman to obtain such information and documents as he may require for the performance of his functions; (g) about restrictions on the disclosure of information held by him<sup>4</sup>.

1 Pensions Act 2004 s 209(1).

2 Ibid s 209(2).

3 Ibid s 209(3).

4 Ibid s 209(4) (head (e) in the text not yet in force). See Pension Protection Fund (PPF Ombudsman) Order 2005, SI 2005/824 (amended by SI 2005/2023, SI 2008/2683). As to orders under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). An order under head (e) in the text (1) may prescribe, or authorise the PPF Ombudsman to determine, the time at which any fee is due, and (2) provide that any fee which is owed to the PPF Ombudsman by virtue of an order under head (e) in the text may be recovered as a debt due to the PPF Ombudsman: Pensions Act 2004 s 209(5) (not yet in force).

The Secretary of State must pay to the PPF Ombudsman out of money provided by Parliament such sums as may be required to be paid by the Secretary of State to or in respect of the PPF Ombudsman by virtue of an order under s 209(4): s 209(6). Regulations may provide for the imposition of a levy in respect of eligible schemes for the purpose of meeting expenditure of the Secretary of State under s 209(6): s 209(7). See Occupational Pension Schemes (Levies) Regulations 2005, SI 2005/842 (see PARA 659A.8). Where regulations

make such provision, the Pensions Act 2004 s 117(2), (3), (5), (6) and (7) (administration levy: see PARA 659A.8) applies in relation to the levy as it applies in relation to an administration levy (within the meaning of s 117), except that in s 117(7) the reference to s 117(1) is to be read as a reference to s 209(7): s 209(8). See SI 2005/842.

#### **4. Deputy PPF Ombudsmen**

The Secretary of State may appoint one or more persons to act as a deputy to the PPF Ombudsman (in Chapter 6 of Part 2 of the Pensions Act 2004<sup>1</sup> referred to as 'a Deputy PPF Ombudsman')<sup>2</sup>. Any such appointment is to be on such terms and conditions as the Secretary of State determines<sup>3</sup>. A Deputy PPF Ombudsman (1) is to hold and vacate office in accordance with the terms and conditions of his appointment, and (2) may resign or be removed from office in accordance with those terms and conditions<sup>4</sup>. A Deputy PPF Ombudsman may perform the functions of the PPF Ombudsman (a) during any vacancy in that office, (b) at any time when the PPF Ombudsman is for any reason unable to discharge his functions, or (c) at any other time, with the consent of the Secretary of State<sup>5</sup>. An order by the Secretary of State<sup>6</sup> may make provision (i) about the payment, or provision for payment, of remuneration, compensation for loss of office, pension, allowances or gratuities to or in respect of a Deputy PPF Ombudsman; (ii) about the reimbursement of any expenses incurred by a Deputy PPF Ombudsman in the performance of any of the PPF Ombudsman's functions<sup>7</sup>.

1    le the Pensions Act 2004 ss 206-218.

2    Ibid s 210(1).

3    Ibid s 210(2).

4    Ibid s 210(3).

5    Ibid s 210(4). References to the PPF Ombudsman in relation to the performance of his functions are accordingly to be construed as including references to a Deputy PPF Ombudsman in relation to the performance of those functions: s 210(5).

6    Under ibid s 209(4) (see PARA 659F.3).

7    Ibid s 210(6). See Pension Protection Fund (PPF Ombudsman) Order 2005, SI 2005/824 (amended by SI 2005/2023, SI 2008/2683). As to orders under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

#### **5. Annual reports to Secretary of State**

The PPF Ombudsman must prepare a report on the discharge of his functions for each financial year<sup>1</sup>. The PPF Ombudsman must send each report to the Secretary of State as soon as practicable after the end of the financial year for which it is prepared<sup>2</sup>.

1    Pensions Act 2004 s 212(1). In s 212 'financial year' means (1) the period beginning with the date on which the PPF Ombudsman is established and ending with the next following 31 March, and (2) each successive period of 12 months: s 212(4).

2    Ibid s 212(2). The Secretary of State must arrange for the publication of each report sent to him under s 212(2): s 212(3).

#### **6. Accounts and audit**

The PPF Ombudsman must send to the Comptroller and Auditor General a statement of the PPF Ombudsman's accounts in respect of a financial year<sup>1</sup> as soon as is reasonably practicable<sup>2</sup>. The Comptroller and Auditor General must examine, certify and report on the statement<sup>3</sup> and send

a copy of the statement and the report to the Secretary of State who must lay them before Parliament<sup>4</sup>.

1 'Financial year' means a period of 12 months ending with 31 March: Pensions Act 2004 s 212A(3) (s 212A added by SI 2008/817).

2 Pensions Act 2004 s 212A(1).

3 Pensions Act 2004 s 212A(2)(a).

4 Pensions Act 2004 s 212A(2)(b).

## **7. Reference of reviewable matter to the PPF Ombudsman**

Unless otherwise stated, the following provisions are in force for the purpose of conferring power to make regulations, and are in force for all other purposes on the day after the day on which the first regulations are made.

Regulations must make provision (1) for a reviewable matter to be referred to the PPF Ombudsman following a reconsideration decision<sup>1</sup>, and (2) for the PPF Ombudsman to investigate and determine what (if any) is the appropriate action for the Board to take in relation to the matter, and to remit the matter to the Board with directions for the purpose of giving effect to his determination<sup>2</sup>. Such regulations must make provision about the making of references to the PPF Ombudsman, including provision (a) about the descriptions of persons who may make them, (b) about the manner of making such references, including the times by which they are to be made, and (c) for prescribed persons to be notified of references made under the regulations, and determinations and directions given under the regulations<sup>3</sup>. The regulations must (i) require the PPF Ombudsman to conduct an oral hearing in relation to any reviewable matter referred to him under the regulations or to dispose of the matter on the basis of written representations, (ii) enable the PPF Ombudsman to consider evidence relating to the matter which was not available to the Board or the Reconsideration Committee, and (iii) make other provision about the procedure for conducting investigations, and reaching and giving determinations, under the regulations, including the times by which determinations are to be given<sup>4</sup>. The regulations may include provision (A) conferring power on the PPF Ombudsman to direct the Board to pay such compensation as he considers appropriate to such persons as he may direct, (B) conferring power on the Board to make such payments, (C) conferring power on the PPF Ombudsman to direct that any determinations, directions or other decisions which are made by the Board in accordance with any determination or direction given by him, or any variations, revocations or substitutions of its determinations, directions or other decisions which are made by the Board in accordance with any determination or direction given by him, are to be treated as if they were made at such time (which may be a time prior to his determination or direction) as he considers appropriate, (D) conferring power on the PPF Ombudsman to direct that any notice varied, substituted, issued or given by the Board in accordance with any determination or direction given by him is to be treated (aa) as if it were issued or given at such time (which may be a time prior to his determination or direction) as he considers appropriate; (bb) as if it became binding for the purposes of Part 2 of the Pensions Act 2004<sup>5</sup> at the time at which he gives his determination or direction or at such later time as he considers appropriate, (E) prescribing the circumstances in which any determination or other act of the Board in accordance with any determination or direction given by the PPF Ombudsman, is not to be treated as being a reviewable matter for the purposes of Part 2 of Chapter 6 of the Pensions Act 2004<sup>6</sup>, and (F) conferring such other powers on the Board as may be required when a matter is remitted to it (including such powers as the Board may have on making a review decision or a reconsideration decision)<sup>7</sup>.

1 Under regulations made under the Pensions Act 2004 s 207(1)(b) (see PARA 695F.1) or by virtue of s 207(3)(b) in respect of the matter.

2 Ibid s 213(1). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). The Pension Protection Fund (Reference of Reviewable Matters to the PPF Ombudsman) Regulations 2005, SI 2005/2024 (amended by SI 2008/2683), have been made under the Pensions Act 2004 s 213.

3 Ibid s 213(2). As to the service of notifications and electronic working under the Pensions Act 2004 see ss 303-305.

4 Ibid s 213(3). The provision that may be made by virtue of head (iii) in the text includes provision (1) conferring rights on prescribed persons (a) to make representations to the PPF Ombudsman in relation to a reviewable matter referred to him by virtue of s 213, (b) to be heard or represented at any oral hearing by the PPF Ombudsman in relation to such a matter, (2) about the consideration of evidence by the PPF Ombudsman, including (i) production of documents, (ii) oral hearings, (iii) expert evidence, (iv) attendance of witnesses, (3) conferring rights on prescribed persons to continue a reference made by a person who has died or is otherwise unable to act for himself, (4) as to the costs or expenses of prescribed persons, (5) conferring rights on prescribed persons to apply for a stay in relation to prescribed legal proceedings which begin after the reference is made and conferring power on the relevant court to make an order staying the proceedings if it is satisfied of prescribed matters, and (6) for securing that any determination or direction of the PPF Ombudsman under the regulations is binding on prescribed persons: s 213(4) (head (5) not yet in force).

5 Ie ibid ss 107-220.

6 Ie ibid ss 206-218.

7 Ibid s 213(5), referring to regulations made under ibid s 207(1) (see PARA 695F.1. Head (E) in the text is not yet in force.

## **8. Investigation by PPF Ombudsman of complaints of maladministration**

Unless otherwise stated, the following provisions are in force for the purpose of conferring power to make regulations, and are in force for all other purposes on the day after the day on which the first regulations are made.

Regulations must provide for the investigation and determination by the PPF Ombudsman of such matters as may be prescribed following decisions on relevant complaints given by the Board or the committee of the Board<sup>1</sup>. Regulations under these provisions must make provision (1) prescribing the descriptions of person who may refer matters to the PPF Ombudsman under the regulations, (2) about the manner in which such references may be made, including the times by which they are to be made, (3) about the procedure for conducting investigations, and reaching and giving determinations, on such references, including the times by which the determinations are to be given, (4) about the powers of the PPF Ombudsman on making such determinations, including (a) the power to direct the Board to pay such compensation as he considers appropriate to such persons as he considers have sustained injustice in consequence of the matters complained of, and (b) the power to direct the Board to take or refrain from taking such other steps as he may specify, (5) conferring such powers on the Board as are necessary to comply with such requirements, (6) for prescribed persons to be notified of references to the PPF Ombudsman under the regulations, and determinations and directions by the PPF Ombudsman under the regulations, (7) conferring rights on prescribed persons (i) to make representations to the PPF Ombudsman in relation to a matter referred to him by virtue of these provisions, (ii) to be heard or represented at any oral hearing by the PPF Ombudsman in relation to such a matter, (8) about the consideration of evidence by the PPF Ombudsman, including (A) production of documents, (B) oral hearings, (C) expert evidence, (D) attendance of witnesses, (9) conferring rights on prescribed persons to continue a reference made by a person who has died or is otherwise unable to act for himself, (10) as to the costs or expenses of prescribed persons, (11) conferring rights on prescribed persons to apply for a stay in relation to prescribed legal proceedings which begin after the reference is made and conferring power on the relevant court to make an order staying the proceedings if it is satisfied of

prescribed matters, and (12) for securing that any determination or direction of the PPF Ombudsman under the regulations is binding on prescribed persons<sup>2</sup>.

1 Referred to in the Pensions Act 2004 s 208(3)(b) (see PARA 659F.2) under regulations made under s 208: s 214(1). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). The Pension Protection Fund (Investigation by PPF Ombudsman of Complaints of Maladministration) Regulations 2005, SI 2005/2025, have been made under the 2004 Act s 214.

2 Ibid s 214(2) (head (11) in the text not yet in force). As to the service of notifications and electronic working under the Pensions Act 2004 see ss 303-305.

## **9. Referral on questions of law**

The PPF Ombudsman may refer any question of law arising for determination in connection with (1) a reviewable matter referred to him by virtue of regulations<sup>1</sup>, or (2) a complaint of maladministration<sup>2</sup>, to, in England and Wales, the High Court<sup>3</sup>.

1 Ie under the Pensions Act 2004 s 213 (see PARA 659F.7).

2 Ie a matter referred to him by virtue of regulations under ibid s 214 (see PARA 659F.8).

3 Ibid s 215.

## **10. Publishing reports etc**

If the PPF Ombudsman considers it appropriate to do so in any particular case, he may publish in such form and manner as he considers appropriate a report of any investigation carried out by virtue of regulations<sup>1</sup> and of the result of that investigation<sup>2</sup>. For the purposes of the law of defamation, the publication of any matter by the PPF Ombudsman under or by virtue of any provision of Chapter 6 of Part 2 of the Pensions Act 2004<sup>3</sup> will be absolutely privileged<sup>4</sup>.

1 Ie under the Pensions Act 2004 s 213 (see 659F.7) or 214 (see 659F.8).

2 Ibid s 216(1).

3 Ie ibid ss 206-218.

4 Ibid s 216(2).

## **11. Determinations of the PPF Ombudsman**

A person bound by a determination or direction by the PPF Ombudsman by virtue of regulations<sup>1</sup> may appeal on a point of law arising from the determination or direction in England and Wales, to the High Court<sup>2</sup>. Any determination or direction of the PPF Ombudsman is enforceable in England and Wales, in a county court as if it were a judgment or order of that court<sup>3</sup>.

1 Made under the Pensions Act 2004 s 213 (see PARA 659F.7) or 214 (see PARA 659F.8).

2 Ibid s 217(1).

3 Ibid s 217(2).

## **12. Obstruction etc of the PPF Ombudsman**

The following provisions come into force on the first day after the day on which the first regulations made under s 213 (see PARA 659F.7) or 214 (see PARA 659F.8) come into force, whichever is the earlier.

The following provisions<sup>1</sup> apply if any person (1) without lawful excuse obstructs the PPF Ombudsman in the performance of his functions, or (2) is guilty of any act or omission in relation to an investigation by the PPF Ombudsman<sup>2</sup> which, if that investigation were a proceeding in the court<sup>3</sup>, would constitute contempt of court<sup>4</sup>. The PPF Ombudsman may certify the offence to the court<sup>5</sup>. Where an offence is certified<sup>6</sup>, the court may (a) inquire into the matter, (b) hear any witnesses who may be produced against or on behalf of the person charged with the offence and any statement that may be offered in defence, and (c) deal with him in any manner in which the court could deal with him if he had committed the like offence in relation to the court<sup>7</sup>.

1    Ie the Pensions Act 2004 s 218.

2    Ie under regulations made under *ibid* s 213 (see PARA 659F.7) or 214 (see PARA 659F.8).

3    In *ibid* s 218 'the court' means in England and Wales, a county court: s 218(5).

4    *Ibid* s 218(1).

5    *Ibid* s 218(2).

6    Ie under *ibid* s 218(2).

7    *Ibid* s 218(3).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **637-659 The Pensions Compensation Board**

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4).

Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

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REGULATION OF PRIVATE PENSION PROVISION/(2) THE PENSIONS COMPENSATION  
BOARD/659G. Miscellaneous.

## **659G. Miscellaneous.**

### **1. Backdating the winding up of eligible schemes**

The provision below<sup>1</sup> applies where (1) a qualifying insolvency event<sup>2</sup> occurs in relation to the employer<sup>3</sup> in relation to an eligible scheme, and (2) the winding up of the scheme begins at or after the time of that event but not later than the first of specified events<sup>4</sup> in relation to the scheme<sup>5</sup>. The provision below<sup>6</sup> also applies where (a) the trustees or managers<sup>7</sup> of an eligible scheme (i) make an application to the Board<sup>8</sup>, or (ii) receive a notice from the Board<sup>9</sup>, and (b) the winding up of the scheme begins (A) at or after the time the application is made or notice is received, but (B) not later than a scheme failure notice or a withdrawal notice<sup>10</sup> in relation to the scheme becoming binding<sup>11</sup>. The winding up of the scheme is to be taken as beginning immediately before the event within head (1) above or, as the case may be, head (a) above if (aa) the winding up is in pursuance of an order of the Regulator<sup>12</sup> directing the winding up of the scheme, or (bb) in any other case, the trustees or managers of the scheme so determine<sup>13</sup>.

1    Ie the Pensions Act 2004 s 219(3).

2    For the purposes of ibid s 219 'qualifying insolvency event' has the same meaning as in s 127 (see PARA 659C.2): s 219(7).

3    For the meaning of 'employer' see PARA 636A.15.

4    Ie (1) a scheme failure notice or a withdrawal notice issued under the Pensions Act 2004 s 122(2) (see PARA 659B.2) in relation to the scheme becoming binding, (2) a withdrawal notice issued under s 148 (see PARA 659C.18) in relation to the scheme becoming binding, or (3) a notice issued under s 122(4) becoming binding in a case where s 148 does not apply: s 219(1).

5    Ibid s 219(1).

6    Ie ibid s 219(3).

7    For the meaning of 'managers' see PARA 636A.11.

8    Ie under the Pensions Act 2004 s 129(1) (see PARA 659C.4). For the meaning of 'the Board' see PARA 659A.2.

9    Ie under ibid s 129(5)(a).

10   Issued under ibid s 130(2) or (3) (see PARA 659C.5).

11   Ibid s 219(2). Section 128(4) (see PARA 659C.3) applies for the purposes of s 219(2) as it applies for the purposes of s 128(1): s 219(8).

12   Ie under the Pensions Act 1995 s 11 (see PARA 612). For the meaning of 'the Regulator' see PARA 636A.2.

13   Pensions Act 2004 s 219(3). In a case where s 219(3) applies, the Regulator may by order direct any person specified in the order (1) to take such steps as are so specified as it considers are necessary as a result of the winding up of the scheme beginning in accordance with s 219(3), and (2) to take those steps within a period specified in the order: s 219(4). If the trustees or managers of a scheme fail to comply with a direction to them contained in an order under s 219(4), the Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to any trustee or manager who has failed to take all reasonable steps to secure compliance: Pensions Act 2004 s 219(5). The Pensions Act 1995 s 10 also applies to any other person who, without reasonable excuse, fails to comply with a direction to him contained in an order under the Pensions Act 2004 s 219(4): s 219(6).

Section 219 is to be read subject to s 135 (which restricts the winding up of an eligible scheme during an assessment period: see PARA 659C.10): s 219(9).

## 2. Pension sharing

Regulations may modify<sup>1</sup> any of the provisions of Part 2 of the Pensions Act 2004<sup>2</sup> as it applies in relation to (1) cases where a person's shareable rights<sup>3</sup> under an eligible scheme have (at any time) become subject to a pension debit<sup>4</sup>; (2) cases where (a) a pension sharing order or provision<sup>5</sup> in respect of such rights is made before the time a transfer notice<sup>6</sup> is received by the trustees or managers of the eligible scheme, and (b) that order or provision takes effect on or after the receipt by them of the notice<sup>7</sup>.

1 For the meaning of 'modifications' see PARA 636A.16.

2 Ie the Pensions Act 2004 ss 107-220. See further Pension Protection Fund (Pension Sharing) Regulations 2006, SI 2006/1690.

3 In ibid s 220 'shareable rights' has the same meaning as in the Welfare Reform and Pensions Act 1999 Pt 4 Ch 1 (pension sharing): Pensions Act 2004 s 220(3).

4 In ibid s 220 'pension debit' has the same meaning as in the Welfare Reform and Pensions Act 1999 Pt 4 Ch 1: Pensions Act 2004 s 220(3).

5 In ibid s 220 'pension sharing order or provision' means an order or provision falling within the Welfare Reform and Pensions Act 1999 s 28(1) (activation of pension sharing): Pensions Act 2004 s 220(3).

6 Ie under ibid s 160: see PARA 659C.24.

7 Ibid s 220(1). Regulations may also modify any of the provisions of the Welfare Reform and Pensions Act 1999 Pt 4 Ch 1 as it applies in relation to (1) cases within head (1) in the text where any liability of the trustees or managers of the eligible scheme in respect of a pension credit was not discharged before the time a transfer notice under s 160 was received by the trustees or managers of the eligible scheme; (2) cases within head (2) in the text: s 220(2). For the meaning of 'pension credit' see PARA 636A.19. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). See further SI 2006/1690 (NOTE 1).

### UPDATE

#### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see PARA 676A.

#### 637-659 The Pensions Compensation Board

Pensions Act 1995 ss 78-86, 96-114, Sch 2 repealed: Pensions Act 2004 Sch 13 Pt 1.

The Pensions Compensation Board is dissolved: Pensions Act 2004 s 302(1). An order under the Pensions Act 2004 s 322 appointing the day on which s 302(1) is to come into force (ie 1 September 2005: see SI 2005/1720) may provide (1) for all property, rights and liabilities to which the Pensions Compensation Board is entitled or subject immediately before that day to become property, rights and liabilities of the Board of the Pension Protection Fund (see PARA 659A), and (2) for any function of the Pensions Compensation Board falling to be exercised on or after that day, or which fell to be exercised before that day but has not been exercised, to be exercised by the Board of the Pension Protection Fund: Pensions Act 2004 s 302(2). Information obtained by the Board by virtue of the Pensions Act 2004 s 302(2) is to be treated for the purposes of ss 197-201 and 203 (disclosure of information: see PARAS 659E.7, 659E.8) as having been obtained by the Board of the Pension Protection Fund in the exercise of its functions from the person from whom the Pensions Compensation Board obtained it: s 302(3). Where tax information disclosed to the Pensions Compensation Board is

obtained by the Board of the Pension Protection Fund by virtue of s 302(2), s 302(3) does not apply, and s 202(3) and (4) (see PARA 659E.7) apply as if that information had been disclosed to the Board of the Pension Protection Fund by virtue of s 202(2): s 302(4). For this purpose 'tax information' has the same meaning as in s 202: s 302(4). Where the Pensions Compensation Board's disclosure under the Pensions Act 1995 s 114(3) (see PARA 659) of information to which the Pensions Act 2004 s 302(3) applies was subject to any express restriction, the Board of the Pension Protection Fund's powers of disclosure under ss 198-201 and 203, in relation to that information, are subject to the same restriction: s 302(5).

As to the Board of the Pension Protection Fund see Pensions Act 2004 Pt 2 (ss 107-220, Schs 5-9); and PARAS 659A-659G.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(3) REGISTRATION OF OCCUPATIONAL AND PERSONAL PENSION SCHEMES/660. Power to make regulations.

### **(3) REGISTRATION OF OCCUPATIONAL AND PERSONAL PENSION SCHEMES**

#### **660. Power to make regulations.**

The Secretary of State<sup>1</sup> may by regulations<sup>2</sup> make provision:

- 1530 (1) for the compilation and maintenance of a register of occupational and personal pension schemes<sup>3</sup> ('the register')<sup>4</sup>;
- 1531 (2) for the appointment of a Registrar of Occupational and Personal Pension Schemes ('the registrar')<sup>5</sup>; and
- 1532 (3) for conferring on the registrar such functions relating to the compilation and maintenance of the register as may be specified in the regulations<sup>6</sup>.

The regulations:

- 1533 (a) may make provision with respect to any of the following matters, that is to say:
  - 159 215. (i) the remuneration and expenses, and any pensions, allowances or gratuities, or compensation for loss of office, payable to or in respect of the registrar<sup>7</sup>;
  - 216. (ii) the staff and other facilities that are to be available to the registrar<sup>8</sup>;
  - 217. (iii) the other terms and conditions upon which the registrar is to hold office<sup>9</sup>; and
  - 218. (iv) the removal of the registrar from office<sup>10</sup>; and
  - 160 1534 (b) may confer upon the registrar power to appoint an agent to perform any of his functions on his behalf <sup>11</sup>.

The register may consist of one or more parts, as may be prescribed<sup>12</sup>; must be organised in such manner, and contain such information relating to occupational and personal pension schemes, as may be prescribed<sup>13</sup>; and, subject to the regulations, may be kept in such manner and form as the registrar may think fit<sup>14</sup>.

The regulations may make provision for the register or extracts from the register, or for copies of the register or of extracts from the register, to be open to inspection by, and for copies of the register or of extracts from it to be supplied to, such persons, in such manner, at such times, upon payment of such fees, and subject to such other terms and conditions, as may be prescribed<sup>15</sup>.

The regulations may require any person who is or has been (A) a trustee or manager<sup>16</sup> of an occupational or personal pension scheme or an administrator of a public service pension scheme<sup>17</sup>; or (B) the employer<sup>18</sup> in relation to employment of any description or category to which an occupational pension scheme relates, and such other persons as may be prescribed, to provide the registrar with such information for the purposes of the register in such form and within such time as may be prescribed<sup>19</sup>.

The regulations may make provision for information obtained by or furnished to the registrar under or for the purposes of the Pension Schemes Act 1993 to be disclosed to the Occupational Pensions Regulatory Authority<sup>20</sup> or the Pensions Compensation Board<sup>21</sup>.

The Secretary of State may direct the registrar to submit to him, in such form and at such intervals as may be specified in the direction, such statistical and other reports as the Secretary of State may require; and the Secretary of State may determine at his discretion whether or not to publish a report submitted to him under this provision<sup>22</sup>.

Nothing in the Pension Schemes Act 1993 or the Pensions Act 1995 may be taken to imply that the authority may not be appointed as the registrar<sup>23</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 For the meaning of 'regulations' see PARA 660 ante.

3 For the meaning of 'occupational pension scheme' see PARA 741 post.

4 Pension Schemes Act 1993 s 6(1)(a).

5 Ibid s 6(1)(b).

6 Ibid s 6(1)(c). Section 6(2)-(5) is without prejudice to the generality of s 6(1): s 6(7) (amended by the Pensions Act 1995 s 122, Sch 3 paras 22, 23).

7 Pension Schemes Act 1993 s 6(2)(a)(i).

8 Ibid s 6(2)(a)(ii).

9 Ibid s 6(2)(a)(iii).

10 Ibid s 6(2)(a)(iv).

11 Ibid s 6(2)(b). Subject to any order made after 13 July 1990 by virtue of the Northern Ireland Constitution Act 1973 s 3(1)(a), matters dealt with by the Pension Schemes Act 1993 s 6(1), (2), (3), (4) and (8) (except s 6(2)(a)(ii)) are not transferred matters for the purposes of the Northern Ireland Constitution Act 1973 but must for the purposes of s 3(2) be treated as specified in Sch 3 (as amended): Pension Schemes Act 1993 s 187(1), (2). See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 70.

12 Ibid s 6(3)(a). For the meaning of 'prescribed' see PARA 555 note 1 ante.

13 Ibid s 6(3)(b).

14 Ibid s 6(3)(c).

15 Ibid s 6(4).

16 As to managers of an occupational pension scheme see PARA 555 note 9 ante.

17 For the meaning of 'public service pension scheme' see PARA 874 post.

18 For these purposes, 'employer' means: (1) in the case of an employed earner employed under a contract of service, his employer; (2) in the case of an employed earner employed in an office with emoluments, such person as may be prescribed in relation to that office or, if no such person is prescribed, the government department, public authority or body of persons responsible for paying the emoluments of the office: Pension Schemes Act 1993 s 181(1). References to employers in the provisions of the Pension Schemes Act 1993 (other than ss 123-127 (as amended) (see PARAS 853-856 post); s 157 (see PARA 854 post) and s 160 (see PARA 559 ante) ('the excluded provisions')) are to be treated, in relation to persons within the application of an occupational pension scheme and qualifying or prospectively qualifying for its benefits, as including references to persons who in relation to them and their employment are treated by regulations as being employers for the purposes of those provisions: s 181(2) (amended by the Pensions Act 1995 Sch 3 para 44(b)).

19 Pension Schemes Act 1993 s 6(5).

20 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

21 Pension Schemes Act 1993 s 6(5A) (added by the Pensions Act 1995 Sch 3 paras 22, 23). As to the Pensions Compensation Board see PARA 637 ante.

22 Pension Schemes Act 1993 s 6(6).

23 Ibid s 6(8) (substituted by the Pensions Act 1995 s 151, Sch 5 paras 18, 20).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **660 Power to make regulations**

TEXT AND NOTES--Pension Schemes Act 1993 s 6 repealed: Pensions Act 2004 Sch 13 Pt 1.

NOTE 11--1993 Act s 187 repealed: Northern Ireland Act 1998 s 100(2), Sch 15.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(3) REGISTRATION OF OCCUPATIONAL AND PERSONAL PENSION SCHEMES/661. The Registrar of Occupational and Personal Pension Schemes and the register.

# **661. The Registrar of Occupational and Personal Pension Schemes and the register.**

There continues to be a Registrar of Occupational and Personal Pension Schemes<sup>1</sup> and the Occupational Pensions Regulatory Authority<sup>2</sup> ('the authority') is the registrar<sup>3</sup>. The registrar may appoint an agent to perform any function of the registrar<sup>4</sup>.

The registrar must continue to compile and maintain the register established in 1991<sup>5</sup> and the register must contain the following information in so far as it is applicable to the scheme:

- 1535 (1) the name and address of the scheme<sup>6</sup>;
- 1536 (2) the names of the trustees of the scheme;
- 1537 (3) the address to which communications for the attention of the trustees are to be directed<sup>7</sup>;
- 1538 (4) the name of the scheme administrator<sup>8</sup>;
- 1539 (5) whether the scheme is an open, closed or frozen scheme<sup>9</sup>;
- 1540 (6) the name (and, if there has been a change of name, the previous name) and address of every employer of earners in employment to which the scheme relates or has at any time since 6 April 1975 related;
- 1541 (7) the total membership<sup>10</sup>;
- 1542 (8) whether the scheme provides money purchase benefits, benefits other than money purchase benefits, or a combination of such benefits<sup>11</sup>;
- 1543 (9) whether scheme benefits, or any of them, are secured by a contract of insurance or annuity contract, and (if so) the name and address of the insurer with which the benefits are secured;
- 1544 (10) the date the scheme became registrable<sup>12</sup>; and
- 1545 (11) any reference number assigned to the scheme by the Board of Inland Revenue<sup>13</sup>.

The register may also contain a compilation of statistical data derived from information held on the register<sup>14</sup>.

It is the duty of the trustees of a registrable scheme to provide the registrar:

- 1546 (a) within three months of the date upon which the scheme becomes a registrable scheme, where that date is on or after 1 April 1997, with the information specified in heads (1) to (11) above; and
- 1547 (b) within three months of the registrar's, on or after 1 April 1997, sending by post to the trustees a written notice requiring that information to be furnished, with such information incidental to that so specified as the registrar may reasonably require for the purposes of the register<sup>15</sup>.

Where the registrar has received all or a part of the information required by head (a) above, and by the corresponding Northern Ireland legislation, from the trustees of a registrable scheme, the registrar must make an entry relating to that scheme in the register<sup>16</sup>.

Except in relation to information about the total membership, it is the duty of the trustees of a registrable scheme to notify the registrar of any change in the information provided to the

registrar under these provisions, or which is treated<sup>17</sup> as so provided, and of the date of any such change, within 12 months of the occurrence of that change, or of 1 April 1997, whichever is the later<sup>18</sup>. The trustees of a registrable scheme must notify the registrar of any change in the total membership within 12 months of the change<sup>19</sup>.

Where any person, without reasonable cause, fails to comply with any duty so imposed, he is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>20</sup>.

Any person who knowingly or recklessly provides the registrar with information which is false or misleading in a material particular is guilty of an offence if the information:

- 1548 (i) is provided in purported compliance with a requirement as to registration<sup>21</sup>;  
or
- 1549 (ii) is provided otherwise than as mentioned in head (i) above but in circumstances in which the person providing the information intends, or could reasonably be expected to know, that it would be used by the registrar for the purpose of discharging his functions under the Pension Schemes Act 1993<sup>22</sup>.

Any person guilty of such an offence is liable on summary conviction to a fine not exceeding the statutory maximum<sup>23</sup> and on conviction on indictment to imprisonment or a fine, or to both<sup>24</sup>.

1 See the Register of Occupational and Personal Pension Schemes Regulations 1997, SI 1997/371, reg 2(1). For transitional provisions see reg 8 (amended by SI 1997/1405).

2 As to the Occupational Pensions Regulatory Authority see PARA 598 et seq ante.

3 Register of Occupational and Personal Pension Schemes Regulations 1997, SI 1997/371, reg 2(2). See also the Pension Schemes Act 1993 s 6(8) (as substituted); and PARA 660 ante.

4 Register of Occupational and Personal Pension Schemes Regulations 1997, SI 1997/371, reg 2(3).

5 Ibid reg 3(1). The register was set up under the Register of Occupational and Personal Pension Schemes Regulations 1990, SI 1990/2278 (revoked).

6 'Address of the scheme' means the place in the United Kingdom, or if more than one, the principal place, at which the management of the scheme is conducted: Register of Occupational and Personal Pension Schemes Regulations 1997, SI 1997/371, reg 1(4). For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

7 Ie if other than that specified in head (1) in the text: ibid reg 3(2)(c).

8 'Scheme administrator' means the person in the United Kingdom having the management of the scheme: ibid reg 1(4).

9 For these purposes, 'closed scheme' means a registrable scheme to which no new members may be admitted, but to which contributions are or may be payable by or in respect of, and under which benefits accrue to, existing members; 'frozen scheme' means a registrable scheme under which benefits continue to be payable to existing members and to which (1) no new members may be admitted; (2) no further contributions are payable by or in respect of existing members; and (3) no further benefits accrue to existing members although benefits which have already accrued to them may be increased; and 'open scheme' means a registrable scheme which has members who are in pensionable service under the scheme and to which new members may be admitted: ibid reg 1(4). 'Member' means (a) in relation to an occupational pension scheme, any person who is in pensionable service under the scheme, has rights under the scheme by virtue of his pensionable service under the scheme, or has rights under the scheme by virtue of having been allowed transfer credits under the scheme; and (b) in relation to a personal pension scheme or a scheme treated as such, a member of the scheme, but does not include a member in respect of whom entitlement under the scheme is only for benefits payable on his death: reg 1(4). For the meaning of 'registrable scheme' see note 12 infra.

10 'Total membership' means the number of members (1) on the day on which the scheme becomes a registrable scheme; then (2) at the end of the second scheme year; then (3) at the end of each subsequent scheme year; and 'scheme year' in relation to a registrable scheme means: (a) a year specified for the purposes

of the scheme in any document comprising the scheme or, if none, a period of 12 months commencing on 1 April or on such other date as the trustees select; or (b) such other period (if any) exceeding six months but not exceeding 18 months as is selected by the trustees (i) in connection with the commencement or termination of the scheme, or (ii) in connection with a variation of the date on which the year or period referred to in head (a) supra is to commence: *ibid* reg 1(4). 'Trustees', in the case of a scheme which is not set up under a trust, means the managers of the scheme, except in relation to a scheme established outside the United Kingdom, and in such a case 'trustees' means the person treated by the Commissioners of Inland Revenue for the time being as administrator of the scheme for the purposes of the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended) (see PARA 747 et seq post) or Pt XIV Ch IV (ss 630-655) (as amended) (see PARA 711 et seq post): Register of Occupational and Personal Pension Schemes Regulations 1997, SI 1997/371, reg 1(4).

11 For these purposes, benefits derived from transfer credits or from a member's voluntary contributions, or which are payable on a member's death, must be disregarded: *ibid* reg 3(2)(h). For the meaning of 'transfer credits' see PARA 612 note 5 ante.

12 'Registrable scheme' means an occupational or personal pension scheme (1) which either is established in the United Kingdom, or has a place at which its management is conducted in the United Kingdom and has a representative appointed to carry out the functions of a trustee in the United Kingdom; and (2) which either (a) is a scheme in respect of which a person has applied for, or received, the approval of the Board of Inland Revenue for the purposes of the Income and Corporation Taxes Act 1988 s 590 (as amended) or s 591 (as amended) (other than s 591(2)(g)) (as amended) (conditions for approval of retirement benefit schemes and discretionary approval: see PARAS 748-749, 751 post) or for the purposes of Pt XIV Ch IV (as amended) (personal pension schemes (see PARA 711 et seq post); or (b) is a scheme which is a public service pension scheme (as to which see PARA 874 post); and (3) which has more than one member, and provides benefits which are not solely payable on the death of a member: Register of Occupational and Personal Pension Schemes Regulations 1997, SI 1997/371, reg 1(4). For these purposes, an occupational pension scheme which is a retirement benefits scheme approved under the Income and Corporation Taxes Act 1988 s 591(2)(h) (discretionary approval: see PARA 751 post) must be treated as a personal pension scheme: Register of Occupational and Personal Pension Schemes Regulations 1997, SI 1997/371, reg 1(4).

13 *Ibid* reg 3(2).

14 *Ibid* reg 3(3).

15 *Ibid* reg 4(1) (amended by SI 1997/1405).

16 Register of Occupational and Personal Pension Schemes Regulations 1997, SI 1997/371, reg 4(2).

17 *Ie* by virtue of *ibid* reg 8(1) (transitional provisions).

18 *Ibid* reg 5(1).

19 *Ibid* reg 5(2).

20 *Ibid* reg 7(1). As to the standard scale see PARA 172 note 3 ante.

21 *Ie* a requirement under the Pension Schemes Act 1993 s 6 (as amended): see PARA 660 ante.

22 *Ibid* s 168A(1) (s 168A added by the Pensions Act 1995 s 155(1)).

23 As to the statutory maximum see PARA 403 note 2 ante.

24 Pension Schemes Act 1993 s 168A(2) (as added: see note 22 supra).

## UPDATE

### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see PARA 676A.

### 661 The Registrar of Occupational and Personal Pension Schemes and the register

TEXT AND NOTES--SI 1997/371 (as amended) replaced: Register of Occupational and Personal Pension Schemes Regulations 2005, SI 2005/597 (amended by SI 2006/467, SI 2006/1733, SI 2007/1625).

TEXT AND NOTES 22-24--Pension Schemes Act 1993 s 168A repealed: Pensions Act 2004 Sch 13 Pt 1.

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## **662. Availability of information held on the register.**

The Registrar of Occupational and Personal Pension Schemes<sup>1</sup> must, on receipt of a written request containing sufficient information to enable the registrar to identify the scheme in question, supply a copy of an extract from the register<sup>2</sup> relating to a registrable scheme<sup>3</sup> to:

- 1550 (1) any person who is, or may be, or may become entitled to benefit under the scheme or any person acting on behalf of such a person;
- 1551 (2) the Pensions Ombudsman<sup>4</sup>;
- 1552 (3) the Official Receiver, the Official Receiver for Northern Ireland or insolvency practitioner<sup>5</sup>.

The registrar must make available to the Pensions Compensation Board<sup>6</sup>, and to the Occupational Pensions Regulatory Authority in connection with its other functions<sup>7</sup>, the information received<sup>8</sup> from trustees of registrable schemes<sup>9</sup>.

The trustees of a registrable scheme are entitled, on the first written request by them in any period of 12 months, to a copy of the information held on the register relating to that scheme<sup>10</sup>. The registrar must on receipt of a written request supply<sup>11</sup> to any person, other than a person the registrar believes to have failed previously to comply with the statutory condition imposed in relation to the use of such information<sup>12</sup>, a copy of the information held on the register, or any part of it, except certain specified information<sup>13</sup>, subject to that person's furnishing his written agreement to the condition that he is not to use or permit the use of the information<sup>14</sup>, or any part of it, for the purposes of marketing a product or service<sup>15</sup>.

Information so supplied must be made available in such form as the registrar may in its discretion determine<sup>16</sup>.

Where any person, without reasonable cause, fails to comply with the statutory condition imposed in relation to the use of such information, the authority may require that person to pay within 28 days a penalty which must not exceed £1,000 in the case of an individual or £10,000 in any other case<sup>17</sup>.

1 As to the registrar see PARA 661 ante.

2 As to the register see PARA 661 ante.

3 For the meaning of 'registrable scheme' see PARA 661 note 12 ante.

4 The Pensions Ombudsman is appointed under the Pension Schemes Act 1993 s 145: see PARA 663 post.

5 Register of Occupational and Personal Pension Schemes Regulations 1997, SI 1997/371, reg 6(1). The Official Receiver, Official Receiver for Northern Ireland or insolvency practitioner must be supplied with such an extract from the register where the Pensions Act 1995 s 22 (see PARA 795 post) or the corresponding Northern Ireland legislation applies: Register of Occupational and Personal Pension Schemes Regulations 1997, SI 1997/371, reg 6(1)(c), (d).

6 As to the Pensions Compensation Board see PARA 637 ante.

7 The functions other than those under the Register of Occupational and Personal Pension Schemes Regulations 1997, SI 1997/371: reg 6(2). As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

8     Ie under ibid reg 4(1) (as amended), reg 5: see PARA 661 ante.

9     Ibid reg 6(2). For the meaning of 'trustees' see PARA 661 note 10 ante.

10    Ibid reg 6(3).

11    There is payable in connection with the supply of information under this provision a sum to defray the cost attributable to its production and, where applicable, packaging and postage: ibid reg 6(8).

12    Ie the condition imposed under ibid reg 6(5): see the text and note 15 infra.

13    Ie the information specified under ibid reg 3(2)(b), (d), (f): see PARA 661 heads (2), (4), (6) ante.

14    This condition does not apply to information specified in ibid reg 3(3) (compilation of statistical data: see PARA 661 ante): see reg 6(5).

15    See ibid reg 6(5). Regulation 6(5) does not apply to a copy of any information which is treated as being supplied pursuant to reg 6(4) by virtue of reg 8(1) (transitional provisions): reg 6(6).

16    Ibid reg 6(7).

17    Ibid reg 7(2).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **662 Availability of information held on the register**

TEXT AND NOTES--SI 1997/371 (as amended) replaced by Register of Occupational and Personal Pension Schemes Regulations 2005, SI 2005/597 (see PARA 661).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/663. The Pensions Ombudsman.

## **(4) THE PENSIONS OMBUDSMAN**

### **663. The Pensions Ombudsman.**

For the purpose of conducting investigations in accordance with Part X of the Pension Schemes Act 1993<sup>1</sup> or any corresponding legislation having effect in Northern Ireland<sup>2</sup> there is a commissioner to be known as the Pensions Ombudsman<sup>3</sup>.

The ombudsman must be appointed by the Secretary of State<sup>4</sup> and holds office upon such terms and conditions as the Secretary of State may think fit<sup>5</sup>. The ombudsman may at any time:

1553 (1) be removed from office by notice in writing given to him by the Secretary of State<sup>6</sup>; or

1554 (2) resign his office by giving such notice to the Secretary of State<sup>7</sup>.

The ombudsman may (with the approval of the Secretary of State as to numbers) appoint such persons to be employees<sup>8</sup> of his as he thinks fit, on such terms and conditions as to remuneration and other matters as the ombudsman may with the approval of the Secretary of State determine<sup>9</sup>. The Secretary of State may, on such terms as to payment by the ombudsman as the Secretary of State thinks fit, make available to the ombudsman such additional staff and such other facilities as he thinks fit<sup>10</sup>. Any function of the ombudsman, other than the determination of complaints made and disputes referred under these provisions<sup>11</sup>, may be performed by any:

1555 (a) Employee so appointed by the ombudsman; or

1556 (b) member of staff so made available to him by the Secretary of State,

who is authorised for that purpose by the ombudsman<sup>12</sup>.

The Secretary of State may:

1557 (i) pay to or in respect of the ombudsman such amounts by way of remuneration, compensation for loss of office, pension, allowances and gratuities, or by way of provision for any such benefits, as the Secretary of State may determine<sup>13</sup>; and

1558 (ii) reimburse him in respect of any expenses incurred by him in the performance of his functions<sup>14</sup>.

The ombudsman must prepare a report on the discharge of his functions for each financial year, and must submit it to the Secretary of State as soon as practicable afterwards<sup>15</sup>. The Secretary of State must arrange for the publication of each report so submitted to him<sup>16</sup>.

<sup>1</sup> ie the Pension Schemes Act 1993 Pt X (ss 145-152) (as amended): see the text and notes 2-16 infra; and PARA 664 et seq post.

<sup>2</sup> ie the Pension Schemes (Northern Ireland) Act 1993 Pt X (ss 141-148).

- 3 Pension Schemes Act 1993 s 145(1).
- 4 As to the Secretary of State see PARA 1 ante.
- 5 Pension Schemes Act 1993 s 145(2).
- 6 Ibid s 145(3)(a).
- 7 Ibid s 145(3)(b).
- 8 For the meaning of 'employee' see PARA 598 note 5 ante.
- 9 Pension Schemes Act 1993 s 145(4A) (s 145(A)-(C) added by the Pensions Act 1995 s 156).
- 10 Pension Schemes Act 1993 s 145(4B) (as added: see note 9 supra).
- 11 Ie the provisions of ibid Pt X (as amended): see PARA 664 et seq post.
- 12 Ibid s 145(4C) (as added: see note 9 supra).
- 13 Ibid s 145(5)(a) (amended by the Pensions Act 1995 ss 173, 177, Sch 6 paras 2, 7, Sch 7 Pt IV).
- 14 Pension Schemes Act 1993 s 145(5)(b).
- 15 Ibid s 145(6).
- 16 Ibid s 145(7). Subject to any order made after 13 July 1990 by virtue of the Northern Ireland Constitution Act 1973 s 3(1)(a), matters dealt with by the Pension Schemes Act 1993 s 145 (as amended) (except s 145(4), (5)(b)) are not transferred matters for the purposes of the Northern Ireland Constitution Act 1973 but must for the purposes of s 3(2) be treated as specified in Sch 3 (as amended): Pension Schemes Act 1993 s 187(1), (2). See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 70.

## UPDATE

### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see PARA 676A.

### 663 The Pensions Ombudsman

TEXT AND NOTES--As to Deputy Pensions Ombudsmen see PARA 663A.

NOTE 2--Pension Schemes (Northern Ireland) Act 1993 s 145 amended: Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649; Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941.

TEXT AND NOTE 3--The following provisions are not yet in force. Provisions conferring power on the Pensions Ombudsman to conduct investigations as mentioned in the Pension Schemes Act 1993 s 145(1) are to be read as conferring power that (1) in a case of a prescribed description, or (2) in a case involving a scheme that is prescribed or is of a prescribed description, may be exercised whatever the extent of any connections with places outside the United Kingdom: s 145(1A) (added by Pensions Act 2004 Sch 12 para 23). In the Pension Schemes Act 1993 s 145(1A) 'scheme' means occupational pension scheme or personal pension scheme: s 145(1B) (as added). Section 145(1A) must not be taken to prejudice any power of the Pensions Ombudsman apart from s 145(1A) to conduct investigations in a case having connections with places outside the United Kingdom: s 145(1C) (as so added).

TEXT AND NOTE 5--In Pension Schemes Act 1993 s 145(2) after 'holds' add 'and vacates': Pensions Act 2004 s 274(1).

TEXT AND NOTES 6, 7--The Pensions Ombudsman may resign or be removed from office in accordance with those terms and conditions: Pension Schemes Act 1993 s 145(3) (substituted by Pensions Act 2004 s 274(2)).

NOTE 16--Pensions Schemes Act 1993 s 187 repealed: Northern Ireland Act 1998 s 100(2), Sch 15.

As to the audit of the Pension Ombudsman's accounts, see the Pensions Schemes Act 1993 s 145(8)-(10) (added by SI 2008/817).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/663A. Deputy Pensions Ombudsmen.

### **663A. Deputy Pensions Ombudsmen.**

The Secretary of State may appoint one or more persons to act as a deputy to the Pensions Ombudsman ('a Deputy Pensions Ombudsman')<sup>1</sup>. Any such appointment is to be on such terms and conditions as the Secretary of State thinks fit<sup>2</sup>. A Deputy Pensions Ombudsman (1) is to hold and vacate office in accordance with the terms and conditions of his appointment, and (2) may resign or be removed from office in accordance with those terms and conditions<sup>3</sup>. A Deputy Pensions Ombudsman may perform the functions of the Pensions Ombudsman (a) during any vacancy in that office, (b) at any time when the Pensions Ombudsman is for any reason unable to discharge his functions, or (c) at any other time, with the consent of the Secretary of State<sup>4</sup>. References to the Pensions Ombudsman in relation to the performance of his functions are accordingly to be construed as including references to a Deputy Pensions Ombudsman in relation to the performance of those functions<sup>5</sup>. The Secretary of State may (i) pay to or in respect of a Deputy Pensions Ombudsman such amounts (A) by way of remuneration, compensation for loss of office, pension, allowances and gratuities, or (B) by way of provision for any such benefits, as the Secretary of State may determine, and (ii) reimburse the Pensions Ombudsman in respect of any expenses incurred by a Deputy Pensions Ombudsman in the performance of any of the Pensions Ombudsman's functions<sup>6</sup>.

1 Pension Schemes Act 1993 s 145A(1) (added by Pensions Act 2004 s 274(3)).

2 Pension Schemes Act 1993 s 145A(2).

3 Ibid s 145A(3).

4 Ibid s 145A(4).

5 Ibid s 145A(5).

6 Ibid s 145A(6).

### **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/664. Functions of the Pensions Ombudsman.

#### **664. Functions of the Pensions Ombudsman.**

The Pensions Ombudsman<sup>1</sup> may investigate and determine the following complaints and disputes:

- 1559 (1) a complaint made to him by or on behalf of an actual or potential beneficiary<sup>2</sup> of an occupational or personal pension scheme<sup>3</sup> who alleges that he has sustained injustice in consequence of maladministration in connection with any act or omission of a person responsible for the management of the scheme<sup>4</sup>;
- 1560 (2) a complaint made to him:
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- 219. (a) by or on behalf of a person responsible for the management of an occupational pension scheme who, in connection with any act or omission of another person responsible for the management of the scheme, alleges maladministration of the scheme<sup>5</sup>; or
- 220. (b) by or on behalf of the trustees or managers of an occupational pension scheme who, in connection with any act or omission of any trustee or manager of another such scheme, allege maladministration of the other scheme<sup>6</sup>;
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- 1561 (3) any dispute of fact or law which arises in relation to an occupational or personal pension scheme between a person responsible for the management of the scheme and an actual or potential beneficiary, and which is referred to him by or on behalf of the actual or potential beneficiary; and
- 1562 (4) any dispute of fact or law which arises between the trustees or managers of an occupational pension scheme and:
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- 221. (a) another person responsible for the management of the scheme; or
- 222. (b) any trustee or manager of another such scheme,
- 164
- 1563 and which is referred to him by or on behalf of the person referred to in head (4) (a) or head (4)(b) above<sup>7</sup>.

Complaints and references made to the ombudsman must be made to him in writing<sup>8</sup>. Regulations<sup>9</sup> may provide that, subject to any prescribed modifications<sup>10</sup> or exceptions, Part X of the Pension Schemes Act 1993 applies in the case of an occupational or personal pension scheme in relation to any prescribed person or body of persons, where the person or body is not a trustee or manager or employer but is concerned with the financing or administration of, or the provision of benefits under, the scheme, as if for the purposes of that Part he were a person responsible for the management of the scheme<sup>11</sup>.

The ombudsman may investigate a complaint or dispute notwithstanding that it arose, or relates to a matter which arose, before 1 October 1990<sup>12</sup>. The ombudsman must not investigate or determine a complaint or dispute:

- 1564 (i) if before the making of the complaint or the reference of the dispute, proceedings have been begun in any court in respect of the matters which would be the subject of the investigation<sup>13</sup>;

- 1565 (ii) if the scheme is of a description which is excluded from the jurisdiction of the ombudsman by regulations under this provision<sup>14</sup>; or
- 1566 (iii) if and to the extent that the complaint or dispute, or any matter arising in connection with the complaint or dispute, is of a description which is excluded from the jurisdiction of the ombudsman by regulations under this provision<sup>15</sup>.

1 As to the Pensions Ombudsman see PARA 663 ante.

2 The persons who, for the purposes of the Pension Schemes Act 1993 Pt X (ss 145-152) (as amended) (see PARAS 663 ante, 665 et seq post) are 'actual or potential beneficiaries' in relation to a scheme are: (1) a member of the scheme; (2) the widow or widower, or any surviving dependant, of a deceased member of the scheme; (3) where the complaint or dispute relates to the question: (a) whether a person who claims to be such a person as is mentioned in head (1) or (2) supra is such a person; or (b) whether a person who claims to be entitled to become a member of the scheme is so entitled, the person so claiming: s 146(7) (amended by the Pensions Act 1995 s 157(1), (3)). As to members see generally para 557 note 9 ante. In the Pension Schemes Act 1993 Pt X (as amended), 'member', in relation to a pension scheme, includes a person: (i) who is or has been in pensionable service under the scheme; or (ii) who is or has been treated under s 181(4) (see PARA 557 note 9 ante) as a member in relation to the scheme for the purposes of any provision of the Pension Schemes Act 1993 or under the Pension Schemes (Northern Ireland) Act 1993 s 176(3) as a member in relation to the scheme for the purposes of any provision of that Act: Pension Schemes Act 1993 s 147(8). 'Pensionable service' includes pensionable service as defined in the Pension Schemes (Northern Ireland) Act 1993 s 176(1): Pension Schemes Act 1993 s 146(8). In the Pension Schemes Act 1993 generally, unless the context otherwise requires, 'pensionable service', in relation to an occupational pension scheme to which Pt IV Ch I (ss 69-82) (as amended) (see PARA 931 et seq post) applies and a member of it, means service in relevant employment (ie any employment to which the scheme applies) which qualifies the member, on the assumption that it continues for the appropriate period, for long service benefit under the scheme; but there is to be taken into account as pensionable service only actual service, ie service notionally attributable for any purposes of the scheme is not to be regarded as pensionable service and no account is to be taken of scheme rules by which a period of service can be treated for any purpose as being longer or shorter than it actually is: ss 70(1)-(3), 181(1). For the meaning of 'long service benefit' see PARA 932 note 7 post.

3 For the meaning of 'occupational pension scheme' and 'personal pension scheme' see PARAS 741, 710 respectively post.

4 For the purposes of the Pension Schemes Act 1993 Pt X (as amended), the following persons (subject to s 146(4) (as substituted)) are responsible for the management of an occupational pension scheme: (1) the trustees or managers; and (2) the employer, but, in relation to a person falling within one of those heads, references in Pt X (as amended) to another person responsible for the management of the same scheme are to a person falling within the other head: s 146(3) (s 146(1)-(3), (3A), (4) respectively substituted and added by the Pensions Act 1995 s 157(1), (2)). For the purposes of the Pension Schemes Act 1993 Pt X (as amended), a person is responsible for the management of a personal pension scheme if he is a trustee or manager of the scheme (s 146(3A) (as so added)); and 'trustees or managers', in relation to a pension scheme which is a public service pension scheme or a Northern Ireland public service pension scheme, includes the scheme's administrators (s 146(8)). As to managers generally see PARA 555 note 9 ante. For the purposes of Pt X (as amended), 'employer', in relation to a pension scheme, includes a person: (a) who is or has been an employer in relation to the scheme; or (b) who is or has been treated under s 181(2) (see PARA 660 note 18 ante) as an employer in relation to the scheme for the purposes of any provision of the Pension Schemes Act 1993, or under the Pension Schemes (Northern Ireland) Act 1993 s 176(2) as an employer in relation to the scheme for the purposes of any provision of that Act: Pension Schemes Act 1993 s 146(8). The jurisdiction of the ombudsman with regard to the employer does not extend to the consideration of disputes regarding the normal contractual relations between the employer and employee but is limited to matters in relation to the occupational pension scheme: see *Engineering Training Authority v Pensions Ombudsman* [1996] PLR 409. For the meaning of 'public service pension scheme' see PARA 874 post. 'Northern Ireland public service pension scheme' means a public service pension scheme within the meaning of the Pension Schemes (Northern Ireland) Act 1993 s 176(1): Pension Schemes Act 1993 s 146(8). A breach of trust which results in no loss to the beneficiaries will not result in maladministration: see *Hillsdown Holdings plc v pensions Ombudsman* [1997] 1 All ER 862, [1996] PLR 427.

5 'Maladministration' should be given a purposive construction: see *Westminster City Council v Haywood* [1996] 2 All ER 467, [1996] 3 WLR 563; affd on other grounds [1997] 2 All ER 84, [1997] 3 WLR 641, CA.

6 In any case falling within head (2)(b) in the text, references to the scheme to which the complaint relates are to the other scheme referred to in that head: Pension Schemes Act 1993 s 146(1) (as substituted: see note 4 supra).

7 Ibid s 146(1) (as substituted: see note 4 supra). In any case falling within head (4)(b) in the text, references to the scheme to which the reference relates are to the scheme first mentioned in that head: s

146(1) (as so substituted). Where the ombudsman directs a person responsible for the management of an occupational or personal pension scheme to make any payment in respect of benefit under the scheme which, in his opinion, ought to have been paid earlier, his direction may also require the payment of interest at the prescribed rate: s 151A (added by the Pensions Act 1995 s 160).

8 Pension Schemes Act 1993 s 146(2) (as substituted: see note 4 supra).

9 For the meaning of 'regulations' see PARA 557 note 2 ante.

10 For the meaning of 'prescribed' see PARA 555 note 1 ante. 'Modifications' includes additions, omissions and amendments, and related expressions are to be construed accordingly: Pension Schemes Act 1993 s 181(1). This definition is applied for the purposes of the Pensions Act 1995: see s 124(5).

11 Pension Schemes Act 1993 s 146(4) (as substituted: see note 4 supra). The ombudsman may investigate and determine a complaint concerning the administration of a personal or an occupational pension scheme made to him by or in respect of an actual or potential beneficiary of the scheme who alleges that he has sustained injustice in consequence of maladministration in connection with an act or omission of an administrator of the scheme: Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, SI 1996/2475, reg 2(1). Where the ombudsman commences an investigation under reg 2(1), the provisions of the Pension Schemes Act 1993 Pt X (as amended) apply in relation to the administrator as they would apply in relation to a person responsible for the management of the scheme: Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, SI 1996/2475, reg 2(2).

12 Ie the date on which the provisions under which his office was constituted came into force: Pension Schemes Act 1993 s 146(5). As to the time limit for investigating complaints see PARA 666 post.

13 Ibid s 146(6)(a).

14 Ibid s 146(6)(b).

15 Ibid s 146(6)(c). As to exclusions from jurisdiction see PARA 665 post.

## UPDATE

### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see PARA 676A.

### 664 Functions of the Pensions Ombudsman

TEXT AND NOTES 1-7--For 'complaints and disputes' read 'matters'; add head (2A) a complaint made to him by or on behalf of an independent trustee of a trust scheme who, in connection with any act or omission which is an act or omission either (1) of trustees of the scheme who are not independent trustees; or (2) of former trustees of the scheme who were not independent trustees, alleges maladministration of the scheme; in head (3), omit 'which arises' and 'and which is referred ... potential beneficiary'; in head (4), omit 'which arises', and for 'and which is referred to him ... head (4)(b) above' read 'and in a case falling within head (4)(b), references in the Pension Schemes Act 1993 Pt X (ss 145-152) to the scheme to which the reference relates are references to each of the schemes'; add heads (5), any dispute not falling within head (6) between different trustees of the same occupational pension scheme; (6), any dispute, in relation to a time while the Pensions Act 1995 s 22 (see PARA 795) applies in relation to an occupational pension scheme, between an independent trustee of the scheme and either (a) trustees of the scheme who are not independent trustees; or (b) former trustees of the scheme who were not independent trustees; and (7), any question relating, in the case of an occupational pension scheme with a sole trustee, to the carrying out of the functions of that trustee: Pension Schemes Act 1993 s 146(1) (amended by the Child Support, Pensions and Social Security Act 2000 s 53(1)-(3), (9), Sch 9 Pt III(3)). 'Independent trustee', in relation to a scheme, means (i) a trustee of the scheme appointed under the Pensions Act 1995 s 23(1) (appointment

of independent trustee by the Regulatory Authority: see PARA 795); (ii) a person appointed under s 7(1) (see PARA 608) to replace a trustee falling within head (i) or (ii) of this definition: Pension Schemes Act 1993 s 146(8) (amended by the Child Support, Pensions and Social Security Act 2000 s 53(1), (8); and the Pensions Act 2004 Sch 12 para 24(c)).

Pension Schemes Act 1993 s 146(1) further amended: Pensions Act 2004 Sch 12 para 24(a).

The Pensions Ombudsman may not investigate or determine any dispute or question falling within heads (3)-(7) unless it is referred to him (A) in the case of a dispute falling within head (3), by or on behalf of the actual or potential beneficiary who is a party to the dispute; (B) in the case of a dispute falling within head (4), by or on behalf of any of the parties to the dispute; (C) in the case of a dispute falling within head (5), by or on behalf of at least half the trustees of the scheme; (D) in the case of a dispute falling within head (6), by or on behalf of the independent trustee who is a party to the dispute; (E) in the case of a question falling within head (7), by or on behalf of the sole trustee: Pension Schemes Act 1993 s 146(1A) (s 146(1A), (1B) added by the Child Support, Pensions and Social Security Act 2000 s 53(1), (4)). For the purposes of the Pension Schemes Act 1993 Pt X, any reference to or determination by the Pensions Ombudsman of a question falling within head (7) is taken to be the reference or determination of a dispute: s 146(1B) (as added).

NOTE 2--Head (2) now refers to 'widow, widower or surviving civil partner': Pension Schemes Act 1993 s 146(7)(b) (amended by SI 2005/2053).

Also head (2A) a person who is entitled to a pension credit as against the trustees or managers of the scheme; and in head (3)(a), for 'head (1) or (2)' read 'head (1), (2) or (2A)': Pension Schemes Act 1993 s 146(7) (amended by the Child Support, Pensions and Social Security Act 2000 s 53(1), (7)).

For the purposes of the Pension Schemes Act 1993 s 146(7) a person must be regarded as a member of a scheme if he is, or has been, entitled to the payment of benefits under it: SI 1996/2475 (see NOTE 11) reg 1A; SI 1997/3038. See *Westminster CC v Haywood (No 2)* [2000] 2 All ER 634 (retrospective effect of SI 1997/3038).

NOTE 4--In the Pension Schemes Act 1993 s 146(3) (amended by the Child Support, Pensions and Social Security Act 2000 s 53(1), (5)) for 'occupational pension scheme' read 'occupational pension scheme or a personal pension scheme'. Pension Schemes Act 1993 s 146(3A) repealed: Child Support, Pensions and Social Security Act 2000 Sch 9 Pt III(3).

When seeking to establish that a person contracted to provide administrative services to the trustees of a pension scheme is an administrator of the scheme, the test is whether he is engaged to act, or advise, in, or about, the trustees' affairs in the running of the scheme and whether he has assumed an administrative role on the trustees' side in the administration of the scheme's affairs: *R (on the application of Britannic Asset Management Ltd) v Pensions Ombudsman* [2002] EWCA Civ 1405, [2002] 4 All ER 860.

See *Edge v Pensions Ombudsman* [2000] Ch 602, [1999] 4 All ER 546, CA (no jurisdiction to set aside a deed of amendment by the trustees of the scheme where the effect would be to deprive members who were not parties to the proceedings of proprietary rights to which they were entitled). See also *Marsh & McLennan Companies UK Ltd v Pensions Ombudsman* [2001] IRLR 505 (no jurisdiction to make direction, without hearing representations from all those affected by it, that method of calculating guaranteed minimum pension be equalised).

TEXT AND NOTE 11--For the purposes of the Pension Schemes Act 1993 s 146(4) a person or body of persons is concerned with the administration of an occupational or personal pension scheme where the person or body is responsible for carrying out an act of administration concerned with the scheme: s 146(4A) (added by Pensions Act 2004 s 275(1)). The amendment made by the Pensions Act 2004 s 275 has effect in relation to the making of any provision under the Pension Schemes Act 1993 s 146(4) applying the Pension Schemes Act 1993 Pt 10 in relation to a complaint or a dispute in so far as it relates to a matter which arises on or after the day on which the Pensions Act 2004 s 275 comes into force (ie 6 April 2005: see SI 2005/275): Pensions Act 2004 s 275(2). For the purposes of s 275(2), a question falling within the Pension Schemes Act 1993 s 146(1)(g) is to be treated as a dispute: Pensions Act 2004 s 275(3).

TEXT AND NOTE 13--Now head (i) if, before the making of the complaint or the reference of the dispute (A) proceedings in respect of the matters which would be the subject of the investigation have been begun in any court or employment tribunal; and (B) those proceedings are proceedings which have not been discontinued or which have been discontinued on the basis of a settlement or compromise binding all the persons by or on whose behalf the complaint or reference is made: Pension Schemes Act 1993 s 146(6)(a) (substituted by the Child Support, Pensions and Social Security Act 2000 s 53(1), (6)).

TEXT AND NOTE 15--See further Pension Schemes Act 1993 s 146(6A) (added by Pensions Act 2004 Sch 12 para 24(b)) (not yet in force).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/665. Exclusions from jurisdiction.

### **665. Exclusions from jurisdiction.**

In a case to which the statutory requirement to make arrangements for internal dispute resolution applies<sup>1</sup>, the Pensions Ombudsman<sup>2</sup> must not investigate or determine a complaint<sup>3</sup> or dispute<sup>4</sup> concerning an occupational pension scheme unless written notice of a decision in respect of that complaint or dispute has first been issued by the trustees or managers of the scheme under the arrangements required by statute<sup>5</sup> or unless, where an application concerning a complaint or dispute has been made to an occupational pension scheme under the required arrangements, he is satisfied that:

- 1567 (1) there is no real prospect of a notice being issued within a reasonable period from the date on which the complaint or dispute was received by him in writing; and
- 1568 (2) it is reasonable in the circumstances that he should investigate and determine the complaint or dispute,

in which case he may investigate and determine that complaint or dispute in advance of written notice of a decision being issued<sup>6</sup> in respect of it<sup>7</sup>.

The ombudsman must not investigate or determine any complaint or dispute which can be investigated by, or under arrangements made by:

- 1569 (a) an organisation which is a recognised self-regulating organisation for the purposes of the grant of recognition by the Secretary of State<sup>8</sup>; or
- 1570 (b) a designated agency<sup>9</sup> for the purposes of the Secretary of State's power to transfer functions to such an agency,

other than a complaint or dispute relating to the management of a personal pension scheme<sup>10</sup>.

For the purposes of the investigation or determination of any complaint or dispute, the ombudsman must not make any findings of fact to the effect that a person responsible for the management of an occupational pension scheme has failed to comply with certain statutory requirements<sup>11</sup>.

1    Ie the Pensions Act 1995 s 50: see PARA 839 post.

2    As to the Pensions Ombudsman see PARA 663 ante.

3    'Complaint' means a complaint falling within the Pension Schemes Act 1993 s 146(1)(a) or s 146(1)(b) (as substituted) (complaint of maladministration): see PARA 664 ante.

4    'Dispute' means a dispute falling within ibid s 146(1)(c) or s 146(1)(d) (as substituted) (disputes of fact or law): see PARA 664 ante.

5    Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, SI 1996/2475, reg 3(1).

6    Ie under the Pensions Act 1995 s 50(2)(a) or s 50(2)(b): see PARA 839 post.

7    Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, SI 1996/2475, reg 3(2).

8 le for the purposes of the Financial Services Act 1986 s 10. A certified copy of the register entry relating to any such recognition may be obtained from the Securities and Investments Board under s 103(5).

9 le for the purposes of ibid s 114: see the Financial Services Act 1986 (Delegation) Order 1987, SI 1987/942 (amended by SI 1991/200).

10 Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, SI 1996/2475, reg 4(1).

11 Ibid reg 4(2). The statutory requirements referred to are requirements under any of the following provisions of the Pensions Act 1995: (1) ss 16-21 (requirement for member-nominated trustees and directors: see PARAS 791-793 post); (2) ss 37, 76 (payment of surplus or excess assets to the employer: see PARAS 851, 860 post); (3) s 40 (restriction on employer-related investments: see PARA 806 post); (4) s 47(1)(a), (b) (requirement to appoint professional advisers: see PARA 825 post); (5) s 49 (requirement to keep books and records: see PARA 798 post); (6) ss 56-61 (the minimum funding requirement and schedules of contributions: see PARA 811 et seq post); and (7) ss 87, 88 (requirement for money purchase schemes to keep schedules of payments: see PARA 864 post): Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, SI 1996/2475, reg 4(2).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **665 Exclusions from jurisdiction**

TEXT AND NOTES 1-7--SI 1996/2475 reg 3 amended: SI 2008/649.

TEXT AND NOTES 8-10--The Pensions Ombudsman must not investigate or determine any complaint or dispute which can be (and is in fact) dealt with under the compulsory jurisdiction of the ombudsman scheme provided for by the Financial Services and Markets Act 2000 Pt XVI (ss 225-234), other than a complaint or dispute relating to the management of a personal pension scheme: SI 1996/2475, reg 4(1) (substituted by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, and amended by the Financial Services and Markets Act 2000 (Consequential Amendments) Order 2002, SI 2002/1555).

NOTE 11--The statutory requirements referred to also include the Pensions Act 2004 Pt 3 (ss 221-233): SI 1996/2475 reg 4(2) (amended by SI 2005/3377).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/666. Time limit for making complaints and referring disputes.

#### **666. Time limit for making complaints and referring disputes.**

The Pensions Ombudsman<sup>1</sup> must not investigate a complaint<sup>2</sup> or dispute<sup>3</sup> if the act or omission which is the subject of it occurred more than three years before the date on which the complaint or reference of the dispute was received by him in writing<sup>4</sup>. Where, however, at the date of its occurrence, the person by or in respect of whom the complaint is made or the dispute is referred was, in the opinion of the ombudsman, unaware of that act or omission, the period of three years begins on the earliest date on which that person knew or ought reasonably to have known of its occurrence<sup>5</sup>; and where, in the opinion of the ombudsman, it was reasonable for a complaint not to be made or a dispute not to be referred before the end of the period allowed under the above provisions, he may investigate and determine that complaint or dispute if it is received by him in writing within such further period as he considers reasonable<sup>6</sup>.

1 As to the Pensions Ombudsman see PARA 663 ante.

2 For the meaning of 'complaint' see PARA 665 note 3 ante.

3 For the meaning of 'dispute' see PARA 665 note 4 ante.

4 Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, SI 1996/2475, reg 5(1).

5 Ibid reg 5(2).

6 Ibid reg 5(3).

#### **UPDATE**

#### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

#### **666 Time limit for making complaints and referring disputes**

NOTES--The Ombudsman does not have jurisdiction to award substantive relief where the complaint would have been statute-barred if it had been brought in court: *Ralph v Arjo Wiggins Ltd (the Pensions Ombudsman intervening)* [2009] EWHC 3198 (Ch), [2009] All ER (D) 65 (Dec).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/667. Death, insolvency or disability of actual or potential beneficiary.

### **667. Death, insolvency or disability of actual or potential beneficiary.**

Where an actual or potential beneficiary<sup>1</sup> dies or is a minor or is otherwise unable to act for himself, then<sup>2</sup>:

- 1571 (1) any complaint or dispute (whenever arising) which the actual or potential beneficiary might otherwise have made or referred may be made or referred by the appropriate person<sup>3</sup>; and
- 1572 (2) anything in the process of being done by or in relation to the actual or potential beneficiary may be continued by or in relation to the appropriate person<sup>4</sup>.

<sup>1</sup> For the meaning of 'actual or potential beneficiary' see PARA 664 note 2 ante.

<sup>2</sup> ie unless the Pension Schemes Act 1993 s 147(3) (amended by the Pensions Act 1995 s 157(1), (5)) applies: see note 4 infra.

<sup>3</sup> 'The appropriate person' means, where the actual or potential beneficiary has died, his personal representatives or, in any other case, a member of his family, or some body or individual suitable to represent him: Pension Schemes Act 1993 s 147(2) (amended by the Pensions Act 1995 s 157(1), (4)).

<sup>4</sup> Pension Schemes Act 1993 s 147(1) (as amended: see note 3 supra). Any reference in Pt X (ss 145-152) (as amended) (see PARA 663 et seq ante, 667 et seq post), except s 147, to an actual or potential beneficiary must be construed as including a reference to the appropriate person: s 147(1) (as so amended). Where a person is acting as an insolvency practitioner in relation to a person by whom, or on whose behalf, a complaint or reference has been made under Pt X (as amended), investigations thereunder are regarded for the purposes of the Insolvency Act 1986 and the Bankruptcy (Scotland) Act 1985 as legal proceedings: Pension Schemes Act 1993 s 147(3) (as amended: see note 2 supra). 'Acting as an insolvency practitioner' must be construed in accordance with the Insolvency Act 1986 s 388 (as amended) but disregarding s 388(5) (as substituted) (exclusion of official receiver): Pension Schemes Act 1993 s 147(4). See further BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 43; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 8.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/668. Staying court proceedings where a complaint is made or a dispute is referred.

**668. Staying court proceedings where a complaint is made or a dispute is referred.**

The following provisions apply where:

1573 (1) a complaint has been made or a dispute referred to the Pensions Ombudsman<sup>1</sup>; and

1574 (2) any party to the investigation<sup>2</sup> subsequently commences any legal proceedings in any court against any other party to the investigation in respect of any of the matters which are the subject of the complaint or dispute<sup>3</sup>.

In England and Wales, where this provision applies any party to the legal proceedings may at any time after acknowledgement of service, and before delivering any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings<sup>4</sup>. On such an application the court may make an order staying the proceedings if it is satisfied:

1575 (a) that there is no sufficient reason why the matter should not be investigated by the ombudsman<sup>5</sup>; and

1576 (b) that the applicant was at the time when the legal proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the investigation<sup>6</sup>.

1 Pension Schemes Act 1993 s 148(1)(a). As to the Pensions Ombudsman see PARA 663 ante.

2 For the purposes of *ibid* s 148 (as amended), the parties to an investigation are: (1) the person by whom, or on whose behalf, the complaint or reference has been made; (2) any person responsible for the management of the scheme to which the complaint or reference relates; (3) any person against whom allegations are made in the complaint or reference; and (4) any person claiming under a person falling within heads (1)-(3) *supra*: Pension Schemes Act 1993 s 148(5) (amended by the Pensions Act 1995 s 157(1), (6)). As to the persons responsible for the management of a scheme see PARA 664 note 4 ante.

3 *Ibid* s 148(1)(b).

4 *Ibid* s 148(2).

5 *Ibid* s 148(4)(a).

6 *Ibid* s 148(4)(b).

**UPDATE**

**598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

**668 Staying court proceedings where a complaint is made or a dispute is referred**

NOTE 2--Pension Schemes Act 1993 s 148(5) repealed in part: Pensions Act 2004 Sch 13 Pt 1.



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/669. Manner of making complaint.

### **669. Manner of making complaint.**

A complainant<sup>1</sup> must give details of the complaint<sup>2</sup> made or dispute<sup>3</sup> referred in writing<sup>4</sup>. The details must include:

- 1577 (1) the name and address of the complainant;
- 1578 (2) the name and address of the respondent<sup>5</sup>;
- 1579 (3) the facts relating to the complaint or dispute;
- 1580 (4) whether or not the complaint or dispute has been brought to the attention of the Occupational Pensions Advisory Service Limited<sup>6</sup>;
- 1581 (5) the name, address and profession of the representative (if any) of the complainant and whether that address is the address for correspondence to the complainant for the purposes of the investigation<sup>7</sup>.

With the leave of the Pensions Ombudsman, which must not be unreasonably refused, the complainant may at any time submit a supplementary statement and amend the details of his complaint or dispute or his supplementary statement<sup>8</sup>.

The complainant may withdraw his complaint or dispute:

- 1582 (a) at any time before the end of 14 days from the date he receives a copy of the reply from the respondent<sup>9</sup> by sending to the office of the ombudsman a notice stating he so withdraws signed by him or his representative; or
- 1583 (b) thereafter with the leave of the ombudsman, which must not be unreasonably refused<sup>10</sup>.

1 'Complainant' means a person by or in respect of whom the complaint is made or the dispute is referred under the Pension Schemes Act 1993 s 146(1) (as substituted) (see PARA 664 ante): Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 1(2) (definition added by SI 1996/2638).

2 'Complaint' means a complaint falling within the Pension Schemes Act 1993 s 146(1)(a), (b) (as substituted) (complaint of maladministration: see PARA 664 ante): Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 1(2) (amended by SI 1996/2638).

3 'Dispute' means a dispute falling within the Pension Schemes Act 1993 s 146(1)(c), (d) (as substituted) (dispute of fact or law: see PARA 664 ante): Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 1(2) (as amended: see note 2 supra).

4 Ibid r 2(1) (r 2 amended by SI 1996/2638). Any document required or authorised by the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, to be sent or delivered to any person is duly sent or delivered to that person: (1) if it is sent to him at his proper address by post; (2) if it is sent to him at that address by facsimile or other similar means which produce a document containing a text of the communication, in which event the document must be regarded as sent when it is received in a legible form; (3) if it is delivered to him or left at his proper address: r 18(1). The proper address for the Pensions Ombudsman is the address of his office; and the proper address of any other person to whom any such document is to be sent or delivered is the address given by that person or, if none, the last known address of that person or, in the case of an incorporated company or body, the registered or principal office of that company or body: r 18(2), (3). If any person to whom any document is required to be sent or delivered for these purposes cannot be found or has died and has no known personal representative, or is out of the United Kingdom, or if for any other reason service on him cannot be readily effected, the ombudsman may dispense with service on such person or may make an order for substituted service on such other person in such other

form (whether by advertisement in a newspaper or otherwise) as is reasonable: r 19. As to the Pensions Ombudsman see PARA 663 et seq ante.

5 'Respondent' means (1) the trustees or managers; or (2) a person responsible for the management of a personal or an occupational pension scheme; or (3) any other person to whom the Pension Schemes Act 1993 Pt X (ss 145-152) (as amended) applies as it applies to a person responsible for the management of a personal or an occupational pension scheme, to whom the complaint or dispute relates: Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 1(2) (as amended: see note 2 supra).

6 The Occupational Pensions Advisory Service Limited is a company limited by guarantee under the Companies Act 1985 (registered number 2459671) whose address for correspondence is 11 Belgrave Road, London SW1V 1RB. The Occupational Pensions Advisory Service Limited provides information and assistance to individuals regarding occupational pension schemes. The service has no legal powers to impose any orders on parties to a dispute but it has a formalised role in dispute resolution procedures: see further PARA 841 post.

7 Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 2(2) (as amended: see note 4 supra).

8 Ibid r 3 (amended by SI 1996/2638).

9 Ie the reply referred to in the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 6(3): see PARA 672 post.

10 Ibid r 4 (amended by SI 1996/2638).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/670. Procedure on an investigation; in general.

### **670. Procedure on an investigation; in general.**

Where the Pensions Ombudsman<sup>1</sup> proposes to conduct an investigation into a complaint made or dispute referred to him, he must give:

- 1584 (1) any person (other than the person by whom, or on whose behalf, the complaint or reference was made) responsible for the management of the scheme<sup>2</sup> to which the complaint or reference relates; and
- 1585 (2) any other person against whom allegations are made in the complaint or reference,

an opportunity to comment on any allegations contained in the complaint or reference<sup>3</sup>.

The Secretary of State<sup>4</sup> may make rules with respect to the procedure which is to be adopted in connection with the making of complaints, the reference of disputes, and the investigation of complaints made and disputes so referred<sup>5</sup>.

The rules may include provision:

- 1586 (a) requiring any oral hearing held in connection with such an investigation to take place in public, except in such cases as may be specified in the rules<sup>6</sup>;
- 1587 (b) as to the persons entitled to appear and be heard on behalf of parties to an investigation<sup>7</sup>; and
- 1588 (c) for the payment by the ombudsman of such travelling and other allowances (including compensation for loss of remunerative time) as the Secretary of State may determine, to:
  - 165 223. (i) actual or potential beneficiaries<sup>8</sup> of a scheme to which a complaint or reference relates; or
  - 224. (ii) persons appearing and being heard on behalf of such actual or potential beneficiaries,

who attend at the request of the ombudsman any oral hearing held in connection with an investigation into the complaint or dispute<sup>9</sup>.

Subject to any provision made by the rules, the procedure for conducting such an investigation must be such as the ombudsman considers appropriate in the circumstances of the case; and he may, in particular, obtain information from such persons and in such manner, and make such inquiries, as he thinks fit<sup>10</sup>. The ombudsman may disclose any information which he obtains for the purposes of such an investigation to any of the specified persons<sup>11</sup>, if the ombudsman considers that the disclosure would enable or assist that person to discharge any of his functions<sup>12</sup>.

For the purposes of such an investigation, the ombudsman may require any person responsible for the management of the scheme to which the complaint or reference relates, or any other person who in his opinion is able to furnish information or produce documents relevant to the investigation, to furnish any such information or produce any such documents<sup>13</sup>.

For the purposes of any such investigation the ombudsman has the same powers as the court<sup>14</sup> in respect of the attendance and examination of witnesses (including the administration of oaths and affirmations and the examination of witnesses abroad) and in respect of the production of documents<sup>15</sup>. No person may be compelled for the purposes of any such investigation to give any evidence or produce any document which he could not be compelled to give or produce in civil proceedings before the court<sup>16</sup>. If any person without lawful excuse obstructs the ombudsman in the performance of his functions or is guilty of any act or omission in relation to such an investigation which, if that investigation were a proceeding in the court, would constitute contempt of court, the ombudsman may certify the offence to the court<sup>17</sup>. Where an offence is so certified the court may inquire into the matter and, after hearing any witnesses who may be produced against or on behalf of the person charged with the offence and hearing any statement that may be offered in defence, deal with him in any manner in which the court could deal with him if he had committed the like offence in relation to the court<sup>18</sup>.

To assist him in an investigation, the ombudsman may obtain advice from any person who in his opinion is qualified to give it and may pay to any such person such fees or allowances as he may with the approval of the Treasury determine<sup>19</sup>. The ombudsman may refer any question of law arising for determination in connection with a complaint or dispute to the High Court<sup>20</sup>.

The ombudsman may order the discontinuance of an investigation if he considers it appropriate to do so; but before making any such order, he must send notice to the party to the investigation against whom it is proposed that any such order should be made giving him an opportunity to show cause why such an order should not be made<sup>21</sup>.

1 As to the Pensions Ombudsman see PARA 663 ante.

2 As to the persons responsible for the management of a scheme see PARA 664 note 4 ante.

3 Pension Schemes Act 1993 s 149(1) (amended by the Pensions Act 1995 s 157(1), (7)).

4 As to the Secretary of State see PARA 1 ante.

5 Pension Schemes Act 1993 s 149(2). In exercise of the power so conferred, the Secretary of State has made the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053 (as amended), which came into force on 10 May 1995: r 1(1). See PARAS 669 ante, 671 et seq post.

6 Pension Schemes Act 1993 s 149(3)(a) (amended by the Pensions Act 1995 ss 158, 177, Sch 7 Pt IV).

7 Pension Schemes Act 1993 s 149(3)(b). As to the parties to an investigation see PARA 668 note 2 ante (definition applied by s 149(3)(b)).

8 For the meaning of 'actual or potential beneficiaries' see PARA 664 note 2 ante.

9 Pension Schemes Act 1993 s 149(3)(c) (added by the Pensions Act 1995 s 158).

10 Pension Schemes Act 1993 s 149(4). The ombudsman is under a duty to comply with the principles of natural justice when conducting an investigation: see *Duffield v Pensions Ombudsman* [1996] PLR 285; *Seifert v Pensions Ombudsman*, *Lynch v Pensions Ombudsman* [1997] 1 All ER 214 (revsd on the question of costs (1997) Times, 3 October, CA).

11 The specified persons are: (1) the Occupational Pensions Regulatory Authority (see PARA 598 et seq ante); (2) the Pensions Compensation Board (see PARA 637 ante); (3) the Registrar of Occupational and Personal Pension Schemes (see PARA 661 ante); (4) any department of the government (including the government of Northern Ireland); (5) the Bank of England; (6) the Friendly Societies Commission; (7) the Building Societies Commission; (8) an inspector appointed by the Secretary of State under the Companies Act 1985 Pt XIV (ss 431-435) or the Financial Services Act 1986 s 94 (as amended) or s 107 (as amended); (9) an inspector appointed by the Department of Economic Development in Northern Ireland under the Companies (Northern Ireland) Order 1986, SI 1986/1032, Pt XV; (10) a person authorised under the Financial Services Act 1986 s 106 to exercise powers conferred by s 105; (11) a designated agency or transferee body or the competent authority within the meaning of that Act; and (12) a recognised self-regulating organisation, recognised professional body, recognised investment exchange or recognised clearing house, within the meaning of that Act: Pension

Schemes Act 1993 s 149(6) (s 149(5)-(7) added by the Pensions Act 1995 s 159(1)). For the meaning of 'recognised self-regulating organisation', 'recognised professional body', 'recognised investment exchange', 'recognised clearing house' and 'competent authority' see the Financial Services Act 1986 s 207(1); for the meaning of 'designated agency' see s 114(3); and for the meaning of 'transferee body' see s 140, Sch 11 para 28(4). The Secretary of State may by order add any such person or remove any such person for the time being so specified, or restrict the circumstances in which, or impose conditions subject to which, disclosure may be made to any such person for the time being so specified: Pension Schemes Act 1993 s 149(7) (as so added).

12 Ibid s 149(5) (as added: see note 11 supra).

13 Ibid s 150(1) (amended by the Pensions Act 1995 s 157(1), (8)). As to the service of documents see PARA 669 note 7 ante.

14 'The court' means in England and Wales, a county court: Pension Schemes Act 1993 s 150(8). The Secretary of State may make rules regulating the practice, and the forms of proceedings, which are to be followed in county courts in any such proceedings and prescribing the scales of costs to be paid in connection with any such proceedings: s 152(1). Without prejudice to the generality of s 152(1), rules under s 152 may, to any extent and with or without modifications, apply any county court rules to proceedings under or by virtue of Pt X (ss 145-152) (as amended): s 152(2). See the County Court (Pensions Ombudsman) (Enforcement of Directions and Determinations) Rules 1993, SI 1993/1978. For the meaning of 'prescribing' see PARA 555 note 1 ante; and for the meaning of 'modifications' see PARA 664 note 10 ante.

15 Pension Schemes Act 1993 s 150(2).

16 Ibid s 150(3).

17 Ibid s 150(4).

18 Ibid s 150(5). As to the meaning of 'lawful excuse' see *Cambridgeshire and Isle of Ely County Council v Rust* [1972] 2 QB 426, [1972] 3 All ER 232; *Dickins v Gill* [1896] 2 QB 310; *Wong Pooh Yin v Public Prosecutor* [1955] AC 93, [1954] 3 All ER 31, PC.

19 Pension Schemes Act 1993 s 150(6).

20 Ibid s 150(7). As to the meaning of 'question of law' see *Edwards v Bairstow* [1956] AC 14, [1955] 3 All ER 48, HL.

21 Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 16(1)(c), (2).

## UPDATE

### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see PARA 676A.

### 670 Procedure on an investigation; in general

TEXT AND NOTES 1-12--Pension Schemes Act 1993 s 149 amended: Pensions Act 2004 Sch 13 Pt 1.

NOTE 10--The ombudsman is entitled to adjudicate a complaint on the basis of existing material: *Brooks v Civil Aviation Authority* (2000) Times, 28 July, Inner House.

NOTE 11--Now, head (2) the Board of the Pension Protection Fund, (2A) the Ombudsman for the Board of the Pension Protection Fund: 1993 Act s 149(6) (amended by Pensions Act 2004 Sch 12 para 25).

Head (5), for 'Bank of England' read now 'Financial Services Authority': 1993 Act s 149(6)(e); Bank of England Act 1998 s 23, Sch 5. Heads (6) and (7) repealed: Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649. Now head (8): 'a person appointed under (a) the Companies Act 1985 Pt XIV, (b) the Financial Services and Markets Act 2000 s 167, (c) s 168(3) or (5), or (d) s

284, to conduct an investigation: SI 2001/3649. Head (9) repealed: SI 2009/1941. Heads (10)-(12) now heads (10) a body designated under the Financial Services and Markets Act 2000 s 326(1); and (11) a recognised investment exchange or a recognised clearing house (as defined by s 285): SI 2001/3649.

Also, heads (12) a person who, in a member state other than the United Kingdom, has functions corresponding to functions of the Pensions Ombudsman; (13) a body corporate established in accordance with the 2000 Act Sch 17 para 2(1) (the scheme operator of the ombudsman scheme); (14) an ombudsman as defined in Sch 17 para 1: 1993 Act s 149(6) (amended by Pensions Act 2004 Sch 12 para 25; and the Pensions Ombudsman (Disclosure of Information) (Amendment of Specified Persons) Order 2005, SI 2005/2743).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15.  
REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/671.  
Acknowledgement and supply of copy documents by Pensions Ombudsman.

### **671. Acknowledgement and supply of copy documents by Pensions Ombudsman.**

Upon receiving details of a complaint<sup>1</sup> or dispute<sup>2</sup> the Pensions Ombudsman<sup>3</sup> must send to the complainant<sup>4</sup> or his representative an acknowledgement of receipt<sup>5</sup>. Where the ombudsman proposes to investigate the complaint or dispute, he must forthwith supply a copy of the details of the complaint or dispute together with any amendments or supplementary statements, written representations or other documents received from the complainant or his representative to the respondent<sup>6</sup>. Where he does not propose to investigate the complaint or dispute, he must forthwith inform the complainant or his representative that he does not propose to conduct an investigation<sup>7</sup>.

1 For the meaning of 'complaint' see PARA 669 note 2 ante.

2 For the meaning of 'dispute' see PARA 669 note 3 ante.

3 As to the Pensions Ombudsman see PARA 663 ante.

4 For the meaning of 'complainant' see PARA 669 note 1 ante.

5 Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 5(1) (r 5 amended by SI 1996/2638). As to the method of sending documents etc see PARA 669 note 4 ante.

6 Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 5(2) (as amended: see note 5 supra).

7 Ibid r 5(3) (as amended: see note 5 supra).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/672. Action by the respondent on receipt of a complaint or dispute.

## **672. Action by the respondent on receipt of a complaint or dispute.**

Upon receiving a copy of the details of a complaint<sup>1</sup> or dispute<sup>2</sup> the respondent<sup>3</sup> must deliver to the Pensions Ombudsman<sup>4</sup> a written reply acknowledging receipt of the details and stating:

- 1589 (1) the facts relating to the complaint or dispute, whether or not the respondent opposes the allegations made in the complaint or dispute and any details on which the respondent relies in opposing those allegations;
- 1590 (2) whether, in the opinion of the respondent, any other person has a direct interest in the subject matter of the complaint or dispute and (if so) the name and address of such other person;
- 1591 (3) the name, address and profession of the representative (if any) of the respondent and whether such address is the address for correspondence to the respondent for the purposes of the investigation<sup>5</sup>.

The respondent must deliver to the ombudsman a sufficient number of additional copies of the reply to enable the ombudsman to provide a copy to the complainant<sup>6</sup> and any other person named by the respondent as having a direct interest in the subject matter of the complaint or dispute<sup>7</sup>. Every such reply must be signed by or on behalf of the respondent and must be delivered at the office of the ombudsman not later than 21 days<sup>8</sup> after the date on which the copy of the details of the complaint or dispute was received by the respondent from the ombudsman<sup>9</sup>. The respondent may in its reply, or in a separate notice to the ombudsman submitted within that 21-day period, request further particulars of the complaint or dispute and a determination of any question as a preliminary issue<sup>10</sup>.

The respondent may with the leave of the ombudsman, which must not be unreasonably refused, at any time submit a supplementary statement and amend any reply or supplementary statement<sup>11</sup>.

If no reply is received by the ombudsman within the prescribed period or any extension of that period allowed by him, or if the respondent states in writing that it does not oppose or withdraws its opposition to the allegations, the ombudsman may, in any such case where there is no other opposition to the allegations, determine the complaint or dispute forthwith<sup>12</sup>.

1 For the meaning of 'complaint' see PARA 669 note 2 ante.

2 For the meaning of 'dispute' see PARA 669 note 3 ante.

3 For the meaning of 'respondent' see PARA 669 note 5 ante.

4 As to the Pensions Ombudsman see PARA 663 ante.

5 Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 6(1). As to the method of sending documents etc see PARA 669 note 4 ante.

6 For the meaning of 'complainant' see PARA 669 note 1 ante.

7 Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 6(2) (amended by SI 1996/2638).

8 The ombudsman may extend the time appointed by or under the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053 (as amended), for doing any act, notwithstanding that the time appointed may have expired: r 16(1)(a).

9 Ibid r 6(3).

10 Ibid r 6(4).

11 Ibid r 7(1). The respondent must deliver to the ombudsman a sufficient number of additional copies of any amended reply or supplementary statement to enable the ombudsman to provide a copy to the complainant and any other person named by the respondent as having a direct interest in the subject matter of the complaint or dispute: r 7(2) (amended by SI 1996/2638).

12 Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 8.

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

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REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/673.  
Disclosure of documents and other material.

### **673. Disclosure of documents and other material.**

The complainant<sup>1</sup> and respondent<sup>2</sup> must send or deliver to the Pensions Ombudsman<sup>3</sup> by such date as the ombudsman may specify a copy of any document or other material on which he intends to rely<sup>4</sup>. The respondent must, in addition, send to the ombudsman a sufficient number of copies of any such document or other material to enable the ombudsman to provide a copy to any other party to the investigation<sup>5</sup>, but need not do so where the document or material or a copy thereof is already in the possession of the other parties or the ombudsman already holds a sufficient number of copies<sup>6</sup>. Where a document or other material is obtained by the ombudsman pursuant to a request made by him to any party to the investigation, he must supply a copy to each of the other parties to the investigation<sup>7</sup>.

It is a condition of the supply of any document under these provisions that a party to the investigation must use the document supplied only for the purposes of the investigation<sup>8</sup>.

1 For the meaning of 'complainant' see PARA 669 note 1 ante.

2 For the meaning of 'respondent' see PARA 669 note 5 ante.

3 As to the Pensions Ombudsman see PARA 663 ante.

4 Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 9(1) (amended by SI 1996/2638). As to the method of sending documents etc see PARA 669 note 4 ante.

5 Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 9(2). 'Party to the investigation' means, as the case may be, the complainant or the respondent and 'party' and 'parties' must be construed accordingly: r 1(2) (amended by SI 1996/2638).

6 Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 9(3).

7 Ibid r 9(4).

8 Ibid r 9(5).

### **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/674. Notice of requirements in the event of an oral hearing.

#### **674. Notice of requirements in the event of an oral hearing.**

Where the Pensions Ombudsman<sup>1</sup> considers it appropriate for an oral hearing to be held in connection with any investigation conducted by him, he must, with due regard to the convenience of the parties to the investigation<sup>2</sup>, fix the time and place of any such hearing and, not less than 21 days<sup>3</sup> before the date so fixed (or such shorter time as the parties agree), send to each party a notice of the time and place of the hearing<sup>4</sup>. The ombudsman must include in or with the notice of hearing:

- 1592 (1) information as to attendance at the hearing of the parties and witnesses, the bringing of documents and the right to representation by another person;
- 1593 (2) a statement explaining the right of any party to the investigation, who does not attend and is not represented, to make representations in writing and the possible consequences of non-attendance<sup>5</sup>.

The ombudsman may, if it is necessary in the circumstances, alter the time and place of any oral hearing and he must give the parties not less than seven days' notice of any such alteration, or such shorter time as the parties agree<sup>6</sup>. He may make payments in respect of allowances, fees and expenses in accordance with the rules<sup>7</sup>.

Where the ombudsman adjourns any oral hearing, providing that the time and place of the reconvening of the hearing are announced before the adjournment, no further notice is required<sup>8</sup>.

1 As to the Pensions Ombudsman see PARA 663 ante.

2 For the meaning of 'parties to the investigation' see PARA 673 note 5 ante.

3 As to the power to extend time limits see PARA 672 note 8 ante.

4 Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 10(1). As to the method of sending documents see PARA 669 note 4 ante.

5 Ibid r 10(2).

6 Ibid r 10(3). Any altered hearing date must not (unless the parties agree) be before the date notified under r 10(1); r 10(3) proviso.

7 See ibid r 15A (added by SI 1996/2638). Payments may be made, in accordance with the rules, of travelling and subsistence expenses and also by way of compensation for lost earnings: see the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 15A(4)-(9) (as so added).

8 Ibid r 10(4).

#### **UPDATE**

#### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/675. Procedure in relation to oral hearing.

### **675. Procedure in relation to oral hearing.**

Each party to the investigation<sup>1</sup> must inform the Pensions Ombudsman<sup>2</sup> whether or not he intends to attend or be represented at the hearing and whether or not he intends to call witnesses<sup>3</sup>. If any party to the investigation does not intend to attend or be represented at the hearing, he may send to the ombudsman additional written representations<sup>4</sup>.

All hearings by the ombudsman must be in public except where, by reason of the disclosure of any matter that relates to intimate personal or financial circumstances, or is commercially sensitive, or consists of information communicated or obtained in confidence, or concerns national security, it is just and reasonable for the hearing or any part of it to be in private<sup>5</sup>. A member of the Council on Tribunals or of the Scottish Committee of that Council is entitled to attend the hearing whether it is in public or in private<sup>6</sup> and the ombudsman, with the consent of the parties to the investigation, may permit any other person to attend any hearing which is held in private<sup>7</sup>.

Any person whose conduct has disrupted or is likely to disrupt the hearing may be excluded by the ombudsman<sup>8</sup>.

If a party to the investigation fails to attend or be represented at a hearing of which he has been duly notified, the ombudsman may conduct the hearing and determine the complaint or dispute in the party's absence or may adjourn the hearing<sup>9</sup>. Before deciding to dispose of any case in the absence of a party, the ombudsman must consider any representations in writing submitted by that party in response to the notice of hearing<sup>10</sup>.

At any hearing, any party to the investigation, if an individual, may conduct his case himself (with assistance from any person if he wishes) or may appear and be represented by any person whether or not legally qualified, provided that, if in any particular case there are good and sufficient reasons for doing so, the ombudsman may refuse to permit a particular person to assist or represent the party at the hearing<sup>11</sup>.

At the beginning of any hearing the ombudsman must explain the order of proceeding which he proposes to adopt<sup>12</sup>. He must conduct the hearing in such manner as he considers appropriate to the clarification of the issues before him and generally to the just handling of the investigation and he must so far as seems appropriate seek to avoid formality in the hearing<sup>13</sup>. The parties to the investigation are to be heard in such order as the ombudsman determines and they are entitled to give evidence, to call witnesses, to question any party to the investigation or witnesses and to address the ombudsman both on the evidence and generally on the subject matter of the investigation<sup>14</sup>.

Evidence before the ombudsman may be given orally or, where the ombudsman considers appropriate, by affidavit or written statement, but the ombudsman may, if it is appropriate, at any stage of the hearing require the personal attendance of any deponent or maker of a written statement<sup>15</sup>. The ombudsman may receive evidence of any fact which appears to him to be relevant notwithstanding that such evidence would be inadmissible in proceedings before a court of law, but must not refuse to admit any evidence which is admissible at law and is relevant<sup>16</sup>.

Any irregularity resulting from failure to comply with any provisions of the relevant procedural rules<sup>17</sup> does not of itself render the proceedings void<sup>18</sup>.

- 1 For the meaning of 'party to the investigation' see PARA 673 note 5 ante.
- 2 As to the Pensions Ombudsman see PARA 663 ante.
- 3 Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 11(1). As to the method of sending documents etc see PARA 669 note 4 ante.
- 4 Ibid r 11(2). The ombudsman may, at any stage of the investigation, order to be struck out or amended any written representation on the grounds that it is scandalous, frivolous or vexatious; but before making any such order he must send notice to the party to the investigation against whom it is proposed that any such order should be made giving him an opportunity to show cause why such an order should not be made: r 16(1)(b), (2).
- 5 Ibid r 12(1).
- 6 Ibid r 12(2). As to the Council on Tribunals see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARAS 55-57.
- 7 Ibid r 12(3).
- 8 Ibid r 12(4).
- 9 Ibid r 13(1).
- 10 Ibid r 13(2).
- 11 Ibid r 14.
- 12 Ibid r 15(1).
- 13 Ibid r 15(2).
- 14 Ibid r 15(3).
- 15 Ibid r 15(4).
- 16 Ibid r 15(5).
- 17 Ie the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053 (as amended): see the text and notes 1-16 supra; and PARA 669 et seq ante.
- 18 Ibid r 17(1).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

### **675 Procedure in relation to oral hearing**

TEXT AND NOTE 6--SI 1995/1053 r 12(2) revoked: SI 2008/2683.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/676. Determinations of the Pensions Ombudsman.

### **676. Determinations of the Pensions Ombudsman.**

Where the Pensions Ombudsman<sup>1</sup> has conducted an investigation he must send a written statement of his determination of the complaint or dispute in question:

- 1594 (1) to the person by whom, or on whose behalf, the complaint or reference was made; and
- 1595 (2) to any person (if different) responsible for the management of the scheme<sup>2</sup> to which the complaint or reference relates,

and any such statement must contain the reasons for his determination<sup>3</sup>.

Where the ombudsman makes such a determination or makes such a determination under any corresponding legislation having effect in Northern Ireland<sup>4</sup>, he may direct any person responsible for the management of the scheme to which the complaint or reference relates to take, or refrain from taking, such steps as he may specify in the statement or otherwise in writing<sup>5</sup>. Subject to the above provision, the determination by the ombudsman of a complaint or dispute, and any such direction given by him, is final and binding on:

- 1596 (a) the person by whom, or on whose behalf, the complaint or reference was made<sup>6</sup>;
- 1597 (b) any person (if different) responsible for the management of the scheme to which the complaint or reference relates<sup>7</sup>; and
- 1598 (c) any person claiming under a person falling within head (a) or head (b) above<sup>8</sup>.

Any determination or direction of the ombudsman is enforceable in England and Wales, in a county court as if it were a judgment or order of that court<sup>9</sup>.

If the ombudsman considers it appropriate to do so in any particular case, he may publish in such form and manner as he thinks fit a report of any such investigation and of the result of that investigation<sup>10</sup>.

An appeal on a point of law lies to the High Court from a determination or direction of the ombudsman at the instance of any person falling within heads (a) to (c) above<sup>11</sup>. The ombudsman may appear as a party on the hearing of the appeal<sup>12</sup> but if he does so he may be at risk for the costs of the appeal<sup>13</sup>.

1 As to the Pensions Ombudsman see PARA 663 ante.

2 As to the persons responsible for the management of a scheme see PARA 664 note 4 ante.

3 Pension Schemes Act 1993 s 151(1) (amended by the Pensions Act 1995 s 157(1), (9)).

4 Ie the Pension Schemes (Northern Ireland) Act 1993 Pt X (ss 141-148).

5 Pension Schemes Act 1993 s 151(2) (amended by the Pensions Act 1995 s 157(1), (11)); and see eg *Law Debenture Trust Corp'n plc v Pensions Ombudsman* [1997] 3 All ER 233; *Hillsdown Holdings plc v Pensions Ombudsman* [1997] 1 All ER 862, [1996] PLR 427. Where the ombudsman directs a person responsible for the management of an occupational or personal pension scheme to make any payment in respect of benefit under

the scheme which, in his opinion, ought to have been paid earlier, his direction may also require the payment of interest at the prescribed rate: Pension Schemes Act 1993 s 151A (added by the Pensions Act 1995 s 160). The prescribed rate of interest for these purposes is the base rate for the time being quoted by the reference banks: Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, SI 1996/2475, reg 6(1). 'Base rate' means the rate for the time being quoted by the reference banks as applicable to sterling deposits or, where there is for the time being more than one such base rate, the rate which, when the base rate quoted by each bank is ranked in a descending sequence of four, is first in the sequence; and 'reference banks' means the four largest institutions for the time being which (1) are authorised by the Bank of England under the Banking Act 1987; (2) are incorporated in and carrying on within the United Kingdom a deposit-taking business (as defined in s 6, but subject to any order under s 7: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 791); and (3) quote a base rate applicable to sterling deposits: Personal and Occupational Pension Schemes (Pensions Ombudsman) Regulations 1996, SI 1996/2475, reg 6(2). As to enforcement of a direction to pay money see note 9 infra.

6 Pension Schemes Act 1993 s 151(3)(a) (substituted by the Pensions Act 1995 s 157(11)).

7 Pension Schemes Act 1993 s 151(3)(b) (as substituted: see note 6 supra).

8 Ibid s 151(3)(c) (as substituted: see note 6 supra).

9 Ibid s 151(5). Clerical mistakes in any written statement of a determination (including any direction made under s 151(2)) or errors arising in such a document from an accidental slip or omission, may be corrected by the ombudsman by certificate under his hand: Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995, SI 1995/1053, r 17(2).

A direction by the ombudsman for the payment of money is not to be enforced, whether by issue of a warrant of execution or otherwise, unless the applicant for enforcement has filed with his application a copy of the direction, certified by the ombudsman to be a true copy of the original; but subject to this, wherever the ombudsman directs the payment of money, the County Court Rules 1981 concerning the enforcement of payment of judgment debts apply to the direction as if it were a county court judgment: County Court (Pensions Ombudsman) (Enforcement of Directions and Determinations) Rules 1993, SI 1993/1978, r 2.

Wherever the ombudsman directs a person to take, or refrain from taking, any step, the County Court Rules 1981 concerning the enforcement of a judgment, in CCR Ord 29 (committal for breach of order or undertaking), apply to the direction as if it were a county court judgment or order; but the procedure provided by Ord 29 r 1(3) for a county court, at the request of the judgment creditor, to issue a copy of the judgment or order indorsed with a notice as to the consequences of disobedience, does not apply to a direction of the ombudsman unless the applicant has filed with his request a copy of the direction, certified by the ombudsman to be a true copy of the original: County Court (Pensions Ombudsman) (Enforcement of Directions and Determinations) Rules 1993, SI 1993/1978, r 3.

10 Pension Schemes Act 1993 s 151(6). For the purposes of the law of defamation, the publication of any matter by the ombudsman (1) in submitting or publishing a report under s 145(6) (see PARA 663 ante) or s 151(6); (2) in disclosing any information under s 149(5) (as added) (see PARA 670 ante); or (3) in sending to any person a statement under s 151(1) (as amended: see note 3 supra) or a direction under s 151(2) (as amended: see note 5 supra), is absolutely privileged: s 151(7) (amended by the Pensions Act 1995 s 159(2)). As to absolute privilege see LIBEL AND SLANDER vol 28 (Reissue) PARA 94 et seq.

11 Pension Schemes Act 1993 s 151(4).

12 See *Dolphin Packaging Materials Ltd v Pensions Ombudsman* [1996] PLR 95.

13 See *Providence Capital Trustees Ltd v Ayres* [1996] 4 All ER 760, [1996] PLR 395. It is not, however, a sufficient ground to order the ombudsman to pay the costs of all the parties' appeals from his decision that part of his determination has been set aside: *Seifert v Pensions Ombudsman* (1997) Times, 3 October, CA; applied in *Elliott v Pensions Ombudsman* (1997) Times, 20 November.

## UPDATE

### 598-676 Regulation of Private Pension Provision

As to the Personal Accounts Delivery Authority see PARA 676A.

### 676 Determinations of the Pensions Ombudsman

TEXT AND NOTES 3, 6-8--Pension Schemes Act 1993 s 151(1), (3) amended: Pensions Act 2004 Sch 13 Pt 1.

NOTE 4--Pension Schemes (Northern Ireland) Act 1993 s 145 amended: Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649; Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009, SI 2009/1941.

NOTE 5--Definition of 'reference banks' substituted: SI 2001/3649.

The 1993 Act s 151(2) does not empower an ombudsman to take a course of action which would not be open to a court in litigation: *Wakelin v Read* (2000) Times, 10 April, CA. His power to give directions is not limited to cases where it is proved that maladministration or a risk of maladministration has occurred: *NHS Pensions Agency v Suggett* [2006] EWCA Civ 10, (2006) Times, 27 January. He is not tied to the particular remedy that a court could have given if the complainant had chosen to bring a civil action: *Henderson v Stephenson Harwood (a firm)* [2005] EWHC 24 (Ch), [2005] All ER (D) 140 (Jan).

NOTE 9--CCR replaced by Civil Procedure Rules 1998, SI 1998/3132 ('the CPR'). See generally CIVIL PROCEDURE.

NOTE 11--The right to appeal conferred by the 1993 Act s 151(4) applies only to final determinations and not to interim determinations: *Legal and General Assurance Society Ltd v Pensions Ombudsman; R v Pensions Ombudsman, ex p Legal and General Assurance Society Ltd* [2000] 2 All ER 577, [2000] 1 WLR 1524. See also *Swallow v Revenue and Customs Comrs* [2010] EWHC 771 (Ch), [2010] All ER (D) 95 (Apr).

NOTE 13--*Elliot*, cited, followed in *University of Nottingham v Eyett (No 2)* [1999] 2 All ER 445; but not followed in *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] 1 All ER 737 (ombudsman liable to pay all of appellant's costs).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/15. REGULATION OF PRIVATE PENSION PROVISION/(4) THE PENSIONS OMBUDSMAN/676A. Personal Accounts Delivery Authority.

## **676A. Personal Accounts Delivery Authority.**

### **1. General**

There is to be a body corporate known as the Personal Accounts Delivery Authority (referred to in Part 3 of the Pensions Act 2007<sup>1</sup> as the 'Authority')<sup>2</sup>. The Authority is not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown<sup>3</sup>. Further provision is made<sup>4</sup>.

1    Ie the Pensions Act 2007 ss 20, 22, 23.

2    Ibid s 20(1).

3    Ibid s 20(2).

4    See ibid s 20(3), Sch 6 (amended by Pensions Act 2008 ss 82, 84, 85), which makes provision with respect to members and employees (Pensions Act 2007 Sch 6 Pt 1), proceedings (Sch 6 Pt 2), money (Sch 6 Pt 3) and supplementary provision (Sch 6 Pt 4). As to the review of the operation of the Pensions Act 2007 see s 24.

### **2. Functions**

The Personal Accounts Delivery Authority<sup>1</sup> has the following functions (1) to give any assistance and advice that the Secretary of State may require, and any advice that the Authority considers expedient, for or in connection with the establishment and operation of a scheme<sup>2</sup>; (2) to give any assistance and advice that the Secretary of State or the Regulator may require, and any advice that the Authority considers expedient, for or in connection with arrangements to enable requirements imposed by or under Chapter 1 of Part 1 of the Pensions Act 2008<sup>3</sup> to be complied with and enforced<sup>4</sup>. The Authority's functions<sup>5</sup> are in addition to any functions that may be conferred on it by or under the Pensions Act 2008 or any other enactment<sup>6</sup>. The Authority may do anything calculated to facilitate, or incidental or conducive to, the carrying out of any of its functions<sup>7</sup>. In particular, the Authority may (a) enter into agreements; (b) borrow money<sup>8</sup>.

The Secretary of State may give the Authority guidance or directions about the discharge of its functions<sup>9</sup>.

1    As to the Personal Accounts Delivery Authority in general see para 676A.1.

2    Ie a scheme under the Pensions Act 2008 s 67(1).

3    Ie the Pensions Act 2008 ss 1-33.

4    Pensions Act 2008 s 79(2). Assistance or advice required by the Secretary of State under head (1) may include assistance or advice to the trustees of the scheme: s 79(3).

In carrying out its functions under s 79(2) the Authority must have regard to specified principles: see Pensions Act 2008 s 80.

5    Under the Pensions Act 2008 s 79(2).

6    Pensions Act 2008 s 79(4).

7    Pensions Act 2008 s 79(5).

8 Pensions Act 2008 s 79(6). The Authority's powers within head (b) are exercisable only with the consent of the Secretary of State: s 79(7).

9 See Pensions Act 2008 s 81.

### **3. Management of the Authority**

In managing its affairs, the Authority<sup>1</sup> must have regard (1) to such general guidance concerning the management of the affairs of public bodies as the Authority thinks appropriate, and (2) to generally accepted principles of good corporate governance<sup>2</sup>.

1 As to the Personal Accounts Delivery Authority in general see PARA 676A.1.

2 Pensions Act 2007 s 22(1). But the obligation in head (2) in the text (1) is subject to guidance falling within head (1) in the text, and (2) applies only to the extent that the principles in question may reasonably be regarded as applicable in relation to a statutory corporation: s 22(2).

### **4. Winding up of the Authority**

The Secretary of State may by order provide for the winding up and dissolution of the Authority<sup>1</sup>. An order under these provisions may, in particular (1) provide for the transfer of property, rights or liabilities of the Authority to the Secretary of State or any other person; (2) provide, in connection with provision made under head (1) above (a) for the creation of interests in property transferred; (b) for the creation of rights and liabilities in relation to such property; (c) for interests, rights and liabilities to be extinguished; (3) provide for the payment by the Secretary of State or the Authority of compensation to any person who suffers loss or damage as a result of the provision made for the winding up of the Authority<sup>2</sup>. An order under these provisions may make (i) such consequential, incidental or supplemental provision, and (ii) such transitional, transitory or saving provision, as the Secretary of State thinks necessary or expedient in connection with, or in consequence of, the winding up and dissolution of the Authority<sup>3</sup>. No order may be made under these provisions unless a draft of the order has been laid before and approved by a resolution of each House of Parliament<sup>4</sup>.

1 Pensions Act 2007 s 23(1) (substituted by the Pensions Act 2008 s 86(2)). As to the Personal Accounts Delivery Authority in general see PARA 676A.1. As to orders under the Pensions Act 2007 generally see s 25.

2 Ibid s 23(5) (amended by Pensions Act 2008 s 86(4)).

3 Pensions Act 2007 s 23(6). An order under s 23 may also contain provision repealing any provision of (1) ss 20-22 or Sch 6 (see PARAS 676A.1-676A.3); (2) the Pensions Act 2008 ss 79-85: s 23(7) (amended by Pensions Act 2008 s 86(5)).

4 Pensions Act 2007 s 23(8).

## **UPDATE**

### **598-676 Regulation of Private Pension Provision**

As to the Personal Accounts Delivery Authority see PARA 676A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(1) TERMINATION OF TAX RELIEF AND TRANSITIONAL PROVISIONS/677. Termination of relief for retirement annuity contracts established on or after 1 July 1988.

## **16. RETIREMENT ANNUITY CONTRACTS**

### **(1) TERMINATION OF TAX RELIEF AND TRANSITIONAL PROVISIONS**

#### **677. Termination of relief for retirement annuity contracts established on or after 1 July 1988.**

Neither (1) a contract made or trust scheme established on or after 1 July 1988<sup>1</sup>; nor (2) a person by whom contributions are first paid on or after that date under a trust scheme established before that date<sup>2</sup>, are eligible for relief under the legislation relating to approved retirement annuity contracts<sup>3</sup>.

<sup>1</sup> See the Income and Corporation Taxes Act 1988 s 618(1)(a) (amended by the Finance Act 1988 s 54(2)(a)).

<sup>2</sup> Income and Corporation Taxes Act 1988 s 618(1)(b).

<sup>3</sup> See under ibid Pt XIV Ch III (ss 618-629) (as amended): see PARA 678 et seq post.

#### **UPDATE**

#### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(1) TERMINATION OF TAX RELIEF AND TRANSITIONAL PROVISIONS/678. Transitional provisions for retirement annuity contracts established after 17 March 1987 and before 1 July 1988.

**678. Transitional provisions for retirement annuity contracts established after 17 March 1987 and before 1 July 1988.**

The terms of a contract made, or the rules of a trust scheme established, on or after 17 March 1987 and before 1 July 1988 and approved<sup>1</sup> by the Board<sup>2</sup> have effect (notwithstanding anything in them to the contrary) as if they did not allow the payment to the individual by whom the contract is made, or an individual paying contributions under the scheme, of a lump sum exceeding £150,000 or such other sum as may be specified in the legislation<sup>3</sup>. The rules of a trust scheme established before 17 March 1987 and approved by the Board have effect as if they did not allow the payment of a lump sum exceeding £150,000 (or the specified amount) to any person first paying contributions under the scheme on or after 17 March 1987<sup>4</sup>.

1    Ie approved under the Income and Corporation Taxes Act 1988 s 620: see PARAS 687-690 post.

2    'The Board' means the Commissioners of Inland Revenue: *ibid* s 832(1).

3    *Ibid* s 618(2) (amended by the Finance Act 1989 s 54(3)). The amount of the lump sum may be varied by order under the Income and Corporation Taxes Act 1988 s 635(4) (repealed by the Finance Act 1989 ss 77, 187(1), Sch 7 Pt I paras 1-2, Sch 17 Pt IV, in relation to the approval of a scheme on or after 27 July 1989). For cases where a scheme is approved before 27 July 1989 but the member makes arrangements after that day, or a lump sum is paid after that day see the Finance Act 1989 s 77, Sch 7 Pt II paras 10-12 (as amended). The Income and Corporation Taxes Act 1988 s 618(2), (3) (as amended) is subject to s 618(4): see PARA 679 post.

4    *Ibid* s 618(3). Section 618(3) did not apply in the case of any person paying contributions under a scheme if, before the end of January 1988, he and the trustees or other persons having the management of the scheme jointly gave notice to the Board that s 618(3) was not to apply; and where notice was given to the Board, the scheme ceased to be approved in relation to the contributor with effect from the date on which he first paid a contribution under it or, if later, the date with effect from which it was approved: s 618(5).

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(1) TERMINATION OF TAX RELIEF AND TRANSITIONAL PROVISIONS/679. Exclusion of transitional provisions in certain circumstances.

### **679. Exclusion of transitional provisions in certain circumstances.**

The restrictions on the payment of a lump sum which apply to certain approved retirement annuity contracts<sup>1</sup> did not apply to such a contract or scheme if, before the end of January 1988, the persons by and to whom premiums are payable under the contract jointly gave notice<sup>2</sup> to the Board<sup>3</sup> that the restrictions were not to apply<sup>4</sup> or, in the case of a scheme, the trustees or other persons having the management of the scheme gave such notice to the Board<sup>5</sup>. Where such notice was given to the Board the contract or scheme ceased to be approved with effect from the date from which it was approved<sup>6</sup>.

1    le those restrictions under the Income and Corporation Taxes Act 1988 s 618(2) (as amended): see PARA 678 ante.

2    The notice must be in writing: see *ibid* s 832(1).

3    For the meaning of 'the Board' see PARA 678 note 2 ante.

4    Income and Corporation Taxes Act 1988 s 618(4)(a).

5    *Ibid* s 618(4)(b).

6    *Ibid* s 618(4).

### **UPDATE**

#### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16.  
RETIREMENT ANNUITY CONTRACTS/(2) TAX RELIEF FOR QUALIFYING PREMIUMS ETC/680.  
Exemption from tax in respect of qualifying premiums.

## **(2) TAX RELIEF FOR QUALIFYING PREMIUMS ETC**

### **680. Exemption from tax in respect of qualifying premiums.**

Where in any year of assessment<sup>1</sup> an individual is, or would but for an insufficiency of profits or gains be, chargeable to income tax in respect of relevant earnings<sup>2</sup> from any trade, profession, vocation, office or employment carried on or held by him, and pays a qualifying premium<sup>3</sup>, then:

- 1599 (1) relief from income tax is given in respect of that qualifying premium, but only on a claim made for the purpose, and where such relief is given the amount of that premium is deducted from or set off against the person's relevant earnings for the year of assessment in which the premium is paid<sup>4</sup>; and
- 1600 (2) any annuity payable to the same or another individual is treated as earned income of the annuitant to the extent to which it is payable in return for any amount on which relief is given<sup>5</sup>.

1 'Year of assessment' means, with reference to any income tax, the year for which such tax was granted by any Act granting income tax: see the Income and Corporation Taxes Act 1988 s 832(1).

2 For the meaning of 'relevant earnings' see PARA 698 post.

3 For the meaning of 'qualifying premium' see PARA 686 post.

4 See the Income and Corporation Taxes Act 1988 s 619(1)(a).

5 Ibid s 619(1)(b). Head (2) in the text applies only in relation to the annuitant to whom the annuity is made payable by the terms of the annuity contract under which it is paid: s 619(1).

### **UPDATE**

#### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(2) TAX RELIEF FOR QUALIFYING PREMIUMS ETC/681. Amount of relief available for qualifying premiums.

### **681. Amount of relief available for qualifying premiums.**

In the case of an individual who is below the age of 50 years at the beginning of the year of assessment<sup>1</sup> concerned, the amount which may be deducted or set off in any year of assessment, whether in respect of one or more qualifying premiums<sup>2</sup>, may not be more than 17.5 per cent of the individual's net relevant earnings<sup>3</sup> for that year<sup>4</sup>. In the case of an individual whose age is above 50 years at the beginning of a year of assessment the applicable percentage for the amount which can be deducted increases in accordance with the following scales:

- 1601 (1) individuals aged within the range of 51 to 55 years, 20 per cent;
- 1602 (2) individuals aged between 56 and 60 years, 22.5 per cent; and
- 1603 (3) individuals aged 61 years or more, 27.5 per cent<sup>5</sup>.

These limits are inclusive of any premiums paid under an approved contract whose main purpose is to provide an annuity for the individual's spouse or dependants, or whose sole purpose is to provide a lump sum on the death of the individual before the age of 75<sup>6</sup>.

1 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

2 For the meaning of 'qualifying premium' see PARA 686 post.

3 For the meaning of 'net relevant earnings' see PARA 701 post.

4 Income and Corporation Taxes Act 1988 s 619(2). Section 619(2) is subject to the provisions of s 619 (as amended) and s 626: s 619(2).

5 See *ibid* s 626.

6 Such contracts are subject to approval under *ibid* s 621 (see PARA 693 post) and are subject to a lower limit on premiums (see PARA 682 post).

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16.  
RETIREMENT ANNUITY CONTRACTS/(2) TAX RELIEF FOR QUALIFYING PREMIUMS ETC/682.  
Amount of relief for other approved contracts.

## **682. Amount of relief for other approved contracts.**

The amount which may be deducted or set off in any year of assessment<sup>1</sup> in respect of qualifying premiums<sup>2</sup> paid under certain approved contracts, whether in respect of one or more such premiums, may not be more than five per cent of the individual's net relevant earnings<sup>3</sup> for that year<sup>4</sup>. The contracts concerned are those whose main purpose is to provide an annuity for the individual's spouse or dependants, or whose sole purpose is to provide a lump sum on the death of the individual before the age of 75<sup>5</sup>.

1 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

2 For the meaning of 'qualifying premium' see PARA 686 post.

3 For the meaning of 'net relevant earnings' see PARA 701 post.

4 Income and Corporation Taxes Act 1988 s 619(3). Section 619(3) is subject to the other provisions of s 619 (as amended): s 619(3).

5 Such contracts are subject to approval under *ibid* s 621: see PARA 693 post.

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16.  
RETIREMENT ANNUITY CONTRACTS/(2) TAX RELIEF FOR QUALIFYING PREMIUMS ETC/683.  
Election to have a qualifying premium treated as being paid in a preceding year of assessment.

**683. Election to have a qualifying premium treated as being paid in a preceding year of assessment.**

An individual who pays a qualifying premium<sup>1</sup> in a year of assessment<sup>2</sup>, whether or not a year for which he has relevant earnings<sup>3</sup>, may, on or before the 31 January next following that year, elect that the premium be treated as paid (1) in the last preceding year of assessment<sup>4</sup>; or (2) if he had no net relevant earnings<sup>5</sup> in that preceding year, in the last preceding year of assessment but one<sup>6</sup>. Where such an election is made in respect of a premium, the premium is treated as if it had been paid in the year specified in the election and not in the year in which it was actually paid<sup>7</sup>.

1 For the meaning of 'qualifying premium' see PARA 686 post.

2 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

3 For to the meaning of 'relevant earnings' see PARA 698 post.

4 Income and Corporation Taxes Act 1988 s 619(4)(a) (amended by the Finance Act 1996 s 135(1), (2), Sch 21 para 17).

5 For the meaning of 'net relevant earnings' see PARA 701 post.

6 Income and Corporation Taxes Act 1988 s 619(4)(b) (as amended: see note 4 supra).

7 Ibid s 619(4) (as amended: see note 4 supra).

**UPDATE**

**677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(2) TAX RELIEF FOR QUALIFYING PREMIUMS ETC/684. Adjustments in relief if subsequent alteration in assessment and exclusion of double relief.

#### **684. Adjustments in relief if subsequent alteration in assessment and exclusion of double relief.**

Where relief<sup>1</sup> for any year of assessment<sup>2</sup> is claimed and allowed, whether or not relief then falls to be given for that year, and afterwards there is made any assessment, alteration of an assessment, or other adjustment of the claimant's liability to tax, there are made also such adjustments, if any, as are consequential thereon in the relief allowed or given for that or any subsequent year of assessment<sup>3</sup>.

Where relief is claimed and allowed for any year of assessment in respect of any payment, relief will not be given in respect of it under any other provision of the Income Tax Acts<sup>4</sup> for the same or a later year of assessment nor, in the case of a payment under an annuity contract, in respect of any other premium or consideration for an annuity under the same contract<sup>5</sup>.

1   le relief granted under the Income and Corporation Taxes Act 1988 s 619 (as amended): see PARAS 680-683 ante.

2   For the meaning of 'year of assessment' see PARA 680 note 1 ante.

3   Income and Corporation Taxes Act 1988 s 619(5).

4   'The Income Tax Acts' means the enactments relating to income tax, including any provisions of the Corporation Tax Acts which relate to income tax: Income and Corporation Taxes Act 1988 s 831(1)(b). For the purposes of the 1988 Act, except so far as the context otherwise requires, 'the Corporation Tax Acts' means the enactments relating to the taxation of the income and chargeable gains of companies and of company distributions (including provisions relating also to income tax): Income and Corporation Taxes Act 1988 s 831(1) (a).

5   Ibid s 619(6).

#### **UPDATE**

#### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16.  
RETIREMENT ANNUITY CONTRACTS/(2) TAX RELIEF FOR QUALIFYING PREMIUMS ETC/685.  
Penalties for false statements or representations.

**685. Penalties for false statements or representations.**

If any person, for the purpose of obtaining for himself or any other person any relief from or repayment of tax under the relevant legislation<sup>1</sup>, knowingly makes any false statement or false representation, he is liable to a penalty not exceeding the amount set out in the legislation<sup>2</sup>.

<sup>1</sup> The relief under the Income and Corporation Taxes Act 1988 s 619 (as amended): see PARAS 680-684 ante.

<sup>2</sup> Ibid s 619(7) (amended by the Finance Act 1989 s 170(4)(a), (6)). The amount currently set out in the legislation, as substituted by the Finance Act 1989 s 170(4)(a), (6), is £3,000 in relation to things done or omitted on or after 27 July 1989.

**UPDATE**

**677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16.  
RETIREMENT ANNUITY CONTRACTS/(2) TAX RELIEF FOR QUALIFYING PREMIUMS ETC/686.  
Meaning of 'qualifying premium'.

# **686. Meaning of 'qualifying premium'.**

For the purpose of the provisions relating to retirement annuities<sup>1</sup>, 'qualifying premium' means a premium or other consideration paid by an individual:

1604 (1) under an annuity contract for the time being approved<sup>2</sup> by the Board<sup>3</sup> as having for its main object the provision for the individual of a life annuity in old age<sup>4</sup>; or

1605 (2) under a contract for the time being approved<sup>5</sup> as one whose main object is to provide an annuity for the individual's spouse or dependants, or whose sole object is to provide a lump sum on the death of the individual before the age of 75 years<sup>6</sup>.

1    Ie the Income and Corporation Taxes Act 1988 Ch III (ss 618-629) (as amended): see PARA 677 et seq ante, 687 et seq post.

2    Ie approved under ibid s 620: see PARA 687 et seq post.

3    For the meaning of 'the Board' see PARA 678 note 2.

4    Income and Corporation Taxes Act 1988 s 620(1)(a).

5    Ie under ibid s 621: see PARA 693 post.

6    Ibid s 620(1)(b). Nothing in the Policies of Assurance Act 1867 ss 4, 6 (obligations of assurance companies in respect of notices of assignment of policies of life assurance: see INSURANCE vol 25 (2003 Reissue) PARA 549) may be taken to apply to any contract approved under the Income and Corporation Taxes Act 1988 s 620: s 620(8).

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(3) APPROVAL OF CONTRACTS/687. Restrictions on approval of retirement annuity contracts.

### **(3) APPROVAL OF CONTRACTS**

#### **687. Restrictions on approval of retirement annuity contracts.**

The Board<sup>1</sup> may not approve<sup>2</sup> a contract as a retirement annuity contract unless it appears to it to satisfy the conditions that it is made by the individual with a person lawfully carrying on in the United Kingdom the business of granting annuities on human life, and that it does not:

- 1606 (1) provide for the payment by that person during the life of the individual of any sum except sums payable by way of annuity to the individual; or
- 1607 (2) provide for the annuity payable to the individual to commence before he attains the age of 60 years or after he attains the age of 75 years; or
- 1608 (3) provide for the payment by that person of any other sums except sums payable by way of annuity to the individual's widow or widower and any sums which, in the event of no annuity becoming payable either to the individual or to a widow or widower, are payable by way of return of premiums, by way of reasonable interest on premiums or by way of bonuses out of profits; or
- 1609 (4) provide for the annuity, if any, payable to a widow or widower of the individual to be of a greater annual amount than that paid or payable to the individual; or
- 1610 (5) provide for the payment of any annuity otherwise than for the life of the annuitant,

and that it does include provision securing that no annuity payable under it is capable in whole or in part of surrender, commutation or assignment<sup>3</sup>.

<sup>1</sup> For the meaning of 'the Board' see PARA 678 note 2 ante.

<sup>2</sup> I.e. approve under the Income and Corporation Taxes Act 1988 s 620.

<sup>3</sup> Ibid s 620(2). The rights arising under a retirement annuity contract vest in a trustee in bankruptcy upon his appointment as part of the bankrupt's estate and this does not amount to an assignment of the policy: see *Re Landau (A Bankrupt)*, *Pointer v Landau* [1997] 3 All ER 322, [1997] PLR 25 per Ferris J.

### **UPDATE**

#### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

#### **687-697 Approval of Contracts**

As to the effect of bankruptcy on any rights under a retirement annuity contract, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(3) APPROVAL OF CONTRACTS/688. Exceptions to restrictions on approval.

# **688. Exceptions to restrictions on approval.**

A contract is not treated as not satisfying the requirements for approval<sup>1</sup> by reason only that it:

- 1611 (1) gives the individual the right to receive, by way of commutation of part of the annuity payable to him, a lump sum not exceeding three times the annual amount of the remaining part of the annuity, taking, where the annual amount is or may be different in different years, the initial annual amount<sup>2</sup>; and
- 1612 (2) makes any such right depend on the exercise by the individual of an election at or before the time when the annuity first becomes payable to him<sup>3</sup>.

<sup>1</sup> Ie the conditions for approval set out in the Income and Corporation Taxes Act 1988 s 620(2); see PARA 687 ante.

<sup>2</sup> Ibid s 620(3)(a).

<sup>3</sup> Ibid s 620(3)(b).

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

### **687-697 Approval of Contracts**

As to the effect of bankruptcy on any rights under a retirement annuity contract, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(3) APPROVAL OF CONTRACTS/689. Discretions open to the Board to grant approval to contracts.

### **689. Discretions open to the Board to grant approval to contracts.**

The Board<sup>1</sup> may, if it thinks fit, and subject to any conditions it thinks proper to impose, approve<sup>2</sup> a contract notwithstanding that the contract provides for one or more of the following matters:

- 1613 (1) for the payment after the individual's death of an annuity to a dependant who is not the widow or widower of the individual;
- 1614 (2) for the payment to the individual of an annuity commencing before he attains the age of 60 years, if the annuity is payable on his becoming incapable through infirmity of body or mind of carrying on his own occupation or any occupation of a similar nature for which he is trained or fitted;
- 1615 (3) if the individual's occupation is one in which persons customarily retire before attaining the age of 60 years, for the annuity to commence before he attains that age;
- 1616 (4) for the annuity payable to any person to continue for a term certain (not exceeding ten years), notwithstanding his death within that term, or for the annuity payable to any person to terminate, or be suspended, on marriage or re-marriage or in other circumstances;
- 1617 (5) in the case of an annuity which is to continue for a term certain, for the annuity to be assignable by will, and in the event of any person dying entitled to it, for it to be assignable by his personal representatives in the distribution of the estate so as to give effect to a testamentary disposition, or to the rights of those entitled on intestacy, or to an appropriation of it to a legacy or to a share or interest in the estate<sup>3</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 Ie approve under the Income and Corporation Taxes Act 1988 s 620.

3 Ibid s 620(4).

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

### **687-697 Approval of Contracts**

As to the effect of bankruptcy on any rights under a retirement annuity contract, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(3) APPROVAL OF CONTRACTS/690. Application of conditions for approval and tax relief to trust schemes.

### **690. Application of conditions for approval and tax relief to trust schemes.**

The relevant provisions regarding approval and tax relief<sup>1</sup> apply in relation to a contribution under a trust scheme approved by the Board<sup>2</sup> as they apply in relation to a premium under an annuity contract so approved, with the modification that, for the condition as to the person with whom the contract is made, there must be substituted a condition that the scheme:

- 1618 (1) is established under the law of any part of, and administered in, the United Kingdom<sup>3</sup>; and
- 1619 (2) is established for the benefit of individuals engaged in or connected with a particular occupation (or one or other of a group of occupations), and for the purpose of providing retirement annuities for them, with or without subsidiary benefits for their families or dependants; and
- 1620 (3) is so established under irrevocable trusts by a body of persons comprising or representing a substantial proportion of the individuals so engaged in the United Kingdom, or of those so engaged in England, Wales, Scotland or Northern Ireland,

and with the necessary adaptations of other references to the contract or the person with whom it is made<sup>4</sup>.

1 le the Income and Corporation Taxes Act 1988 s 619 (as amended), s 620(1)-(4): see PARAS 677-689 ante.

2 For the meaning of 'the Board' see PARA 678 note 2 ante.

3 For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

4 Income and Corporation Taxes Act 1988 s 620(5). Exemption from income tax is allowed in respect of income derived from investments or deposits of any fund maintained for the purpose mentioned in head (2) in the text under a scheme for the time being approved under that head: s 620(6). As to the position where the main purpose of a trust scheme, or part of a trust scheme within s 620(5) is to provide annuities for the wives, husbands and dependants of the individuals, or lump sums payable on death see PARA 695 post.

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

### **687-697 Approval of Contracts**

As to the effect of bankruptcy on any rights under a retirement annuity contract, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(3) APPROVAL OF CONTRACTS/691. Withdrawal of approval.

### **691. Withdrawal of approval.**

The Board<sup>1</sup> may at any time, by notice<sup>2</sup> given to the persons by and to whom premiums are payable under any contract for the time being approved as a retirement annuity contract<sup>3</sup>, or to the trustees or other persons having the management of any approved trust scheme, withdraw that approval on such grounds and from such date as may be specified in the notice<sup>4</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 'Notice' means notice in writing: see the Income and Corporation Taxes Act 1988 s 832(1).

3 le approved under *ibid* Pt XIV Ch III (ss 618-629) (as amended): see PARA 677 et seq ante, 692 et seq post.

4 *Ibid* s 620(7). As to the service of notices see the Taxes Management Act 1970 s 115 (amended by the General and Special Commissioners (Amendment of Enactments) Regulations 1994, SI 1994/1813, reg 2(1), Sch 1 paras 1, 16). The Board has a broad discretion when considering the withdrawal of approval: see *R v IRC, ex p Roux Waterside Inn Ltd* [1997] TLR 207, [1997] PLR 123.

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

### **687-697 Approval of Contracts**

As to the effect of bankruptcy on any rights under a retirement annuity contract, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(3) APPROVAL OF CONTRACTS/692. Meaning of 'approved annuities'.

## **692. Meaning of 'approved annuities'.**

'Approved annuities' means (1) annuities under contracts approved by the Board<sup>1</sup> under the relevant legislation<sup>2</sup>, being annuities payable wholly in return for premiums or other consideration paid by a person who (when the premiums or other consideration are or is payable) is, or would but for an insufficiency of profits or gains<sup>3</sup> be, chargeable to tax in respect of relevant earnings from a trade, profession, vocation<sup>4</sup>, office or employment carried on or held by him<sup>5</sup>; and (2) annuities or lump sums under approved personal pension arrangements<sup>6</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 Ie under the Income and Corporation Taxes Act 1988 s 620: see PARAS 686-692 ante.

3 For the meaning of 'profits or gains' see INCOME TAXATION vol 23(1) (Reissue) PARA 1.

4 As to the meaning of 'trade', 'profession' and 'vocation' see INCOME TAXATION vol 23(1) (Reissue) PARAS 105, 135-136.

5 Income and Corporation Taxes Act 1988 s 620(9)(a).

6 Ibid s 620(9)(b). 'Personal pension arrangements' means arrangements made by an individual in accordance with a personal pension scheme: see s 630(1) (as amended); and see further Pt XIV Ch IV (ss 630-655) (as amended); and PARA 711 et seq post.

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

### **687-697 Approval of Contracts**

As to the effect of bankruptcy on any rights under a retirement annuity contract, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(3) APPROVAL OF CONTRACTS/693. Other approved contracts.

### **693. Other approved contracts.**

The Board<sup>1</sup> may also grant approval<sup>2</sup> to:

1621 (1) a contract the main object of which is the provision of an annuity for the wife or husband of the individual, or for any one or more dependants of the individual<sup>3</sup>; and

1622 (2) a contract the sole object of which is the provision of a lump sum on the death of the individual before he attains the age of 75 years<sup>4</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 I.e. approval under the Income and Corporation Taxes Act 1988 Pt XIV Ch III (ss 618-629) (as amended): see PARA 677 et seq ante, 694 et seq post.

3 Ibid s 621(1)(a).

4 Ibid s 621(1)(b). Except as otherwise provided in Pt XIV Ch III (as amended) (and in particular except in s 620), any reference in the Tax Acts to a contract or scheme approved under the Income and Corporation Taxes Act 1988 s 620 includes a reference to a contract or scheme approved under s 621: s 621(6). For the purposes of the Income and Corporation Taxes Act 1988, 'the Tax Acts', except so far as the context otherwise requires, means the 1988 Act and all other provisions of the Income Tax Acts and the Corporation Tax Acts: see the Income and Corporation Taxes Act 1988 s 831(2). For the meaning of 'the Income Tax Acts' and 'the Corporation Tax Acts' see PARA 684 note 4 ante.

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

### **687-697 Approval of Contracts**

As to the effect of bankruptcy on any rights under a retirement annuity contract, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(3) APPROVAL OF CONTRACTS/694. Restrictions on approval of other approved contracts.

#### **694. Restrictions on approval of other approved contracts.**

The Board<sup>1</sup> must not approve the contract<sup>2</sup> unless it appears to the Board that it is made by the individual with a person lawfully carrying on in the United Kingdom<sup>3</sup> the business of granting annuities on human life<sup>4</sup>. Unless the Board sees fit and subject to any conditions it sees proper to impose<sup>5</sup>, it may not approve a contract the main object of which is the provision of an annuity for the wife or husband of the individual, or for any one or more dependants of the individual, which does not appear to the Board to satisfy all the following conditions, that is to say:

- 1623 (1) that any annuity payable to the wife or husband or dependant of the individual commences on the death of the individual;
- 1624 (2) that any annuity payable to the individual commences at a time after the individual attains the age of 60 years, and, unless the individual's annuity is one to commence on the death of a person to whom an annuity would be payable under the contract if that person survived the individual, cannot commence after the time when the individual attains the age of 75 years;
- 1625 (3) that the contract does not provide for the payment by the person contracting with the individual of any sum, other than any annuity payable to the individual's wife or husband or dependant, or to the individual, except, in the event of no annuity becoming payable under the contract, any sums payable by way of return of premiums, by way of reasonable interest on premiums or by way of bonuses out of profits;
- 1626 (4) that the contract does not provide for the payment of any annuity otherwise than for the life of the annuitant;
- 1627 (5) that the contract includes provision securing that no annuity payable under it is capable in whole or in part of surrender, commutation or assignment<sup>6</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 As to other approved contracts see the Income and Corporation Taxes Act 1988 s 621(1); and PARA 693 ante.

3 For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

4 Income and Corporation Taxes Act 1988 s 621(2).

5 See *ibid* s 621(4).

6 See *ibid* s 621(3). The rights arising under a retirement annuity contract vest in a trustee in bankruptcy upon his appointment as part of the bankrupt's estate and this does not amount to an assignment: see *Re Landau (A Bankrupt), Pointer v Landau* [1997] 3 All ER 322, [1997] PLR 25 per Ferris J.

### **UPDATE**

#### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

**687-697 Approval of Contracts**

As to the effect of bankruptcy on any rights under a retirement annuity contract, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(3) APPROVAL OF CONTRACTS/695. Further provisions for approval of trust schemes.

### **695. Further provisions for approval of trust schemes.**

If the main purpose of an approved trust scheme<sup>1</sup>, or part of a trust scheme, is to provide annuities for the wives, husbands and dependants of the individuals, or lump sums payable on death, approval of the scheme will (subject to any necessary modifications) be on the same terms as those applicable to contracts whose main object is to provide an annuity for the individual's spouse or dependants or whose sole object is to provide a lump sum on the death of the individual before the age of 75 years<sup>2</sup>.

1     le a trust scheme approved under the Income and Corporation Taxes Act 1988 s 620(5): see PARA 690 ante.

2     See *ibid* s 621(5). In that case (1) approval of the trust scheme is subject to s 621(1)-(4) (see PARAS 693-694 ante) with any necessary modifications, and not subject to s 620(2)-(4) (see PARAS 687-689 ante); (2) the provisions of Pt XIV Ch III (ss 618-629) (as amended) apply to the scheme or part of the scheme when duly approved as they apply to a contract approved under s 621; and (3) s 620(6) (see PARA 690 ante) applies to any duly approved trust scheme, or part of a trust scheme: s 621(5).

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

### **687-697 Approval of Contracts**

As to the effect of bankruptcy on any rights under a retirement annuity contract, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(3) APPROVAL OF CONTRACTS/696. Substituted retirement annuity contracts.

### **696. Substituted retirement annuity contracts.**

The Board<sup>1</sup> may, if it thinks fit, and subject to any conditions it thinks proper to impose, approve an annuity contract as a retirement annuity contract notwithstanding that the contract provides that the individual by whom it is made (or a widow, widower or dependant of that individual who has accrued rights under the contract):

- 1628 (1) may agree with the person with whom it is made that a sum representing the value of the individual's accrued rights under it should be applied as the premium or other consideration either under another annuity contract made between them and approved by the Board under the relevant legislation<sup>2</sup>, or under personal pension arrangements<sup>3</sup> made between them and approved by the Board<sup>4</sup>; or
- 1629 (2) may require the person with whom it is made to pay such a sum to such other person as the individual may specify, to be applied by that other person as the premium or other consideration either under an annuity contract made between the individual and him and approved by the Board under the relevant legislation<sup>5</sup>, or under personal pension arrangements made between the individual and him and accordingly approved<sup>6</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 Ie under the Income and Corporation Taxes Act 1988 s 620: see PARAS 686-691 ante.

3 For the meaning of 'personal pension arrangements' see PARA 692 note 6 ante.

4 Ie approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq post.

5 See note 2 supra.

6 Income and Corporation Taxes Act 1988 s 622(1), (2).

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

### **687-697 Approval of Contracts**

As to the effect of bankruptcy on any rights under a retirement annuity contract, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(3) APPROVAL OF CONTRACTS/697. Treatment of income under substituted retirement annuity contracts.

### **697. Treatment of income under substituted retirement annuity contracts.**

Where, in pursuance of a substitution provision<sup>1</sup>, a sum representing the value of accrued rights under one contract (the original contract) is paid by way of premium or other consideration under another contract (the substituted contract), any annuity payable under the substituted contract is treated as earned income<sup>2</sup> of the annuitant to the same extent that an annuity payable under the original contract would have been so treated<sup>3</sup>.

<sup>1</sup> Is a provision of the type mentioned in the Income and Corporation Taxes Act 1988 s 622(1) (see PARA 696 ante) of an annuity contract approved under s 620 (see PARAS 686-691 ante), or a corresponding provision of a contract approved under s 621(1)(a) (see PARA 693 ante); see s 622(3).

<sup>2</sup> For the meaning of 'earned income' see INCOME TAXATION vol 23(2) (Reissue) PARA 1274.

<sup>3</sup> Income and Corporation Taxes Act 1988 s 622(3).

### **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

### **687-697 Approval of Contracts**

As to the effect of bankruptcy on any rights under a retirement annuity contract, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(4) RELEVANT EARNINGS/698. Meaning of 'relevant earnings'.

#### **(4) RELEVANT EARNINGS**

##### **698. Meaning of 'relevant earnings'.**

'Relevant earnings', in relation to any individual, means, for the purposes of the legislation relating to retirement annuity contracts and trust schemes<sup>1</sup>, any income of his chargeable to tax for the year of assessment<sup>2</sup> in question, being either:

- 1630 (1) income arising in respect of remuneration from an office or employment held by him other than a pensionable office or employment<sup>3</sup>; or
- 1631 (2) income from any property which is attached to or forms part of the emoluments<sup>4</sup> of any such office or employment held by him; or
- 1632 (3) income which is chargeable under Schedule D<sup>5</sup> and is immediately derived by him from the carrying on or exercise by him of his trade, profession or vocation<sup>6</sup> either as an individual or, in the case of a partnership, as a partner personally acting therein; or
- 1633 (4) patent income treated as earned income<sup>7</sup>,

but does not include any remuneration as director of a company whose income consists wholly or mainly of investment income, that is income which, if the company were an individual, would not be earned income, being a company of which he is a controlling director<sup>8</sup>.

1    Ie the Income and Corporation Taxes Act 1988 Pt XIV Ch III (ss 618-629) (as amended): see PARA 677 et seq ante, 699 et seq post.

2    For the meaning of 'year of assessment' see PARA 680 note 1 ante.

3    For the meaning of 'pensionable office or employment' see PARA 699 post.

4    'Emoluments' includes all salaries, fees, wages, perquisites and profits whatsoever: see the Income and Corporation Taxes Act 1988 s 131(1).

5    As to the charge to tax under Schedule D see INCOME TAXATION vol 23(1) (Reissue) PARA 88 et seq.

6    As to the meaning of 'trade', 'profession' and 'vocation' see INCOME TAXATION vol 23(1) (Reissue) PARAS 105, 135-136.

7    Ie by virtue of the Income and Corporation Taxes Act 1988 s 529: see INCOME TAXATION vol 23(2) (Reissue) PARA 1484. For the meaning of 'earned income' see INCOME TAXATION vol 23(2) (Reissue) PARA 1274.

8    Ibid s 623(2) (amended by the Finance Act 1988 s 148, Sch 14 Pts V, VIII; and the Finance Act 1989 s 107, Sch 12 Pt II para 15). A 'controlling director' means a director of a company, the directors of which have a controlling interest in the company, who is the beneficial owner of, or able either directly or through the medium of other companies or by any other indirect means to control, more than 5% of the ordinary share capital of the company: Income and Corporation Taxes Act 1988 s 624(3). 'Director' means (1) in relation to a body corporate the affairs of which are managed by a board of directors or similar body, a member of that board or similar body; (2) in relation to a body corporate the affairs of which are managed by a single director or similar person, that director or person; and (3) in relation to a body corporate the affairs of which are managed by the members themselves, a member of the body corporate; and includes any person who is to be or has been a director; and 'company' means a company within the Companies Act 1985 or the Companies (Northern Ireland) Order 1986: Income and Corporation Taxes Act 1988 s 624(3). See generally COMPANIES vol 14 (2009) PARA 24.

**UPDATE**

**677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see **PARA 873B**.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(4) RELEVANT EARNINGS/699. Pensionable office or employment.

### **699. Pensionable office or employment.**

For the purposes of the relevant legislation relating to retirement annuity contracts and trust schemes<sup>1</sup>, an office or employment is a pensionable office or employment if, and only if, service in it is service to which a sponsored superannuation scheme<sup>2</sup> relates, not being a scheme under which the benefits provided in respect of that service are limited to a lump sum payable on the termination of the service through death or disability before the age of 75 years or some lower age; but references to a pensionable office or employment apply whether or not the duties are performed wholly or partly in the United Kingdom<sup>3</sup> or the holder is chargeable to tax in respect of it<sup>4</sup>. Service in an office or employment must not be treated as service to which a sponsored superannuation scheme relates by reason only of the fact that the holder of the office or employment might (but he does not) participate in the scheme by exercising or refraining from exercising an option open to him by virtue of that service<sup>5</sup>.

1     Ile for the purposes of the Income and Corporation Taxes Act 1988 Pt XIV Ch III (ss 618-629) (as amended): see PARA 677 et seq ante, 700 et seq post.

2     For the meaning of 'sponsored superannuation scheme' see PARA 704 post.

3     For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

4     Income and Corporation Taxes Act 1988 s 623(3).

5     Ibid s 623(4).

### **UPDATE**

#### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(4) RELEVANT EARNINGS/700. Relevant earnings for the purposes of tax relief for qualifying premiums.

## **700. Relevant earnings for the purposes of tax relief for qualifying premiums.**

For the purpose of exemption from tax in respect of qualifying premiums<sup>1</sup>, an individual's relevant earnings<sup>2</sup> are those earnings before giving effect to any capital allowances<sup>3</sup>, other than deductions allowable in computing profits or gains<sup>4</sup>, but after taking into account the amounts on which charges fall to be made under any of the Capital Allowances Acts<sup>5</sup>.

<sup>1</sup> le for the purposes of relief under the Income and Corporation Taxes Act 1988 s 619 (as amended): see PARAS 680-685 ante.

<sup>2</sup> For the meaning of 'relevant earnings' generally see PARA 698 ante.

<sup>3</sup> As to capital allowances see INCOME TAXATION vol 23(1) (Reissue) PARA 286 et seq.

<sup>4</sup> For the meaning of 'profits or gains' see INCOME TAXATION vol 23(1) (Reissue) PARA 1.

<sup>5</sup> Income and Corporation Taxes Act 1988 s 623(5). 'Capital Allowances Acts' means the Capital Allowances Act 1990, including enactments which under the Income and Corporation Taxes Act 1988 are to be treated as contained in any Part of that Act: s 832(1) (substituted by the Capital Allowances Act 1990 s 164, Sch 1 para 8(1), (36); amended by the Finance Act 1990 ss 88, 132, Sch 13 para 7, Sch 19 Pt IV).

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(4) RELEVANT EARNINGS/701. Net relevant earnings.

### **701. Net relevant earnings.**

'Net relevant earnings' means, in relation to an individual, the amount of his relevant earnings<sup>1</sup> for the year of assessment<sup>2</sup> in question, less the amount of any deductions falling to be made from the relevant earnings in computing for the purposes of income tax his total income for that year, being:

- 1634 (1) annual payments (other than interest) payable out of profits or gains;
- 1635 (2) patent royalties;
- 1636 (3) certain rents and royalties in respect of mines, quarries and similar concerns and electric line wayleaves<sup>3</sup>;
- 1637 (4) deductions in respect of losses or capital allowances<sup>4</sup> arising from activities the profits or gains of which would be included in computing relevant earnings of the individual<sup>5</sup>.

To the extent that a deduction within head (4) above has been made from income other than relevant earnings in any year for which the individual claimed and was allowed relief with regard to a qualifying premium<sup>6</sup>, that amount must be treated as reducing the individual's net relevant earnings for subsequent years of assessment, being deducted as far as possible from those of the immediately following year, whether or not he claims or is entitled to claim relief<sup>7</sup> for that year, and so far as it cannot be so deducted, then from those of the next following year, and so on<sup>8</sup>.

1 As to the meaning of 'relevant earnings' see PARA 698 ante.

2 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

3 The deductions in heads (1)-(3) in the text are those which, but for the Income and Corporation Taxes Act 1988 s 74(m), (p), (q) (as amended) (see INCOME TAXATION vol 23(1) (Reissue) PARA 182), could be made in computing the individual's profits or gains. For the meaning of 'profits or gains' see INCOME TAXATION vol 23(1) (Reissue) PARA 1.

4 As to capital allowances see INCOME TAXATION vol 23(1) (Reissue) PARA 286 et seq.

5 Income and Corporation Taxes Act 1981 s 623(6) (amended by the Finance Act 1988 s 148, Sch 14 Pt VIII).

6 For the meaning of 'qualifying premium' see PARA 686 ante.

7 I.e. under the Income and Corporation Taxes Act 1988 s 623 (as amended): see PARAS 698-700 ante, 702-703 post.

8 Ibid s 623(7) (amended by the Finance Act 1988 Sch 14 Pt VIII).

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(4) RELEVANT EARNINGS/702. Disregard of qualifying premiums in computing net relevant earnings.

## **702. Disregard of qualifying premiums in computing net relevant earnings.**

An individual's net relevant earnings<sup>1</sup> for any year of assessment<sup>2</sup> are to be computed without regard to any relief which falls to be given<sup>3</sup> for that year to that individual by reason of any qualifying premium<sup>4</sup> being paid<sup>5</sup>.

- 1 For the meaning of 'net relevant earnings' see PARA 701 ante.
- 2 For the meaning of 'year of assessment' see PARA 680 note 1 ante.
- 3 Ie under the Income and Corporation Taxes Act 1988 s 619 (as amended): see PARAS 680-685 ante.
- 4 For the meaning of 'qualifying premium' see PARA 686 ante.
- 5 Income and Corporation Taxes Act 1988 s 623(8) (amended by the Finance Act 1988 s 148, Sch 14 Pt VIII).

### **UPDATE**

#### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(4) RELEVANT EARNINGS/703. Special provisions regarding partnership profits.

### **703. Special provisions regarding partnership profits.**

An individual's relevant earnings<sup>1</sup>, in the case of partnership profits, are taken to be his share of the partnership income, estimated in accordance with the Income Tax Acts<sup>2</sup>, but the amount to be included in respect of those earnings in arriving at his net relevant earnings<sup>3</sup> is his share of that income after making therefrom all such deductions, if any, in respect of payments made by the partnership or in respect of capital allowances<sup>4</sup> falling to be made to the partnership as would be made in computing the tax payable in respect of that income<sup>5</sup>.

- 1 For the meaning of 'relevant earnings' see PARA 698 ante.
- 2 For the meaning of 'the Income Tax Acts' see PARA 684 note 4 ante.
- 3 For the meaning of 'net relevant earnings' see PARA 701 ante.
- 4 As to capital allowances see INCOME TAXATION vol 23(1) (Reissue) PARA 286 et seq.
- 5 Income and Corporation Taxes Act 1988 s 623(9).

### **UPDATE**

#### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(4) RELEVANT EARNINGS/704. Meaning of 'sponsored superannuation scheme'.

#### **704. Meaning of 'sponsored superannuation scheme'.**

For the purposes of the provisions relating to relevant earnings<sup>1</sup>, a sponsored superannuation scheme means a scheme or arrangement:

- 1638 (1) relating to service in particular offices or employments; and
- 1639 (2) having for its object or one of its objects to make provision in respect of persons serving in those offices or employments against future retirement or partial retirement, against future termination of service through death or disability, or against similar matters,

being a scheme or arrangement under which any part of the cost of the provision so made is or has been borne otherwise than by those persons by reason of their service, whether it is the cost or part of the cost of the benefits provided, or of paying premiums or other sums in order to provide those benefits, or of administering or instituting the scheme or arrangement<sup>2</sup>.

A person is to be treated as bearing by reason of his service the cost of any payment made or agreed to be made in respect of his service, if that payment or the agreement to make it is treated under the Income Tax Acts<sup>3</sup> as increasing his income, or would be so treated if he were chargeable to tax under Case I of Schedule E in respect of his emoluments from that service<sup>4</sup>.

<sup>1</sup> le for the purposes of the Income and Corporation Taxes Act 1988 s 623 (as amended): see PARAS 698-703 ante.

<sup>2</sup> Ibid s 624(1).

<sup>3</sup> For the meaning of 'the Income Tax Acts' see PARA 684 note 4 ante.

<sup>4</sup> Income and Corporation Taxes Act 1988 s 624(2). As to the charge to tax under Case I of Schedule E see INCOME TAXATION vol 23(1) (Reissue) PARA 619 et seq.

#### **UPDATE**

#### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(5) UNUSED RELIEF/705. Carry forward of unused relief.

## **(5) UNUSED RELIEF**

### **705. Carry forward of unused relief.**

Where in any year of assessment<sup>1</sup>:

- 1640 (1) an individual is, or would but for an insufficiency of profits or gains<sup>2</sup>, be chargeable to income tax in respect of relevant earnings<sup>3</sup> from any trade, profession, vocation<sup>4</sup>, office or employment carried on or held by him; but
- 1641 (2) there is unused relief for that year, that is to say, an amount which would have been deducted from or set off against the individual's relevant earnings for that year with respect to a qualifying premium<sup>5</sup> if either he had paid a qualifying premium in that year or the qualifying premium or premiums paid by him in that year had been greater,

then relief may be given under the relevant legislation<sup>6</sup> up to the amount of the unused relief, in respect of so much of any qualifying premium or premiums paid by the individual in any of the next six years of assessment as exceeds the maximum applying<sup>7</sup> for that year<sup>8</sup>.

Such relief will be given for an earlier year rather than a later year, the unused relief taken into account in giving relief for any year being deducted from that available for giving relief in subsequent years and unused relief derived from an earlier year being exhausted before unused relief derived from a later year<sup>9</sup>.

1 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

2 For the meaning of 'profits or gains' see INCOME TAXATION vol 23(1) (Reissue) PARA 1.

3 For the meaning of 'relevant earnings' see PARA 698 ante.

4 As to the meaning of 'trade', 'profession' and 'vocation' see INCOME TAXATION vol 23(1) (Reissue) PARAS 105, 135-136.

5 I.e. under the Income and Corporation Taxes Act s 619(1): see PARA 680 ante. For the meaning of 'qualifying premium' see PARA 686 ante.

6 I.e. under ibid s 619(1) but subject to s 655(1)(b) (reduction for amount of any contributions paid by him in that year under approved personal pension arrangements): see PARA 715 note 6 post.

7 I.e. under ibid s 655(2) (as amended): see PARA 718 post.

8 Ibid s 625(1).

9 Ibid s 625(2).

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(5) UNUSED RELIEF/706. Unused relief arising from late assessments.

## **706. Unused relief arising from late assessments.**

Where a relevant assessment to tax<sup>1</sup> in respect of a year of assessment<sup>2</sup> becomes final and conclusive more than six years after the end of that year and there is an amount of unused relief<sup>3</sup> for that year which results from the making of the assessment then:

- 1642 (1) that amount will not be available for giving relief by virtue of this provision for any of the six years following that year; but
- 1643 (2) the individual may, within the period of six months beginning with the date on which the assessment becomes final and conclusive, elect that relief be given up to that amount, in respect of so much of any qualifying premium<sup>4</sup> or premiums paid by him within that six-month period as exceeds the maximum applying for the year of assessment in which they were paid<sup>5</sup>.

1 'A relevant assessment to tax' means an assessment on the individual's relevant earnings or on the profits or gains of a partnership from which the individual derives relevant earnings: Income and Corporation Taxes Act 1988 s 625(4). For the meaning of 'relevant earnings' see PARA 698 ante; and for the meaning of 'profits or gains' see INCOME TAXATION vol 23(1) (Reissue) PARA 1.

2 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

3 I.e. relief under the Income and Corporation Taxes Act 1988 s 619 (as amended): see PARAS 680-685 ante.

4 For the meaning of 'qualifying premium' see PARA 686 ante.

5 Income and Corporation Taxes Act 1988 s 625(3). To the extent to which relief in respect of any premium or premiums is given by virtue of s 625(3) it will not be given by virtue of s 625(1) (carry forward of unused relief: see PARA 705 ante): s 625(3).

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(6) SPECIAL CASES/707. Special provisions applying to ministers and other officers.

## **(6) SPECIAL CASES**

### **707. Special provisions applying to ministers and other officers.**

Special provisions apply in relation to retirement annuities<sup>1</sup> for ministers and other officers<sup>2</sup>.

<sup>1</sup> ie in relation to the relief available under the Income and Corporation Taxes Act 1988 Pt XIV Ch III (ss 618-629) (as amended): see PARA 677 et seq ante.

<sup>2</sup> See ibid s 629. For these purposes, so much of any salary which (1) is payable to the holder of a qualifying office who is also a member of the House of Commons; and (2) is payable for a period in respect of which the holder is not a participant in relation to that office in arrangements contained in the parliamentary pension scheme but is a participant in relation to his membership of the House of Commons in any such arrangements, or for any part of such a period, as is equal to the difference between a member's pensionable salary and the salary which is payable to him as a member holding that qualifying office is treated as remuneration from the office of member and not from the qualifying office: s 629(1). As to the parliamentary pension scheme, and the qualifying offices for the purposes of the Parliamentary and other Pensions Act 1987 s 2 (as amended) see PARLIAMENT vol 78 (2010) PARA 926 et seq.

## **UPDATE**

### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(6) SPECIAL CASES/708. Special provisions applying to partnerships.

### **708. Special provisions applying to partnerships.**

In relation to partnerships, where a person ('the former partner') has ceased to be a member of a partnership on retirement, because of age or ill-health or on death, and under (1) the partnership agreement; or (2) an agreement replacing the partnership agreement or supplementing it or supplementing an agreement replacing it; or (3) an agreement made with an individual who acquires the whole or part of the business carried on by the partnership, annual payments are made for the benefit of the former partner or a widow, widower or dependant of the former partner, and are for the purposes of income tax income of the person for whose benefit they are made, the payments are treated as earned income<sup>1</sup> of that person, except to the extent that they exceed 50 per cent of the average of the amounts which, in the best three years of the relevant years of assessment<sup>2</sup>, were the former partner's shares of the relevant profits or gains<sup>3</sup>.

1 For the meaning of 'earned income' see INCOME TAXATION vol 23(2) (Reissue) PARA 1274.

2 For these purposes, 'the relevant years of assessment' are the last seven years of assessment in which he was required to devote substantially the whole of his time to acting as a partner in the partnership; and the best three years are those three of them in which the amounts of his shares of the relevant profits were the highest: see the Income and Corporation Taxes Act 1988 s 628(2)(c), (d); and see note 3 infra. For the meaning of 'year of assessment' see PARA 680 note 1 ante.

3 See *ibid* s 628(1), (2) (amended by the Finance Act 1988 s 35, Sch 3 paras 1, 19). The former partner's share is so much of the relevant profits or gains as fell to be included in a return of his income for that year and the relevant profits or gains are the profits or gains of any trade, profession or vocation on which the partnership or any other partnership of which the former partner was a member was assessed to income tax: Income and Corporation Taxes Act 1988 s 628(2)(a), (b). Where, however, in any of the relevant years the circumstances were such that the profits or gains of a partnership were not assessable to income tax, s 628(2) (a), (b), (d) apply as they would apply had those profits or gains been so assessable: see s 628(2). Adjustments may be made depending on the retail price index: see s 628(3)-(5).

### **UPDATE**

#### **677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/16. RETIREMENT ANNUITY CONTRACTS/(6) SPECIAL CASES/709. Special provisions formerly applying to Lloyd's underwriters.

**709. Special provisions formerly applying to Lloyd's underwriters.**

Special provisions formerly applying to Lloyd's underwriters<sup>1</sup> are repealed with effect from the year 1997-98<sup>2</sup>.

1 See the Income and Corporation Taxes Act 1988 s 627 (amended by the Finance Act 1993 ss 183(3), 184(3)). An underwriter who works through an agent and not at Lloyd's is not regarded as having relevant earnings: see *Koenigsberger v Mellor (Inspector of Taxes)* [1995] STC 547, 67 TC 280, CA.

2 See the Finance Act 1994 ss 228(2)(a), (4), 258, Sch 26 Pt V(25).

**UPDATE**

**677-709 Retirement Annuity Contracts**

Provisions of the Income and Corporation Taxes Act 1988 relating to retirement annuity contracts replaced by legislation relating to registered pension schemes: see PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(i) In general/710. Meaning of 'personal pension scheme'.

## **17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS**

### **(1) PERSONAL PENSION SCHEMES**

#### **(i) In general**

##### **710. Meaning of 'personal pension scheme'.**

For the purposes of obtaining the approval<sup>1</sup> of the Board<sup>2</sup>, a personal pension scheme means a scheme whose sole purpose is the provision of annuities, income withdrawals<sup>3</sup>, or lump sums under arrangements made by individuals in accordance with the scheme<sup>4</sup>. For other purposes<sup>5</sup>, a personal pension scheme means any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect so as to provide benefits, in the form of pensions or otherwise, payable on death or retirement to or in respect of employed earners<sup>6</sup> who have made arrangements with the trustees or managers of the scheme for them to become members of it<sup>7</sup>.

<sup>1</sup> The approval under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq post.

<sup>2</sup> For the meaning of 'the Board' see PARA 678 note 2 ante.

<sup>3</sup> 'Income withdrawal' means a payment of income, under arrangements made in accordance with a personal pension scheme, otherwise than by way of an annuity: Income and Corporation Taxes Act 1988 s 630(1) (renumbered, and definition added by, the Finance Act 1995 s 58, Sch 11 paras 1, 2(2)).

<sup>4</sup> Income and Corporation Taxes Act 1988 s 630(1) (renumbered; and definition amended by, the Finance Act 1995 Sch 11 paras 1, 2(2)).

<sup>5</sup> The for purposes under the Pension Schemes Act 1993 and the Pensions Act 1995: see PARA 551 et seq ante, 736 et seq post.

<sup>6</sup> For the meaning of 'employed earner' see PARA 32 ante (definition applied by the Pension Schemes Act 1993 s 181(1)).

<sup>7</sup> Ibid s 1.

### **UPDATE**

#### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

#### **710-711 In general**

For provision as to consultation by employers in relation to personal pension schemes see PARA 711A.

## **710 Meaning of 'personal pension scheme'**

TEXT AND NOTE 7--'Personal pension scheme' means a pension scheme that (1) is not an occupational pension scheme, and (2) is established by a person within any of the Finance Act 2004 s 154(1): Pension Schemes Act 1993 s 1(1) (substituted by Pensions Act 2004 s 239(1)-(3); and amended by the Finance Act 2007 Sch 20 para 23). In the 1993 Act s 1(1) 'pension scheme' (except in the phrases 'occupational pension scheme', 'personal pension scheme' and 'public service pension scheme') means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people on retirement, on having reached a particular age, or on termination of service in an employment: s 1(5) (added by Pensions Act 2004 s 239(4)). The power of the Treasury under the Finance Act 2004 s 154(4) (power to amend ss 154 and 155) includes power consequentially to amend (a) head (1) of the definition in the Pension Schemes Act 1993 s 1(1) of 'personal pension scheme', and (b) any provision in force in Northern Ireland corresponding to that head: s 1(6) (as so added). A stakeholder pension scheme will be treated for all purposes as a personal pension scheme where (1) it is established under a trust; (2) the provisions of such a scheme do not require the employer of any member of the scheme to make contributions to the scheme; and (3) it would be an occupational pension scheme, except for these provisions: Pension Schemes (Categories) Regulations 2005, SI 2005/2401, reg 3.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(i) In general/711. Approval of schemes.

## **711. Approval of schemes.**

An application to the Board<sup>1</sup> for its approval<sup>2</sup> of a personal pension scheme<sup>3</sup> must be in such form, must contain such information, and must be accompanied by such documents, in such form, as the Board may prescribe<sup>4</sup>. The Board may at its discretion grant or refuse an application for approval of a personal pension scheme, but its discretion is subject to statutory restrictions<sup>5</sup>. The Board has the power to grant provisional approval in certain circumstances<sup>6</sup>. The Board must give notice to the applicant of the grant or refusal of an application and in the case of a refusal the notice must state the grounds for the refusal<sup>7</sup>. If an amendment is made to an approved scheme without being approved by the Board, its approval of the scheme ceases to have effect<sup>8</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 I.e. approval under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq post.

3 For the meaning of 'personal pension scheme' see PARA 710 ante.

4 Income and Corporation Taxes Act 1988 s 631(1).

5 Ibid s 631(2). For the statutory restrictions see ss 632-638 (as amended); and PARAS 712-714 post. The Board may not grant any such application so as to approve a scheme with effect from a date earlier than 1 July 1988: s 655(4) (amended by the Finance Act 1988 s 54(3)).

6 The Board may by regulations make provisions for applications for approval of personal pension schemes to be granted provisionally notwithstanding that the Board has not satisfied itself that the schemes comply with the requirements of the Income and Corporation Taxes Act 1988 ss 632-638 (as amended); and such regulations may, in particular, provide (1) for the contents and form of certificates or other documents which the Board may require the applicant to give it before it grants an application provisionally; (2) for the making of such amendments of the rules of the scheme after the provisional grant of an application as are necessary to enable the scheme to comply with the requirements of ss 632-638 (as amended), and for those amendments to have effect as from the date of approval of the scheme; (3) for the withdrawal of approval of the scheme as from that date if it does not comply with the requirements of ss 632-638 and such amendments as are mentioned in head (2) supra are not made; and may make such supplementary provision as appears to the Board to be necessary or expedient: s 655(5) (amended by the Finance Act 1989 ss 77, 187(1), Sch 7 paras 1, 9, Sch 17 Pt IV). Where the scheme is established under a trust, the Board may grant approval of the scheme provisionally if the application is also accompanied by a written undertaking by the scheme administrator that provision is made so as to ensure that neither the capital nor the income of the trust fund is paid to a member of the scheme except by the provision of a benefit referred to in the Income and Corporation Taxes Act 1988 ss 633-637 (as amended): Personal Pension Schemes (Provisional Approval) Regulations 1987, SI 1987/1765, reg 3A (added by SI 1988/1437). If on examination of the application for approval, and the documents which accompany it, the Board is not satisfied that the scheme complies with the statutory requirements, the Board must give written notice to the person who has power to amend the rules of the scheme requiring him within a period of six months from the date of the notice (or such further time as the Board may allow) to amend the rules of the scheme so that it complies with those requirements with effect as from the date of approval of the scheme: Personal Pension Schemes (Provisional Approval) Regulations 1987, SI 1987/1765, reg 4. If at the expiration of the specified period (or at the end of such further time as the Board may have allowed) the Board is not satisfied that a scheme complies with the statutory requirements, the Board must give written notice to the applicant of the withdrawal of approval as from the date of approval of the scheme: reg 5(1). The notice must state the grounds on which approval is withdrawn: reg 5(2). Where the Board withdraws an approval by such notice, the applicant may appeal to the Special Commissioners against the withdrawal, by written notice stating the grounds for the appeal and given to the Board before the end of the period of 30 days beginning with the day on which notice of withdrawal was given to the appellant: reg 6(1), (2). The bringing of such an appeal does not affect the validity of the withdrawal pending the determination of the proceedings: reg 6(3). The Taxes Management Act 1970 Pt V (ss 44-58) (as amended) (appeals and other proceedings: see INCOME

TAXATION vol 23(2) (Reissue) PARA 1759 et seq) applies to such an appeal: Personal Pension Schemes (Provisional Approval) Regulations 1987, SI 1987/1765, reg 6(4).

7 Income and Corporation Taxes Act 1988 s 631(3); and see note 6 supra.

8 Ibid s 631(4).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

### **710-711 In general**

For provision as to consultation by employers in relation to personal pension schemes see PARA 711A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17.  
PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION  
SCHEMES/(i) In general/711A. Consultation by employers: personal pension schemes.

### **711A. Consultation by employers: personal pension schemes.**

Regulations may require any prescribed<sup>1</sup> person who (1) is the employer<sup>2</sup> in relation to a personal pension scheme<sup>3</sup> where direct payment arrangements<sup>4</sup> exist in respect of one or more members of the scheme who are his employees<sup>5</sup>, and (2) proposes to make a prescribed decision affecting the application of the direct payment arrangements in relation to those employees, to consult prescribed persons in the prescribed manner before he makes the decision<sup>6</sup>. The validity of any decision prescribed for the purposes of head (2) above is not affected by any failure to comply with regulations under these provisions<sup>7</sup>.

Further provision about regulations relating to consultation under the above provisions is made<sup>8</sup>.

1 For the meaning of 'prescribed' see PARA 636A.3.

2 For the meaning of 'employer' see PARA 636A.15.

3 For the meaning of 'personal pension scheme' see PARA 636A.3.

4 For the meaning of 'direct payment arrangements' see PARA 636A.3.

5 For the meaning of 'employee' see PARA 636A.3.

6 Pensions Act 2004 s 260(1). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

7 Pensions Act 2004 s 260(2).

8 See *ibid* ss 260(3), 261.

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

### **710-711 In general**

For provision as to consultation by employers in relation to personal pension schemes see PARA 711A.

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## **(ii) Restrictions on Approval**

### **712. Establishment of schemes.**

The Board<sup>1</sup> must not approve<sup>2</sup> a personal pension scheme<sup>3</sup> established on or after 1 July 1988<sup>4</sup> which is established by any person other than:

- 1644 (1) a person who is authorised<sup>5</sup> to carry on investment business and who carries on the business of issuing insurance policies or annuity contracts or managing authorised<sup>6</sup> unit trust schemes<sup>7</sup>;
- 1645 (2) an EC company which lawfully carries on long term business in the United Kingdom<sup>8</sup> or lawfully provides long term insurance in the United Kingdom<sup>9</sup>;
- 1646 (3) a building society within the meaning of the Building Societies Act 1986<sup>10</sup>;
- 1647 (4) a pension company<sup>11</sup> which is an associate<sup>12</sup> of a building society<sup>13</sup>;
- 1648 (5) an institution authorised under the Banking Act 1987<sup>14</sup>;
- 1649 (6) a body corporate which is a subsidiary or holding company<sup>15</sup> of an institution authorised under the Banking Act 1987, or is a subsidiary of the holding company of such an institution<sup>16</sup>;
- 1650 (7) a recognised bank or licensed institution<sup>17</sup> within the meaning of previous banking legislation<sup>18</sup>;
- 1651 (8) an institution which is a European institution<sup>19</sup> and which, in conformity with the conditions and requirements of the relevant regulations<sup>20</sup>, carries on in the United Kingdom, through a branch established in the United Kingdom for that purpose, or by the provision of services, any specified<sup>21</sup> activity<sup>22</sup>.

A personal pension scheme approved for these purposes is an appropriate scheme for the purposes of the Pension Schemes Act 1993 only if it takes one, but not more than one, of certain specified forms<sup>23</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 Ie under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARAS 711 ante, 713 et seq post.

3 For the meaning of 'personal pension scheme' see PARA 710 ante.

4 See the Income and Corporation Taxes Act 1988 s 632(3) (amended by the Finance Act 1988 s 54(1)).

5 Ie under the Financial Services Act 1986 Pt I Ch III (ss 7-34) (as amended).

6 Ie unit trust schemes authorised under ibid s 78(1).

7 Income and Corporation Taxes Act 1988 s 632(1)(a), (2).

8 For these purposes, an EC company lawfully carries on long term business in the United Kingdom if it does so through a branch in respect of which such of the requirements of the Insurance Companies Act 1982 Sch 2F Pt I (as added) as are applicable have been complied with: Income and Corporation Taxes Act 1988 s 632(2ZA) (a) (added by the Personal Pension Schemes (Establishment of Schemes) Order 1997, SI 1997/2388, art 4). The Treasury may by order amend the Income and Corporation Taxes Act 1988 s 632 (as amended) as it has effect for the time being: s 632(4).

9 Ibid s 632(1)(aa) (added by the Personal Pension Schemes (Establishment of Schemes) Order 1997, SI 1997/2388, art 3). For these purposes, an EC company lawfully provides long term insurance in the United Kingdom if such of the requirements mentioned in note 8 *supra* as are applicable have been complied with in respect of such insurance: Income and Corporation Taxes Act 1988 s 632(2ZA)(b) (as added: see note 8 *supra*).

10 Ibid s 632(1)(b).

11 Ie within the meaning of the Building Societies (Designation of Pension Companies) Order 1987, SI 1987/1871 (revoked).

12 Ie within the meaning of the Building Societies Act 1986 s 18(17).

13 Income and Corporation Taxes Act 1988 s 632(1)(bb) (added by the Personal Pension Schemes (Establishment of Schemes) Order 1988, SI 1988/993).

14 Income and Corporation Taxes Act 1988 s 632(1)(c).

15 For these purposes, 'holding company' and 'subsidiary' are to be construed in accordance with the Companies Act 1985 s 736 (as substituted) or the corresponding Northern Ireland legislation (see COMPANIES vol 14 (2009) PARA 25): Income and Corporation Taxes Act 1988 s 632(2A) (added by the Personal Pension Schemes (Establishment of Schemes) Order 1988, SI 1988/993).

16 Income and Corporation Taxes Act 1988 s 632(1)(cc) (added by the Personal Pension Schemes (Establishment of Schemes) Order 1988, SI 1988/993).

17 Ie within the meaning of the Banking Act 1979 (now almost wholly repealed). 'Recognised bank' and 'licensed institution' were defined in s 50(1) (repealed).

18 Income and Corporation Taxes Act 1988 s 632(1)(d).

19 Ie within the meaning of the Banking Co-ordination (Second Council Directive) Regulations 1992, SI 1992/3218, reg 3(1).

20 Ie the conditions and requirements of the Banking Co-ordination (Second Council Directive) Regulations 1992, SI 1992/3218.

21 Ie any activity falling within *ibid* reg 2(1), Sch 1 items 1, 7 or 11.

22 Income and Corporation Taxes Act 1988 s 632(1)(e) (added by the Personal Pension Schemes (Establishment of Schemes) Order 1997, SI 1997/2388, art 3).

23 See the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 2; and PARA 886 note 4 *post*.

## UPDATE

### 710-740 Personal Pension Schemes and Personal Equity Plans

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

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### **713. Scope of benefits.**

The Board<sup>1</sup> must not approve<sup>2</sup> a personal pension scheme<sup>3</sup> which makes provision for any benefit other than:

- 1652 (1) the payment of an annuity or income withdrawals<sup>4</sup> with respect to which the statutory conditions<sup>5</sup> are satisfied<sup>6</sup>;
- 1653 (2) the payment to a member<sup>7</sup> of a lump sum satisfying the statutory conditions<sup>8</sup>;
- 1654 (3) the payment after the death of a member of an annuity or income withdrawals with respect to which the statutory conditions<sup>9</sup> are satisfied<sup>10</sup>;
- 1655 (4) the payment on the death of a member of a lump sum satisfying the statutory conditions<sup>11</sup> relating to death benefit<sup>12</sup>;
- 1656 (5) the payment on or after the death of a member of a lump sum with respect to which the statutory conditions<sup>13</sup> relating to return of contributions are satisfied<sup>14</sup>.

These restrictions on benefits do not prevent the approval of a scheme which makes provision for insurance against a risk relating to the non-payment of contributions<sup>15</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 I.e. approve under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 714 post.

3 For the meaning of 'personal pension scheme' see PARA 710 ante.

4 For the meaning of 'income withdrawals' see PARA 710 note 3 ante.

5 I.e. in relation to annuities, the conditions are that: (1) the annuity must be payable by an authorised insurance company which may be chosen by the member; (2) it must not commence before the member attains the age of 50 or after he attains the age of 75, except that it may commence before the member attains the age of 50 if (a) it is payable on his becoming incapable through infirmity of body or mind of carrying on his own occupation or any occupation of a similar nature for which he is trained or fitted; or (b) the Board is satisfied that his occupation is one in which persons customarily retire before that age; (3) the annuity must be payable to the member for his life, except that it may continue for a term certain not exceeding ten years, notwithstanding the member's death within that term; and for this purpose an annuity must be regarded as payable for a term certain notwithstanding that it may terminate, after the death of the member and before expiry of that term, on the happening of any of the following, i.e. (a) the marriage of the annuitant; (b) his attaining the age of 18; (c) the later of his attaining that age and ceasing to be in full-time education; and (4) the annuity must not be capable of assignment or surrender, except that an annuity for a term certain may be assigned by will or by the annuitant's personal representatives in the distribution of his estate so as to give effect to a testamentary disposition, or to the rights of those entitled on an intestacy, or to an appropriation of it to a legacy or to a share or interest in the estate: Income and Corporation Taxes Act 1988 s 634(1)-(6).

In relation to income withdrawals, the conditions are that where a member elects to defer the purchase of an annuity such as is mentioned in s 634, income withdrawals may be made by him during the period of deferral, subject as follows: (i) they must not be made before the member attains the age of 50, unless they are available on his becoming incapable through infirmity of body or mind of carrying on his own occupation or any occupation of a similar nature for which he is trained or fitted, or the Board is satisfied that his occupation is one in which persons customarily retire before that age; (ii) they must not be made after the member attains the age of 75; (iii) the aggregate amount of income withdrawals by a member in each successive period of 12 months beginning with his pension date must be not less than 35% or more than 100% of the annual amount of the annuity which would have been purchasable by him on the relevant reference date; and for these purposes the relevant reference date for the first three years is the member's pension date, and for each succeeding

period of three years is the first day of that period; (iv) the right to income withdrawals must not be capable of assignment or surrender: s 634A(1)-(6) (added by Finance Act 1995 s 58, Sch 11 paras 1, 4). The annual amount of the annuity which would have been purchasable by a person on any date must be calculated by reference to (A) the value on that date, determined by or on behalf of the scheme administrator, of the fund from which income withdrawals are to be or have been made by him under the arrangements in question (ie the value of the accrued rights to which the person concerned is entitled conferring prospective entitlement to benefits under those arrangements, after allowing for the payment of any lump sum that falls to be paid on the date in question); and (B) the current published tables of rates of annuities prepared for these purposes by the Government Actuary: Income and Corporation Taxes Act 1988 s 630(2), (C) (added by the Finance Act 1995 s 58, Sch 11 paras 1, 2). The Board may make provision by regulations as to the basis on which the tables mentioned in head (b) *supra* are to be prepared and the manner in which they are to be applied: Income and Corporation Taxes Act 1988 s 630(4) (as so added). See the Personal Pension Schemes (Tables of Rates of Annuities) Regulations 1996, SI 1996/1311, regs 3, 4.

6 Income and Corporation Taxes Act 1988 s 633(1)(a) (amended by the Finance Act 1995 Sch 11 paras 1, 3).

7 For these purposes, 'member', in relation to a personal pension scheme, means an individual who makes arrangements in accordance with the scheme: Income and Corporation Taxes Act 1988 s 630(1).

8 *Ibid* s 633(1)(b). The conditions are that (1) the lump sum must be payable only if the member so elects on or before his pension date under the arrangements in question; (2) the lump sum must be payable on the date which is his pension date under the arrangements in question; (3) the lump sum must not exceed one quarter of the difference between (a) the total value, at the time when the lump sum is paid, of the benefits provided for by the arrangements in question; and (b) the value, at that time, of such of the member's rights under those arrangements as are protected rights for the purposes of the Pension Schemes Act 1993 or the Pension Schemes (Northern Ireland) Act 1993; (4) the right to payment of the lump sum must not be capable of assignment or surrender: Income and Corporation Taxes Act 1988 s 635 (amended by the Finance Act 1989 ss 77, 187, Sch 7 para 2, Sch 17 Pt IV; the Pension Schemes Act 1993 s 190, Sch 8 para 20(2); the Pension Schemes (Northern Ireland) Act 1993 s 184, Sch 7; and the Finance Act 1995 Sch 11 paras 1, 5).

9 The conditions in relation to an annuity are that: (1) the annuity must be payable by an authorised insurance company which may be chosen by the member or by the annuitant; (2) it must be payable to the surviving spouse of the member, or to a person who was at the member's death a dependant of his; (3) the aggregate annual amount (or, if that amount varies, the aggregate of the initial annual amounts) of all annuities to which these provisions apply and which are payable under the same personal pension arrangements must not exceed: (a) where before his death the member was in receipt of an annuity under the arrangements, the annual amount (or, if it varied, the highest annual amount) of that annuity; or (b) where head (a) *supra* does not apply, the highest annual amount of the annuity that would have been payable under the arrangements to the member (ignoring any entitlement of his to commute part of it for a lump sum) if it had been purchased on the day before his death; (4) subject to heads (5)-(9) *infra*, the annuity must be payable for the life of the annuitant; (5) where the annuity is payable to the surviving spouse of the member and at the time of the member's death the surviving spouse is under the age of 60, the annuity may be deferred to a time not later than: (a) the time when the surviving spouse attains that age; or (b) where the member's annuity is payable to the surviving spouse for a term certain as mentioned in the Income and Corporation Taxes Act 1988 s 634(5) (see note 5 *supra*) and the surviving spouse attains the age of 60 before the time when the member's annuity terminates, that time; (6) the annuity may cease to be payable on the marriage of the annuitant; (7) where the annuity is payable to the surviving spouse of the member, it may cease before the death of the surviving spouse if: (a) the member was survived by one or more dependants under the age of 18 and at the time of the member's death the surviving spouse was under the age of 45; and (b) at some time before the surviving spouse attains that age no such dependant remains under the age of 18; (8) where the annuity is payable to a person who is under the age of 18 when it is first payable, it must cease to be payable either: (a) on his attaining that age; or (b) on the later of his attaining that age and ceasing to be in full-time education, unless he was a dependant of the member otherwise than by reason only that he was under the age of 18; (9) the annuity may continue for a term certain not exceeding ten years, notwithstanding the original annuitant's death within that term; and for this purpose an annuity must be regarded as payable for a term certain notwithstanding that it may terminate, after the death of the original annuitant and before the expiry of that term, on the happening of any of the following: (a) the marriage of the annuitant to whom it is payable; (b) his attaining the age of 18; (c) the later of his attaining that age and ceasing to be in full-time education; (10) the annuity must not be capable of assignment or surrender, except that an annuity for a term certain may be assigned by will or by the annuitant's personal representatives in the distribution of his estate so as to give effect to a testamentary disposition, or to the rights of those entitled on an intestacy, or to an appropriation of it to a legacy or to a share or interest in the estate: s 636 (amended by the Finance Act 1995 Sch 11 paras 1, 6).

In relation to income withdrawals, the conditions are that where a person entitled to such an annuity as is mentioned in the Income and Corporation Taxes Act 1988 s 636 (as so amended) elects to defer the purchase of the annuity, income withdrawals may be made by him during the period of deferral, subject as follows: (i) no such deferral may be made, and accordingly income withdrawals may not be made, if the person concerned elects in accordance with s 636(5)(a) (see head (5)(a) *supra*) to defer the purchase of an annuity; (ii) they must not be made after the person concerned, if he had purchased such an annuity as is mentioned in s 636 (as so

amended) would have ceased to be entitled to payments under it; (iii) they must not in any event be made after the member would have attained the age of 75 or, if earlier, after the person concerned attains the age of 75; (iv) the aggregate amount of income withdrawals by a person in each successive period of 12 months beginning with the date of the member's death must be not less than 35% or more than 100% of the annual amount of the annuity which would have been purchasable by him on the relevant reference date; and for these purposes, the relevant reference date for the first three years is the date of the member's death, and for each succeeding period of three years is the first day of that period; (v) the right to income withdrawals must not be capable of assignment or surrender: s 636A (added by the Finance Act 1995 Sch 11 paras 1, 7).

10 Income and Corporation Taxes Act 1988 s 633(1)(c) (as amended: see note 6 supra).

11 The conditions are that the lump sum must be payable on the death of the member before he attains the age of 75, and must be payable by an authorised insurance company: *ibid* s 637 (substituted by the Finance Act 1995 Sch 11 paras 1, 8).

12 Income and Corporation Taxes Act 1988 s 633(1)(d) (as amended: see note 6 supra).

13 The conditions are that: (1) the lump sum payable under the arrangements in question (or, where two or more lump sums are so payable, those lump sums taken together) must represent no more than the return of contributions together with reasonable interest on contributions or bonuses out of profits, after allowing for (a) any income withdrawals; and (b) any purchases of annuities such as are mentioned in *ibid* s 636 (as amended) (see note 9 supra); and to the extent that contributions are invested in units under a unit trust scheme, the lump sum (or lump sums) may represent the sale or redemption price of the units; (2) a lump sum must be payable only if, in the case of the arrangements in question: (a) no such annuity as is mentioned in s 634 (see note 5 supra) has been purchased by the member; (b) no such annuity as is mentioned in s 636 (as amended) has been purchased in respect of the relevant interest; and (c) no election in accordance with s 636(5)(a) (see note 9 head (5)(a) supra) has been made in respect of the relevant interest; (3) where the member's death occurs after the date which is his pension date in relation to the arrangements in question, a lump sum must not be payable more than two years after the death unless, in the case of that lump sum, the person entitled to such an annuity as is mentioned in s 636 (as amended) in respect of the relevant interest: (a) has elected in accordance with s 636A (as added) (see note 9 supra) to defer the purchase of an annuity; and (b) has died during the period of deferral: s 637A(1)-(3) (s 637A added by the Finance Act 1995 Sch 11 paras 1, 8; substituted by the Finance Act 1996 s 172(2), (3), but not so as to affect approvals given before 29 April 1996). For these purposes, 'the relevant interest' means the interest, under the arrangements in question, of the person to whom or at whose direction the payment in question is made, except where there are two or more such interests, in which case it means that one of them in respect of which the payment is made; and where, under the arrangements in question, there is a succession of interests, any reference in heads (2) or (3) supra to the relevant interest includes a reference to any interest (other than that of the member) in relation to which the relevant interest is a successive interest: Income and Corporation Taxes Act 1988 s 637A(4), (5) (as so added and substituted).

14 *Ibid* s 633(1)(e) (added by the Finance Act 1995 Sch 11 paras 1, 3; amended by the Finance Act 1996 s 172(1), (2) in relation to approvals given on or after 29 April 1996, but not so as to affect any approval previously given).

15 Income and Corporation Taxes Act 1988 s 633(2).

## UPDATE

### 710-740 Personal Pension Schemes and Personal Equity Plans

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

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#### **714. Other restrictions on approval.**

The Board<sup>1</sup> must not approve<sup>2</sup> a personal pension scheme<sup>3</sup> unless:

- 1657 (1) the Board is satisfied that there is a person resident in the United Kingdom<sup>4</sup> who will be responsible for the management of the scheme<sup>5</sup>;
- 1658 (2) the scheme makes such provision for the making, acceptance and application of transfer payments<sup>6</sup> as satisfies any requirements imposed by or under regulations made by the Board<sup>7</sup>;
- 1659 (3) the scheme makes provision, in relation to arrangements made in accordance with the scheme, for ensuring that the aggregate amount of the contributions that may be made in a year of assessment<sup>8</sup> by the member<sup>9</sup> and an employer<sup>10</sup> of his under the arrangements, together with the aggregate amounts of such contributions under other approved personal pension arrangements<sup>11</sup> made by that member, does not exceed the permitted maximum<sup>12</sup> for that year<sup>13</sup> and any excess is repaid to the member to the extent of his contributions and otherwise to his employer<sup>14</sup>;
- 1660 (4) the scheme prohibits, except in such cases as may be prescribed by regulations made by the Board<sup>15</sup>, the acceptance of further contributions and the making of transfer payments after the date which is the member's pension date<sup>16</sup> in relation to the arrangements in question<sup>17</sup>.

Nor must the Board approve a personal pension scheme which permits the acceptance of:

- 1661 (a) contributions other than contributions by members and by employers of members and minimum contributions paid<sup>18</sup> by the Secretary of State<sup>19</sup>; or
- 1662 (b) minimum contributions paid by the Secretary of State as mentioned in head (a) above in respect of an individual's service as director of a company if his emoluments<sup>20</sup> are not treated<sup>21</sup> as relevant earnings<sup>22</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 Ie approve under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 715 et seq post.

3 For the meaning of 'personal pension scheme' see PARA 710 ante.

4 For the meaning of 'United Kingdom' see PARA 15 note 4 ante. As to residence in the United Kingdom for income tax purposes see generally INCOME TAXATION vol 23(2) (Reissue) PARA 1260.

5 Income and Corporation Taxes Act 1988 s 638(1). That person is referred to as 'the scheme administrator': see s 630(1).

6 For the prescribed requirements see the Personal Pension Schemes (Transfer Payments) Regulations 1988, SI 1988/1014 (as amended). If requested to do so in writing by an individual who is a member of the scheme, the administrator of a personal pension scheme must make a transfer payment to another personal pension scheme, a retirement benefits scheme (see PARA 741 post) or a relevant statutory scheme (see PARA 756 post) which must comprise the whole of the accumulated fund held in connection with any arrangements made by the individual in accordance with the scheme except that, where the fund includes protected rights (see PARA 883 post) or has been, or will be, used to pay a personal pension protected rights premium, the amount of the fund which represents those rights or has been, or will be, so used may be excluded: see reg 3 (amended by SI

1989/1115; and by SI 1997/480). Within 30 days after the date on which the payment is made, the administrator must notify the administrator of the receiving scheme of any part of the payment which had its origin in a transfer payment from a retirement benefits scheme or a statutory scheme, and of any amount of that part which has been certified to him as payable under the rules of the scheme to the individual in respect of whom the transfer payment is made by way of lump sum, together with any amount by which that amount has been enhanced at the date of the transfer payment to another personal pension scheme by virtue of the Personal Pension Schemes (Transfer Payments) Regulations 1988, SI 1988/1014, reg 11 (as added): see reg 4 (regs 4-9 amended by SI 1989/1115). He must provide a signed certificate showing separately the maximum amount of the transfer payment which is payable to the individual by way of lump sum: see the Personal Pension Schemes (Transfer Payments) Regulations 1988, SI 1988/1014, reg 4A (regs 4A, 10, 11 added by SI 1989/1115).

A personal pension scheme must accept a transfer payment from another personal pension scheme, a retirement benefits scheme, a relevant statutory scheme or a retirement annuity contract or trust scheme, except in prescribed circumstances: see the Personal Pension Schemes (Transfer Payments) Regulations 1988, SI 1988/1014, regs 5, 6 (as so amended). As to the application of transfer payments see regs 8-10 (as so amended and added). Where the administrator of a personal pension scheme is satisfied, having taken all reasonable steps, that there is no surviving spouse to whom an annuity can be paid, the whole of the accumulated value may be paid as a lump sum: see reg 9.

7 Income and Corporation Taxes Act 1988 s 638(2).

8 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

9 For the meaning of 'member' see PARA 713 note 7 ante.

10 For these purposes, references to an employee or to an employer include references to the holder of an office or to the person under whom an office is held: Income and Corporation Taxes Act 1988 s 630(1) (definition added by the Finance Act 1988 s 55(1), (4)).

11 For the meaning of 'personal pension arrangements' see PARA 692 note 6 ante.

12 For these purposes, 'the permitted maximum' for a year of assessment means an amount equal to the aggregate of: (1) the relevant percentage of the member's net relevant earnings for the year; and (2) so much of any relief given under the Income and Corporation Taxes Act 1988 s 639(1) (see PARA 715 post) for that year as is given by virtue of s 642 (carry forward of unused relief: see PARA 719 post); and references in s 638(3) to contributions by the member do not include references to minimum contributions paid by the Secretary of State which are treated by virtue of section 649(3) (see PARA 728 post) as paid by the member: s 638(4). 'The relevant percentage' means 17.5% or, in a case where s 640(2) applies, the relevant percentage there specified: s 638(5).

13 Ibid s 638(3)(a).

14 Ibid s 638(3)(b).

15 The case prescribed is the acceptance by a personal pension scheme after a member's pension date of minimum contributions paid as mentioned in ibid s 638(6)(c) (as amended) (see the text and notes 18-19 infra) in respect of that member: Personal Pension Schemes (Deferred Annuity Purchase) (Acceptance of Contributions) Regulations 1996, SI 1996/805, reg 3; and 'pension date' for these purposes means the date determined in accordance with arrangements made by a member in accordance with a personal pension scheme on which the member elects to defer the purchase of an annuity such as is mentioned in the Income and Corporation Taxes Act 1988 s 634 and to make income withdrawals in accordance with s 634A (as added) (see PARA 713 ante): Personal Pension Schemes (Deferred Annuity Purchase) (Acceptance of Contributions) Regulations 1996, SI 1996/805, reg 2(1).

16 For these purposes, 'pension date', in relation to any personal pension arrangements, means the date determined in accordance with the arrangements on which (1) an annuity such as is mentioned in the Income and Corporation Taxes Act 1988 s 634 is first payable; or (2) the member elects to defer the purchase of such an annuity and to make income withdrawals in accordance with s 634A (as added): s 630(1) (renumbered, and definition added, by the Finance Act 1995 s 58, Sch 11 paras 1, 2).

17 Income and Corporation Taxes Act 1988 s 638(7A) (added by the Finance Act 1995 Sch 11 paras 1, 9).

18 Ie under the Pension Schemes Act 1993 s 43 (as amended) (see PARA 913 post), or paid by the Department of Health and Social Services for Northern Ireland under the Pension Schemes (Northern Ireland) Act 1993 s 39. A personal pension scheme which permits the acceptance of minimum contributions so paid in respect of an individual's service in an office or employment to which the Income and Corporation Taxes Act 1988 s 645 (pensionable employment: see PARA 722 post) applies may be approved by the Board only if (1) the scheme does not permit the acceptance of contributions from the individual or from the person who is his

employer in relation to that office or employment; or (2) at the time when the minimum contributions are paid the individual is not serving in an office or employment to which s 645 applies: s 638(8) (substituted by the Finance Act 1988 s 55(2), (4)).

19 Income and Corporation Taxes Act 1988 s 638(6) (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 20(3); and by the Pension Schemes (Northern Ireland) Act 1993 s 184, Sch 7 para 22(2)).

20 For the meaning of 'emoluments' see PARA 698 note 4 ante.

21 Ie because they fall within the Income and Corporation Taxes Act 1988 s 644(5): see PARA 721 post.

22 Ibid s 638(7) (substituted by the Finance Act 1988 s 55(2), (4)).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(iii) Tax Reliefs/A. RELIEFS AVAILABLE/715. Member's contributions.

### **(iii) Tax Reliefs**

#### **A. RELIEFS AVAILABLE**

##### **715. Member's contributions.**

A contribution paid by an individual under approved<sup>1</sup> personal pension arrangements<sup>2</sup> made by him must, subject to the relevant statutory provisions<sup>3</sup>, be deducted from or set off against any relevant earnings<sup>4</sup> of his for the year of assessment<sup>5</sup> in which the payment is made<sup>6</sup>. In prescribed cases<sup>7</sup> and subject to prescribed conditions<sup>8</sup>, an individual who is entitled to such relief in respect of a contribution may deduct from the contribution when he pays it, and may retain, an amount equal to income tax at the basic rate on the contribution<sup>9</sup>. The scheme administrator<sup>10</sup> must, in such cases and subject to such conditions, accept the amount paid after the deduction in discharge of the individual's liability to the same extent as if the deduction had not been made and may recover an amount equal to the deduction from the Board<sup>11</sup>. Regulations made by the Board for these purposes under these provisions may make provision for carrying these arrangements for deduction into effect and, without prejudice to the generality of that, may provide:

- 1663 (1) for the manner in which claims for the recovery from the Board of a sum equal to the deduction may be made<sup>12</sup>;
- 1664 (2) for the giving of such information, in such form, as may be prescribed by or under the regulations<sup>13</sup>;
- 1665 (3) for the inspection by persons authorised by the Board of books, documents and other records<sup>14</sup>.

Except where the above arrangements for deduction apply, relief in respect of a contribution is given only on a claim made for the purpose<sup>15</sup>.

Where relief under these provisions for any year of assessment is claimed and allowed (whether or not it then falls to be given for that year), and afterwards an assessment, alteration of an assessment, or other adjustment of the claimant's liability to tax is made, there must also be made such consequential adjustments in the relief allowed or given for that or any subsequent year as are appropriate<sup>16</sup>. Where such relief is claimed and allowed for any year of assessment in respect of a contribution, relief must not be given in respect of it under any other provision of the Income Tax Acts<sup>17</sup> for the same or any subsequent year, nor (in the case of a contribution under an annuity contract) in respect of any other premium or consideration for an annuity under the same contract<sup>18</sup>.

1    Ie approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 716 et seq post.

2    For the meaning of 'personal pension arrangements' see PARA 692 note 6 ante.

3    Ie subject to the provisions of the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (as amended): see PARA 711 et seq ante, 716 et seq post.

4    For the meaning of 'relevant earnings' see ibid s 644 (as amended) ; and PARA 721 post.

5 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

6 Income and Corporation Taxes Act 1988 s 639(1). Where approved personal pension arrangements are made by an individual who pays qualifying premiums under a retirement annuity contract within the meaning of s 620(1) (see PARA 686 ante), then (1) the amount that may be deducted or set off by virtue of s 639(1) in any year of assessment must be reduced by the amount of any qualifying premiums which are paid in the year by the individual and in respect of which relief is given for the year under s 619(1)(a) (see PARA 680 ante); and (2) the relief which, by virtue of s 625 (see PARAS 705-706 ante), may be given under s 619 (as amended) by reference to the individual's unused relief for any year must be reduced by the amount of any contributions paid by him in that year under the approved personal pension arrangements: s 655(1).

7 The prescribed cases are cases where under arrangements an individual is paying contributions in respect of net relevant Schedule E earnings; 'net relevant Schedule E earnings' means 'relevant Schedule E earnings' computed in accordance with ibid s 646 (as amended) (see PARA 723 post); and 'relevant Schedule E earnings' means 'relevant earnings' within the meaning of s 644 (as amended) (see PARA 721 post) but with the omission of s 644(2)(c), (d) (which relate to Cases I and II of Schedule D, income and patent income respectively): see the Personal Pension Schemes (Relief at Source) Regulations 1988, SI 1988/1013, regs 2(1), 3, 4. As to the charge to tax under Schedule E (PAYE) see INCOME TAXATION vol 23(1) (Reissue) PARA 605 et seq.

8 The prescribed conditions are (1) that an individual must furnish in writing to the scheme administrator before, or within, the prescribed time, the following particulars, ie (a) his full name and address, date of birth and national insurance number; (b) the full name and address of his employer who has paid, or will pay, net relevant Schedule E earnings to him; (c) an estimate of his net relevant Schedule E earnings for the year of assessment in which he will first pay a net contribution; (d) the full name and address of any employer of his, other than the employer previously referred to, who has paid net relevant Schedule E earnings to him; (2) that an individual must furnish to the scheme administrator before, or within, the prescribed time, certificates which show (a) that, except where the Income and Corporation Taxes Act 1988 s 645(4) or (5) (see PARA 722 post) applies, the individual is not participating in a relevant superannuation scheme; (b) whether or not the individual is paying contributions under other arrangements or under a retirement annuity contract or trust scheme; (c) that the total contributions which the individual is paying under any arrangements or scheme referred to in head (2)(b) supra and will pay under the arrangements to which the certificate relates do not together exceed the total of the maximum amount permitted under s 640 (see PARA 716 post) and so much of any relief given under s 639(1) as is given by virtue of s 642 (carry forward of unused reliefs: see PARA 719 post); (d) that the relevant Schedule E earnings in respect of which the individual will pay, or has paid, a net contribution do not fall within s 644(5) (emoluments of controlling director of investment company: see PARA 721 post); and (3) that on every occasion on which an individual furnishes particulars or a certificate (or both) in accordance with heads (1) or (2) supra he must furnish declarations signed by him to the effect that (a) in relation to the particulars specified in head (1) supra, they are to the best of the knowledge and belief of the individual correct and complete and in relation to a certificate specified in head (2) supra, it is to the best of the knowledge and belief of the individual correct; (b) the individual will within 30 days give notice in writing to the scheme administrator if: (i) he ceases to be employed by an employer who has paid net relevant Schedule E earnings to him; (ii) except where s 645(4) or (5) (see PARA 722 post) applies, he participates in a relevant superannuation scheme: Personal Pension Schemes (Relief at Source) Regulations 1988, SI 1988/1013, regs 5(1), (2), 6(1), (2), 7(1), (2).

The prescribed time relation to the particulars specified in head (1)(a) or (b) supra is before the time at which the individual first pays a net contribution: reg 5(3)(a). The prescribed time in relation to the particulars specified in head (1)(c) supra is within 30 days after the date on which the individual first pays a net contribution or pays a net contribution of such an amount that, except where the Income and Corporation Taxes Act 1988 s 641 (carry back of contributions) or s 642 (carry forward of unused relief) applies, the total net contributions paid by him in the year of assessment exceeds the maximum amount permitted under s 640 on the assumption that his net relevant Schedule E earnings for that year of assessment are not in excess of the estimate referred to in that head and last furnished to the scheme administrator under this provision: Personal Pension Schemes (Relief at Source) Regulations 1988, SI 1988/1013, reg 5(3)(b). The prescribed time in relation to the particulars specified in head (1)(d) supra is within 30 days after the date on which the individual first pays a net contribution in respect of net relevant Schedule E earnings paid to him by an employer of his other than the employer referred to in head (1)(b) supra: reg 5(3)(c).

The prescribed time in relation to the certificate specified in head (2)(a) supra is before the time specified in reg 5(3)(a), within 60 days after that specified in reg 5(3)(c) or within 30 days after the expiry of a period of five years from the date on which the individual last furnished such a certificate: reg 6(3)(a). The prescribed time in relation to the certificate specified in heads (2)(b), (c) supra is before the time specified in reg 5(3)(a) and the prescribed time in relation to the certificate specified in head (2)(d) supra is before the time specified in reg 5(3)(a) or within 60 days after that specified in reg 5(3)(c): reg 6(3)(b), (c).

9 Income and Corporation Taxes Act 1988 s 639(2), (3).

10 For the meaning of 'scheme administrator' see PARA 714 note 5 ante.

# 11 Income and Corporation Taxes Act 1988 s 639(4).

12 A claim must be made for a year of assessment (an 'annual claim') or for a tax month (an 'interim claim'); see the Personal Pension Schemes (Relief at Source) Regulations 1988, SI 1988/1013, reg 8(1)-(3). Notwithstanding the provisions of any other enactment, the Board is not under an obligation to make any payment earlier than the end of the month following the month in which the claim is received: reg 8(4). The Taxes Management Act 1970 s 42 (as substituted and amended) (procedure for making claims: see INCOME TAXATION vol 23(2) (Reissue) PARA 1720) does not apply to such a claim: Personal Pension Schemes (Relief at Source) Regulations 1988, SI 1988/1013, reg 11(1). Claims must contain such information and be in such form as the Board may prescribe (and forms prescribed for annual claims may require a report to be given by the scheme administrator's auditor); must contain declarations to the effect that sufficient records in respect of the scheme are maintained so as to enable the prescribed requirements to be satisfied, and that the information contained in the claim (including that declaration) is correct; and must be signed by the scheme administrator or by an authorised representative in the service of the scheme administrator: reg 11(7).

An interim claim for a tax month may be made by a scheme administrator within six months after the end of the tax month for which it is made: reg 9(1). Such a claim may not be based on an estimate but may only be made to recover an amount deducted in respect of contributions paid in the tax month: reg 9(2). An interim claim may not be made for the tax month ending 5 October or any subsequent month until the annual claim for the preceding year of assessment has been made by the scheme administrator and received by the Board: reg 9(3). If the amount claimed is established to the Board's satisfaction, the Board must pay the amount to the claimant; if the Board is not so satisfied it must pay to the claimant any lesser amount established to its satisfaction: reg 9(4). Where a scheme administrator discovers that an amount so paid to him was excessive he must bring into account in the interim claim made by him next after the discovery ('the subsequent claim') the amount of the excess; and if that amount exceeds the amount deducted in respect of the tax month for which the subsequent claim is made, the scheme administrator must repay the amount of the excess to the Board with the claim and if he fails so to do that amount is immediately recoverable by the Board in the same manner as tax charged by an assessment on the scheme administrator which has become final and conclusive: reg 9(5). No payment made or other thing done on or in relation to an interim claim prejudices the decision on an annual claim: reg 11(4).

An annual claim for a year of assessment may be made at any time within six years after the end of the year of assessment; but where in relation to any year of assessment a scheme administrator has received and not repaid in full any amount on an interim claim he must within six months after the end of the year of assessment make an annual claim: reg 10(1), (2). Such a claim may not be based on an estimate but may only be made to recover an amount deducted in respect of contributions paid in the year of assessment, and must bring into account payments made in respect of the year of assessment; and for these purposes 'aggregate interim payments' means the aggregate of payments made (and not repaid) on interim claims: reg 10(3). Where the aggregate of the interim payments shown by an annual claim exceeds the amount deducted for the year of assessment, the scheme administrator must repay the amount of the excess to the Board with the claim and if he fails so to do, that amount is immediately recoverable by the Board in the same manner as tax charged by an assessment on the scheme administrator which has become final and conclusive: reg 10(4). If a scheme administrator fails to make an annual claim within the time limited for the purposes, the Board may issue a notice to the scheme administrator showing the aggregate interim payments for the year, and stating that the Board is not satisfied that the amount due to the scheme administrator for the year of assessment exceeds the lower amount stated in the notice: reg 10(5). If an annual claim is not delivered to the Board within 14 days after the issue of such a notice, the amount of the difference between the aggregate amount and the amount stated in the notice is immediately recoverable by the Board in the same manner as tax charged by an assessment on the scheme administrator which has become final and conclusive: reg 10(6). Where an annual claim has been made and the scheme administrator subsequently discovers that an error or mistake has been made in the claim the scheme administrator may make a supplementary claim within the time limited by reg 10(1): reg 10(7). All such assessments, payments and repayments must be made as are necessary to give effect to the Board's decision on an annual claim, or to any variation of that decision on appeal: reg 11(6).

No appeal lies from the Board's decision on an interim claim: reg 11(2). An appeal from the Board's decision on an annual claim is to the Special Commissioners, and must be brought by giving written notice to the Board within 30 days of receipt of written notice of the decision: reg 11(3). The like provisions as are contained in the Taxes Management Act 1970 Pt V (ss 44-58) (as amended) (appeals and other proceedings: see INCOME TAXATION vol 23(2) (Reissue) PARA 1759 et seq) apply to such an appeal, and on an appeal the Special Commissioners may vary the decision appealed against whether or not the variation is to the advantage of the appellant: Personal Pension Schemes (Relief at Source) Regulations 1988, SI 1988/1013, reg 11(5).

13 The Board may by notice in writing require any person who is, or who at any time has been, a scheme administrator to whom net contributions have been paid, or an individual who has paid such contributions, to give to the Board within such time (not being less than 14 days) as may be provided in the notice such information and in such form as may be prescribed in the notice: *ibid* reg 14(1). If the Board by notice under the Income and Corporation Taxes Act 1988 s 650 (see PARA 730 post) withdraws its approval of a scheme, or of arrangements made in accordance with it and under which net contributions have been paid, the scheme administrator must within 30 days give to the Board in relation to that scheme, or to those arrangements, the

following information: (1) the full name, address, national insurance number, and where known tax office reference of each individual who has paid net contributions after the date specified in the notice in relation to the scheme, or to the arrangements, as the case may be, ('the relevant contributions'); (2) the amount of the relief obtained under s 639(1) by means of the relevant contributions; (3) the amount of such relief actually due; and (4) the difference between the relief referred to in head (2) supra and that referred to in head (3) supra: Personal Pension Schemes (Relief at Source) Regulations 1988, SI 1988/1013, reg 14(2), (3). If an individual who has paid net contributions fails to comply with the requirements of regs 5-7 (see note 9 supra), the scheme administrator to whom such contributions have been made must within 30 days give to the Board the following information: (a) the full name, address, national insurance number, and where known tax office reference of the individual; (b) the amount of relief obtained by him under the Income and Corporation Taxes Act 1988 s 639(1) by means of such contributions; (c) the amount of such relief actually due; and (d) the difference between the relief referred to in head (b) supra and that referred to in head (c) supra: Personal Pension Schemes (Relief at Source) Regulations 1988, SI 1988/1013, reg 14(4), (5). Where a scheme administrator gives to the Board information in accordance with reg 14(2) he must at the time that he gives the information pay to the Board the amount (if any) referred to in reg 14(3)(d) (see head (4) supra) and, if he fails so to do, that amount is immediately recoverable by the Board in the same manner as tax charged by an assessment on the scheme administrator which has become final and conclusive: reg 12.

14 Income and Corporation Taxes Act 1988 s 639(5). Every scheme administrator to whom net contributions have been paid must, whenever required so to do, make available for inspection by a person authorised by the Board for that purpose all books, documents and other records (including all particulars, certificates and declarations furnished under the Personal Pension Schemes (Relief at Source) Regulations 1988, SI 1988/1013, regs 5-7) (see note 9 supra) in his possession or under his control relating to (1) such contributions paid to him; (2) the scheme and the arrangements made in accordance with it and under which the contributions were paid; and (3) the individual who paid the contributions: reg 15(1). Where records are maintained by computer the scheme administrator must provide the person making the inspection with all facilities necessary to obtain information from them: reg 15(2). All books, documents and records referred to in reg 15(1) must be preserved by the scheme administrator so as to be available for inspection for a period of six years following the termination of the scheme, or of arrangements made in accordance with it, to which they relate; and all particulars, certificates and declarations furnished under regs 5-7 must be so preserved for a period of six years following the date on which the individual to whom they relate ceased to make net contributions: reg 15(3), (4).

15 Income and Corporation Taxes Act 1988 s 639(1).

16 Ibid s 639(6). The like provisions as are contained in the Taxes Management Act 1970 s 30 (as substituted and amended) (recovery of overpayment of tax, etc: see INCOME TAXATION vol 23(2) (Reissue) PARA 1807) apply in relation to the payment by the Board of an amount paid under the Personal Pension Schemes (Relief at Source) Regulations 1988, SI 1988/1013, to which a scheme administrator was not entitled, or recoverable from a scheme administrator under reg 9(5), reg 10(4) or (6) or reg 12 (see notes 13-14 supra), as if it had been income tax repaid to the scheme administrator to which he was not entitled: reg 13(1). An assessment so made must be made by the Board and, subject to the provisions of the Personal Pension Schemes (Relief at Source) Regulations 1988, SI 1988/1013, the like provisions as are contained in the Taxes Management Act 1970 apply as if the assessment were an assessment to tax for the year of assessment in respect of which the amount was paid or is recoverable: Personal Pension Schemes (Relief at Source) Regulations 1988, SI 1988/1013, reg 13(2).

17 For the meaning of 'the Income Tax Acts' see PARA 684 note 4 ante.

18 Income and Corporation Taxes Act 1988 s 639(7). References in the Income Tax Acts to relief in respect of life assurance premiums must not be taken to include relief under the Income and Corporation Taxes Act 1988 s 639: s 639(8).

## UPDATE

### 710-740 Personal Pension Schemes and Personal Equity Plans

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(iii) Tax Reliefs/A. RELIEFS AVAILABLE/716. Maximum amount of deductions.

## **716. Maximum amount of deductions.**

The maximum amount that may be deducted or set off in any year of assessment<sup>1</sup> under the relevant legislation<sup>2</sup> is in general 17.5 per cent of the individual's net relevant earnings<sup>3</sup> for that year<sup>4</sup>; but in the case of an individual whose age at the beginning of the year of assessment is within a specified range<sup>5</sup> that percentage is increased<sup>6</sup>.

Without prejudice to the above provisions, the maximum amount that may be deducted or set off in any year of assessment in respect of contributions paid by an individual to secure a lump sum payable on his death before the age of 75 years<sup>7</sup> is 5 per cent of the individual's net relevant earnings for that year<sup>8</sup>.

Where personal pension arrangements<sup>9</sup> are made by an employee whose employer makes contributions under the arrangements, the maximum amount that may be deducted or set off in any year of assessment is reduced by the amount of the employer's contributions in the year<sup>10</sup>. Any minimum contributions paid under the Pension Schemes Act 1993<sup>11</sup> which are treated<sup>12</sup> as paid by the individual in respect of whom they are paid must be disregarded for the purposes of assessing the amount of relief available<sup>13</sup>.

1 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

2 Ie by virtue of the Income and Corporation Taxes Act 1988 s 639(1): see PARA 715 ante.

3 For the meaning of 'net relevant earnings' see PARA 723 post.

4 Income and Corporation Taxes Act 1988 s 640(1).

5 Ie a range specified in the first column of the table in ibid s 640(2) (as amended): see note 6 infra.

6 Ibid s 640(2). The specified age ranges and percentages are: age 36-45, 20%; age 46-50, 25%; age 51-55, 30%; age 56-60, 35%; and 61 or more, 40%: s 649(2), Table (substituted by the Finance Act 1989 s 77, Sch 7 para 3).

7 Subject to the conditions in the Income and Corporation Taxes Act 1988 s 637 (as substituted): see PARA 713 ante.

8 Ibid s 640(3) (amended by the Finance Act 1995 s 58, Sch 11 paras 1, 10).

9 For the meaning of 'personal pension arrangements' see PARA 692 note 6 ante.

10 Income and Corporation Taxes Act 1988 s 640(4).

11 Ie under the Pension Schemes Act 1993 s 43 (as amended): see PARA 913 post.

12 Ie by virtue of the Income and Corporation Taxes Act 1988 s 649(3): see PARA 728 post.

13 Ibid s 640(5).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(iii) Tax Reliefs/A. RELIEFS AVAILABLE/717. The earnings cap.

## **717. The earnings cap.**

In arriving at an individual's net relevant earnings<sup>1</sup> for a year of assessment<sup>2</sup> for the purposes of assessing the tax relief available for his contributions<sup>3</sup>, any excess of what otherwise would be the individual's net relevant earnings for the year over the allowable maximum<sup>4</sup> for the year must be disregarded<sup>5</sup>.

1 For the meaning of 'net relevant earnings' see PARA 723 post.

2 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

3 le for the purposes of the Income and Corporation Taxes Act 1988 s 640 (as amended): see PARA 716 ante.

4 'The allowable maximum' means, as regards a particular year of assessment, the figure found for that year as follows: *ibid* s 640A(2) (s 640A added by the Finance Act 1989 s 77, Sch 7 paras 1, 4). For the year of assessment 1989-90 the figure is £60,000; and for the year of assessment 1990-91 and any subsequent year, the figure is the figure found for that year, for the purposes of the Income and Corporation Taxes Act 1988 s 590C (as added and amended) (earnings cap for retirement benefit schemes: see PARA 750 post) by virtue of s 590C(4)-(5A) (as added and amended): s 640A(3), (4) (as so added; amended by the Finance Act 1993 s 107(6), (8)).

5 Income and Corporation Taxes Act 1988 s 640A(1) (as added: see note 4 *supra*).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(iii) Tax Reliefs/A. RELIEFS AVAILABLE/718. Carry-back of contributions.

### **718. Carry-back of contributions.**

An individual who pays a contribution under approved<sup>1</sup> personal pension arrangements<sup>2</sup> in a year of assessment<sup>3</sup> may elect that the contribution, or part of it, is to be treated as paid:

- 1666 (1) in the year of assessment preceding that year<sup>4</sup>; or
- 1667 (2) if he had no net relevant earnings<sup>5</sup> in that preceding year of assessment, in the year of assessment before that<sup>6</sup>.

An election must be made on or before the 31 January next following the year of assessment in which the contributions treated as paid in another year are actually paid<sup>7</sup>. Where such an election is made in respect of a contribution or part of a contribution, the other statutory provisions relating to taxation and personal pension schemes<sup>8</sup> have effect as if the contribution or part had been paid in the year specified in the election and not in the year in which it was actually paid<sup>9</sup>.

Special rules apply in respect of years of assessment prior to 1997-98 for individuals with relevant earnings as an underwriting or former underwriting member of Lloyd's or by way of commission calculated by reference to the profits of Lloyd's underwriting business<sup>10</sup>.

1    I.e. approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 719 et seq post.

2    For the meaning of 'personal pension arrangements' see PARA 692 note 6 ante.

3    For the meaning of 'year of assessment' see PARA 680 note 1 ante.

4    Income and Corporation Taxes Act 1988 s 641(1)(a).

5    For the meaning of 'net relevant earnings' see PARA 723 post.

6    Income and Corporation Taxes Act 1988 s 641(1)(b).

7    Ibid s 641(4) (amended by the Finance Act 1996 s 135, Sch 21 para 18).

8    I.e. the other provisions of the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (as amended): see PARA 711 et seq ante, 719 et seq post.

9    Ibid s 641(5). For transitional provisions see s 655(2) (amended by the Finance Act 1988 s 54).

10   Where for any such year of assessment: (1) an individual has relevant earnings as an underwriting or former underwriting member of Lloyd's or by way of commission calculated by reference to the profits of Lloyd's underwriting business; and (2) there is an amount of unused relief attributable to those earnings, the individual may elect that there is to be treated as paid in that year so much of any contributions paid by him under approved personal pension arrangements in the next year of assessment but two as does not exceed the amount of the unused relief: Income and Corporation Taxes Act 1988 s 641(2) (amended by the Finance Act 1993 ss 183(3), 184(3); repealed in relation to the year 1997-98 and subsequent years by the Finance Act 1994 ss 228, 258, Sch 26 Pt V). Subject to the Income and Corporation Taxes Act 1988 s 655(2) (as amended) (transitional provisions), references for these purposes to an amount of unused relief attributable to the earnings mentioned in head (1) supra are to an amount which could have been deducted from or set off against those earnings under s 639(1) (see PARA 715 ante) if (a) the individual had paid contributions under approved personal pension arrangements in the year of assessment for which he has the earnings; or (b) any such contributions paid by him in that year had been greater: s 641(3).

**UPDATE**

**710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(iii) Tax Reliefs/A. RELIEFS AVAILABLE/719. Carry-forward of relief.

## **719. Carry-forward of relief.**

Where for any year of assessment<sup>1</sup> an individual has relevant earnings<sup>2</sup> from any trade<sup>3</sup>, profession, vocation, office or employment<sup>4</sup> carried on or held by him, and there is an amount of unused relief for that year<sup>5</sup>, relief may be given<sup>6</sup>, up to the amount of the unused relief, in respect of so much of any contributions paid by him under approved<sup>7</sup> personal pension arrangements in any of the next six years of assessment as exceeds the maximum applying<sup>8</sup> for that year for the statutory purposes<sup>9</sup>.

Relief by virtue of these provisions is given for an earlier year rather than a later year, the unused relief taken into account in giving relief for any year being deducted from that available for giving relief in subsequent years and unused relief derived from an earlier year being exhausted before unused relief derived from a later year<sup>10</sup>. Where a relevant assessment to tax<sup>11</sup> in respect of a year of assessment becomes final and conclusive<sup>12</sup> more than six years after the end of that year and there is an amount of unused relief for that year which results from the making of the assessment:

- 1668 (1) that amount is not available for giving relief by virtue of these provisions for any of the six years following that year; but
- 1669 (2) the individual may, within the period of six months beginning with the date on which the assessment becomes final and conclusive, elect that relief is to be given<sup>13</sup>, up to that amount, in respect of so much of any contributions paid by him under approved personal pension arrangements within that six-month period as exceeds the maximum applying for the year of assessment in which they are paid<sup>14</sup>.

1 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

2 For the meaning of 'relevant earnings' see PARA 721 post.

3 As to the meaning of 'trade' see INCOME TAXATION vol 23(1) (Reissue) PARA 105.

4 As to the meaning of 'profession' and 'vocation' see INCOME TAXATION vol 23(1) (Reissue) PARAS 135-136; and as to the meaning of 'office' and 'employment' see INCOME TAXATION vol 23(1) (Reissue) PARAS 617-618.

5 For these purposes, references to an amount of unused relief for any year are to an amount which could have been deducted from or set off against the individual's relevant earnings for that year under the Income and Corporation Taxes Act 1988 s 639(1) (see PARA 715 ante) if (1) the individual had paid contributions under approved personal pension arrangements in that year; or (2) any such contributions paid by him in that year had been greater: s 642(2). For transitional provisions see s 655(3) (amended by the Finance Act 1988 s 54). For the meaning of 'personal pension arrangements' see PARA 692 note 6 ante.

6 Ie under the Income and Corporation Taxes Act 1988 s 639(1): see PARA 715 ante.

7 Ie approved under ibid Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 720 et seq post.

8 Ie under ibid s 640 (as amended): see PARA 716 ante.

9 Ibid s 642(1).

10 Ibid s 642(3).

11 'A relevant assessment to tax' means an assessment on the individual's relevant earnings or on the profits or gains of a partnership from which the individual derives relevant earnings: ibid s 642(5).

12 As to when an assessment becomes final and conclusive see INCOME TAXATION vol 23(2) (Reissue) PARA 1739.

13 See note 6 supra.

14 Income and Corporation Taxes Act 1988 s 642(4)(a), (b). To the extent to which relief in respect of any contributions is so given, it must not be given by virtue of s 642(1): s 642(4).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(iii) Tax Reliefs/A. RELIEFS AVAILABLE/720. Employer's contributions and personal pension income etc.

## **720. Employer's contributions and personal pension income etc.**

Where contributions are paid by an employer<sup>1</sup> under approved<sup>2</sup> personal pension arrangements<sup>3</sup> made by his employee<sup>4</sup>, those contributions are not regarded as emoluments of the employment chargeable to tax under Schedule E<sup>5</sup>.

Income derived by a person from investments or deposits held by him for the purposes of an approved personal pension scheme<sup>6</sup> is exempt from income tax<sup>7</sup>. An annuity payable under approved personal pension arrangements is, however, treated as earned income of the annuitant<sup>8</sup> and income withdrawals<sup>9</sup> under approved personal pension arrangements are assessable to tax under Schedule E and are treated as earned income of the recipient<sup>10</sup>.

1 For the meaning of 'employer' see PARA 714 note 10 ante.

2 Ie approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 721 et seq post.

3 For the meaning of 'personal pension arrangements' see PARA 692 note 6 ante.

4 For the meaning of 'employee' see PARA 714 note 10 ante.

5 Income and Corporation Taxes Act 1988 s 643(1). For the meaning of 'emoluments' see PARA 698 note 4 ante; and as to the charge to income tax under Schedule E (PAYE) see INCOME TAXATION vol 23(1) (Reissue) PARA 605 et seq.

6 For the meaning of 'personal pension scheme' see PARA 710 ante.

7 Income and Corporation Taxes Act 1988 s 643(2). For these purposes, 'investments' includes futures contracts and options contracts, and income derived from transactions relating to such contracts is to be treated as income arising from those contracts: see s 659A (added by the Finance Act 1990 s 81(2), (5)).

8 Income and Corporation Taxes Act 1988 s 643(3). Section 643(3), however, applies only in relation to the annuitant to whom the annuity is made payable by the terms of the arrangements: s 643(4).

9 For the meaning of 'income withdrawals' see PARA 710 note 3 ante.

10 Income and Corporation Taxes Act 1988 s 643(5) (added by the Finance Act 1995 s 58, Sch 11 paras 1, 11).

### **UPDATE**

#### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(iii) Tax Reliefs/B. RELEVANT EARNINGS/721. Meaning of 'relevant earnings'.

## ***B. RELEVANT EARNINGS***

### **721. Meaning of 'relevant earnings'.**

'Relevant earnings', in relation to personal pension schemes<sup>1</sup>, means any income of an individual which is chargeable to tax for the year of assessment<sup>2</sup> in question and is within the following descriptions<sup>3</sup>:

- 1670 (1) Emoluments chargeable under Schedule E<sup>4</sup> from an office or employment<sup>5</sup> held by the individual<sup>6</sup>;
- 1671 (2) income from any property which is attached to or forms part of the emoluments of an office or employment held by him<sup>7</sup>;
- 1672 (3) income which is chargeable under Schedule D<sup>8</sup> and is immediately derived by him from the carrying on or exercise by him of his trade<sup>9</sup>, profession or vocation<sup>10</sup> either as an individual or as a partner acting personally in a partnership<sup>11</sup>;
- 1673 (4) patent income treated<sup>12</sup> as earned income<sup>13</sup>.

The following are not income within heads (1) to (4) above:

- 1674 (a) anything in respect of which tax is chargeable under Schedule E and which arises from the acquisition or disposal of shares or an interest in shares or from a right to acquire shares;
- 1675 (b) anything in respect of which tax is chargeable by virtue of the statutory provisions<sup>14</sup> relating to payments on retirement or removal from office or from an employment<sup>15</sup>.

Nor are emoluments of an individual as director<sup>16</sup> of a company<sup>17</sup> income within those heads if the income of the company consists wholly or mainly of investment income<sup>18</sup> and the individual, either alone or together with any other persons who are or have been at any time directors of the company, controls<sup>19</sup> the company<sup>20</sup>. Finally, emoluments of an individual as an employee of a company are not income within those heads if he is a controlling director<sup>21</sup> of the company at any time in the year of assessment in question or has been a controlling director of the company at any time in the ten years immediately preceding that year of assessment, and any of the specified circumstances<sup>22</sup> applies in his case<sup>23</sup>.

1    Ie for the purposes of the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 722 et seq post.

2    For the meaning of 'year of assessment' see PARA 680 note 1 ante.

3    Income and Corporation Taxes Act 1988 s 644(1).

4    For the meaning of 'emoluments' see PARA 698 note 4 ante; and as to the charge to income tax under Schedule E (PAYE) see INCOME TAXATION vol 23(1) (Reissue) PARA 605 et seq.

5    As to the meaning of 'office' and 'employment' see INCOME TAXATION vol 23(1) (Reissue) PARAS 617-618.

6    Income and Corporation Taxes Act 1988 s 644(2)(a). Where s 645 (as amended) (see PARA 722 post) applies to an office or employment held by the individual, neither emoluments from the office or employment

nor income from any property which is attached to it or forms part of its emoluments are within heads (1)-(4) in the text: s 644(3).

7 Ibid s 644(2)(b); and see note 6 supra.

8 As to income chargeable to income tax under Schedule D see INCOME TAXATION vol 23(1) (Reissue) PARA 88 et seq.

9 As to the meaning of 'trade' see INCOME TAXATION vol 23(1) (Reissue) PARA 105.

10 As to the meaning of 'profession' and 'vocation' see INCOME TAXATION vol 23(1) (Reissue) PARAS 135-136.

11 Income and Corporation Taxes Act 1988 s 644(2)(c).

12 Ie by virtue of ibid s 529: see INCOME TAXATION vol 23(2) (Reissue) PARA 1484.

13 Ibid s 644(2)(d). Heads (1)-(4) in the text are subject to s 644(3)-(6F) (as amended) (see the text and notes 14-22 infra): s 644(2) (amended by the Finance Act 1989 s 77, Sch 7 para 5(2)).

14 Ie the Income and Corporation Taxes Act 1988 s 148: see INCOME TAXATION vol 23(1) (Reissue) PARA 688.

15 Ibid s 644(4).

16 For these purposes, 'director' includes any person occupying the position of director by whatever name called: ibid s 644(6).

17 For the meaning of 'company' see INCOME TAXATION vol 23(1) (Reissue) PARA 1.

18 For these purposes, 'investment income' means income which, if the company were an individual, would not be earned income: Income and Corporation Taxes Act 1988 s 644(6) (definition substituted by the Finance Act 1989 s 107, Sch 12 para 16).

19 The Income and Corporation Taxes Act 1988 s 840 (meaning of 'control': see INCOME TAXATION vol 23(1) (Reissue) PARA 845) applies for these purposes: s 644(5).

20 Ibid s 644(5).

21 For these purposes, a person is a controlling director of a company if he is a director (as defined by ibid s 612(1) (see PARA 741 note 8 post), and he is within s 417(5)(b) in relation to the company: s 644(6F)(a) (s 644(6A)-(6F) added by the Finance Act 1989 Sch 7 para 5(3)).

22 Ie the circumstances specified in the Income and Corporation Taxes Act 1988 s 644(6B)-(6E) (as added: see note 21 supra). Section 644(6B) (as so added) applies in the case of an individual if at any time in the year of assessment in question he is in receipt of benefits under a relevant superannuation scheme, and the benefits are payable in respect of past service with the company: s 644(6B) (as so added). Section 644(6C) (as so added) applies in the case of the individual if (1) at any time in the year of assessment in question he is in receipt of benefits under a personal pension scheme; (2) the scheme has received a transfer payment relating to him from a relevant superannuation scheme; and (3) the transfer payment is in respect of past service with the company: s 644(6C) (as so added). Section 644(6D) (as so added) applies in the case of the individual if: (a) at any time in the year of assessment in question he is in receipt of benefits under a relevant superannuation scheme; (b) the benefits are payable in respect of past service with another company; (c) the emoluments are for a period during which the company mentioned in the text to this note has carried on a trade or business previously carried on by the other company; and (d) the other company carried on the trade or business at any time during the period of service in respect of which the benefits are payable: s 644(6D) (as so added). Finally, s 644(6E) (as so added) applies in the case of the individual if: (i) at any time in the year of assessment in question he is in receipt of benefits under a personal pension scheme; (ii) the scheme has received a transfer payment relating to him from a relevant superannuation scheme; (iii) the transfer payment is in respect of past service with another company; (iv) the emoluments are for a period during which the company mentioned in the text to this note has carried on a trade or business previously carried on by the other company; and (v) the other company carried on the trade or business at any time during the period of service in respect of which the transfer payment was made: s 644(6E) (as so added). For the purposes of s 644(6A)-(6E) (as so added), 'relevant superannuation scheme' has the same meaning as in s 645(1) (as amended) (see PARA 722 post); references to benefits payable in respect of past service with a company include references to benefits payable partly in respect of past service with the company; and references to a transfer payment in respect of past service with a company include references to a transfer payment partly in respect of past service with the company: s 644(6F)(b)-(d) (as so added).

23 Ibid s 644(6A) (as added: see note 21 supra).

**UPDATE**

**710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(iii) Tax Reliefs/B. RELEVANT EARNINGS/722. Earnings from pensionable employment.

## **722. Earnings from pensionable employment.**

Where the following provisions apply to an office or employment<sup>1</sup>, emoluments from it and income from property attached to it are not included in the statutory definition of 'relevant earnings'<sup>2</sup> for the purposes of the provisions relating to personal pension schemes<sup>3</sup>. These provisions apply to an office or employment held by an individual if:

- 1676 (1) service in it is service to which a relevant superannuation scheme<sup>4</sup> relates; and
- 1677 (2) the individual is a participant in the scheme; and
- 1678 (3) the scheme is not one which provides only an annuity payable to his surviving spouse or a dependant of his or a lump sum payable on his death in service<sup>5</sup>.

These provisions apply whether or not the duties of the office or employment are performed wholly or partly in the United Kingdom<sup>6</sup> or the individual is chargeable to tax in respect of it<sup>7</sup>.

1 As to the meaning of 'office' and 'employment' see INCOME TAXATION vol 23(1) (Reissue) PARAS 617-618.

2 See PARA 721 ante. For the meaning of 'emoluments' see PARA 698 note 4 ante.

3 See the Income and Corporation Taxes Act 1988 s 644(3); and PARA 721 ante.

4 For these purposes, 'a relevant superannuation scheme' means a scheme or arrangement: (1) the object or one of the objects of which is the provision, in respect of persons serving in particular offices or employments, of relevant benefits within the meaning of *ibid* s 612 (see PARA 741 note 6 post); (2) which is established by a person other than the individual; and (3) which is of a description mentioned in s 596(1)(a), (b) or (c) (see PARA 757 head (a) post): s 645(3)(a)-(c) (amended by the Finance Act 1989 ss 77, 187, Sch 7 para 6(3), Sch 17 Pt IV). Where the emoluments from an office or employment held by an individual are foreign emoluments within the meaning of the Income and Corporation Taxes Act 1988 s 192 (see INCOME TAXATION vol 23(1) (Reissue) PARA 621), these provisions have effect with the substitution, for the words in head (3), of the words 'which corresponds to a scheme of a description mentioned in s 596(1)(a), (b) or (c)': s 645(4A) (added by the Finance Act 1989 Sch 7 para 6(4)).

5 Income and Corporation Taxes Act 1988 s 645(1), (4) (s 645(1) amended by the Finance Act 1989 Sch 7 para 6(2)). The Income and Corporation Taxes Act 1988 s 645(4) does not apply: see head (3) in the text.

6 For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

7 Income and Corporation Taxes Act 1988 s 645(2).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(iii) Tax Reliefs/B. RELEVANT EARNINGS/723. Meaning of 'net relevant earnings'.

### **723. Meaning of 'net relevant earnings'.**

For the purposes of the statutory provisions relating to approved personal pension schemes and arrangements<sup>1</sup>, 'net relevant earnings', in relation to an individual, means the amount of his relevant earnings<sup>2</sup> for the year of assessment<sup>3</sup> in question, less the amount of any relevant deductions<sup>4</sup> which fall to be made from the relevant earnings in computing for the purposes of income tax his total income for that year<sup>5</sup>. An individual's net relevant earnings for any year of assessment must be computed without regard to any deduction or set off for contributions<sup>6</sup> which falls to be made for that year in respect of the individual<sup>7</sup>.

For these purposes, an individual's relevant earnings must be taken to be those earnings before giving effect to any capital allowances, other than deductions allowable in computing profits or gains, but after taking into account the amounts on which charges fall to be made under the Capital Allowances Act 1990<sup>8</sup>, and references below to income (other than references to total income) must be construed similarly<sup>9</sup>.

In the case of an individual's partnership profits, the amount to be included in arriving at his net relevant earnings is his share of the partnership income (estimated in accordance with the Income Tax Acts<sup>10</sup>) after making from it any such deductions in respect of payments made by the partnership or capital allowances falling to be made to the partnership as would be made in computing the tax payable in respect of that income<sup>11</sup>.

Where in the year of assessment<sup>12</sup> in question:

- 1679 (1) an individual holds two or more offices or employments which are associated in that year<sup>13</sup>;
- 1680 (2) one or more of them is a pensionable job<sup>14</sup>; and
- 1681 (3) one or more of them is a non-pensionable job<sup>15</sup>,

and the emoluments for that year from the pensionable job (or jobs) are equal to or exceed the allowable maximum<sup>16</sup> for that year, have effect in the case of the individual as if the references to relevant earnings were references to relevant earnings not attributable to the non-pensionable job (or jobs)<sup>17</sup>. Where the allowable maximum for that year exceeds the emoluments for that year from the pensionable job (or jobs), the individual's net relevant earnings, so far as attributable to the non-pensionable job (or jobs), must not be greater than the amount of the excess<sup>18</sup>.

1    Ie for the purposes of the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 724 et seq post.

2    For the meaning of 'relevant earnings' see PARA 722 ante.

3    For the meaning of 'year of assessment' see PARA 680 note 1 ante.

4    The relevant deductions are: (1) annual payments (other than interest) payable out of profits or gains, patent royalties and certain rents and royalties in respect of mines, quarries and similar concerns and electric line wayleaves (ie deductions which but for the Income and Corporation Taxes Act 1988 ss 74 (m), (p) or (q) (as amended) (see INCOME TAXATION vol 23(1) (Reissue) PARA 182) could be made in computing the profits or gains of the individual); (2) deductions from Schedule E income in respect of expenses of employments, professional fees and subscriptions and clergymen's special expenses made by virtue of ss 198, 201 (as amended) or s 332(3) (see INCOME TAXATION vol 23(1) (Reissue) PARAS 628, 654, 652 respectively); (3) deductions in respect of

losses or capital allowances, being losses or capital allowances arising from activities profits or gains of which would be included in computing relevant earnings of the individual: s 646(2) (amended by the Finance Act 1988 s 148, Sch 14 Pt VIII).

Where, in a year of assessment for which an amount is deducted or set off under the Income and Corporation Taxes Act 1988 s 639(1) (see PARA 715 ante) against the net relevant earnings of an individual: (a) a deduction in respect of such a loss or allowance of the individual as is mentioned in head (3) supra falls to be made in computing the total income of the individual; and (b) the deduction or part of it falls to be so made from income other than relevant earnings, the amount of the deduction made from that other income must be treated as reducing the individual's net relevant earnings for subsequent years of assessment as follows, ie the deduction must be made so far as possible from the individual's net relevant earnings for the first of the subsequent years of assessment (whether or not he is entitled to relief under s 639(1) for that year), and then, so far as it cannot be so made, from those of the next year, and so on: s 646(5), (6) (s 646(5) amended by the Finance Act 1988 Sch 14 Pt VIII).

5 Income and Corporation Taxes Act 1988 s 646(1) (amended by the Finance Act 1989 s 77, Sch 7 para 7).

6 Ie under the Income and Corporation Taxes Act 1988 s 639(1): see PARA 715 ante.

7 Ibid s 646(7) (amended by the Finance Act 1988 Sch 14 Pt VIII).

8 Ie including enactments which under the Income and Corporation Taxes Act 1988 are to be treated as contained in the Capital Allowances Act 1990: Income and Corporation Taxes Act 1988 s 646(3) (amended by the Capital Allowances Act 1990 s 164, Sch 1 para 8(29)).

9 Income and Corporation Taxes Act 1988 s 636(3) (as amended: see note 8 supra).

10 For the meaning of 'the Income Tax Acts' see PARA 684 note 4 ante.

11 Income and Corporation Taxes Act 1988 s 646(4).

12 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

13 For these purposes, two or more offices or employments held by an individual in a year of assessment are associated in that year if the employers in question are associated at any time during it; and employers are associated if (directly or indirectly) one is controlled by the other or if both are controlled by a third person: Income and Corporation Taxes Act 1988 s 646A(4), (5) (s 646A added by the Finance Act 1989 Sch 7 para 8). The reference to control, in relation to a body corporate, is to be construed: (1) where the body corporate is a close company, in accordance with the Income and Corporation Taxes Act 1988 s 416 (as amended) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1299); and (2) where it is not, in accordance with s 840 (see INCOME TAXATION vol 23(1) (Reissue) PARA 845): s 646A(6) (as so added).

14 Ie an office or employment to which para 722 heads (1)-(3) ante apply: see ibid s 646A(1)(b) (as added: see note 13 supra).

15 Ie an office or employment to which para 722 heads (1)-(3) ante do not apply: see ibid s 646A(1)(c) (as added: see note 13 supra).

16 For these purposes, 'the allowable maximum' has the same meaning as in ibid s 640A(1) (as added) (see PARA 717 ante): s 646A(7) (as added: see note 13 supra).

17 Ibid s 646A(1), (2) (as added: see note 13 supra).

18 Ibid s 646A(3) (as added: see note 13 supra).

## UPDATE

### 710-740 Personal Pension Schemes and Personal Equity Plans

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(iv) The Charge to Tax/724. Unauthorised payments.

## **(iv) The Charge to Tax**

### **724. Unauthorised payments.**

Where a payment: (1) is not expressly authorised by the rules of the personal pension scheme<sup>1</sup>; or (2) is made at a time when the scheme or the personal pension arrangements<sup>2</sup> are not approved<sup>3</sup> and would not have been expressly authorised by the rules of the scheme or by the arrangements when the scheme, or as the case may be the arrangements, were last approved, and the payment is made:

- 1682 (a) out of funds which are or have been held for the purposes of a personal pension scheme which is or has at any time been approved; and
- 1683 (b) to or for the benefit of an individual who has made personal pension arrangements in accordance with the scheme,

the individual referred to in head (b) above is chargeable to tax under Schedule E<sup>4</sup> on the amount of the payment for the year of assessment<sup>5</sup> in which the payment is made, whether or not he is the recipient of the payment<sup>6</sup>.

This provision applies to a transfer of assets or other transfer of money's worth as it applies to a payment, and in relation to such a transfer the reference to the amount of the payment must be read as a reference to the value of the transfer<sup>7</sup>.

1 For the meaning of 'personal pension scheme' see PARA 710 ante.

2 For the meaning of 'personal pension arrangements' see PARA 692 note 6 ante.

3 Ie approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 725 et seq post.

4 As to tax under Schedule E (PAYE) see INCOME TAXATION vol 23(1) (Reissue) PARA 605 et seq.

5 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

6 Income and Corporation Taxes Act 1988 s 647(1)-(3).

7 Ibid s 647(4).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

### **724-726 Unauthorised payments ... Annuities; the charge under Schedule E**

Income and Corporation Taxes Act 1988 ss 647-648A repealed: Income Tax (Earnings and Pensions) Act 2003 Sch 6 para 96, Sch 8 Pt 1.

As to assessment and collection of tax charged on the administrator of a scheme within the meaning of the 1988 Act s 611AA (see PARA 747), see s 658A; and PARA 727A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(iv) The Charge to Tax/725. Contributions under unapproved arrangements.

## **725. Contributions under unapproved arrangements.**

Where contributions are paid by an employer<sup>1</sup> under personal pension arrangements<sup>2</sup> made by his employee<sup>3</sup> then, if those arrangements are not approved<sup>4</sup> arrangements and the contributions are not otherwise chargeable to income tax as income of the employee, the contributions must be regarded for all the purposes of the Income Tax Acts<sup>5</sup> as emoluments<sup>6</sup> of the employment chargeable to tax under Schedule E<sup>7</sup>.

1 For the meaning of 'employer' see PARA 714 note 10 ante.

2 For the meaning of 'personal pension arrangements' see PARA 692 note 6 ante.

3 For the meaning of 'employee' see PARA 714 note 10 ante.

4 If approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 726 et seq post.

5 For the meaning of 'the Income Tax Acts' see PARA 684 note 4 ante.

6 For the meaning of 'emoluments' see PARA 698 note 4 ante.

7 Income and Corporation Taxes Act 1988 s 648. As to the charge to tax under Schedule E (PAYE) see INCOME TAXATION vol 23(1) (Reissue) PARA 605 et seq.

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

### **724-726 Unauthorised payments ... Annuities; the charge under Schedule E**

Income and Corporation Taxes Act 1988 ss 647-648A repealed: Income Tax (Earnings and Pensions) Act 2003 Sch 6 para 96, Sch 8 Pt 1.

As to assessment and collection of tax charged on the administrator of a scheme within the meaning of the 1988 Act s 611AA (see PARA 747), see s 658A; and PARA 727A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(iv) The Charge to Tax/726. Annuities; the charge under Schedule E.

## **726. Annuities; the charge under Schedule E.**

Where funds held for the purposes of an approved<sup>1</sup> personal pension scheme<sup>2</sup> are used to acquire an annuity, the annuity is charged to tax under Schedule E<sup>3</sup> and must not be charged to tax under Case III of Schedule D<sup>4</sup>. As respects any approved personal pension scheme the Board<sup>5</sup> may, however, direct that, until such date as the Board may specify, annuities acquired with funds held for the purposes of the scheme are to be charged to tax as annual payments under Case III of Schedule D, and tax is to be deductible<sup>6</sup> accordingly<sup>7</sup>.

1    Ie approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 727 et seq post.

2    For the meaning of 'personal pension scheme' see PARA 710 ante.

3    The Income and Corporation Taxes Act 1988 s 203 (as amended) (PAYE: see INCOME TAXATION vol 23(1) (Reissue) PARA 754 et seq) applies accordingly: s 648A(1)(a) (s 648A added by the Finance Act 1994 s 109).

4    Income and Corporation Taxes Act 1988 s 648A(1)(b) (as added: see note 3 supra). As to the charge to tax under Case III of Schedule D see INCOME TAXATION vol 23(1) (Reissue) PARA 464 et seq.

5    For the meaning of 'the Board' see PARA 678 note 2 ante.

6    Ie under the Income and Corporation Taxes Act 1988 ss 348, 349 (as amended): see INCOME TAXATION vol 23(1) (Reissue) PARA 528 et seq.

7    Ibid s 648A(2) (as added: see note 3 ante).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

### **724-726 Unauthorised payments ... Annuities; the charge under Schedule E**

Income and Corporation Taxes Act 1988 ss 647-648A repealed: Income Tax (Earnings and Pensions) Act 2003 Sch 6 para 96, Sch 8 Pt 1.

As to assessment and collection of tax charged on the administrator of a scheme within the meaning of the 1988 Act s 611AA (see PARA 747), see s 658A; and PARA 727A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(iv) The Charge to Tax/727. Return of contributions after pension date.

## **727. Return of contributions after pension date.**

Tax is to be charged on any payment to a person under approved<sup>1</sup> personal pension arrangements<sup>2</sup> of a lump sum satisfying the statutory conditions as to the return of contributions<sup>3</sup> in a case where the member's<sup>4</sup> death occurred after his pension date<sup>5</sup> in relation to the arrangement in question<sup>6</sup>. Where a payment is so chargeable to tax, the scheme administrator<sup>7</sup> is to be charged to income tax under Case VI of Schedule D<sup>8</sup>.

The tax is to be charged on the amount paid or, if the rules of the scheme permit the scheme administrator to deduct the tax before payment, on the amount before deduction of tax; and the amount so charged to tax must not be treated as income for any other purpose of the Tax Acts<sup>9</sup>.

1    Ie approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 726 et seq post.

2    For the meaning of 'personal pension arrangements' see PARA 692 note 6 ante.

3    Ie such a lump sum as is mentioned in the Income and Corporation Taxes Act 1988 s 637A (as added): see PARA 713 ante.

4    For the meaning of 'member' see PARA 713 note 7 ante.

5    For the meaning of 'pension date' see PARA 714 note 16 ante.

6    Income and Corporation Taxes Act 1988 s 648B(1) (s 648B added by the Finance Act 1995 s 58, Sch 11 paras 1, 12).

7    For the meaning of 'scheme administrator' see PARA 714 note 5 ante.

8    Income and Corporation Taxes Act 1988 s 648B(2) (as added: see note 6 supra). The rate of tax is 35% but the Treasury may by order from time to time increase or decrease that rate: s 648B(2), (3) (as so added). As to the charge to income tax under Case VI of Schedule D see INCOME TAXATION vol 23(1) (Reissue) PARA 560 et seq.

9    Ibid s 648B(4) (as added: see note 6 supra).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(v) Miscellaneous Provisions/728. Minimum contributions by the Secretary of State.

## **(v) Miscellaneous Provisions**

### **728. Minimum contributions by the Secretary of State.**

Where the Secretary of State<sup>1</sup> pays minimum contributions<sup>2</sup> for the purposes of approved<sup>3</sup> personal pension arrangements<sup>4</sup>, the amount of the employee's share<sup>5</sup> of those contributions is the grossed-up equivalent<sup>6</sup> of the amount provided for in the pensions legislation<sup>7</sup>.

The employee's share of minimum contributions paid for a year of assessment by the Secretary of State for the purposes of approved personal pension arrangements is treated for the purposes of income tax:

- 1684 (1) as the income for that year of the individual in respect of whom it is paid;  
and
- 1685 (2) as contributions paid in that year by that individual under those arrangements<sup>8</sup>.

The Board<sup>9</sup> may make regulations:

- 1686 (a) providing for the recovery by the Secretary of State from the Board, in such circumstances as may be prescribed by the regulations, of any increase attributable to these provisions in the sums paid by the Secretary of State out of the National Insurance Fund<sup>10</sup>;
- 1687 (b) requiring the Secretary of State to give the Board such information as may be so prescribed about minimum contributions paid by the Secretary of State<sup>11</sup>;
- 1688 (c) prescribing circumstances in which these provisions or any of them are not to apply;
- 1689 (d) making such provision as appears to the Board to be necessary or expedient for the purposes of supplementing these provisions<sup>12</sup>.

Any payment received by the Secretary of State by virtue of these provisions must be paid into the National Insurance Fund<sup>13</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 Ie under the Pension Schemes Act 1993 s 43 (as amended): see PARA 913 post.

3 Ie approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 729 et seq post.

4 For the meaning of 'personal pension arrangements' see PARA 692 note 6 ante.

5 'The employee's share' of minimum contributions is the amount that would be the minimum contributions if, for the reference in Pension Schemes Act 1993 s 45(1) (as substituted) (see PARA 915 post) to the appropriate age-related percentage, there were substituted a reference to the percentage mentioned in s 41(1A)(a) (as added) (see PARA 911 post): Income and Corporation Taxes Act 1988 s 649(2) (definition substituted by the Pensions Act 1995 s 151, Sch 5 para 12(1)).

6 'The grossed-up equivalent' of an amount is such sum as, after deduction of income tax at the basic rate in force for the year of assessment for which the contributions are paid, is equal to that amount: Income and Corporation Taxes Act 1988 s 649(2). For the meaning of 'year of assessment' see PARA 680 note 1 ante.

7 Ibid s 649(1) (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 20(3)).

8 Income and Corporation Taxes Act 1988 s 649(3).

9 For the meaning of 'the Board' see PARA 678 note 2 ante.

10 The Board must from time to time, and in amounts and at intervals agreed by the Board with the Secretary of State, advance moneys to the Secretary of State for the purpose of his recovering any such increase: see the Personal Pension Schemes (Minimum Contributions under the Social Security Act 1986) Regulations 1988, SI 1988/1012, reg 3. Those regulations have effect by virtue of the Interpretation Act 1978 s 17(2)(b). As to the National Insurance Fund see PARA 8 ante.

11 For the prescribed information see the Personal Pension Schemes (Minimum Contributions under the Social Security Act 1986) Regulations 1988, SI 1988/1012, regs 4, 5; and see also note 10 supra.

12 Income and Corporation Taxes Act 1988 s 649(4). At the date at which this volume states the law, no such regulations had been made; but see notes 10-11 supra.

13 Ibid s 649(5). The like provisions as are contained in the Taxes Management Act 1970 s 30 (as substituted and amended) (recovery of overpayment of tax, etc: see INCOME TAXATION vol 23(2) (Reissue) PARA 1807) apply in relation to the payment by the Secretary of State of an amount by way of minimum contributions which (1) he was not required to pay; or (2) he was required to pay but which he paid to other persons than the trustees or managers of the personal pension scheme to whom he should have made the payment, as if an amount representing income tax at the basic rate on the amount paid had been income tax repaid to the person to, or in respect of, whom the amount was paid to which that person was not entitled: Personal Pension Schemes (Minimum Contributions under the Social Security Act 1986) Regulations 1988, SI 1988/1012, reg 6(1); and see note 10 supra. An assessment made by virtue of this provision must be made by the Board and, subject to the 1988 Regulations, the like provisions as are contained in the Taxes Management Act 1970 apply as if the assessment were an assessment to tax for the year of assessment in respect of which the amount was paid: Personal Pension Schemes (Minimum Contributions under the Social Security Act 1986) Regulations 1988, SI 1988/1012, reg 6(2).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

### **728-729 Miscellaneous Provisions**

Rights under a personal pension scheme are not forfeited on bankruptcy: see the Pension Schemes Act 1993 s 159A; and PARA 729A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(v) Miscellaneous Provisions/729. Special provisions relating to remuneration of ministers etc.

## **729. Special provisions relating to remuneration of ministers etc.**

So much of any salary payable:

1690 (1) to the holder of a qualifying office<sup>1</sup> who is also a member of the House of Commons; and

1691 (2) for a period in respect of which the holder is not a participant in relation to that office in arrangements contained in the parliamentary pension scheme<sup>2</sup> but is a participant in relation to his membership of the House of Commons in any such arrangements, or for any part of such a period,

as is equal to the difference between a member's pensionable salary<sup>3</sup> and the salary which is payable to him as a member holding that qualifying office, is treated for the purposes of the statutory provisions relating to the taxation of personal pension schemes<sup>4</sup> as remuneration from the office of member and not from the qualifying office<sup>5</sup>.

1 'Qualifying office' means an office mentioned in the Parliamentary and other Pensions Act 1987 s 2(2)(b), (c) or (d) (see PARLIAMENT vol 78 (2010) PARA 926); Income and Corporation Taxes Act 1988 s 654(3).

2 As to the parliamentary pension scheme see PARLIAMENT vol 78 (2010) PARA 926 et seq.

3 'Member's pensionable salary' means a member's ordinary salary under any resolution of the House of Commons which, being framed otherwise than as an expression of opinion, is for the time being in force relating to the remuneration of members or, if the resolution provides for a member's ordinary salary thereunder to be treated for pension purposes as being at a higher rate, a notional yearly salary at that higher rate; and for these purposes, a 'member's ordinary salary', in relation to any resolution of the House of Commons, means (1) if the resolution provides for salary to be paid to members at different rates according to whether or not they are holders of particular offices or are in receipt of salaries or pensions as the holders or former holders of particular offices, a member's yearly salary at the higher or highest rate; and (2) in any other case, a member's yearly salary at the rate specified in or determined under the resolution: Income and Corporation Taxes Act 1988 s 654(3), (4).

4 Ie for the purposes of ibid Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 730-733 post.

5 See ibid s 654(1), (2). Regulations under the Parliamentary and other Pensions Act 1987 s 2 (as amended) may make provision specifying the circumstances in which a person is to be regarded for these purposes as being or not being a participant in relation to his membership of the House of Commons, or in relation to any office, in arrangements contained in the parliamentary pension scheme: Income and Corporation Taxes Act 1988 s 654(3). As to participating members and participating office holders in that scheme see PARLIAMENT vol 78 (2010) PARA 926.

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

**728-729 Miscellaneous Provisions**

Rights under a personal pension scheme are not forfeited on bankruptcy: see the Pension Schemes Act 1993 s 159A; and PARA 729A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(v) Miscellaneous Provisions/729A. No forfeiture on bankruptcy of rights under personal pension schemes.

**729A. No forfeiture on bankruptcy of rights under personal pension schemes.**

A person's rights under a personal pension scheme cannot be forfeited by reference to his bankruptcy<sup>1</sup>. For these purposes, (1) a person must be treated as having a right under a personal pension scheme where (a) he is entitled to a pension credit<sup>2</sup>; (b) he is so entitled as against the person responsible for the scheme<sup>3</sup>; and (c) the person so responsible has not discharged his liability in respect of the credit; and (2) forfeiture must be taken to include any manner of deprivation or suspension<sup>4</sup>.

<sup>1</sup> Pension Schemes Act 1993 s 159A(1) (s 159A added by the Welfare Reform and Pensions Act 1999 s 14(1)).

<sup>2</sup> *Ie* under *ibid* s 29(1)(b): see PARA 961A.3.

<sup>3</sup> *Ie* within the meaning of *ibid* Pt IV Ch I (ss 27-46): see PARA 961A.

<sup>4</sup> Pension Schemes Act 1993 s 159A(2) (s 159A as added: see NOTE 1; s 159A(2) amended by SI 2005/2053).

**UPDATE**

**710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

**728-729 Miscellaneous Provisions**

Rights under a personal pension scheme are not forfeited on bankruptcy: see the Pension Schemes Act 1993 s 159A; and PARA 729A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(vi) Withdrawal of Approval and Appeals/730. Withdrawal of approval.

## **(vi) Withdrawal of Approval and Appeals**

### **730. Withdrawal of approval.**

If in the opinion of the Board<sup>1</sup> the facts concerning an approved<sup>2</sup> personal pension scheme<sup>3</sup> or its administration or arrangements made in accordance with it do not warrant the continuance of the Board's approval of the scheme, the Board may at any time by notice given to the scheme administrator<sup>4</sup> withdraw its approval of the scheme<sup>5</sup>.

If in the opinion of the Board the facts concerning any approved personal pension arrangements<sup>6</sup> do not warrant the continuance of its approval in relation to the arrangements, the Board may at any time by notice given to the individual who made them and to the scheme administrator withdraw its approval in relation to the arrangements<sup>7</sup>; and without prejudice to the generality of this power, the Board may withdraw its approval in relation to any personal pension arrangements if of the opinion that securing the provision of benefits under the arrangements was not the sole purpose of the individual in making them<sup>8</sup>.

A notice withdrawing approval must state the grounds on which, and the date from which, approval is withdrawn<sup>9</sup> and the Board may not withdraw its approval from a date earlier than the date when the facts were first such that they did not warrant the continuance of the Board's approval, unless the Board is of the opinion that securing the provision of benefits under the arrangements was not the sole purpose of the individual in making them, in which case its approval may be withdrawn from the day the arrangements in question were made<sup>10</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 I.e. approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante, 731 et seq post.

3 For the meaning of 'personal pension scheme' see PARA 710 ante.

4 For the meaning of 'scheme administrator' see PARA 714 note 5 ante.

5 Income and Corporation Taxes Act 1988 s 650(1). The Board has a broad discretion when considering the withdrawal of approval: see *R v IRC, ex p Roux Waterside Inn Ltd* [1997] TLR 207, [1997] PLR 123.

6 For the meaning of 'personal pension arrangements' see PARA 692 note 6 ante.

7 Income and Corporation Taxes Act 1988 s 650(2).

8 Ibid s 650(3).

9 Ibid s 650(4).

10 Ibid s 650(5).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(vi) Withdrawal of Approval and Appeals/731. Appeals against refusal of, or withdrawal of, approval.

### **731. Appeals against refusal of, or withdrawal of, approval.**

Where the Board<sup>1</sup> refuses an application for approval<sup>2</sup> or withdraws an approval<sup>3</sup>, in either case by notice, the person to whom the notice is given may appeal to the Special Commissioners<sup>4</sup> against the refusal or, as the case may be, the withdrawal<sup>5</sup>. The appeal must be made by notice stating the grounds for the appeal and must be given to the Board before the end of the period of 30 days beginning with the day on which the notice of refusal or withdrawal was given to the appellant<sup>6</sup>.

On an appeal against the withdrawal of an approval, the Special Commissioners may, instead of allowing or dismissing the appeal, order that the withdrawal is to have effect from a date other than that determined by the Board<sup>7</sup>.

The bringing of an appeal does not affect the validity of the decision appealed against pending the determination of the proceedings<sup>8</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 Ie under the Income and Corporation Taxes Act 1988 s 631: see PARA 711 ante.

3 Ie under ibid s 650: see PARA 730 ante.

4 As to the Special Commissioners see INCOME TAXATION vol 23(1) (Reissue) PARAS 39-41.

5 Income and Corporation Taxes Act 1988 s 651(1).

6 Ibid s 651(2).

7 Ibid s 651(3).

8 Ibid s 651(4).

### **UPDATE**

#### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(vii) Information and Penalties/732. Information about payments.

## **(vii) Information and Penalties**

### **732. Information about payments.**

Any inspector of taxes may give a notice to a scheme administrator<sup>1</sup> requiring him to provide the inspector with:

- 1692 (1) such particulars as the notice may require relating to contributions paid under approved<sup>2</sup> personal pension arrangements<sup>3</sup> made in accordance with the scheme;
- 1693 (2) such particulars as the notice may require relating to payments by way of return of contributions;
- 1694 (3) copies of such accounts as the notice may require<sup>4</sup>.

A person to whom such a notice is given must comply with the notice within the period of 30 days beginning with the day on which it is given<sup>5</sup>.

1 For the meaning of 'scheme administrator' see PARA 714 note 5 ante.

2 Ie approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended): see PARA 711 et seq ante.

3 For the meaning of 'personal pension arrangements' see PARA 692 note 6 ante.

4 Income and Corporation Taxes Act 1988 ss 652(1), 832(1). As to the service of notice see the Taxes Management Act 1970 s 115 (as amended); and INCOME TAXATION vol 23(2) (Reissue) PARA 1831.

5 Income and Corporation Taxes Act 1988 s 652(2). As to the penalties for failure to comply, or for furnishing incorrect information, see the Taxes Management Act 1970 s 98 (as amended); and INCOME TAXATION vol 23(2) (Reissue) PARA 1711.

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(vii) Information and Penalties/733. Penalties.

### **733. Penalties.**

A person who knowingly makes a false statement or false representation on making an application for approval of a personal pension scheme<sup>1</sup> or for the purpose of obtaining for himself or any other person any relief from or repayment of tax in connection with such a scheme<sup>2</sup> is liable to a penalty not exceeding £3,000<sup>3</sup>.

1     Ie an application under the Income and Corporation Taxes Act 1988 s 631: see PARA 711 ante.

2     Ie any relief from or repayment of tax under *ibid* Pt XIV Ch IV (ss 630-655) (as amended): see PARA 710 et seq ante.

3     *Ibid* s 653 (amended by the Finance Act 1989 s 170(4)(b), (6)).

### **UPDATE**

#### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(1) PERSONAL PENSION SCHEMES/(vii) Information and Penalties/734. Restrictions on the advertisement of personal pension schemes.

### **734. Restrictions on the advertisement of personal pension schemes.**

Regulations<sup>1</sup> may be made relating to the form and content of advertisements and such other material as may be prescribed<sup>2</sup> issued by or on behalf of the trustees or managers of a personal pension scheme<sup>3</sup> for the purposes of the scheme<sup>4</sup>. For the purpose of the relevant regulations, 'advertisement' includes every form of advertising, whether in a publication, by the display of notices, signs, labels or showcards, by means of circulars, catalogues, price lists or other documents, by an exhibition of pictures or photographic or cinematographic films, by way of sound broadcasting or television, by the distribution of recordings, or in any other manner; and references to the issue of an advertisement are construed accordingly<sup>5</sup>.

Restrictions are placed on the advertisement of deposit-based schemes<sup>6</sup>. Any projection<sup>7</sup> contained in an advertisement for such a scheme must be prepared on a prescribed basis<sup>8</sup>, contain or be accompanied by a statement in the prescribed terms<sup>9</sup> and, in so far as it relates to contributions which will not give rise to protected rights under the scheme, must comply with other prescribed requirements<sup>10</sup>.

An off the page advertisement<sup>11</sup> for a deposit-based scheme must include the following information:

- 1695 (1) where contributions are payable periodically, whether there are any minimum or maximum amounts of such a contribution and, if so, what those amounts are;
- 1696 (2) how and where full details of the scheme may be obtained; and
- 1697 (3) other prescribed information<sup>12</sup>.

An advertisement for a deposit-based scheme must not, in respect of its design, format or content:

- 1698 (a) convey any information which is false or misleading;
- 1699 (b) contain any statement of fact which the issuer does not at the time the advertisement is issued have reasonable grounds for believing will continue to be true for so long as it remains relevant to the subject-matter of the advertisement;
- 1700 (c) make any comparison with any other personal pension scheme or occupational pension scheme<sup>13</sup> or the state earnings-related pension scheme<sup>14</sup> which is unfair or misleading;
- 1701 (d) make any statement about the past performance of the scheme unless it also contains a warning that such information is not necessarily a guide to future performance; or
- 1702 (e) contain, whether expressly or by implication, any statement to the effect that the advertisement has been approved by any government department or by the Occupational Pensions Board (now replaced by the Occupational Pensions Regulatory Authority)<sup>15</sup>.

Any person who issues or causes to be issued in Great Britain<sup>16</sup> an advertisement for a deposit-based scheme which he knows contravenes any of the statutory restrictions, or being reckless

as to whether there is such a contravention, is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>17</sup>.

- 1 For the meaning of 'regulations' see PARA 557 note 2 ante.
- 2 For the meaning of 'prescribed' see PARA 555 note 1 ante.
- 3 For the meaning of 'personal pension scheme' see PARA 710 ante.
- 4 Pension Schemes Act 1993 s 117. At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Interpretation Act 1978 s 17(2)(b), the Personal Pension Schemes (Advertisements) Regulations 1990, SI 1990/1140 (amended by SI 1994/1062) partly have effect as if so made.
- 5 Personal Pension Schemes (Advertisements) Regulations 1990, SI 1990/1140, reg 1(2).
- 6 See *ibid* reg 2.
- 7 'Projection' means an illustration of the amount of any future benefit payable under a deposit-based scheme, being benefit the amount of which is not ascertainable under the rules of the scheme when the calculation is made: *ibid* reg 1(2).
- 8 See *ibid* reg 3(2) (amended by SI 1994/1062).
- 9 The statement must be in the following terms: 'The figures quoted in this projection of future benefits are illustrations only. They do not represent the upper and lower limits of the amounts of the benefits. What is actually payable will depend on the future movement of market forces, which can go down as well as up, and the effect of charges applicable to the scheme. These illustrations should not be used as a basis for comparing similar contracts issued by other pension providers': Personal Pension Schemes (Advertisements) Regulations 1990, SI 1990/1140, reg 3(1).
- 10 See *ibid* reg 3(3).
- 11 'Off the page advertisement' means an advertisement which contains (1) an offer by a deposit-based scheme or the provider of it to admit to membership a person who responds to the advertisement; or (2) an invitation to a person to respond to the advertisement by making an offer to a deposit-based scheme or the provider of it to become a member of that scheme: *ibid* reg 1(2).
- 12 See *ibid* reg 4.
- 13 As to occupational pension schemes see PARA 741 et seq post.
- 14 As to the state earnings-related pension scheme see PARA 561 et seq ante.
- 15 See the Personal Pension Schemes (Advertisements) Regulations 1990, SI 1990/1140, reg 5. As to the Occupational Pensions Regulatory Authority see PARA 598 et seq ante.
- 16 For the meaning of 'Great Britain' see PARA 15 note 4 ante.
- 17 Personal Pension Schemes (Advertisements) Regulations 1990, SI 1990/1140, reg 6. As to the standard scale see PARA 172 note 3 ante.

## UPDATE

### 710-740 Personal Pension Schemes and Personal Equity Plans

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

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### **735. Disclosure of information.**

Special requirements<sup>1</sup> are imposed in relation to the disclosure of information about personal pension schemes<sup>2</sup>. The trustees or managers of a personal pension scheme are under an obligation to provide information in relation to the constitution of the scheme<sup>3</sup> to members and beneficiaries<sup>4</sup>. Basic information<sup>5</sup> about the scheme must be furnished as of course to every member of the scheme within 13 weeks of his becoming a member<sup>6</sup> and to members and beneficiaries on request as soon as practicable after it is requested, provided that the request is not made within three years of a similar request or within three years of the information having been furnished when that person became a member<sup>7</sup>.

Certain material alterations in the basic information must be notified to any member otherwise than an excluded person<sup>8</sup> who is otherwise entitled to it within one month of the occurrence of the alteration<sup>9</sup> and intended material alterations<sup>10</sup> must be so notified not less than three months before the alteration is intended to take effect<sup>11</sup>.

Information concerning:

- 1703 (1) the amount of contributions credited to the individual member under the scheme during the 12 months preceding a specified date<sup>12</sup>;
- 1704 (2) as at a specified date, the value of the member's protected rights under the scheme, and the value of his accrued rights, other than his protected rights<sup>13</sup>; and
- 1705 (3) the date of birth used for determining the appropriate age-related percentage<sup>14</sup> as disclosed to the trustees by the Secretary of State<sup>15</sup> and the name and address of the person to contact should that date of birth be incorrect<sup>16</sup>,

must be furnished as of course to each member of the scheme except an excluded person at least once in every period of 12 months after the date of his becoming a member of it<sup>17</sup>, and other prescribed information<sup>18</sup> must be made available to individuals in prescribed circumstances<sup>19</sup>. When any information is provided in accordance with this provision it must be accompanied by a written statement that further information about the scheme is available, giving the address to which inquiries about it should be sent<sup>20</sup>.

Where the trustees or managers of any scheme have not received a payment of contributions (other than minimum contributions<sup>21</sup>) by the date on or before which it was expected to be made, they must inform the member concerned in writing before the expiry of three months from that date, unless the payment is received by them within that period<sup>22</sup>.

A document or series of documents containing prescribed information relating to the financial performance of the scheme<sup>23</sup> must be made available to scheme members in relation to, and not more than one year after the end of, each scheme year<sup>24</sup>.

1 The rules are contained in the Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110 (as amended), which have effect, by virtue of the Interpretation Act 1978 s 17(2)(b), as if made under the Pension Schemes Act 1993 s 113. As to the Secretary of State's power to make regulations under s 113 see PARA 557 ante.

2 See the text and notes 3-24 infra. For the meaning of 'personal pension scheme' see PARA 710 ante. The disclosure requirements do not apply to a scheme comprised in an annuity contract or trust scheme which is

approved by the Board under the Income and Corporation Taxes Act 1988 s 619 (as amended) (see PARAS 680-685 ante) or s 621 (see PARAS 693-695): Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, reg 2; Interpretation Act 1978 s 17(2)(a). For the meaning of 'the Board' see PARA 678 note 2 ante.

3 The prescribed information is (1) the contents of the trust deed constituting the scheme, if it is constituted by such a deed, and of any document constituting the scheme, if it is not constituted by a trust deed (and, if the rules of the scheme are not set out in any trust deed or other document the contents of which so fall to be disclosed, the contents of the rules); and (2) the contents of any document which amends or supplements or wholly or partly supersedes a document the contents of which fall to be disclosed under these provisions: Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, reg 3(1). A copy of the contents of any of the documents of which disclosure is so required must be made available free of charge for inspection on request (not being a request made by a person within 12 months of the last occasion on which a copy of the contents of the same document was made available for inspection by the same person) by any member or beneficiary, within a reasonable time after the request is made, at a place which is reasonable having regard to the circumstances of the request (reg 3(2)); and a copy of any such document must be furnished, on request, on payment of a reasonable charge, to any such person, within a reasonable time after the request is made, so however that in the case of a document which is publicly available the trustees or managers of the scheme may, instead of furnishing a copy, advise the person who has requested it where copies may be obtained (reg 3(3)).

4 See *ibid* reg 3(1), (4).

5 The information specified in *ibid* reg 4(1), Sch 1 (as amended) as follows: (1) the address to which inquiries about the scheme generally, or about an individual's entitlement to benefit, should be sent; (2) the names and addresses of the trustees of the scheme; (3) the conditions of membership; (4) how and where copies of the contents of the documents (relating to the constitution of the scheme) of which disclosure is required by reg 3(1) may be purchased and inspected; (5) whether the scheme is an appropriate scheme and, if it is not, whether an application for the scheme to be certified as such a scheme is under consideration by the Secretary of State; (6) whether the scheme is approved by the Board either as a personal pension scheme under the Income and Corporation Taxes Act 1988 Pt XIV Ch 1 (ss 630-655) (as amended) (see PARA 711 *et seq* ante) or as a retirement benefits scheme under Pt XIV Ch 1 (ss 590-612) (as amended) (see PARA 747 *et seq* post) by reference to s 591(2)(h) (see PARA 751 head (8) post) and if not whether an application for such approval is under consideration by the Board; (7) how tax relief on members' contributions is effected; (8) how contributions by members and their employers and (if the scheme is an appropriate scheme) minimum contributions by the Secretary of State, are paid to the scheme; (9) a summary of the conditions of the scheme which govern how a member's accrued rights may be transferred, converted to an annuity or annuities, discharged by the making of payments under an interim arrangement, or commuted to a lump sum; (10) a summary of the scheme's investment policy; (11) illustrative estimates of the cash equivalents, clearly labelled as such and stating the period for which they will be honoured by the scheme, which would be paid on the transfer of protected rights to another scheme at the end of each of the first five years of membership, stating the assumptions made, and whether the same basis of calculation has been used for all members of the scheme, so however that, where a scheme is established by a person to whose business the Financial Services Act 1986 Pt I Ch V (ss 47-63C) (as amended) applies, those estimates may be prepared in accordance with rules made thereunder, and where a scheme is established by a person who is a member of a self-regulating organisation, which is organised for the purposes of Pt I Ch III (ss 7-34) (as amended), those estimates may be prepared in accordance with rules which are binding on that person as a member of that organisation; (12) the basis on which any part (a) of any payment or payments that are made to the scheme by or on behalf of a member; (b) of any income or capital gain arising from the investments of payments such as are mentioned in head (a) *supra*; or (c) of the value of rights under the scheme, may be used to defray the administrative expenses of the scheme, to pay commission; or in any other way which does not result in the provision of benefits for or in respect of members, so however that, where a scheme is established by a person to whose business Pt I Ch V (as amended) applies, the information required to be specified may be specified in accordance with rules made thereunder, and where a scheme is established by a person who is a member of a self-regulating organisation, which is recognised for the purposes of Pt I Ch III (as amended), the information required to be specified may be specified in accordance with rules which are binding on that person as a member of that organisation; (13) which of the benefits, if any, are such that fulfilment of the obligation to pay them, to or in respect of particular members, is guaranteed by means of one or more insurance policies which are specifically allocated to the provision of benefits payable to, or in respect of, those members; (14) the arrangements that have been made to enable the scheme to meet its obligations in respect of members' protected rights in the event of the scheme's resources proving insufficient to do so and the names and addresses of the persons with whom they have been so made; (15) the arrangements that would be made, in accordance with legislation, to enable the scheme to meet its obligations in respect of members' protected rights in the event of the scheme's resources, proving insufficient to do so and the names and addresses of the persons with whom they would be so made; (16) a statement that the Pensions Ombudsman appointed under the Pension Schemes Act 1993 s 145(2) (see PARA 663 *et seq* ante) may investigate and determine any complaint or dispute of fact or law in relation to an occupational pension scheme made or referred in accordance with that Act and the address at which he may be contacted; and (17) a statement that the

Occupational Pensions Advisory Service Ltd is available to assist members and beneficiaries of the scheme in connection with difficulties which they have failed to resolve with the trustees or administrators of the scheme and the address at which it may be contacted: Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, Sch 1 (amended by SI 1988/474; SI 1992/1531; SI 1994/1062; SI 1996/776; and SI 1997/786).

6 See the Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, reg 5(2).

7 See *ibid* reg 5(3). Where different information is applicable to different members and beneficiaries, nothing in this requirement is to be construed as requiring the trustees of the scheme to disclose information in relation to a member or beneficiary that is not relevant to his rights under the scheme: reg 5(4). 'Beneficiary', in relation to a personal pension scheme, means a person other than a member of the scheme who is entitled to payment of benefits under it: reg 1(2). Where the scheme is an appropriate scheme for the purposes of the Pension Schemes Act 1993 s 43 (as amended) (see PARA 913 post), spouses of members are also entitled to basic information: see the Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, reg 5(3).

8 'Excluded person' means a person whose present address is not known to the trustees or managers and in respect of whom correspondence sent by the trustees to his last known address has been returned, and no contribution has been made to the scheme during the two calendar years preceding the date on which the information in question would otherwise fall to be disclosed: *ibid* reg 1(2) (definition added by SI 1992/1531).

9 See the Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, reg 4(5) (reg 4(5), (6) amended by SI 1988/474; SI 1992/1531). The alterations concerned are alterations in the information specified in any of note 5 heads (1)-(4), (6) or (8) *supra*.

10 The intended alterations concerned are alterations in the information specified in any of note 5 heads (3), (7)-(9) or (12)-(15) *supra*.

11 See the Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, reg 4(6) (as amended: see note 9 *supra*). Where any intended material alteration in the specified information is consequential on events over which the trustees or managers of the scheme had no control, and it is not possible for them to comply with this requirement within the three-month period, they must comply as soon as reasonably practicable after the intention is formed to make the alteration: reg 4(7). When any information is provided in accordance with reg 4 (as so amended), it must be accompanied by a written statement that further information about the scheme is available, giving the address to which inquiries about it should be sent: reg 4(8).

12 See *ibid* reg 5(1), Sch 2 para 1 (as amended).

13 See *ibid* Sch 2 para 2.

14 *Ie* for the purposes of the Pension Schemes Act 1993 s 45(1) (as substituted): see PARA 915 post.

15 As to the Secretary of State see PARA 1 ante.

16 See the Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, Sch 2 para 12 (added by SI 1996/1435).

17 See the Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, reg 5(2) (amended by SI 1992/1531; SI 1996/1435).

18 *Ie* other information specified in the Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, Sch 2 (as amended).

19 See *ibid* reg 5(3)-(9) (as amended).

20 *Ibid* reg 5(10).

21 *Ie* made by the Secretary of State under the Pension Schemes Act 1993 s 43 (as amended): see PARA 913 post.

22 Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, reg 5A (added by SI 1995/3067).

23 The prescribed information is: (1) to the extent that any scheme is comprised in an arrangement for the issue of insurance policies (other than linked long-term insurance policies) or annuity contracts, a statement of the rates of bonus payment declared by the scheme in the scheme year to which the information relates ('the

year') and in each of the four scheme years (other than any throughout which the scheme did not exist) immediately preceding the year; (2) to the extent that any scheme is comprised in an arrangement for the issue of linked long-term insurance policies: (a) a statement which describes the property to which the scheme is linked, as at a specified date, according to the descriptions specified in the Insurance Companies Regulations 1994, SI 1994/1516, Sch 10 (as amended), and specifies the proportion of the scheme's resources invested, on that date, in property of each sum description; (b) a statement specifying any changes, since the end of the last scheme year (if any), of the descriptions mentioned in head (a) *supra*, of the property to which the scheme is linked; and (c) a statement of the returns on the investment of the scheme's resources during the year and during each of the four scheme years (other than any throughout which the scheme did not exist) immediately preceding the year; (3) in the case of any scheme which is comprised in an arrangement to invest the scheme's resources in an interest-bearing account or accounts, a statement of the rates of interest which have accrued to the resources so invested in the year and in each of the four scheme years (other than any throughout which the scheme did not exist) immediately preceding the year; (4) where investments are held by a unit trust scheme which may be an appropriate scheme, the information required to be specified in the annual and half-yearly reports by the Financial Services (Regulated Schemes) Regulations 1991 Sch 3 issued by the Securities and Investments Board and (a) a list of any investments which are held on a date specified in the information, being a date falling not earlier than 14 days before the day on which the information is furnished; (b) a list of investments which have been acquired during the period of six months which falls immediately before that date; and (c) a list of investments that have been disposed of within that period: see the Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, reg 6(1), Sch 3 (amended by SI 1992/1531; SI 1995/35).

24 See the Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, reg 6(2)-(5) (respectively amended and added by SI 1992/1531).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

### **735 Disclosure of information**

NOTE 2--The reference is now to a trust scheme which is to be treated as becoming a registered pension scheme under the Finance Act 2004 s 153(9) in accordance with Sch 36 para 1(1)(f): SI 1987/1110 reg 2 (amended by SI 2006/744).

TEXT AND NOTE 4--SI 1987/1110 reg 3(4) amended: SI 2005/2877.

NOTE 5--Now, head (6) whether the scheme is registered under the Finance Act 2004 s 153 (see PARA 873B.1): SI 1987/1110 reg 5A (substituted by SI 2006/744).

Head (11) substituted, head (12) amended: SI 2001/3649.

Heads (14), (15) now refer to protected rights: SI 1987/1110 Sch 1 (amended by SI 2000/2691, SI 2009/598).

NOTE 6--SI 1987/1110 reg 5(2) amended, reg 5(2A), (2B) added: SI 2002/1383.

NOTE 7--SI 1987/1110 reg 5(3), (4) amended: SI 2000/2691, SI 2009/598.

TEXT AND NOTES 12-19--Also, head (4) an illustration of the amount of the pension an entitlement to which would be likely to accrue to the member, or be capable of being secured by him, at his retirement date in respect of rights that may arise under the scheme: see SI 1987/1110 Sch 2 para 2A (added by SI 2002/1383 and amended by SI 2005/2877).

NOTES 12-19--As to the disclosure of information by the trustees of a stakeholder pension scheme (see PARA 873A) which is removed from the register of such schemes, see SI 1987/1110 reg 5(7A) (added by SI 2000/1403).

NOTE 12--SI 1987/1110 reg 5(1) amended: SI 2000/1403. SI 1987/1110 Sch 2 para 1 amended: SI 2006/744, SI 2007/814.

NOTE 17--In the case of a scheme which is a stakeholder pension scheme within the meaning of the Welfare Reform and Pensions Act 1999 s 1, SI 1987/1110 reg 5 has effect as if reg 5(2) were omitted: reg 2A (added by SI 2000/1403). For amendments to SI 1987/1110 reg 2A as it applies to registered pension schemes see SI 2006/744.

NOTE 18--SI 1987/1110 Sch 2 amended: SI 2000/2691, SI 2009/598.

NOTE 19--SI 1987/1110 reg 5(3), (4) amended: SI 2000/2691.

NOTE 22--SI 1987/1110 reg 5A revoked: SI 2000/2692.

NOTE 23--SI 1994/1516 revoked: SI 2001/3649. In head (4) for 'Financial Services ... Board' read 'Collective Investment Schemes Sourcebook Chapter 10 (reports and accounts) made by the Financial Services Authority under the Financial Services and Markets Act 2000 Part X': SI 1987/1110 Sch 3 (amended by SI 2002/1555, SI 2007/814).

NOTE 24--SI 1987/1110 reg 6(5) amended: SI 2002/1555.

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### **736. 'Blowing the whistle' in relation to appropriate schemes.**

If any person acting as an auditor or actuary of a personal pension scheme which is an appropriate scheme for the purposes of the contracting-out provisions<sup>1</sup> has reasonable cause to believe that:

- 1706 (1) any requirement which, in the case of the scheme, is required<sup>2</sup> to be satisfied is not satisfied; and
- 1707 (2) the failure to satisfy the requirement is likely to be of material significance in the exercise by the Secretary of State<sup>3</sup> of any of his functions relating to appropriate schemes,

that person must immediately give a written report of the matter to the Secretary of State<sup>4</sup>.

No duty to which a person acting as auditor or actuary of an appropriate scheme is subject must be regarded as contravened merely because of any information or opinion contained in a written report under this provision<sup>5</sup>.

1 For the meaning of 'appropriate scheme' see PARA 880 note 9 post. As to contracting out see PARA 877 et seq post.

2 le by the Pension Schemes Act 1993 s 9(5)(a): see PARA 882 post.

3 As to the Secretary of State see PARA 1 ante.

4 Pension Schemes Act 1993 s 33A(1) (s 33A added by the Pensions Act 1995 s 147).

5 Pension Schemes Act 1993 s 33A(2) (as added: see note 4 supra).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

### **736 'Blowing the whistle' in relation to appropriate schemes**

TEXT AND NOTES 3, 4--References to the Secretary of State are now to the Inland Revenue: 1993 Act s 33A(1) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 44).

TEXT AND NOTE 4--1993 Act s 33A(1) further amended: Pensions Act 2007 Sch 4 para 14 (in force on the abolition date: see s 15; and PARA 880). For savings see Sch 4 Pt 3.



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## **(viii) Annual Increase**

### **737. In general.**

The following provisions apply to any pension<sup>1</sup> provided to give effect to protected rights<sup>2</sup> of a member<sup>3</sup> of a personal pension scheme<sup>4</sup> if:

- 1708 (1) there is in force, or was in force at any time after the appointed day<sup>5</sup>, an appropriate scheme certificate<sup>6</sup>; and
- 1709 (2) apart from this provision, the annual rate<sup>7</sup> of the pension would not be increased each year by at least the appropriate percentage<sup>8</sup> of that rate<sup>9</sup>.

Where such a pension, or any part of it, is attributable to contributions in respect of employment<sup>10</sup> carried on on or after the appointed day:

- 1710 (a) the annual rate of the pension; or
- 1711 (b) if only part of the pension is attributable to contributions in respect of employment carried on on or after the appointed day, so much of the annual rate as is attributable to that part,

must be increased annually by at least the appropriate percentage<sup>11</sup>.

The first increase so required in the rate of a pension must take effect not later than the first anniversary of the date on which the pension is first paid; and subsequent increases must take effect at intervals of not more than 12 months<sup>12</sup>. Where the first such increase is to take effect on a date when the pension has been in payment for a period of less than 12 months, the increase must be of an amount at least equal to one-twelfth of the amount of the increase so required (apart from this provision) for each complete month in that period<sup>13</sup>.

1 For these purposes, 'pension', in relation to a scheme, means any pension in payment under the scheme and includes an annuity: Pensions Act 1995 s 163(3).

2 'Protected rights' has the meaning given by the Pension Schemes Act 1993 s 10 (as amended) (money purchase benefits: see PARA 883 post): Pensions Act 1995 s 163(3).

3 As to who is a member of a scheme see the Pension Schemes Act 1993 s 181(4); and see PARA 612 note 5 ante.

4 For the meaning of 'personal pension scheme' see *ibid* s 1; and PARA 710 ante (definition applied by the Pensions Act 1995 s 176).

5 'The appointed day' means the day appointed under *ibid* s 180 for the commencement of s 162 (ie 6 April 1997): s 163(3).

6 Ie issued in accordance with the Pension Schemes Act 1993 Pt III Ch I (ss 7-39) (as amended) (certification: see PARA 878 et seq post): Pensions Act 1995 s 162(1)(a).

7 'Annual rate', in relation to a pension, means the annual rate of the pension, as previously increased under the rules of the scheme or under *ibid* s 162: s 163(3).

8 'Appropriate percentage', in relation to an increase in the whole or part of the annual rate of a pension, means the revaluation percentage for the revaluation period the reference period for which ends with the last preceding 30 September before the increase is made (expressions used in this definition having the same meaning as in the Pension Schemes Act 1993 Sch 3 para 2 (methods of revaluing accrued pension benefits)) (see PARAS 942-944 post): Pensions Act 1995 s 163(3).

9 Ibid s 162(1)(b).

10 For the meaning of 'employment' see the Pension Schemes Act 1993 s 181(1); and see PARA 560 note 1 ante.

11 Pensions Act 1995 s 162(2).

12 Ibid s 163(1).

13 Ibid s 163(2).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

### **737 In general**

NOTE 8--Definition of 'appropriate percentage' amended: Pensions Act 2004 s 279(3).

TEXT AND NOTE 9--Pensions Act 1995 s 162(1)(b) now s 162(1)(b)-(d) (substituted by Pensions Act 2004 s 279(2)). Now, heads (2) the pension became a pension in payment before the commencement day; (3) the whole, or any part of, the pension is attributable to contributions in respect of employment carried on or after the appointed day; and (4) apart from the Pensions Act 1995 s 162 (a) the annual rate of the pension, or (b) if only part of the pension is attributable as described in head (3), so much of the annual rate as is attributable to that part, would not be increased each year by at least the appropriate percentage of that rate: s 162(1)(b)-(d). 'The commencement day' means the day appointed for the coming into force of the Pensions Act 2004 s 279 (ie 6 April 2005: see SI 2005/275): Pensions Act 1995 s 163(3) (amended by Pensions Act 2004 s 279(3)).

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## **(ix) Mis-selling of Personal Pensions**

### **738. Mis-selling of personal pension schemes.**

The sale and promotion of personal pension schemes is subject to the normal rules on investor protection<sup>1</sup>. The Securities and Investment Board has, however, issued specific guidance on the conduct of future pensions business<sup>2</sup> and on the identification of cases of mis-selling and remedies in relation to past business<sup>3</sup>. The guidance requires certain categories of investor to be compensated by the financial intermediary<sup>4</sup>.

Where a firm becomes aware of a case of serious and immediate harm or risk of harm attributable to its poor advice or mis-selling, it should be prepared to take immediate steps to mitigate that harm or risk, for example by relieving present hardship where liability is not contested<sup>5</sup>.

1 As to investor protection see generally the Financial Services Act 1986; and **FINANCIAL SERVICES**.

2 See *Pensions Transfers and Opt Outs: Further Safeguards for Future Business* (March 1994); and GR2 *Future Pension Transfers and Opt Outs: Model Guidance* (May 1994), both issued by the Securities and Investments Board. This guidance is not to be viewed as a source of criteria by which to judge past business; nor is it a compendious statement of best practice in relation to pension transfers and opt outs or a comprehensive statement of the principles, rules and other regulatory requirements applicable to such transfers and opt outs; and it should be read in conjunction with those requirements. Firms should supply a copy of the guidance to an investor who requests it: see GR2 *Future Pension Transfers and Opt Outs: Model Guidance* (May 1994) Annex para 2.

3 See GR3 *Past Pension Transfers and Opt Outs: Model Guidance on Priority Cases and Complaints* (May 1994); *Pension Transfers and Opt Outs: Review of Past Business* (October 1994), both issued by the Securities and Investments Board.

4 The guidance is lawful and within the powers of the Securities and Investments Board under the Financial Services Act 1986: see *R v Securities and Investments Board, ex p Independent Financial Advisers Association* [1995] 2 BCLC 76, [1995] PLR 123, DC. A claim which is commenced regarding mis-selling will not necessarily be struck out as an abuse of process simply because the defendant is complying with the requirements laid down by the regulator for compensating victims of mis-selling: see *Cocking v Prudential Assurance Co Ltd* [1996] TLR 31, [1996] PLR 235.

5 See GR3 *Past Pension Transfers and Opt Outs: Model Guidance on Priority Cases and Complaints* (May 1994) Annex para 3. New targets were set in May 1997: see 583 HL Official Report (5th series), 18 November 1997, col 481 et seq; 301 HC Official Report (6th series), 18 November 1997, col 155 et seq.

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see **PARA 873B**.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and **PARA 754A**.

### **738 Mis-selling of personal pension schemes**

TEXT AND NOTES--Where a pension company has professional indemnity insurance in the form of 'claims made' policies, the participation by investors in an investigation into the mis-selling or the acceptance by the investors of compensation will amount to a claim against the company for the purpose of the 'claims made' policies: *J Rothschild assurance plc v Collyear* (1998) Times, 15 October.

NOTES 1, 4--Financial Services Act 1986 repealed: SI 2001/3649. See now Financial Services and Markets Act 2000; and **FINANCIAL SERVICES AND INSTITUTIONS**.

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## **(2) PERSONAL EQUITY PLANS**

### **739. Power to make regulations providing for tax relief on personal equity plans.**

The Treasury may make regulations providing that an individual who invests under a personal equity plan is entitled to relief from income tax in respect of the investments<sup>1</sup>. The regulations must set out the conditions subject to which plans are to operate and the extent to which investors are to be entitled to relief from tax<sup>2</sup>; and particular, the regulations may:

- 1712 (1) specify the description of individuals who may invest and the kind of investments they may make<sup>3</sup>;
- 1713 (2) specify maximum investment limits and minimum periods for which investments are to be held<sup>4</sup>;
- 1714 (3) provide that investments are to be held by persons ('plan managers') on behalf of investors<sup>5</sup>;
- 1715 (4) specify how relief from tax is to be claimed by, and granted to, investors or plan managers on their behalf<sup>6</sup>;
- 1716 (5) provide that plans and plan managers must be such as are approved by the Board<sup>7</sup>;
- 1717 (6) specify the circumstances in which approval may be granted and withdrawn<sup>8</sup>;
- 1718 (7) provide for plans to be treated as being of different kinds, according to criteria set out in the regulations<sup>9</sup>;
- 1719 (8) provide that the Board may register a plan as being of a particular kind<sup>10</sup>;
- 1720 (9) make different provision as to different kinds of plan<sup>11</sup>;
- 1721 (10) provide for investment by an individual under more than one plan in the same year of assessment<sup>12</sup>.

The regulations may include provision:

- 1722 (a) that in prescribed circumstances<sup>13</sup> an investor under a plan must cease to be, and be treated as not having been, entitled to relief from tax in respect of the investments and he or the plan manager concerned (depending on the terms of the regulations) must account to the Board for tax from which relief has already been given on the basis that the investor was so entitled<sup>14</sup>;
- 1723 (b) that an investor under a plan or the plan manager concerned (depending on the terms of the regulations) must account to the Board for tax from which relief has been given in circumstances such that the investor was not entitled to it<sup>15</sup>;
- 1724 (c) adapting, or modifying the effect of, any enactment relating to income tax in order to secure that investors under plans are entitled to relief from tax in respect of investments, that investors under plans cease to be, and are treated as not having been, so entitled and that investors under plans or plan managers account for tax as mentioned in head (a) or head (b) above<sup>16</sup>;
- 1725 (d) that a person who is, or has at any time been, either an investor under a plan or a plan manager:

225. (i) must comply with any notice which is served on him by the Board and which requires him within a prescribed period to make available for the Board's inspection documents (of a prescribed kind) relating to a plan or to investments which are or have been held under it;
226. (ii) must, within a prescribed period of being required to do so by the Board, furnish to the Board information (of a prescribed kind) about a plan or about investments which are or have been held under it<sup>17</sup>;
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- 1726 (e) generally for the purpose of bringing plans into existence, and generally for the purpose of the administration of plans and the administration of income tax and corporation tax in relation to them<sup>18</sup>.

The Treasury may also make regulations providing that an individual who invests in a plan is entitled to relief from capital gains tax in respect of the investments<sup>19</sup> and for the purposes of such regulations, the above provisions apply with the substitution for any reference to income tax of a reference to capital gains tax<sup>20</sup>.

The existing tax regime for personal equity plans is due to be replaced in 1999 with a new regime for individual savings accounts<sup>21</sup>.

1 Income and Corporation Taxes Act 1988 s 333(1). A plan is a scheme of investment to which an individual who is a qualifying individual may subscribe and in respect of which the following conditions must be fulfilled: (1) that it is either a general plan or a single company plan; (2) that it is the only general plan, or as the case may be the only single company plan, to which the qualifying individual subscribes in any year; (3) that it is a plan to which only one qualifying individual subscribes; (4) that, subject to the Personal Equity Plan Regulations 1989, SI 1989/469, reg 4(2) (as substituted) and, in the case of a single company plan, to reg 4A(2) (as added), it is a plan to which the qualifying individual subscribes only by payment directly to the plan manager of a sum or sums of the individual's cash which do not in the aggregate exceed the subscription limit, or in the case of a single company plan one half of the subscription limit, in any year: reg 4(1) (amended by SI 1990/678; SI 1991/733; SI 1991/2774).

Subject to the conditions prescribed by the Personal Equity Plan Regulations 1989, SI 1989/469, reg 4(3) (as amended), a plan fulfils the condition in head (4) supra if the qualifying individual subscribes to it by transferring, or renouncing his rights to, any shares allotted or allocated to him in the circumstances specified in heads (a)-(c) infra to the plan manager or a nominee for the plan manager; and the specified circumstances are where: (a) in pursuance of a public offer, an application is made by the qualifying individual for the allotment or allocation to him of shares in a company which are qualifying investments for general plans or, as the case may be, qualifying investments for single company plans within the meaning of reg 6B(2) (as added), and shares are allotted or allocated to him in consequence of that application; or (b) in connection with the transfer of the whole of the business of a building society ('the society') to a company which has share capital ('the successor company') in accordance with the Building Societies Act 1986 s 97 and the other applicable provisions of that Act, shares in the successor company which satisfy the prescribed conditions in the Personal Equity Plan Regulations 1989, SI 1989/469, reg 4(2B) (as added) are allotted or allocated to the qualifying individual by virtue of his being at a relevant time a member of the society or an employee, former employee or pensioner of the society or of a company which is a wholly-owned subsidiary of the society (i) in priority to other persons; or (ii) for consideration of an amount or value lower than the market price of the shares; or (iii) free; or (c) in connection with the transfer of the whole or part of the business of a mutual insurance company ('the mutual') to a company which has share capital ('the acquiring company') under a scheme to which the Insurance Companies Act 1982 Sch 2C (as added) applies, or (on the assumption, where it is not in fact the case, that the mutual is carrying on business through a branch in the United Kingdom) would apply but for s 15(1A) (as added), shares in a company which is either the acquiring company or a company of which the acquiring company is a wholly-owned subsidiary, and which satisfy the prescribed conditions in the Personal Equity Plan Regulations 1989, SI 1989/469, reg 4(2B) (as added), are allotted or allocated to the qualifying individual by virtue of his being at a relevant time a member of the mutual or an employee, former employee or pensioner of the mutual or of a company which is a wholly-owned subsidiary of the mutual (i) in priority to other persons; or (ii) for consideration of an amount or value lower than the market price of the shares or (iii) free; reg 4(2), (2A) (respectively amended and added by SI 1990/678; amended by SI 1992/623; SI 1997/511). The prescribed conditions in the Personal Equity Plan Regulations 1989, SI 1989/469, reg 4(2B) (as added) are that the shares are qualifying investments for general plans or, as the case may be, single company plans, and have not been allocated or appropriated to the qualifying individual in accordance with the provisions of an approved share option scheme or an approved profit sharing scheme: see reg 4(2B) (added by SI 1997/511).

The conditions prescribed by the Personal Equity Plan Regulations 1989, SI 1989/469, reg 4(3) (as amended) are that the shares are transferred, or the rights to the shares are renounced, within 42 days of their allotment or allocation to the individual; that, in relation to shares referred to in head (a) supra, the shares were not allotted or allocated to the qualifying individual in the circumstances specified in reg 4(3A) (as added); that, in the case of a general plan, any sum payable on such an application as is referred to in head (a) supra, any sum payable for such an allotment or allocation as is referred to in head (b) supra, any sum payable for such an allotment or allocation as is referred to in head (c) supra and the individual's cash subscription to the plan do not together exceed the subscription limit in any year, or that, in the case of a single company plan, any such sums and the aggregate market value at the date of transfer of any shares transferred to the plan manager or his nominee in accordance with reg 4A(2) (as added) and the individual's cash subscription to the plan do not together exceed one half of the subscription limit in any year: reg 4(3) (amended by SI 1990/678; SI 1991/733; SI 1991/2774; SI 1996/1355; and SI 1997/511). The circumstances specified in the Personal Equity Plan Regulations 1989, SI 1989/469 reg 4(3A) (as added) are where: (A) the allotment or allocation of the shares was connected with the allotment or allocation of shares in the company of a different class, or rights to shares in the company of a different class, or shares or rights to shares in another company, or shares or rights to shares in an open-ended investment company or a part of an umbrella company, or units or rights to units in an authorised unit trust or a part of an umbrella scheme, or securities or rights to securities of the company or of another company, to that individual or to any other person; and (B) the terms on which the shares were offered were significantly more favourable to the qualifying individual than they would have been if their allotment or allocation had not been connected as described in head (A) supra: reg 4(3A) (added by SI 1996/1355).

2 Income and Corporation Taxes Act 1988 s 333(2). As to tax reliefs see the Personal Equity Plan Regulations 1989, SI 1989/469, regs 17, 18 (as amended).

3 Income and Corporation Taxes Act 1988 s 333(3)(a). The description of an individual who may invest under a plan (a 'qualifying individual') is an individual (1) who is 18 years of age or over; (2) who has not subscribed to any other general plan, or as the case may be any other single company plan, during the year for which he makes an application under the Personal Equity Plan Regulations 1989, SI 1989/469, reg 9 (as amended); and (3) who is resident and ordinarily resident in the United Kingdom, or who, though non-resident, performs duties which by virtue of the Income and Corporation Taxes Act 1988 s 132(4)(a) (Crown employees serving overseas) are treated as being performed in the United Kingdom: Personal Equity Plan Regulations 1989, SI 1989/469, reg 7 (amended by SI 1991/733; SI 1991/2774). As to qualifying investments see the Personal Equity Plan Regulations 1989, SI 1989/469, reg 6 (as amended); and for general investment rules see reg 5 (as amended). A plan investor who, after subscribing to a plan, at any time ceases to fulfil the conditions of head (3) supra, may retain the benefits of the plan (including the right to any relief or exemption due under the plan) subsisting at that time but, so long as he fails to fulfil those conditions, is not entitled to subscribe further to such a plan: reg 8.

4 Income and Corporation Taxes Act 1988 s 333(3)(b). The subscription limit is £6,000: Personal Equity Plan Regulations 1989, SI 1989/469, reg 4(4) (amended by SI 1990/678).

5 Income and Corporation Taxes Act 1988 s 333(3)(c). As to plan managers see further PARA 740 post; and see the Personal Equity Plan Regulations 1989, SI 1989/469, regs 11-16 (as amended). A plan must be managed in accordance with the Personal Equity Plan Regulations 1989, SI 1989/469, (as amended) by a plan manager and under terms agreed in writing between the plan manager and the plan investor: reg 4(5). Apart from other requirements of the 1989 Regulations, the terms agreed must include the following conditions: (1) that the plan investments must be in the beneficial ownership of the plan investor; (2) that the title to the plan investments must be vested in the plan manager or his nominee or jointly in one of them and the plan investor; (3) that, where a share certificate or other document evidencing title to a plan investment is issued, it must be held by the plan manager or as he may direct; (4) that the plan manager must, if the plan investor so elects, arrange for the plan investor to receive a copy of the annual report and accounts issued to investors by every company, unit trust, open-ended investment company or other entity in which he has plan investments; (5) that the plan manager must be under an obligation (subject to any provisions made under any other enactment and if the plan investor so elects) to arrange for the plan investor to be able (a) to attend any meetings of investors in companies, unit trusts, open-ended investment companies and other entities in which he has plan investments; (b) to vote; and (c) to receive, in addition to the documents referred to in head (4) supra, any other information issued to investors in such companies, unit trusts, open-ended investment companies and other entities; (6) that the plan manager must satisfy himself that any person to whom he delegates any of his functions or responsibilities under the terms agreed with the plan investor is competent to carry out those functions or responsibilities; (7) that at the request of the plan investor and within such time as must be agreed an entire plan with all rights and obligations of the parties to it may be transferred to another plan manager; (8) that the plan manager must notify the plan investor if by reason of any failure to satisfy the provisions of the 1989 Regulations a plan has or will become void: reg 4(6) (amended by SI 1997/1716).

6 Income and Corporation Taxes Act 1988 s 333(3)(d); and see the Personal Equity Plan Regulations 1989, SI 1989/469, regs 19-21 (as amended).

7 Income and Corporation Taxes Act 1988 s 333(3)(e); and see the Personal Equity Plan Regulations 1989, SI 1989/469, reg 3 (amended by SI 1990/678).

8 Income and Corporation Taxes Act 1988, s 333(3)(f). As to approval by the Board see the Personal Equity Plan Regulations 1989, SI 1989/469, reg 11 (as amended); as to withdrawal of the Board's approval see reg 12; and as to appeals against the withdrawal of approval see reg 13. For the meaning of 'the Board' see PARA 678 note 2 ante.

9 Income and Corporation Taxes Act 1988, s 333(3)(g) (s 333(3)(g)-(j) added by the Finance Act 1991 s 70). Special provisions apply in relation to single company plans: see the Personal Equity Plan Regulations 1989, SI 1989/469, reg 4A (as added and amended).

10 Income and Corporation Taxes Act 1988 s 333(3)(h) (as added: see note 9 supra).

11 Ibid s 333(3)(i) (as added: see note 9 supra).

12 Ibid s 333(3)(j) (as added: see note 9 supra). For the meaning of 'year of assessment' see PARA 680 note 1 ante.

13 'Prescribed' means prescribed by the regulations: *ibid* s 333(5). For the prescribed circumstances see the Personal Equity Plan Regulations 1989, SI 1989/469, reg 8; and note 3 supra.

14 Income and Corporation Taxes Act 1988 s 333(4)(a).

15 Ibid s 333(4)(b). Where any relief or exemption from tax given in respect of income or gains under a plan is found not to be due or to be excessive, or where the full amount of tax in respect of the income or gains under a plan has not otherwise been fully accounted for and paid to the Board by or on behalf of the plan investor, an assessment to tax may be made by the Board in the amount or further amount which in their opinion ought to be charged: Personal Equity Plan Regulations 1989, SI 1989/469, reg 22(1). Such an assessment may be made on the plan manager or on the plan investor: reg 22(2). If the assessment is made to recover tax in respect of income (including any amount in respect of a tax credit) under a plan it must be made under Case VI of Schedule D: reg 22(3). As to the charge to tax under Case VI of Schedule D see **INCOME TAXATION** vol 23(1) (Reissue) PARA 560 et seq.

16 Income and Corporation Taxes Act 1988 s 333(4)(c).

17 Ibid s 333(4)(d); and see the Personal Equity Plan Regulations 1989, SI 1989/469, regs 23-26 (as amended).

18 Income and Corporation Taxes Act 1988 s 333(4)(e); and see generally the Personal Equity Plan Regulations 1989, SI 1989/469 (as amended).

19 Taxation of Chargeable Gains Act 1992 s 151(1).

20 See *ibid* s 151(2); and see generally the Personal Equity Plan Regulations 1989, SI 1989/469 (as amended).

21 See 297 HC Official Report (6th series), 2 July 1997, col 306.

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

### **739-740 Personal Equity Plans**

Personal equity plans cease to be available on 6 April 1999: see PARA 739 NOTE 1.

### **739 Personal equity plans**

TEXT AND NOTES--Personal equity plans ceased to be available on 6 April 1999. SI 1989/469 further amended: SI 1998/1869, SI 2000/3109, SI 2001/923, SI 2001/3629, SI 2001/3777, SI 2006/1722.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/17. PERSONAL PENSION SCHEMES AND PERSONAL EQUITY PLANS/(2) PERSONAL EQUITY PLANS/740. Tax representatives.

#### **740. Tax representatives.**

Regulations<sup>1</sup> may include provision that a European institution<sup>2</sup> cannot be a plan manager<sup>3</sup> unless one of the following three requirements is fulfilled<sup>4</sup>. The first requirement is that:

- 1727 (1) a person who either is not an individual and has a business establishment in the United Kingdom<sup>5</sup>, or is an individual and is resident<sup>6</sup> in the United Kingdom, is for the time being appointed by the institution to be responsible for securing the discharge of prescribed duties<sup>7</sup> which fall to be discharged by the institution<sup>8</sup>; and  
 1728 (2) his identity and the fact of his appointment have been notified to the Board<sup>9</sup> by the institution<sup>10</sup>.

The second requirement is that there are for the time being other arrangements with the Board for a person other than the institution to secure the discharge of such duties<sup>11</sup> and the third requirement is that there are for the time being other arrangements with the Board designed to secure the discharge of such duties<sup>12</sup>. Different duties may be prescribed as regards different institutions or different descriptions of institution<sup>13</sup>.

The regulations may provide:

- 1729 (a) that the first requirement must not be treated as fulfilled unless the person concerned is of a prescribed description<sup>14</sup>;  
 1730 (b) that the appointment of a person in pursuance of that requirement must be treated as terminated in prescribed circumstances<sup>15</sup>;  
 1731 (c) that the second requirement must not be treated as fulfilled unless the person concerned is of a prescribed description<sup>16</sup>;  
 1732 (d) that arrangements made in pursuance of that requirement must be treated as terminated in prescribed circumstances<sup>17</sup>;  
 1733 (e) as regards a case where either in accordance with the first requirement a person is for the time being appointed to be responsible for securing the discharge of duties, or in accordance with the second requirement there are for the time being arrangements for a person to secure the discharge of duties, that the person concerned:  
 169 227. (i) must be entitled to act on the institution's behalf for any of the purposes of the provisions relating to the duties;  
 228. (ii) must secure (where appropriate by acting on the institution's behalf) the institution's compliance with and discharge of the duties;  
 229. (iii) must be personally liable in respect of any failure of the institution to comply with or discharge any such duty as if the duties imposed on the institution were imposed jointly and severally on the institution and the person concerned<sup>18</sup>.

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These provisions apply in the case of a person who is a relevant authorised person for the purposes of the Financial Services Act<sup>19</sup> as they apply in the case of a European institution<sup>20</sup>.

- 1 le under the Income and Corporation Taxes Act 1988 s 333 (as amended) or the Taxation of Chargeable Gains Act 1992 s 151 (as amended): see PARA 739 ante.
- 2 'European institution' has the same meaning as in the Banking Co-ordination (Second Council Directive) Regulations 1992, SI 1992/3218 (as amended): Income and Corporation Taxes Act 1988 s 333A(11) (s 333A added by the Finance Act 1995 s 64(1)).
- 3 For the meaning of 'plan manager' see PARA 739 head (3) ante.
- 4 Income and Corporation Taxes Act 1988 s 333A(1) (as added: see note 2 supra); and see the Taxation of Chargeable Gains Act 1992 s 151(2A) (added by the Finance Act 1995 s 64(2)).
- 5 For the meaning of 'United Kingdom' see PARA 15 note 4 ante.
- 6 As to residence for tax purposes see generally **INCOME TAXATION** vol 23(2) (Reissue) PARA 1260.
- 7 'Prescribed' means prescribed by the regulations: Income and Corporation Taxes Act 1988 s 333A(11) (as added: see note 2 supra). The prescribed duties are those that fall to be discharged by a plan manager under the Personal Equity Plan Regulations 1989, SI 1989/469 (as amended): see reg 11A(4) (added by SI 1995/3287).
- 8 Income and Corporation Taxes Act 1988 s 333A(2)(a), (5) (as added: see note 2 supra).
- 9 For the meaning of 'the Board' see PARA 678 note 2 ante.
- 10 Income and Corporation Taxes Act 1988 s 333A(2)(b) (as added: see note 2 supra).
- 11 Ibid s 333A(3) (as added: see note 2 supra).
- 12 Ibid s 333A(4) (as added: see note 2 supra).
- 13 Ibid s 333A(6) (as added: see note 2 supra).
- 14 Ibid s 333A(7)(a) (as added: see note 2 supra).
- 15 Ibid s 333A(7)(b) (as added: see note 2 supra).
- 16 Ibid s 333A(8)(a) (as added: see note 2 supra).
- 17 Ibid s 333A(8)(b) (as added: see note 2 supra).
- 18 Ibid s 333A(9), (10) (as added: see note 2 supra).
- 19 le by virtue of the Financial Services Act 1986 s 31.
- 20 Income and Corporation Taxes Act 1988 s 333A(12) (as added: see note 2 supra).

## **UPDATE**

### **710-740 Personal Pension Schemes and Personal Equity Plans**

Provisions of Income and Corporation Taxes Act 1988 replaced by legislation concerning registered pension schemes: see PARA 873B.

As to the effect of bankruptcy on any rights under a personal pension scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

### **739-740 Personal Equity Plans**

Personal equity plans cease to be available on 6 April 1999: see PARA 739 NOTE 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(1) GENERAL PRINCIPLES/741. Meaning of 'occupational pension scheme' and 'retirement benefits scheme'.

## **18. OCCUPATIONAL PENSION SCHEMES**

### **(1) GENERAL PRINCIPLES**

#### **741. Meaning of 'occupational pension scheme' and 'retirement benefits scheme'.**

For most statutory purposes, an occupational pension scheme means any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more descriptions or categories of employments<sup>1</sup> so as to provide benefits, in the form of pensions or otherwise, payable on termination of service, or on death or retirement, to or in respect of earners<sup>2</sup> with qualifying service in an employment of any such description or category<sup>3</sup>.

For the purposes of obtaining the approval<sup>4</sup> of the Board<sup>5</sup>, a retirement benefits scheme means a scheme for the provision of benefits consisting of or including relevant benefits<sup>6</sup> but does not include any national scheme providing such benefits<sup>7</sup>. References for those purposes to a scheme include references to a deed, agreement, series of agreements, or other arrangements providing for relevant benefits notwithstanding that it relates or they relate only to:

- 1734 (1) a small number of employees<sup>8</sup>, or a single employee, or
- 1735 (2) the payment of a pension starting immediately on the making of the arrangements<sup>9</sup>.

The Board may, if it thinks fit, treat a retirement benefits scheme relating to employees of two or more different classes or descriptions as being two or more separate retirement benefits schemes relating respectively to such one or more of those classes or descriptions of those employees as the Board thinks fit<sup>10</sup>; and for these purposes, employees may be regarded as belonging to different classes or descriptions if they are employed by different employers and a particular class or description of employee may consist of a single employee, or any number of employees, however small<sup>11</sup>.

1 For the meaning of 'employment' see PARA 560 note 5 ante.

2 For the meaning of 'earner' see PARA 32 ante (definition applied by the Pension Schemes Act 1993 s 181(1)).

3 Ibid s 1.

4 I.e. approval under the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended): see PARA 747 et seq post. For discussion of the practice on approval see John Hayward 'Sorry no Approval', Tax Journal, Issue 409, p 18 and 'The PSO Lays Down the Law', Tax Journal, Issue 425, p 19.

5 For the meaning of 'the Board' see PARA 678 note 2 ante.

6 'Relevant benefits' means any pension, lump sum, gratuity or other like benefit given or to be given on retirement or on death, or in anticipation of retirement, or, in connection with past service, after retirement or death, or to be given on or in anticipation of or in connection with any change in the nature of the service of the employee in question, except that it does not include any benefit which is to be afforded solely by reason of the disablement by accident of a person occurring during his service or of his death by accident so occurring and for no other reason: Income and Corporation Taxes Act 1988 s 612(1). See further PARA 747 et seq post.

7 Ibid s 611(1).

8 For these purposes, 'employee' (1) in relation to a company, includes any officer of the company, any director of the company and any other person taking part in the management of the affairs of the company; and (2) in relation to any employer, includes a person who is to be or has been an employee; and 'employer' and other cognate expressions are to be construed accordingly: *ibid* s 612(1). 'Director' in relation to a company includes: (a) in the case of a company the affairs of which are managed by a board of directors or similar body, a member of that board or body; (b) in the case of a company the affairs of which are managed by a single director or similar person, that director or person; (c) in the case of a company the affairs of which are managed by the members themselves, a member of that company; and includes a person who is to be or has been a director: s 612(1). For the meaning of 'company' see **INCOME TAXATION** vol 23(1) (Reissue) PARA 1.

9 *Ibid* s 611(2).

10 *Ibid* s 611(3).

11 *Ibid* s 611(4). For transitional provisions see s 611(5).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 741-746 General Principles

For provision as to consultation by employers in relation to occupational pension schemes see PARA 746A.

### 741 Meaning of 'occupational pension scheme' and 'retirement benefits scheme'

TEXT AND NOTES--As to the effect of bankruptcy on any rights under a retirement benefits scheme, see the Welfare Reform and Pensions Act 1999 s 11; and PARA 754A.

TEXT AND NOTES 1-3--'Occupational pension scheme' means a pension scheme (1) that (a) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or (b) for that purpose and also for the purpose of providing benefits to, or in respect of, other people, is established by, or by persons who include, a person to whom the Pension Schemes Act 1993 s 1(2) applies when the scheme is established or (as the case may be) to whom s 1(2) would have applied when the scheme was established had s 1(2) then been in force, and (2) that has its main administration in the United Kingdom or outside the member states, or a pension scheme that is prescribed or is of a prescribed description: s 1(1) (substituted by Pensions Act 2004 s 239(1)-(3)). Certain other pension schemes fall within heads (1), (2): see the Pension Scheme (Categories) Regulations 2005, SI 2005/2401 (amended by SI 2007/814).

The 1993 Act s 1(2) applies (i) where people in employments of the description concerned are employed by someone, to a person who employs such people, (ii) to a person in an employment of that description, and (iii) to a person representing interests of a description framed so as to include (A) interests of persons who employ people in employments of the description mentioned in head (i), or (B) interests of people in employments of that description: s 1(2) (added by the 2004 Act s 239(4)). For the purposes of the 1993 Act s 1(2), if a person is in an employment of the description concerned by reason of holding an office (including an elective office) and is entitled to remuneration for holding it, the person responsible for paying the remuneration will be taken to employ the office-holder: s 1(3) (as so added). In the definition in s 1(1) of 'occupational pension scheme', the reference to a description includes a description framed by reference to an employment being of any of two or more kinds: s 1(4). In s 1(1) 'pension scheme' (except in the phrases 'occupational pension scheme', 'personal pension scheme' and 'public service pension scheme') means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people on retirement, on having reached a particular age, or on termination of service in an employment: s 1(5).

See *Swansea City and County v Johnson* [1999] 1 All ER 863 (scheme for industrial injury allowances could amount to an occupational pension scheme).

NOTE 6--See *Barclays Bank plc v HMRC Comrs* [2007] EWCA Civ 442, (2007) 79 TC 1, [2008] STC 476 (compensation payments on termination of arrangement entitling former employees to free assistance in preparing tax returns constituted a relevant benefit).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(1) GENERAL PRINCIPLES/742. Applicability of the law of trusts.

## **742. Applicability of the law of trusts.**

In principle, occupational pension scheme trusts are subject to the normal law of trusts<sup>1</sup>.

<sup>1</sup> See generally **TRUSTS**; and see *Mihlenstedt v Barclays Bank International Ltd* [1989] IRLR 522, [1989] PLR 124, CA; *Stannard v Fisons Pension Trust Ltd* [1991] IRLR 27, [1991] PLR 225, CA; *Cowan v Scargill* [1985] Ch 270, [1984] 2 All ER 750; *Re Courage Group's Pension Schemes* [1987] 1 All ER 528, [1987] 1 WLR 495; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597, [1991] ICR 524.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **741-746 General Principles**

For provision as to consultation by employers in relation to occupational pension schemes see PARA 746A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(1) GENERAL PRINCIPLES/743. Construction of pension scheme documents.

### **743. Construction of pension scheme documents.**

No special rules of construction are applicable to pension scheme trusts; nevertheless the provisions of a pension scheme should wherever possible be construed to give reasonable and practical effect to the scheme. The approach of the court to construction should be practical and purposive rather than detached and literal. The background against which pension scheme documentation has to be construed includes four special factors:

- 1736 (1) the beneficiaries under a pension scheme are not volunteers; their rights have contractual and commercial origins and the benefits have been earned by the service of the members;
- 1737 (2) pension scheme documents have to be construed in light of the requirements of the Inland Revenue from time to time for their approval of the scheme under statutory requirements<sup>1</sup>;
- 1738 (3) common practice from time to time in the field of pensions generally; and
- 1739 (4) temporary and imprecise documents which have been brought into existence as a result of the practice of the Inland Revenue and the Occupational Pensions Regulatory Authority<sup>2</sup> should not be construed strictly so as to undermine their purpose<sup>3</sup>.

1 As to approval see PARA 747 et seq post.

2 As to the Occupational Pensions Regulatory Authority see PARA 598 et seq ante.

3 See *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587; see also *Mihlenstedt v Barclays Bank International Ltd* [1989] IRLR 522, [1989] PLR 124, CA; *Stannard v Fisons Pension Trust Ltd* [1991] IRLR 27, [1991] PLR 225, CA; *Re Courage Group's Pension Schemes* [1987] 1 All ER 528, [1987] 1 WLR 495; *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597, [1991] ICR 524.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **741-746 General Principles**

For provision as to consultation by employers in relation to occupational pension schemes see PARA 746A.

### **743 Construction of pension scheme documents**

NOTES--When considering a employee's eligibility for an early retirement pension on the grounds of ill health, an employer ought to consider only whether that employee is prevented by ill health from continuing in his current position: *Derby Daily Telegraph Ltd v Pensions Ombudsman* (1999) Times, May 12. See also *AGCO Ltd v Massey Ferguson Works Pension Trust Ltd* [2003] EWCA Civ 1044, [2004] ICR 15 (member taking voluntary redundancy; eligibility for early retirement under scheme); and *MNOPF Trustees Ltd v F T Everard & Sons Ltd* [2005] EWHC 446 (Ch), (2005) 7 ITEL 687.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(1) GENERAL PRINCIPLES/744. Membership to be voluntary.

#### **744. Membership to be voluntary.**

Subject to prescribed exceptions, membership of an occupational pension scheme is to be voluntary and any term of a contract of service<sup>1</sup> purporting to make membership of a particular scheme compulsory is void<sup>2</sup>. Any term of a contract of service or any rule of an occupational pension scheme to the effect that an employed earner<sup>3</sup> must be a member of a particular occupational pension scheme or one or other of a number of particular occupational pension schemes, is not, however, void<sup>4</sup> during any period when that scheme is, or those schemes are, so framed that in relation to that period:

- 1740 (1) the earner in question is not required to pay contributions to the scheme;  
and
- 1741 (2) the scheme will provide benefit in respect of that earner only on his death<sup>5</sup>.

Similarly, there is no legal obligation on an employer to make pension arrangements<sup>6</sup>.

<sup>1</sup> For the meaning of 'contract of service' see PARA 32 note 4 ante (definition applied by the Pension Schemes Act 1993 s 181(1)).

<sup>2</sup> See the Pension Schemes Act 1993 s 160; and PARA 559 ante.

<sup>3</sup> For the meaning of 'employed earner' see PARA 32 ante (definition as applied: see note 1 supra).

<sup>4</sup> Ie the Pension Schemes Act 1993 s 160 does not apply.

<sup>5</sup> Pension Schemes (Voluntary Contributions Requirements and Voluntary and Compulsory Membership) Regulations 1987, SI 1987/1108, reg 3 (amended by SI 1994/1062).

<sup>6</sup> *Adams v Lancashire County Council and BET Catering Services Ltd* [1997] IRLR 436, [1997] PLR 153. See also the Pension Schemes Act 1993 s 160(2); and PARA 559 ante.

### **UPDATE**

#### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

#### **741-746 General Principles**

For provision as to consultation by employers in relation to occupational pension schemes see PARA 746A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(1) GENERAL PRINCIPLES/745. Restrictions on employer when exercising its powers under a pension scheme.

#### **745. Restrictions on employer when exercising its powers under a pension scheme.**

A pension scheme is established against the background of employment and will be determined against that background. In every contract of employment there is an implied term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee<sup>1</sup>. This obligation applies to the exercise of an employer's rights and powers under a pension scheme. A pension trust deed and rules are impliedly subject to the limitation that the rights and powers of the employer can only be exercised in accordance with the implied obligation of good faith<sup>2</sup>.

1 For the implied terms in a contract of employment generally see **EMPLOYMENT** vol 39 (2009) PARA 90.

2 *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597, [1991] ICR 524.

### **UPDATE**

#### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

#### **741-746 General Principles**

For provision as to consultation by employers in relation to occupational pension schemes see PARA 746A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(1) GENERAL PRINCIPLES/746. Obligation on an employer to inform an employee of pension benefit.

#### **746. Obligation on an employer to inform an employee of pension benefit.**

In certain circumstances the court may imply a term into the contract of employment<sup>1</sup> that the employer is under a duty to bring to the attention of an employee the existence of a valuable right in relation to his pension entitlements which is contingent on some action by the employee<sup>2</sup>. There are also statutory obligations to provide specified information<sup>3</sup>.

1 For implied terms in a contract of employment see **EMPLOYMENT** vol 39 (2009) PARA 90.

2 See *Scully v Southern Health and Social Services Board (British Medical Association, third party)* [1992] 1 AC 294, [1991] 4 All ER 563, HL. Such a term may be implied where the terms of the contract are negotiated with a representative body and are incorporated by reference in circumstances where the employee cannot reasonably be expected to know of the term unless it is drawn to his attention. There is no fiduciary obligation on a pension fund trustee to inform a member of his rights in relation to the scheme: see *Hamar v Pensions Ombudsman* [1996] PLR 1. However, where information is provided regarding the scheme by either the employer or the trustees it may give rise to a contractual obligation or an estoppel: see *Dorrell v May & Baker Ltd* [1991] PLR 31; *Icarus (Hertford) Ltd v Driscoll* [1990] PLR 1; *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587; *ITN v Ward* [1997] PLR 131.

3 See PARAS 767-768, 800 post.

### **UPDATE**

#### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

#### **741-746 General Principles**

For provision as to consultation by employers in relation to occupational pension schemes see PARA 746A.

#### **746 Obligation on an employer to inform an employee of pension benefit**

NOTE 1--See *University of Nottingham v Eyett* (No 1) [1999] 2 All ER 437 (employer's implied duty of good faith does not include a positive obligation to advise an employee

that the manner in which he intends to exercise his pension rights under pension scheme might not be to his best advantage).

NOTE 2--See *Outram v Academy Plastics Ltd* [2001] ICR 367, CA (employer who is also trustee of employer's pension scheme owes employee no duty of care in tort to give information or advice in respect of scheme membership); *Marlow v East Thames Housing Group Ltd* [2002] IRLR 798 (not part of employer's implied duty of trust and confidence to inform employee how to join a pension scheme where employee fully aware of his failure to become a member).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(1) GENERAL PRINCIPLES/746A. Consultation by employers: occupational pension schemes.

#### **746A. Consultation by employers: occupational pension schemes.**

Regulations may require any prescribed<sup>1</sup> person who is the employer<sup>2</sup> in relation to an occupational pension scheme<sup>3</sup> and who (1) proposes to make a prescribed decision in relation to the scheme, or (2) has been notified by the trustees or managers<sup>4</sup> of the scheme that they propose to make a prescribed decision in relation to the scheme, to consult prescribed persons in the prescribed manner before the decision is made<sup>5</sup>. Regulations may require the trustees or managers of an occupational pension scheme not to make a prescribed decision in relation to the scheme unless (a) they have notified the employer of the proposed decision, and (b) they are satisfied that the employer has undertaken any consultation<sup>6</sup>. The validity of any decision made in relation to an occupational pension scheme is not affected by any failure to comply with regulations under the above provisions<sup>7</sup>.

Further provision about regulations relating to consultation under the above provisions is made<sup>8</sup>.

1 For the meaning of 'prescribed' see PARA 636A.3.

2 For the meaning of 'employer' see PARA 636A.15.

3 For the meaning of 'occupational pension scheme' see PARA 636A.3.

4 For the meaning of 'managers' see PARA 636A.11.

5 Pensions Act 2004 s 259(1). As to the service of notifications and electronic working under the Pensions Act 2004 see ss 303-305. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). As to the modification of the powers under Pensions Act 2004 s 259 in relation to multi-employer schemes see the Occupational Pension Schemes (Consultation by Employers) (Modification for Multi-employer Schemes) Regulations 2006, SI 2006/16.

6 Required by the 2004 Act s 259(1): s 259(2).

7 Ibid s 259(3).

8 See ibid ss 259(4), 261.

#### **UPDATE**

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The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(2) APPROVAL AND TREATMENT FOR INCOME TAX PURPOSES/(i) Application for, and Granting of, Approval/747. Application for approval of a retirement benefits scheme.

## **(2) APPROVAL AND TREATMENT FOR INCOME TAX PURPOSES**

### **(i) Application for, and Granting of, Approval**

#### **747. Application for approval of a retirement benefits scheme.**

An application for the approval<sup>1</sup> of any retirement benefits scheme<sup>2</sup> must be made in writing by the administrator<sup>3</sup> of the scheme to the Board<sup>4</sup> before the end of the first year of assessment<sup>5</sup> for which approval is required, and must be accompanied by:

- 1742 (1) two copies of the instrument or other document constituting the scheme<sup>6</sup>; and
- 1743 (2) two copies of the rules of the scheme and, except where the application is being sought on the setting up of the scheme, two copies of the accounts of the scheme for the last year for which such accounts have been made up<sup>7</sup>; and
- 1744 (3) such other information and particulars including copies of any actuarial report or advice given to the administrator or employer<sup>8</sup> in connection with the setting up of the scheme as the Board may consider relevant<sup>9</sup>.

The form in which an application for approval is to be made, or in which any information is to be given, may be prescribed by the Board<sup>10</sup>.

A provision, however expressed, designed to preclude any amendment of a scheme which would have prejudiced its approval under previous legislation<sup>11</sup> does not prevent any amendment of a retirement benefits scheme proposed in connection with an application for the Board's approval which is needed in order to ensure that approval is so given, or designed to enhance the benefits under the scheme up to the limits suitable in a scheme for which approval is sought<sup>12</sup>. In the case of a scheme which contains no powers of amendment, the administrator of the scheme may, with the consent of all the members of the scheme, and of the employer (or of each of the employers), make any such proposed amendment<sup>13</sup>.

1    le an application for approval under the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended): see PARA 748 et seq post.

2    For the meaning of 'retirement benefits scheme' see PARA 741 ante.

3    For these purposes, references to the administrator, in relation to a retirement benefits scheme, are to the person who is, or the persons who are, for the time being the administrator of the scheme by virtue of the following provisions: Income and Corporation Taxes Act 1988 s 611AA(1) (s 611AA added by the Finance Act 1994 s 103(1)). Where the scheme is a trust scheme, and at any time the trustee, or any of the trustees, is or are resident in the United Kingdom, the administrator of the scheme at that time is the trustee or trustees of the scheme: Income and Corporation Taxes Act 1988 s 611AA(2) (as so added). Where the scheme is a non-trust scheme, and at any time the scheme sponsor, or any of the scheme sponsors, is or are resident in the United Kingdom, the administrator of the scheme at that time is the scheme sponsor or scheme sponsors: s 611AA(3) (as so added). At any time when the trustee of a trust scheme is not resident in the United Kingdom or (if there is more than one trustee) none of the trustees is so resident, the trustee or trustees must ensure that there is a person, or there are persons resident in the United Kingdom, and appointed by the trustee or trustees to be responsible for the discharge of all duties relating to the scheme which are imposed on the administrator under Pt XIV Ch I (as amended): s 611AA(4) (as so added). For the meaning of 'United Kingdom'

see PARA 15 note 4 ante; and as to residence for tax purposes see generally **INCOME TAXATION** vol 23(2) (Reissue) PARA 1260.

At any time when the scheme sponsor of a non-trust scheme is not resident in the United Kingdom or (if there is more than one scheme sponsor) none of the scheme sponsors is so resident, the scheme sponsor or scheme sponsors must ensure that there is a person, or there are persons resident in the United Kingdom and appointed by the scheme sponsor or scheme sponsors to be responsible for the discharge of all duties relating to the scheme which are imposed on the administrator under Pt XIV Ch I (as amended): s 611AA(5) (as so added). Without prejudice to s 611AA(4), (5) (as so added), the trustee or trustees of a trust scheme, or the scheme sponsor or scheme sponsors of a non-trust scheme, may at any time appoint a person who is, or persons who are, resident in the United Kingdom to be responsible for the discharge of all duties relating to the scheme which are so imposed: s 611AA(6) (as so added).

Where at any time there is or are a person or persons for the time being appointed under s 611AA(4), (5) or (6) (as so added) as regards a scheme, and resident in the United Kingdom, the administrator of the scheme at that time is that person or those persons (and no other person): s 611AA(7) (as so added). Any appointment under s 611AA(4), (5) or (6) (as so added) must be in writing, and, if made after the time when the scheme is established, constitutes an alteration of the scheme for the purposes of s 591B(2) (as added) (see PARA 752 post): s 611AA(8) (as so added). For the purposes of s 611AA (as so added), references to a trust scheme are to a retirement benefits scheme established under a trust or trusts; references to the trustee or trustees, in relation to a trust scheme and to a particular time, are to the person who is the trustee, or the persons who are the trustees, of the scheme at that time; references to a non-trust scheme are to a retirement benefits scheme not established under a trust or trusts, and references to the scheme sponsor or scheme sponsors, in relation to a retirement benefits scheme and to a particular time, are references to any person who established the scheme and is in existence at that time or, if more than one, all such persons: s 611AA(9) (as so added).

- 4 For the meaning of 'the Board' see PARA 678 note 2 ante.
- 5 For the meaning of 'year of assessment' see PARA 680 note 1 ante.
- 6 Income and Corporation Taxes Act 1988 s 604(1)(a).
- 7 Ibid s 604(1)(b).
- 8 For the meaning of 'employer' see PARA 741 note 8 ante.
- 9 Income and Corporation Taxes Act 1988 s 604(1)(c).
- 10 Ibid s 604(2).
- 11 Ie under the Income and Corporation Taxes Act 1970 ss 208 or 222 (both repealed).
- 12 See the Income and Corporation Taxes Act 1988 s 610(1), (2).
- 13 Ibid s 610(3). As to amendment of a scheme see further PARA 832 et seq post.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

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The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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#### **748. Conditions for approval of retirement benefit schemes.**

Unless all the statutory conditions for approval are satisfied, the Board<sup>1</sup> must not approve<sup>2</sup> any retirement benefits scheme<sup>3</sup>, although discretionary approval may be granted in certain circumstances notwithstanding that all those conditions are not satisfied<sup>4</sup>. The statutory conditions are that:

- 1745 (1) the scheme is bona fide established for the sole purpose of providing relevant benefits<sup>5</sup> in respect of service as an employee<sup>6</sup>, being benefits payable to, or to the widow, widower, children or dependants or personal representatives of, the employee<sup>7</sup>;
- 1746 (2) the scheme is recognised by the employer<sup>8</sup> and employees to whom it relates, and every employee who is, or has a right to be, a member of the scheme has been given written particulars of all essential features of the scheme which concern him<sup>9</sup>;
- 1747 (3) there is a person resident in the United Kingdom<sup>10</sup> who will be responsible for the discharge of all duties imposed<sup>11</sup> on the administrator<sup>12</sup> of the scheme under the relevant legislation<sup>13</sup>;
- 1748 (4) the employer is a contributor to the scheme<sup>14</sup>;
- 1749 (5) the scheme is established in connection with some trade<sup>15</sup> or undertaking carried on in the United Kingdom by a person resident in the United Kingdom<sup>16</sup>;
- 1750 (6) in no circumstances, whether during the subsistence of the scheme or later, can any amount be paid by way of repayment of an employee's contributions under the scheme<sup>17</sup>.

The conditions set out in heads (1) to (6) above, and the conditions relating to relevant benefits<sup>18</sup>, are referred to as 'the prescribed conditions'<sup>19</sup>.

If it thinks fit, the Board may, subject to such conditions as it thinks proper to attach to the approval, approve a pilots' benefit fund<sup>20</sup> for these purposes as if it were a retirement benefits scheme and notwithstanding that it does not satisfy one or more of the prescribed conditions<sup>21</sup>.

Transitional provision is made in respect of (a) superannuation funds approved before 6 April 1980<sup>22</sup>; and (b) schemes approved before 23 July 1987<sup>23</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 I.e. under the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended); see PARAS 747 ante, 749 et seq post.

3 Ibid s 590(1). For the meaning of 'retirement benefits scheme' see PARA 741 ante.

4 As to discretionary approval see PARA 751 post.

5 For the meaning of 'relevant benefits' see PARA 741 note 6 ante.

6 For the meaning of 'employee' see PARA 741 note 8 ante.

7 Income and Corporation Taxes Act 1988 s 590(2)(a) (amended by the Finance Act 1988 s 35, Sch 3 para 18). For the meaning of 'child' see **INCOME TAXATION** vol 23(1) (Reissue) PARA 556.

- 8 For the meaning of 'employer' see PARA 741 note 8 ante.
- 9 Income and Corporation Taxes Act 1988 s 590(2)(b).
- 10 For the meaning of 'United Kingdom' see PARA 15 note 4 ante.
- 11 le imposed by the Income and Corporation Taxes Act 1988 Pt XIV Ch I (as amended): see PARAS 747 ante, 749 et seq post.
- 12 For the meaning of 'administrator' see PARA 747 note 3 ante.
- 13 Income and Corporation Taxes Act 1988 s 590(2)(c).
- 14 Ibid s 590(2)(d).
- 15 As to the meaning of 'trade' see **INCOME TAXATION** vol 23(1) (Reissue) PARA 105.
- 16 Income and Corporation Taxes Act 1988 s 590(2)(e).
- 17 Ibid s 590(2)(f).
- 18 le the conditions set out in ibid s 590(3) (as amended): see PARA 749 post.
- 19 Ibid s 590(4). Where the Board is considering whether a retirement benefits scheme satisfies or continues to satisfy the prescribed conditions, then for the purposes of determining whether the scheme, so far as it relates to a particular class or description of employees, satisfies or continues to satisfy those conditions, that scheme must be considered in conjunction with (1) any other retirement benefits scheme or schemes which relates or relate to employees of that class or description and which is or are approved for these purposes; (2) any other retirement benefits scheme or schemes which relates or relate to employees of that class or description and which is or are at the same time before the Board in order for it to decide whether to give approval for these purposes; (3) any fund to which s 608 (see the text to note 22 infra) applies relating to employees of that class or description; and (4) any relevant statutory scheme or schemes relating to employees of that class or description: see s 590(7), (8), (11) (respectively substituted and added by the Finance Act 1989 s 75, Sch 6 paras 1, 3(4), 18(3)). If those conditions are satisfied in the case of both or all of those schemes taken together, they must be taken to be satisfied in the case of the retirement benefits scheme being considered by the Board, as well as the other scheme or schemes; and if they are not so satisfied, they are not to be taken to be satisfied in the case of that scheme: Income and Corporation Taxes Act 1988 s 590(9), (10) (as so added).
- 20 'Pilots' benefit fund' means a fund established under the Pilotage Act 1983 s 15(1)(i) (repealed) or any scheme supplementing or replacing any such fund: Income and Corporation Taxes Act 1988 s 607(4).
- 21 Ibid s 607(1). If a fund is so approved, ss 592, 597-600, 604-606 (as amended) have effect in relation to the fund with specified modifications (see s 607(3) (amended by the Finance Act 1994 s 104(2), (3)); and Pt XIV Ch III (ss 618-629) (as amended) (see PARA 677 et seq ante) has effect as if a member of the fund were the holder of a pensionable office or employment and his earnings as a pilot (estimated in accordance with the provisions of Case II of Schedule D) were remuneration from such an office or employment: s 607(2)(a), (c), (3). As to the charge to tax under Case II of Schedule D see **INCOME TAXATION** vol 23(1) (Reissue) PARA 134 et seq. For these purposes, 'remuneration' does not include (1) anything in respect of which tax is chargeable under Schedule E and which arises from the acquisition or disposal of shares or an interest in shares or from a right to acquire shares; or (2) anything in respect of which tax is chargeable by virtue of s 148 (payment on removal from office etc: see **INCOME TAXATION** vol 23(1) (Reissue) PARA 688): s 612(1).
- 22 See ibid s 608.
- 23 See ibid s 609, Sch 23 (amended by the Finance Act 1988 s 56; the Finance Act 1989 ss 75, 187(1), Sch 6 paras 1, 17, 18(1), Sch 17 Pt IV); and see also the Occupational Pension Schemes (Transitional Provisions) Regulations 1988, SI 1988/1436 (as amended).

## UPDATE

### 741-873 Occupational Pension Schemes

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The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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#### **749. Prescribed conditions with respect to relevant benefits.**

The Board<sup>1</sup> must approve<sup>2</sup> a retirement benefits scheme<sup>3</sup> if the scheme satisfies the general statutory conditions for approval<sup>4</sup> and also satisfies the following prescribed conditions<sup>5</sup>:

- 1751 (1) that any benefit for an employee<sup>6</sup> is a pension on retirement at a specified age not earlier than 60 and not later than 75<sup>7</sup>, which does not exceed one-sixtieth of the employee's final remuneration for each year of service up to a maximum of 40<sup>8</sup>;
- 1752 (2) that any benefit for any widow or widower of an employee is a pension payable on his death after retirement such that the amount payable to the widow or widower by way of pension does not exceed two-thirds of any pension or pensions payable to the employee<sup>9</sup>;
- 1753 (3) that no other benefits are payable under the scheme<sup>10</sup>;
- 1754 (4) that no pension is capable in whole or in part of surrender, commutation or assignment, except in so far as the scheme allows an employee on retirement to obtain, by commutation of his pension, a lump sum or sums not exceeding in all three-eighths of his final remuneration for each year of service up to a maximum of 40<sup>11</sup>;
- 1755 (5) that, in the case of any employee who is a member of the scheme by virtue of two or more relevant associated employments<sup>12</sup>, the amount payable by way of pension in respect of service in any one of them may not, when aggregated with any amount payable by way of pension in respect of service in the other or others, exceed the relevant amount<sup>13</sup>;
- 1756 (6) that, in the case of any employee who is a member of the scheme by virtue of two or more relevant associated employments, the amount payable by way of commuted pension in respect of service in any one of them may not, when aggregated with any amount payable by way of commuted pension in respect of service in the other or others, exceed the relevant amount<sup>14</sup>;
- 1757 (7) that, in the case of any employee in relation to whom the scheme is connected<sup>15</sup> with another scheme which is, or other schemes each of which is, an approved scheme, the amount payable by way of pension under the scheme may not, when aggregated with any amount payable by way of pension under the other scheme or schemes, exceed the relevant amount<sup>16</sup>;
- 1758 (8) that, in the case of any employee in relation to whom the scheme is connected with another scheme which is, or other schemes each of which is, an approved scheme, the amount payable by way of commuted pension may not, when aggregated with any amount payable by way of commuted pension under the other scheme or schemes, exceed the relevant amount<sup>17</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 I.e. grant approval under the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended): see PARAS 747-748 ante, 750 et seq post.

3 For the meaning of 'retirement benefits scheme' see PARA 741 ante.

4 le the conditions set out in the Income and Corporation Taxes Act 1988 s 590(2) (as amended): see PARA 748 ante.

5 Ibid s 590(1), (4).

6 For the meaning of 'employee' see PARA 741 note 8 ante.

7 As to judicial pensions see generally **COURTS**.

8 Income and Corporation Taxes Act 1988 s 590(3)(a) (amended by the Finance Act 1991 s 34(2), (4)).

9 Income and Corporation Taxes Act 1988 s 590(3)(b) (amended by the Finance Act 1988 s 35, Sch 3 para 18).

10 Income and Corporation Taxes Act 1988 s 590(3)(c). For these purposes, 'benefits' does not include any benefits for whose payment the scheme makes provision in pursuance of any obligation imposed by legislation relating to social security: s 590(4A) (added by the Finance Act 1991 s 34(3), (4)).

11 Income and Corporation Taxes Act 1988 s 590(3)(d) (amended by the Finance Act 1989 ss 75, 187, Sch 6 paras 3, 18(2), Sch 17 Pt IV).

12 For the purposes of heads (5)-(6) in the text, two or more employments are relevant associated employments if they are employments in the case of which (1) there is a period during which the employee has held both or all of them; (2) the period counts under the scheme in the case of both or all of them as a period in respect of which benefits are payable, and (3) the period is one during which both or all of the employers in question are associated: *ibid* s 590A(1) (s 590A added by the Finance Act 1989 s 75, Sch 6 paras 4, 18(2)). Employers are associated if (directly or indirectly) one is controlled by the other or if both are controlled by a third person; and this reference to control, in relation to a body corporate, is to be construed (a) where the body corporate is a close company, in accordance with the Income and Corporation Taxes Act 1988 s 416 (as amended); and (b) where it is not, in accordance with s 840 (see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1299; **INCOME TAXATION** vol 23(1) (Reissue) PARA 845 respectively): s 590A(3), (4) (as so added).

13 *Ibid* s 590(3)(e) (s 590(e)-(h) added by the Finance Act 1989 Sch 6 paras 3, 18(2)). The relevant amount for these purposes, in relation to an employee, is found by applying the formula  $A \times C$  divided by 60: Income and Corporation Taxes Act 1988 s 590B(1) (s 590B added by the Finance Act 1989 s 75, Sch 6 paras 4, 18(2)). For the purposes of the Income and Corporation Taxes Act 1988 s 590B (as so added): (1) 'A' is the aggregate number of years' service (expressing parts of a year as a fraction), subject to a maximum of 40, which, in the case of the employee, count for the purposes of the scheme at the time the benefits in respect of service in the employment become payable; but where the same year (or part of a year) counts for the purposes of the scheme by virtue of more than one of the relevant associated employments it must be counted only once in calculating the aggregate number of years' service for these purposes; (2) 'C' is the permitted maximum in relation to the year of assessment in which the benefits in question become payable, ie, for the years 1988-89 and 1989-90, £60,000, and for any subsequent year of assessment, the figure found for that year, for the purposes of s 590C (as added and amended) (earnings cap: see PARA 750 post), by virtue of s 590C(4)-(5A) (as added and amended): s 590B(5), (6), (9)-(11) (as so added; s 590B(11) (amended by the Finance Act 1993 s 107(6), (8))).

14 *Ibid* s 590(f) (as added: see note 13 supra). See also note 12 supra. For these purposes, the relevant amount, in relation to an employee, is found by applying the formula  $A \times C$  multiplied by 3 and divided by 80: s 590B(2) (as added: see note 13 supra). For the meaning of 'A' and 'C' for these purposes see note 13 supra.

15 For the purposes of heads (7)-(8) in the text, the scheme is connected with another scheme in relation to an employee if (1) there is a period during which he has been the employee of two persons who are associated employers; (2) the period counts under both schemes as a period in respect of which benefits are payable, and (3) the period counts under one scheme by virtue of service with one employer and under the other scheme by virtue of service with the other employer: Income and Corporation Taxes Act 1988 s 590A(2) (as added: see note 13 supra).

16 *Ibid* s 590(3)(g) (as added: see note 13 supra). For these purposes, the relevant amount in relation to an employee is found by applying the formula  $B \times C$  divided by 60: s 590B(3) (as added: see note 13 supra). For these purposes, 'B' is the aggregate number of years' service (expressing parts of a year as a fraction), subject to a maximum of 40, which, in the case of the employee, count for the purposes of any of the following: (a) the scheme; and (b) the other scheme or schemes with which the scheme is connected in relation to him, at the time the benefits become payable; but where the same year (or part of a year) counts for the purposes of more than one scheme it must be counted only once in calculating the aggregate number of years service for these purposes: s 590B(7), (8) (as so added). For the meaning of 'C' see note 13 supra.

17 Ibid s 590(3)(h) (as added: see note 13 supra). For these purposes, the relevant amount in relation to an employee is found by applying the formula  $B \times C$  multiplied by 3 and divided by 80: s 590B(4) (as added: see note 13 supra). For the meaning of 'B' see note 16 supra and for the meaning of 'C' see note 13 supra.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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## **750. The earnings cap.**

In arriving at an employee's<sup>1</sup> final remuneration for the purposes of assessing relevant benefits<sup>2</sup>, any excess of what would otherwise be his final remuneration over the permitted maximum<sup>3</sup> for the year of assessment in which his participation in the scheme ceases must be disregarded<sup>4</sup>.

1 For the meaning of 'employee' see PARA 741 note 8 ante.

2 See for the purposes of the Income and Corporation Taxes Act 1988 s 590(3)(a) or (d) (as amended): see PARA 749 ante.

3 'The permitted maximum', in relation to a year of assessment, means the figure found for that year as follows: *ibid* s 590C(2) (s 590C added by the Finance Act 1989 s 75, Sch 6 paras 1, 4, 18(2)). For the years 1988-89 and 1989-90 the figure is £60,000; and for any subsequent year of assessment the figure is also £60,000, subject as follows: (1) if the retail prices index for the month of September preceding such a year of assessment is higher than it was for the previous September, the figure for that year is an amount arrived at by (a) increasing the figure for the previous year of assessment by the same percentage as the percentage increase in the retail prices index; and (b) if the result is not a multiple of £600, rounding it up to the nearest amount which is such a multiple; (2) if the retail prices index for the month of September preceding such a year of assessment is not higher than it was for the previous September, the figure for that year is the same as the figure for the previous year of assessment: Income and Corporation Taxes Act 1988 s 590C(3)-(5A) (s 590C(3)-(5) as so added; s 590C(4), (5) amended, and s 590C(5A) added, by the Finance Act 1993 s 107(1), (4), (5), (8)). The Treasury must, in each year of assessment, make an order specifying the figure which is by virtue of these provisions the figure for the following year of assessment: Income and Corporation Taxes Act 1988 s 590C(6) (as so added)). For the year of assessment 1997-98, the specified figure is £84,000: see the Retirement Benefits Schemes (Indexation of Earnings Cap) Order 1996, SI 1996/2951, art 2.

4 Income and Corporation Taxes Act 1988 s 590C(1) (as added: see note 3 *supra*).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

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The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

## **750 The earnings cap**

TEXT AND NOTES --Repealed: Finance Act 2004 Sch 42 Pt 3.



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### **751. Discretionary approval.**

The Board<sup>1</sup> may, if it thinks fit having regard to the facts of a particular case, and subject to such conditions, if any, as it thinks proper to attach to the approval, approve<sup>2</sup> a retirement benefits scheme<sup>3</sup> notwithstanding that it does not satisfy one or more of the prescribed conditions<sup>4</sup>. The Board may in particular so approve a scheme:

- 1759 (1) which exceeds the limits imposed by the prescribed conditions as respects benefits for less than 40 years; or
- 1760 (2) which provides pensions for the widows of employees<sup>5</sup> on death in service<sup>6</sup>, or for the children<sup>7</sup> or dependants of employees; or
- 1761 (3) which provides on death in service a lump sum of up to four times the employee's final remuneration<sup>8</sup> (exclusive of any refunds of contributions); or
- 1762 (4) which allows benefits to be payable on retirement within ten years of the specified age, or on earlier incapacity; or
- 1763 (5) which provides for the return in certain contingencies of employees' contributions; or
- 1764 (6) which relates to a trade<sup>9</sup> or undertaking carried on only partly in the United Kingdom<sup>10</sup> and by a person not resident<sup>11</sup> in the United Kingdom; or
- 1765 (7) which provides in certain contingencies for securing certain relevant benefits<sup>12</sup> (but no other benefits) by means of an annuity contract made with an insurance company<sup>13</sup> of the employee's choice; or
- 1766 (8) to which the employer is not a contributor and which provides benefits additional to those provided by a scheme to which he is a contributor<sup>14</sup>.

The Board must not approve a scheme on this discretionary basis if to do so would be inconsistent with relevant regulations made by the Board<sup>15</sup>; and regulations made for these purposes may restrict the Board's discretion to approve a scheme by reference to the benefits provided by the scheme, the investments held for the purposes of the scheme, the manner in which the scheme is administered or any other circumstances whatever<sup>16</sup>.

The Board may not exercise its discretion to approve a scheme by virtue of these provisions in circumstances where the scheme is a small self-administered scheme<sup>17</sup> and:

- 1767 (a) the Board has previously approved such a scheme of which an employee of any employer<sup>18</sup> in relation to the scheme has at any time been a scheme member, and to which any such employer was entitled to pay contributions, and which has not been wound up; or
- 1768 (b) the governing instrument of the scheme does not contain provisions as to borrowing<sup>19</sup>, investments<sup>20</sup>, lending<sup>21</sup> and the acquisition of shares<sup>22</sup>, transactions with scheme members and others<sup>23</sup>, pensioner trustees<sup>24</sup> and the furnishing of information and documents<sup>25</sup> of a prescribed description<sup>26</sup>.

Nor may the Board exercise its discretion to approve a retirement benefits scheme:

- 1769 (i) which is a freestanding additional voluntary contributions scheme<sup>27</sup> unless the rules of the scheme provide that the administrator<sup>28</sup> of the scheme is to comply

with the prescribed requirements<sup>29</sup> and, where the scheme is the leading scheme<sup>30</sup> in relation to an employee, with the specified requirements relating to the calculation of surplus funds<sup>31</sup> so far as they concern freestanding additional voluntary contributions schemes<sup>32</sup>;

- 1770 (ii) which is not a freestanding additional voluntary contributions scheme, unless the rules of the scheme provide that the administrator of the scheme is to comply with the prescribed requirements<sup>33</sup> and, where the scheme is the leading scheme in relation to an employee, with the specified requirements relating to the calculation of surplus funds<sup>34</sup> so far as they concern main schemes<sup>35</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 Ie for the purposes of the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended): see PARA 747 et seq ante, 752 et seq post.

3 For the meaning of 'retirement benefits scheme' see PARA 741 ante.

4 Income and Corporation Taxes Act 1988 s 591(1). For the prescribed conditions see s 590(2), (3) (as amended); and PARAS 748-749 ante.

5 For the meaning of 'employee' see PARA 741 note 8 ante.

6 'Service' means service as an employee of the employer in question and other expressions, including 'retirement' are to be construed accordingly: Income and Corporation Taxes Act 1988 s 612(1).

7 For the meaning of 'child' see **INCOME TAXATION** vol 23(1) (Reissue) PARA 556.

8 'Final remuneration' means the average annual remuneration of the last three years' service: Income and Corporation Taxes Act 1988 s 612(1).

9 For the meaning of 'trade' see **INCOME TAXATION** vol 23(1) (Reissue) PARA 105.

10 For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

11 As to residence for income tax purposes see generally **INCOME TAXATION** vol 23(2) (Reissue) PARA 1260.

12 Ie relevant benefits falling within the Income and Corporation Taxes Act 1988 s 591(2A) (added by the Finance Act 1994 s 107(3), (4)). Relevant benefits fall within that provision if they correspond with benefits that could be provided by an approved scheme, and for this purpose (1) a hypothetical scheme (rather than any particular scheme) is to be taken; and (2) benefits provided by a scheme directly (rather than by means of an annuity contract) are to be taken: Income and Corporation Taxes Act 1988 s 591(2A) (as so added).

13 For these purposes, 'insurance company' has the meaning given by *ibid* s 659B (added by the Finance Act 1995 ss 59(1), (5), 60(1)-(3)): Income and Corporation Taxes Act 1988 s 591(3) (substituted by the Finance Act 1995 ss 59(2), 60(1)).

14 Income and Corporation Taxes Act 1988 s 591(2) amended by the Finance Act 1994 ss 107(2), (4), 258, Sch 26 Pt V).

15 Income and Corporation Taxes Act 1988 s 591(5) (s 591(5), (6) amended by the Finance Act 1988 s 146, Sch 13 para 6).

16 Income and Corporation Taxes Act 1988 s 591(6) (as amended: see note 15 *supra*). In exercise of the power so conferred, the Board has made (1) the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Small Self-administered Schemes) Regulations 1991, SI 1991/1614; and (2) the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Additional Voluntary Contributions) Regulations 1993, SI 1993/3016.

Where on or after 17 April 1991 regulations are made for these purposes ('section 591 regulations') which contain provisions restricting the Board's discretion to approve a retirement benefits scheme by reference to any circumstances other than the benefits provided by the scheme ('relevant provisions'), any retirement benefits scheme approved by the Board by virtue of the Income and Corporation Taxes Act 1988 s 591 (as amended) before the day on which the section 591 regulations come into force ceases to be approved at the end of the period of 36 months beginning with that day if at the end of that period the scheme contains a provision of a prohibited description, or does not contain a provision of a required description, unless the

description of provision is specified in regulations made by the Board for these purposes: s 591A(1), (2) (s 591A added by the Finance Act 1991 s 35). For these purposes, a provision contained in a scheme must not be treated as being of a prohibited description by reason only of the fact that it authorises the retention of an investment held immediately before the day on which the section 591 regulations are made; and in determining for these purposes whether any provision contained in a scheme is of a required description, the fact that it is framed so as not to require the disposal of an investment held immediately before the day on which the section 591 regulations are made must be disregarded: Income and Corporation Taxes Act 1988 s 591A(3), (4) (as so added). References to a provision of a prohibited description are to a provision of a description specified in the relevant provisions of the section 591 regulations as a description of provision which, if contained in a retirement benefits scheme, would prevent the Board from approving the scheme by virtue of s 591 (as amended); and references to a provision of a required description are to a provision of a description specified in the relevant provisions of the section 591 regulations as a description of provision which must be contained in a retirement benefits scheme before the Board may approve the scheme by virtue of s 591 (as amended): s 591A(5) (as so added). See the Retirement Benefits Schemes (Restriction of Discretion to Approve) (Excepted Schemes) Regulations 1996, SI 1996/1582, by virtue of which the provisions contained in the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Additional Voluntary Contributions) Regulations 1993, SI 1993/3016 (see head (ii) in the text; and notes 33-35 infra) do not apply to existing approved schemes.

17 'Small self-administered scheme' means a retirement benefits scheme some or all of the income and other assets of which are invested otherwise than in insurance policies, and which, if a scheme member is connected with another scheme member, a trustee of the scheme, or a person who is an employer in relation to the scheme, has less than 12 members: Retirement Benefits Schemes (Restriction on Discretion to Approve) (Small Self-administered Schemes) Regulations 1991, SI 1991/1614, reg 2(1). 'Scheme member' in relation to a scheme means a member of the scheme to whom benefit is currently accruing as a result of service as an employee: reg 2(1). A person is connected with an individual if that person is the individual's husband or wife, or is a relative, or the husband or wife of a relative, of the individual or of the individual's husband or wife: reg 2(3), (4). Without prejudice to reg 2(4), a person, in his capacity as a scheme member, is connected with an employer in relation to a scheme if (1) where the employer is a partnership, he is connected with a partner in the partnership; or (2) where the employer is a company, he or a person connected with him is, or at any time during the preceding ten years has been, a controlling director of the company: reg 2(5). A company is connected with another company: (a) if the same person has control of both, or a person has control of one and persons connected with him, or he and persons connected with him, have control of the other; or (b) if a group of two or more persons has control of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person with whom he is connected (reg 2(6)); and a company is connected with another person if that person has control of it or if that person and persons connected with him together have control of it (reg 2(7)). Any two or more persons acting together to secure or exercise control of a company are to be treated in relation to that company as connected one with another and with any person acting on the directions of any of them to secure or exercise control of the company: reg 2(8).

18 'Employer', in relation to a scheme, means an employer who, by virtue of the governing instrument, is entitled to pay contributions to the scheme; and 'governing instrument' in relation to a scheme means a trust deed, or other document by which the scheme is established, and any other document which contains provisions by which the administration of the scheme is governed: *ibid* reg 2(1).

19 Is a provision limiting the aggregate amount of the trustees' borrowing at any time to: (1) three times the ordinary annual contribution paid by employers; (2) three times the annual amount of contributions paid by scheme members as a condition of membership in the year of assessment ending immediately before that time; (3) 45% of the market value of the investments held for the purposes of the scheme: see *ibid* reg 4.

20 Is a provision to the effect that the trustees of the scheme in their capacity as such must not directly or indirectly hold as an investment (1) personal chattels other than choses in action; (2) residential property unless occupied by an employee who is not connected with his employer and who is required as a condition of his employment to occupy the property or property which is, or is to be, occupied by a person who is neither a scheme member nor connected with a scheme member in connection with the occupation by that person of business premises held by the trustees of the scheme in their capacity as such; (3) shares in an unlisted company which carry more than 30% of the voting power in the company or entitle the holder of them to more than 30% of any dividends declared by the company: see *ibid* reg 5.

21 Is a provision to the effect that the trustees of the scheme in their capacity as such must not directly or indirectly lend money to a member of the scheme or a person connected with him, other than an employer in relation to the scheme or any company associated with that employer, or to an employer in relation to the scheme, or any company associated with that employer, unless the lending is within the exception contained in *ibid* reg 6(2): see reg 6.

22 Is a provision to the effect that at the time that any money is lent, or any shares in an employer or any company associated with that employer are acquired, the aggregate of (1) the total amount outstanding of money lent to an employer and any company associated with him in accordance with *ibid* reg 6(2), (3); and (2)

the market value of shares in an employer and any company associated with him held by the trustees in their capacity as such, must not, where that time is during the period of two years from the date on which the scheme was established, exceed 25% of the market value of the assets of the scheme which are derived from contributions made by an employer and by employees since the scheme was established or, where that time is after the end of that two-year period, exceed 50% of the market value of all the assets of the scheme: see reg 7.

23    Ie a provision to the effect that the trustees of the scheme in their capacity as such must not directly or indirectly purchase, sell or lease any asset from or to a member of the scheme or a person connected with him, other than an employer in relation to the scheme or any company associated with that employer, or from or to an employer, or any company associated with that employer, unless the purchase, sale or lease is made after the trustees have obtained independent professional advice in writing, and in accordance with that advice: see *ibid* reg 8.

24    Ie a provision to the effect that one of the trustees of the scheme must be a pensioner trustee, and if a pensioner trustee ceases to be qualified to act as such or ceases to be a trustee, the trustees or the remaining trustee or trustees must (1) within 30 days after that cessation notify the Board in writing; (2) within 60 days after that cessation appoint a successor to him as a pensioner trustee; and (3) within 30 days after that appointment notify the Board in writing of the name of the successor: *ibid* reg 9. 'Pensioner trustee' [sic] means a trustee of a scheme who is approved by the Board to act as such, and is not connected with a scheme member, with any other trustee of the scheme or with a person who is an employer in relation to the scheme: reg 2(1).

25    Ie provisions to the effect that the administrator of a scheme must, within 90 days after any transaction by the trustees in their capacity as such as is specified in heads (1)-(6) *infra*, furnish to the Board such information and documents as may be specified on the relevant form to be supplied by the Board: *ibid* reg 10(1). The specified transactions are: (1) the acquisition or disposal of land; (2) the lending of money to an employer or any company associated with him; (3) the acquisition or disposal of shares in an employer or any company associated with him; (4) the acquisition or disposal of shares in an unlisted company; (5) the borrowing of money; (6) the purchase, sale or lease from or to an employer, or any company associated with him, of any asset other than one specified in heads (1), (3) or (4) *supra*: reg 10(2).

26    *Ibid* reg 3. For transitional provisions see reg 11.

27    'Freestanding additional voluntary contributions scheme' means a retirement benefits scheme to which a relevant employer of an employee who contributes to the scheme is not a contributor and which provides benefits additional to those provided by an approved retirement benefits scheme to which a relevant employer is a contributor or by a relevant statutory scheme: Retirement Benefits Schemes (Restriction on Discretion to Approve) (Additional Voluntary Contributions) Regulations 1993, SI 1993/3016, reg 2(1). 'Relevant employer', in relation to an employee, means: (1) the current employer of that employee or, where he has more than one current employer, any of those current employers who are associated; and (2) any of two or more associated employers successively of that employee of whom one is that current employer, or one of those associated current employers; and (3) either of two employers successively of that employee, where one is that current employer, or one of those associated current employers, and one has acquired the other, or has taken over the whole or part of the business of the other; and (4) any of two or more employers successively of that employee, where one is that current employer, or one of those associated current employers, and the Board has agreed that service with each of the employers may be regarded as continuous pensionable service: reg 2(1).

28    For the meaning of 'administrator of the scheme' see PARA 747 note 3 *ante*.

29    For the prescribed requirements in relation to notifying the administrator of the main scheme of contributions paid by an employee, the keeping of separate records, payment of benefits, and administrative matters see the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Additional Voluntary Contributions) Regulations 1993, SI 1993/3016, reg 4. 'Main scheme', in relation to an employee who is a contributor to a freestanding additional voluntary contributions scheme in respect of service with a relevant employer, means (1) the retirement benefits scheme to which a relevant employer is a contributor and which provides benefits which are supplemented by those provided to the employee by the freestanding additional voluntary contributions scheme; or (2) where there is more than one such retirement benefits scheme, the scheme which provides benefits which are supplemented by those provided by the other schemes: reg 2(1).

30    'Leading scheme', in relation to an employee, means (1) where the employee has paid voluntary contributions to a main scheme or any other scheme established by a relevant employer of the employee or to which a relevant employer is a contributor, that main scheme; and (2) in all other cases, the freestanding additional voluntary contributions scheme from which the main scheme last received a notification in respect of the employee in accordance with *ibid* reg 4(2): reg 2(1).

31    As to the calculation of surplus funds see *ibid* reg 6.

32 See *ibid* regs 3, 4(1).

33 For the prescribed information and other requirements see *ibid* reg 5.

34 See note 31 *supra*.

35 See the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Additional Voluntary Contributions) Regulations 1993, SI 1993/3016, regs 3, 5(1). The provisions of the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Additional Voluntary Contributions) Regulations 1993, SI 1993/3016, are disapplied in certain transitional cases: see note 16 *supra*.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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## **752. Cessation of approval.**

If in the opinion of the Board<sup>1</sup> the facts concerning any approved scheme<sup>2</sup> or its administration cease to warrant the continuance of its approval of the scheme, the Board may at any time by notice to the administrator<sup>3</sup> withdraw its approval on such grounds, and from such date<sup>4</sup> as may be specified in the notice<sup>5</sup>.

Where an alteration has been made in a retirement benefits scheme<sup>6</sup>, no approval given by the Board as regards the scheme before the alteration applies after the date of the alteration unless:

- 1771 (1) the alteration has been approved by the Board<sup>7</sup>; or
- 1772 (2) the scheme is of a class specified in regulations made by the Board for these purposes and the alteration is of a description so specified in relation to schemes of that class<sup>8</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 'Approved scheme' means a retirement benefits scheme for the time being approved by the Board for the purposes of the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended); see PARA 747 et seq ante, 753 et seq post.

3 For the meaning of 'administrator' see PARA 747 note 3 ante.

4 The date must not be earlier than the date when those facts first ceased to warrant the continuance of their approval or 17 March 1987, whichever is the later: Income and Corporation Taxes Act 1988 s 591B(1) (s 591B added by the Finance Act 1991 s 36(1), (3)).

5 Income and Corporation Taxes Act 1988 s 591B(1) (as added: see note 4 supra). The Board has a broad discretion when considering the withdrawal of approval: see *R v IRC, ex p Roux Waterside Inn Ltd* [1997] TLR 207, [1997] PLR 123.

6 For the meaning of 'retirement benefits scheme' see PARA 741 ante.

7 Income and Corporation Taxes Act 1988 s 591B(2)(a) (as added: see note 4 supra).

8 Ibid s 591B(2)(b) (as added: see note 4 supra). At the date at which this volume states the law, no such regulations had been made.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004

Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and  
PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a  
trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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### 753. Consequences of cessation of approval for certain schemes.

Where an approval<sup>1</sup> of a retirement benefits scheme<sup>2</sup> in respect of which either of the specified conditions is satisfied ceases to have effect<sup>3</sup>, tax must be charged under Case VI of Schedule D<sup>4</sup> at the rate of 40 per cent on an amount equal to the value of the assets<sup>5</sup> which immediately before the date of the cessation of the approval of the scheme are held for the purposes of the scheme, taking that value as it stands immediately before that date<sup>6</sup>.

The first specified condition is satisfied in respect of a scheme if, immediately before the date of the cessation of the approval of the scheme, less than 12 individuals are members of the scheme<sup>7</sup>; and the second such condition is satisfied in respect of a scheme if at any time within the period of one year ending with the date of the cessation of the approval of the scheme, a person who is or has been a controlling director of a company<sup>8</sup> which has contributed to the scheme is a member of the scheme<sup>9</sup>.

The person liable for the tax is the administrator<sup>10</sup> of the scheme in his capacity as such<sup>11</sup>; but where the administrator of the scheme is constituted by persons who include a person who is an approved independent trustee<sup>12</sup> in relation to a scheme, that person is not liable for tax so chargeable<sup>13</sup>.

1    Ie an approval under the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended): see PARA 747 et seq ante, 754 et seq post.

2    For the meaning of 'retirement benefits scheme' see PARA 741 ante.

3    This reference to an approval of a scheme ceasing to have effect is a reference to (1) the scheme ceasing to be an approved scheme by virtue of the Income and Corporation Taxes Act 1988 s 591A(2) (as added) (see PARA 752 ante); (2) the approval of the scheme being withdrawn under s 591B(1) (as added: see PARA 752 ante); or (3) the approval of the scheme no longer applying by virtue of s 591B(2) (as added: see PARA 752 ante); and any reference for these purposes to the date of the cessation of the approval of the scheme is to be construed accordingly: s 591D(7) (ss 591C, 591D added by the Finance Act 1995 s 61(1), (3)). Arrangements made to transfer funds out of one pension scheme into a new one so as to avoid the restrictions on the ways pension benefits could be taken fell within the tax avoidance principles laid down in *Ramsay (WT) Ltd v IRC* [1982] AC 300, [1981] STC 174, HL, and justified the Board's decision to exercise its discretion to withdraw approval of the old scheme and to raise an assessment on the trustees: see *R v IRC, ex p Roux Waterside Inn Ltd* [1997] TLR 207, [1997] PLR 123.

4    As to the charge to income tax under Case VI of Schedule D see **INCOME TAXATION** vol 23(1) (Reissue) PARA 560 et seq.

5    The value of an asset is its market value, construing 'market value' in accordance with the Taxation of Chargeable Gains Act 1992 s 272 (see **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARA 44); but where an asset held for the purposes of a scheme is a right or interest in respect of any money lent (directly or indirectly) to any specified person, the value of the asset must be treated as being the amount owing (including any unpaid interest) on the money lent: Income and Corporation Taxes Act 1988 s 591D(1), (2) (as added: see note 3 supra); s 831(3). The specified persons are (1) any employer who has at any time contributed to the scheme; (2) any company connected with such an employer; (3) any member of the scheme; and (4) any person connected with any member of the scheme; and s 839 (meaning of 'connected': see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1258) applies for these purposes: s 591D(3), (9) (as so added). For the purposes of ss 591C, 591D (as so added), a person is a member of a scheme at a particular time if at that time a benefit is being provided under the scheme, or may be so provided, in respect of any past or present employment of his: s 591D(8) (as so added). For the meaning of 'employer' see PARA 741 note 8 ante.

6    Ibid s 591C(1), (2), (4) (as added: see note 3 supra).

7 See *ibid* s 591C(5) (as added: see note 3 *supra*).

8 For these purposes, a person is a controlling director of a company if he is a director of it and within *ibid* s 417(5)(b) (see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1296) in relation to it: s 591C(7) (as added: see note 3 *supra*).

9 *Ibid* s 591C(6) (as added: see note 3 *supra*).

10 For the meaning of 'administrator' see PARA 747 note 3 *ante*.

11 Income and Corporation Taxes Act 1988 s 591C(3) (as added: see note 3 *supra*).

12 A person is an approved independent trustee in relation to a scheme only if he is approved by the Board to act as a trustee of the scheme and is not connected with (1) a member of the scheme; (2) any other trustee of the scheme; or (3) an employer who has contributed to the scheme: *ibid* s 591D(5) (as added: see note 3 *supra*).

13 *Ibid* s 591D(4) (as added: see note 3 *supra*).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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## **(ii) Tax Reliefs**

### **754. Exempt approved schemes.**

The following provisions have effect only as respects income arising or contributions paid at a time when the scheme in question is an exempt approved scheme, that is to say:

- 1773 (1) any approved scheme<sup>1</sup> which is shown to the satisfaction of the Board<sup>2</sup> to be established under irrevocable trusts; or
- 1774 (2) any other approved scheme as respects which the Board, having regard to any special circumstances, directs that these provisions are to apply<sup>3</sup>.

On a claim being made in that behalf, exemption from income tax must be allowed in respect of:

- 1775 (a) income derived from investments or deposits if, or to such extent as the Board is satisfied that, it is income from investments or deposits held for the purposes of the scheme<sup>4</sup>;
- 1776 (b) underwriting commissions if, or to such extent as the Board is satisfied that, the underwriting commissions are applied for the purposes of the scheme and would otherwise be chargeable to tax under Case VI of Schedule D<sup>5</sup>.

Any sum paid by an employer<sup>6</sup> by way of contribution under the scheme must be allowed<sup>7</sup> to be deducted as an expense, or expense of management, incurred in the chargeable period<sup>8</sup> in which the sum is paid but no other sum must be so allowed to be deducted as an expense, or expense of management, in respect of the making, or any provision for the making, of any contributions under the scheme<sup>9</sup>. The amount of an employer's contributions which may be deducted under this provision must not exceed the amount contributed by him under the scheme in respect of employees<sup>10</sup> in a trade<sup>11</sup> or undertaking in respect of the profits of which the employer is assessable to United Kingdom<sup>12</sup> income tax or corporation tax<sup>13</sup>; and a sum not paid by way of ordinary annual contribution must be treated for these purposes, as the Board may direct, either as an expense incurred in the chargeable period in which the sum is paid, or as an expense to be spread over such period of years as the Board thinks proper<sup>14</sup>.

Where any sum is paid to the trustees of the scheme in or towards the discharge of any liability of an employer under the statutory provisions relating to deficiencies in the assets of a scheme<sup>15</sup>, the payment of that sum:

- 1777 (i) must be treated for these purposes as an employer's contribution under the scheme; and
- 1778 (ii) notwithstanding (where it is the case) that the employer's trade, profession, vocation<sup>16</sup> or business is permanently discontinued before the making of the payment, must be allowed<sup>17</sup> to be deducted as such a contribution to the same extent as it would have been allowed but for the discontinuance and as if it had been made on the last day on which the trade, profession, vocation or business was carried on<sup>18</sup>.

Any contribution paid under the scheme by an employee must, in assessing tax under Schedule E<sup>19</sup>, be allowed to be deducted as an expense incurred in the year of assessment in which the contribution is paid<sup>20</sup>. The amount so allowed to be deducted in respect of contributions paid by an employee in a year of assessment (whether under a single scheme or under two or more schemes) must not exceed 15 per cent, or such higher percentage as the Board may in a particular case prescribe, of his remuneration<sup>21</sup> for that year<sup>22</sup>; and where an employee's remuneration for a year of assessment includes remuneration in respect of more than one employment, the amount so allowed to be deducted in respect of contributions paid by the employee in that year by virtue of any employment (whether under a single scheme or under two or more schemes) must not exceed 15 per cent, or such higher percentage as the Board may in a particular case prescribe, of his remuneration for the year in respect of that employment<sup>23</sup>. In arriving at an employee's remuneration for a year of assessment for these purposes, however, any excess of what would otherwise be his remuneration over the permitted maximum<sup>24</sup> for that year must be disregarded<sup>25</sup>.

Nothing in these provisions is to be construed as affording relief in respect of any sums to be brought into account under the provisions conferring tax exemption<sup>26</sup> on the income and gains of an insurance company's pension business<sup>27</sup>.

1 For the meaning of 'approved scheme' see PARA 752 note 2 ante.

2 For the meaning of 'the Board' see PARA 678 note 2 ante.

3 Income and Corporation Taxes Act 1988 s 592(1), (12). Sections 468(2), 469(3) (see **INCOME TAXATION** vol 23(2) (Reissue) PARAS 1434, 1440) do not apply to any authorised unit trust which is also an exempt approved scheme if the employer is not a contributor to the exempt approved scheme and that scheme provides benefits additional to those provided by another exempt approved scheme to which he is a contributor: s 592(10). For the meaning of 'authorised unit trust' see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1434.

4 Ibid s 592(2).

5 Ibid s 592(3). As to income tax under Case VI of Schedule D see **INCOME TAXATION** vol 23(1) (Reissue) PARA 560 et seq.

6 For the meaning of 'employer' see PARA 741 note 8 ante.

7 Ie for the purposes of Case I or Case II of Schedule D and of the Income and Corporation Taxes Act 1988 ss 75, 76 (as amended): see **INCOME TAXATION** vol 23(1) (Reissue) PARAS 95 et seq, 134 et seq.

8 'Chargeable period' means an accounting year of a company or a year of assessment: ibid s 832(1). For the meaning of 'year of assessment' see PARA 680 note 1 ante; and for the meaning of 'company' see **INCOME TAXATION** vol 23(1) (Reissue) PARA 1.

9 Ibid s 592(4) (amended by the Finance Act 1993 s 112(1), (2)).

10 For the meaning of 'employee' see PARA 741 note 8 ante.

11 For the meaning of 'trade' see **INCOME TAXATION** vol 23(1) (Reissue) PARA 105.

12 For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

13 Income and Corporation Taxes Act 1988 s 592(5).

14 Ibid s 592(6).

15 Ie under the Social Security Pensions Act 1975 s 58B (repealed) or the Pension Schemes Act 1993 s 144 (repealed) or under the corresponding Northern Ireland legislation.

16 For the meaning of 'profession' and 'vocation' see **INCOME TAXATION** vol 23(1) (Reissue) PARAS 135-136.

17 Ie in accordance with the Income and Corporation Taxes Act 1988 s 592(4) (as amended): see the text and notes 6-9 ante.

- 18 Ibid s 592(6A) (added by the Finance Act 1993 s 112(6)).
- 19 As to income tax under Schedule E (PAYE) see **INCOME TAXATION** vol 23(1) (Reissue) PARA 605 et seq.
- 20 Income and Corporation Taxes Act 1988 s 592(7). Relief must not be given under ss 266 or 273 (see **INCOME TAXATION** vol 23(2) (Reissue) PARAS 1016-1017) in respect of any payment in respect of which an allowance can be made under s 592(7): s 592(9).
- 21 For the meaning of 'remuneration' see PARA 748 note 21 ante.
- 22 Income and Corporation Taxes Act 1988 s 592(8) (amended by the Finance Act 1989 s 75, Sch 6 paras 5(3), 18(4)).
- 23 Income and Corporation Taxes Act 1988 s 592(8A) (added by the Finance Act 1989 Sch 6 paras 5(3), 18(4)).
- 24 'Permitted maximum', in relation to a year of assessment, means the figure found for that year as follows, ie for the year 1989-90, the figure is £60,000 and for any subsequent year of assessment, the figure is the figure found for that year, for the purposes of the Income and Corporation Taxes Act 1988 s 590C (as added and amended) by virtue of s 590C(4)-(5A) (as added and amended) (see PARA 750 ante): s 592(8B)-(8E) (added by the Finance Act 1989 Sch 6 paras 5(4), 18(4); the Income and Corporation Taxes Act 1988 s 592(8E) amended by the Finance Act 1993 s 107(6), (8)). The Income and Corporation Taxes Act 1988 s 592(8B)-(8E) (as added and amended) is disapplied in relation to certain exempt approved schemes, additional voluntary contributions schemes and mis-sold pension contracts if prescribed conditions are satisfied and in prescribed circumstances: see the Retirement Benefits Schemes (Tax Relief on Contributions) (Disapplication of Earnings Cap) Regulations 1990, SI 1990/586, regs 3, 5, 6 (reg 3 amended by SI 1993/3221; reg 6 added by SI 1996/3113).
- 25 Income and Corporation Taxes Act 1988 s 592(8B) (as added: see note 24 supra). Section s 592(8B)-(8E) (as added and amended) is disapplied in relation to certain exempt approved schemes, additional voluntary contributions schemes and mis-sold pension contracts if prescribed conditions are satisfied and in prescribed circumstances: see the Retirement Benefits Schemes (Tax Relief on Contributions) (Disapplication of Earnings Cap) Regulations 1990, SI 1990/586, regs 3, 5, 6 (reg 3 amended by SI 1993/3221; reg 6 added by SI 1996/3113).
- 26 Ie under the Income and Corporation Taxes Act 1988 s 438 (as amended): see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1390.
- 27 Ibid s 592(11).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 754 Exempt approved schemes

NOTE 1--See *Thorpe v Revenue and Customs Comrs* [2010] EWCA Civ 339, [2010] STC 959 (there was no provision for appeal against the decision to remove approval).



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#### **754A. Effect of bankruptcy on pension rights: approved arrangements.**

Where a bankruptcy order is made against a person on a petition presented after the coming into force of this provision<sup>1</sup>, any rights of his under an approved pension arrangement<sup>2</sup> are excluded from his estate<sup>3</sup>. For these purposes, 'approved pension arrangement' means (1) a registered pension scheme<sup>4</sup>; (2) an occupational pension scheme<sup>5</sup> set up by a government outside the United Kingdom for the benefit, or primarily for the benefit, of its employees<sup>6</sup>; (3) an annuity purchased for the purpose of giving effect to rights under a scheme falling within head (1) above<sup>7</sup>; (4) any pension arrangements of any description which may be prescribed by regulations made by the Secretary of State<sup>8</sup>.

If (a) at the time when a bankruptcy order is made against a person an appeal against a decision not to register a pension scheme has been made<sup>9</sup>; and (b) the decision of the General or Special Commissioners is to uphold the decision of Her Majesty's Revenue and Customs not to register the scheme, any rights of that person under the scheme vest (without any conveyance, assignment or transfer) in his trustee in bankruptcy, as part of his estate, immediately on the General or Special Commissioners' decision being made or, if later, the trustee's appointment taking effect or, in the case of the official receiver, his becoming trustee<sup>10</sup>.

If, at any time after a bankruptcy order is made against a person, Her Majesty's Revenue and Customs (i) gives notice withdrawing registration of the pension scheme<sup>11</sup>; and (ii) the date specified as being that from which deregistration occurs<sup>12</sup> ('the deregistration date') is the date from which the scheme ceases to be a registered pension scheme, any rights of that person under the scheme or arising by virtue of the arrangements, and any rights of his under any related annuity<sup>13</sup>, vest (without any conveyance, assignment or transfer) in his trustee in bankruptcy, as part of his estate, immediately on the giving of the notice, or (if later) the trustee's appointment taking effect or, in the case of the official receiver, his becoming trustee<sup>14</sup>.

Where under either of the aforementioned rules<sup>15</sup>, any rights vest in a person's trustee in bankruptcy, the trustee's title to them has relation back to the commencement of the person's bankruptcy; but where any transaction is entered into by the trustees or managers of the scheme in question in good faith and without notice of the making of the decision mentioned in head (b) above or, as the case may be, the giving of the notice mentioned in heads (i), (ii) above, the trustee in bankruptcy is not in respect of that transaction entitled by virtue of this provision to any remedy against them or any person whose title to any property derives from them<sup>16</sup>.

1 The Welfare Reform and Pensions Act 1999 s 11 came into force in part on 29 May 2000 and for remaining purposes on 6 April 2002: SI 2000/1382, SI 2002/153.

2 For the purposes of the 1999 Act s 11, a person is to be treated as having a right under an approved pension arrangement where (1) he is entitled to a credit under s 29(1)(b) (see PARA 961A.3) as against the person responsible for the arrangement (within the meaning of Pt IV Ch I (ss 27-46) (see PARA 961A.3)); and (2) the person so responsible has not discharged his liability in respect of the credit: s 11(12).

3 Ibid s 11(1). 'Estate', in relation to a person against whom a bankruptcy order is made, means his estate for the purposes of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY**): 1999 Act s 11(11)(c).

4 Ibid s 11(2)(a) (substituted by the Taxation of Pension Schemes (Consequential Amendments) Order 2006, SI 2006/745). 'Pension scheme' has the meaning given in the Finance Act 2004 s 150(1); and 'registered pension scheme' means a pension scheme registered under s 153 (see PARA 873B.2): 1999 Act s 11(11)(b) (substituted by SI 2006/745).

5 'Occupational pension scheme' has the meaning given in the 2004 Act s 150(5) (see PARA 873B.2): 1999 Act s 11(11)(a) (substituted by SI 2006/745).

6 1999 Act s 11(2)(c) (amended by SI 2006/745).

7 1999 Act s 11(2)(g) (substituted by SI 2006/745). This includes an annuity in payment before 6 April 2006, giving effect to rights under any scheme approved before that date under the Income and Corporation Taxes Act 1988 Pt 14 Ch 1 (ss 590-612) (repealed), Ch 3 (ss 618-629) (repealed) or Ch 4 (ss 630-655) (repealed); or any relevant statutory scheme, as defined in s 611 (repealed): 1999 Act s 11(2)(g) (as so substituted).

8 Ibid s 11(2)(h). Without prejudice to s 83 (which makes general supplementary provision in respect of the making of regulations and orders), regulations under head (4) of the text may, in the case of any description of arrangements prescribed by the regulations, make provision corresponding to any provision made by s 11(4)-(9): s 11(10).

9 Ie under the 2004 Act s 156: see PARA 873B.2.

10 1999 Act s 11(4), (5) (s 11(4) substituted, s 11(5) amended, by SI 2006/745).

11 Ie under the 2004 Act 157: see PARA 873B.3.

12 Ie under ibid s 157(4): see PARA 873B.3.

13 'Related annuity' means an annuity purchased on or after the withdrawal date for the purpose of giving effect to rights under the scheme or (as the case may be) to rights arising by virtue of the arrangements: 1999 Act s 11(8).

14 Ibid s 11(6), (7) (s 11(6) substituted by SI 2006/745).

15 Ie the 1999 Act s 11(5) or (7).

16 Ibid s 11(9).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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#### **754B. Effect of bankruptcy on pension rights: unapproved arrangements.**

The Secretary of State may by regulations make provision for or in connection with enabling rights of a person under an unapproved pension arrangement<sup>1</sup> to be excluded, in the event of a bankruptcy order being made against that person, from his estate<sup>2</sup>. Such regulations may, in particular, make provision (1) for rights under an unapproved pension arrangement to be excluded from a person's estate (a) by an order made on his application by a prescribed<sup>3</sup> court; or (b) in accordance with a qualifying agreement<sup>4</sup> made between him and his trustee in bankruptcy<sup>5</sup>; (2) for the court's decision whether to make such an order in relation to a person to be made by reference to (a) future likely needs of him and his family; and (b) whether any benefits, by way of a pension or otherwise, are likely to be received by virtue of rights of his under other pension arrangements and, if so, the extent to which they appear likely to be adequate for meeting any such needs<sup>6</sup>; (3) for the prescribed persons in the case of any pension arrangement to provide a person or his trustee in bankruptcy on request with information reasonably required by that person or trustee for or in connection with the making of such applications and agreements as are mentioned in head (1) above<sup>7</sup>.

1 'Unapproved pension arrangement' means a pension arrangement which (1) is not an approved pension arrangement within the meaning of the Welfare Reform and Pensions Act 1999 s 11 (see PARA 754A); and (2) is of a prescribed description: s 12(3). For the purposes of s 12, a person is treated as having a right under an unapproved pension arrangement where (a) he is entitled to a credit under s 29(1)(b) as against the person responsible for the arrangement (within the meaning of Pt IV Ch I (ss 27-46) (see PARA 961A); and (b) the person so responsible has not discharged his liability in respect of the credit: s 12(4).

2 Ie for the purposes of the Insolvency Act 1986 Pts VIII-XI (ss 252-385): 1999 Act s 12(1).

3 'Prescribed' means prescribed by regulations under *ibid* s 12: s 12(3).

4 'Qualifying agreement' means an agreement entered into in such circumstances, and satisfying such requirements, as may be prescribed: *ibid* s 12(3).

5 *Ibid* s 12(2)(a).

6 *Ibid* s 12(2)(b).

7 *Ibid* s 12(2)(c).

### **UPDATE**

#### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004

Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and  
PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a  
trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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### **755. Relief by way of deductions from contributions.**

There are special provisions for giving relief in respect of schemes to which employees, but not their employers<sup>1</sup>, are contributors, and which provide benefits additional to benefits provided by schemes to which their employers are contributors<sup>2</sup>. In such cases<sup>3</sup> and subject to such conditions<sup>4</sup> as the Board may prescribe in regulations<sup>5</sup>, an employee<sup>6</sup> who is entitled to relief<sup>7</sup> in respect of a contribution may deduct from the contribution when he pays it, and may retain, an amount equal to income tax at the basic rate on the contribution<sup>8</sup>. The administrator<sup>9</sup> of the scheme must accept the amount paid after the deduction in discharge of the employee's liability to the same extent as if the deduction had not been made and may recover an amount equal to the deduction from the Board<sup>10</sup>.

The regulations may<sup>11</sup> in particular provide for:

- 1779 (1) the manner in which claims for the recovery of a sum<sup>12</sup> may be made<sup>13</sup>;
- 1780 (2) the giving of such information, in such form, as may be prescribed by or under the regulations<sup>14</sup>;
- 1781 (3) the inspection by persons authorised by the Board of books, documents and other records<sup>15</sup>.

1 For the meaning of 'employer' see PARA 741 note 8 ante.

2 See the Income and Corporation Taxes Act 1988 s 593(1).

3 The prescribed cases are cases where an employee contributes as a scheme member to a retirement benefits scheme which (1) is one to which his employer is not a contributor and which provides benefits additional to those provided by a retirement benefits scheme or a relevant statutory scheme to which his employer is a contributor; and (2) is an exempt approved scheme within the meaning of *ibid* s 592(1) (see PARA 754 ante): Occupational Pension Schemes (Additional Voluntary Contributions) Regulations 1987, SI 1987/1749, reg 4 (substituted by SI 1990/585).

4 For the prescribed conditions see the Occupational Pension Schemes (Additional Voluntary Contributions) Regulations 1987, SI 1987/1749, reg 5 (amended by SI 1990/585).

5 *Ie* by regulations under the Income and Corporation Taxes Act 1988 s 612(3). The Board may make regulations generally for the purpose of carrying ss 590-611A (as amended) into effect: s 612(3). For the meaning of 'the Board' see PARA 678 note 2 ante.

6 For the meaning of 'employee' see PARA 741 note 8 ante.

7 *Ie* under the Income and Corporation Taxes Act 1988 s 592(7): see PARA 754 ante.

8 *Ibid* s 593(2).

9 For the meaning of 'administrator' see PARA 747 note 3 ante.

10 Income and Corporation Taxes Act 1988 s 593(3).

11 *Ie* without prejudice to the generality of *ibid* s 612(3): s 593(4).

12 *Ie* under *ibid* s 593(3)(b) (recovery of an amount equal to the deduction): see the text to note 5 supra.

13 As to making annual claims see the Occupational Pension Schemes (Additional Voluntary Contributions) Regulations 1987, SI 1987/1749, regs 6(2), 8, 9; and as to interim claims see regs 6(3), 7, 9. The Board is not under an obligation to make any payment earlier than the end of the month following the month in which the

claim is received: reg 6(4). There is no appeal from the Board's decision on an interim claim but appeal lies to the Special Commissioners from the Board's decision on an annual claim: see reg 9(2), (3). Overpaid amounts may be recovered by assessment: see reg 11.

14 See *ibid* reg 12. If approval of a scheme is withdrawn, the scheme administrator must furnish to the Board, within 30 days, the following information: (1) the full name, address, national insurance number and tax office reference of each scheme member who has paid contributions after the date specified in the notice ('the relevant contributions'); (2) the amount of the relief obtained by means of the relevant contributions; (3) the amount of such relief actually due; and (4) the difference between the relief referred to head (2) *supra* and that referred to in head (3) *supra*: reg 12(2), (3). He must also pay the amount of that difference, if any, to the Board at that time, and if he fails to do so that amount is immediately recoverable by the Board in the same manner as tax charged by an assessment on the scheme administrator which has become final and conclusive: reg 10.

15 Income and Corporation Taxes Act 1988 s 593(4). At the date at which this volume states the law, no such regulations had been made but, by virtue of the Interpretation Act 1978 s 17(2)(b), the Occupational Pension Schemes (Additional Voluntary Contributions) Regulations 1987, SI 1987/1749 (as amended), have effect as if so made: see notes 6-7, 13-14 *supra*. Every scheme administrator to whom contributions have been paid must, whenever required so to do, make available for inspection by a person authorised by the Board for that purpose all books, documents and other records (including all particulars furnished under reg 5) in his possession or under his control relating to: (1) such contributions paid to him; (2) the scheme to which the contributions relate; and (3) the scheme member who paid the contributions: reg 13(1). Where records are maintained by computer the scheme administrator must provide the person making the inspection with all facilities necessary to obtain information from them: reg 13(2). All such books, documents and records must be preserved by the scheme administrator in such manner as may be approved by the Board so as to be available for inspection for a period of three years following the termination of the scheme to which they relate; and all particulars, declarations and undertakings furnished under reg 5 must be so preserved for a period of six years following the date on which the scheme member to whom they relate ceased to pay contributions to a scheme: reg 13(3), (4) (amended by SI 1990/585).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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## 756. Exempt statutory schemes.

Any contribution paid by any officer or employee<sup>1</sup> under a relevant statutory scheme<sup>2</sup> established under a public general Act is, in assessing tax under Schedule E<sup>3</sup>, allowed to be deducted as an expense incurred in the year of assessment<sup>4</sup> in which the contribution is paid<sup>5</sup>. The amount allowed to be deducted by virtue of this provision in respect of contributions paid by a person in a year of assessment (whether under a single scheme or under two or more schemes) must not exceed 15 per cent, or such higher percentage as the Board may in a particular case prescribe<sup>6</sup>, of his remuneration<sup>7</sup> for that year<sup>8</sup>.

Where a person's remuneration for a year of assessment includes remuneration in respect of more than one office or employment, the amount allowed to be deducted by virtue of the above provisions in respect of contributions paid by the person in that year by virtue of any office or employment (whether under a single scheme or under two or more schemes) must not exceed 15 per cent, or such higher percentage as the Board may in a particular case prescribe, of his remuneration for the year in respect of that office or employment<sup>9</sup>.

In arriving at a person's remuneration for a year of assessment for these purposes, any excess of what would otherwise be his remuneration over the permitted maximum<sup>10</sup> for that year must be disregarded<sup>11</sup>.

1 For the meaning of 'employee' see PARA 741 note 8 ante.

2 For the purposes of the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended), any reference to a relevant statutory scheme is a reference to a statutory scheme either (1) established before 14 March 1989 or (2) established on or after that date and entered in the register maintained by the Board for these purposes: s 611A(1) (s 611A added by the Finance Act 1989 s 75, Sch 6 paras 15, 18(1)). The Board must maintain a register for these purposes and must enter in it the relevant particulars of any statutory scheme established on or after 14 March 1989 which is reported to the Board by the authority responsible for establishing it as a scheme the provisions of which correspond with those of an approved scheme: Income and Corporation Taxes Act 1988 s 611A(2) (as so added). The reference to the relevant particulars, in relation to a scheme, is a reference to (a) the identity of the scheme; (b) the date on which it was established; (c) the authority responsible for establishing it; and (d) the date on which that authority reported the scheme to the Board: s 611A(3) (as so added). Where the Board enters the relevant particulars of a scheme in the register maintained by the Board for these purposes, it must inform the authority responsible for establishing the scheme of the date of the entry: s 611A(4) (as so added). For the meaning of 'the Board' see PARA 678 note 2 ante.

3 As to the assessment and charge to tax under Schedule E (PAYE) see **INCOME TAXATION** vol 23(1) (Reissue) PARA 605 et seq.

4 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

5 Income and Corporation Taxes Act 1988 s 594(1) (amended by the Finance Act 1989 s 75, Sch 6 paras 6(2), 18(1)). Relief must not be given under ss 266 or 273 (life assurance premium relief: see **INCOME TAXATION** vol 23(2) (Reissue) PARAS 1016-1017) in respect of any contribution allowable as a deduction under s 594 (as amended): s 594(1).

6 As to the Board's power to make regulations for these purposes see s 612(3); and see PARA 755 note 5 ante.

7 For the meaning of 'remuneration' see PARA 748 note 21 ante.

8 Income and Corporation Taxes Act 1988 s 594(2) (amended by the Finance Act 1989 Sch 6 paras 6(3), 18(4)).

9 Income and Corporation Taxes Act 1988 s 594(3) (s 594(3)-(7) added by the Finance Act 1989 Sch 6 paras 6(4), 18(4)).

10 'Permitted maximum', in relation to a year of assessment, means the figure found for that year as follows, ie for the year 1989-90, the figure is £60,000 and for any subsequent year of assessment the figure is the figure found for that year, for the purposes of section ibid 590C (as added and amended) by virtue of s 590C(4)-(5A) (as added and amended) (see PARA 750 ante): s 594(5)-(7) (as added: see note 9 supra; s 594(7) amended by the Finance Act 1993 s 107(6), (8)).

11 Income and Corporation Taxes Act 1988 s 594(4) (as added: see note 9 supra). Section 594(4)-(7) (as added and amended) is disapplied in relation to certain relevant statutory schemes, additional voluntary contributions schemes and mis-sold pension contracts if prescribed conditions are satisfied and in prescribed circumstances: see the Retirement Benefits Schemes (Tax Relief on Contributions) (Disapplication of Earnings Cap) Regulations 1990, SI 1990/586, regs 4-6 (reg 6 added by SI 1996/3113).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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### **(iii) Charge to Tax in Certain Cases**

#### **757. Charge to tax in respect of certain sums paid by employer etc.**

Where, pursuant to a retirement benefits scheme<sup>1</sup>, the employer<sup>2</sup> in any year of assessment<sup>3</sup> pays a sum with a view to the provision of any relevant benefits<sup>4</sup> for any employee<sup>5</sup> of that employer, then (whether or not the accrual of the benefits is dependent on any contingency):

- 1782 (1) the sum paid, if not otherwise chargeable to income tax as income of the employee, is deemed for all purposes of the Income Tax Acts<sup>6</sup> to be income of that employee for that year of assessment and assessable to tax under Schedule E<sup>7</sup>; and
- 1783 (2) where the payment is made under a specified type of life insurance or contract<sup>8</sup>, relief, if not otherwise allowable, must be given<sup>9</sup> to that employee in respect of the payment to the extent, if any, to which such relief would have been allowable to him if the payment had been made by him and the insurance or contract under which the payment is made had been made with him<sup>10</sup>.

Where the employer pays any such sum in relation to more than one employee, the sum so paid must, for the above purposes, be apportioned among those employees by reference to the separate sums which would have had to be paid to secure the separate benefits to be provided for them respectively, and the part of the sum apportioned to each of them is deemed for that purpose to have been paid separately in relation to that one of them<sup>11</sup>.

The provisions set out above do not apply:

- 1784 (a) where the retirement benefits scheme in question is an approved scheme<sup>12</sup> or a relevant statutory scheme<sup>13</sup> or where it is a scheme set up by a government outside the United Kingdom<sup>14</sup> for the benefit, or primarily for the benefit, of its employees<sup>15</sup>;
- 1785 (b) for any year of assessment where the employee performs the duties of his employment in such circumstances that no tax is chargeable under Case I or Case II of Schedule E<sup>16</sup> in respect of the emoluments<sup>17</sup> of his employment (or would be so chargeable were there such emoluments), or where the emoluments from the employment are foreign emoluments<sup>18</sup> and the Board is satisfied, on a claim made by the employee, that the retirement benefits scheme in question corresponds to any such scheme as is mentioned in head (a) above<sup>19</sup>.

Where, in respect of the provision for an employee of any relevant benefits, a sum has been deemed to be income of his<sup>20</sup> and subsequently the employee proves to the satisfaction of the Board that:

- 1786 (i) no payment in respect of, or in substitution for, the benefits has been made; and
- 1787 (ii) some event has occurred by reason of which no such payment will be made,

and makes application for relief within six years from the time when that event occurred, the Board must give relief in respect of tax on that sum by repayment or otherwise as may be appropriate; and if the employee so satisfies the Board in relation to some particular part, but not the whole, of the benefits, the Board may give such relief as may seem to it to be just and reasonable<sup>21</sup>.

1 For the meaning of 'retirement benefits scheme' see PARA 741 ante.

2 For the meaning of 'employer' see PARA 741 note 8 ante.

3 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

4 Any reference for these purposes to the provision for an employee of relevant benefits includes a reference to the provision of benefits payable to that employee's wife or widow, children, dependants or personal representatives: Income and Corporation Taxes Act 1988 s 595(5). For the meaning of 'relevant benefits' generally see PARA 741 note 6 ante.

5 For the meaning of 'employee' see PARA 741 note 8 ante.

6 For the meaning of 'the Income Tax Acts' see PARA 684 note 4 ante.

7 As to assessment and charge to tax under Schedule E (PAYE) see **INCOME TAXATION** vol 23(1) (Reissue) PARA 605 et seq.

8 Ie such an insurance or contract as is mentioned in the Income and Corporation Taxes Act 1988 s 266 (as amended): see **INCOME TAXATION** vol 23(2) (Reissue) (as amended) PARA 1017.

9 Ie under ibid s 266 (as amended): see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1017.

10 Ibid s 595(1).

11 Ibid s 595(4).

12 For the meaning of 'approved scheme' see PARA 752 note 2 ante.

13 For the meaning of 'relevant statutory scheme' see PARA 756 note 2 ante.

14 For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

15 Income and Corporation Taxes Act 1988 s 596(1) (amended by the Finance Act 1989 s 75, Sch 6 paras 8(2), 18(1), (5)).

16 As to tax chargeable under Case I or Case II of Schedule E see **INCOME TAXATION** vol 23(1) (Reissue) PARA 617 et seq.

17 For the meaning of 'emoluments' see PARA 698 note 4 ante.

18 Ie within the meaning of the Income and Corporation Taxes Act 1988 s 192: see **INCOME TAXATION** vol 23(1) (Reissue) PARA 621.

19 Ibid s 596(2) (amended by the Finance Act 1989 Sch 6 paras 8(2), 18(5)).

20 Ie by virtue of the Income and Corporation Taxes Act 1988 s 595(1): see the text and notes 1-10 supra.

21 Ibid s 596(3) (amended by the Finance Act 1989 s 187, Sch 6 paras 8(4), 18(6), Sch 17 Pt IV).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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### **758. Benefits under non-approved schemes.**

Where in any year of assessment<sup>1</sup> a person receives a benefit provided under a retirement benefits scheme<sup>2</sup> which is not of an approved description<sup>3</sup>, tax must be charged in accordance with the following provisions<sup>4</sup>.

Where the benefit is received by an individual, he must be charged to tax under Schedule E<sup>5</sup> for that year<sup>6</sup>. Where the benefit is received by a person other than an individual, the administrator<sup>7</sup> of the scheme must be charged to tax under Case VI of Schedule D<sup>8</sup> for that year<sup>9</sup>.

The amount to be charged to tax is in the case of a cash benefit, the amount received, and in the case of a benefit in kind, an amount equal to whatever is the cash equivalent<sup>10</sup> of the benefit<sup>11</sup>.

Tax must not be charged under these provisions in the case of (1) any pension or annuity which is chargeable to tax under the general provisions of Schedule E<sup>12</sup> or (2) any pension or other benefit chargeable to tax<sup>13</sup> as a foreign pension<sup>14</sup>; but where the amount chargeable to tax as mentioned in head (1) above is less than the amount which would be chargeable to tax under these provisions, head (1) above does not apply and the amount chargeable to tax under these provisions is reduced by the amount otherwise chargeable to tax by virtue of the general provisions of Schedule E<sup>15</sup>.

Tax must not be charged under these provisions, or under the general provisions of Schedule E or the provision for charging termination payments to tax<sup>16</sup> in the case of a lump sum where:

- 1788 (a) the employer has paid any sum or sums with a view to the provision of any relevant benefits under a retirement benefits scheme;
- 1789 (b) an employee has been assessed to tax in respect of the sum or sums<sup>17</sup>; and
- 1790 (c) the lump sum is provided under the scheme to the employee, any wife or widow, children, dependants or personal representatives of the employee<sup>18</sup> or any other individual designated by the employee<sup>19</sup>;

but where any of the income or gains accruing to the scheme under which the lump sum is provided is not brought into charge to tax, tax must be charged under these provisions on the amount of the lump sum received less any deduction applicable<sup>20</sup> for these purposes<sup>21</sup>. It must be assumed unless the contrary is shown that no sums have been paid, and the employee has not been assessed in respect of any sums paid, with a view to the provision of relevant benefits, that the income or gains accruing to a scheme under which the benefit is provided are not brought into charge to tax and that no deduction<sup>22</sup> is applicable<sup>23</sup>.

1 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

2 For the meaning of 'retirement benefits scheme' see PARA 741 ante.

3 I.e. which is not of a description mentioned in the Income and Corporation Taxes Act 1988 s 596(1)(a), (b) or (c): see PARA 757 head (a) ante.

4 Ibid s 596A(1) (s 596A added by the Finance Act 1989 s 75, Sch 6 paras 9, 18(7)).

5 As to the charge to tax under Schedule E (PAYE) see **INCOME TAXATION** vol 23(1) (Reissue) PARA 605 et seq.

6 Income and Corporation Taxes Act 1988 s 596A(2)(as added: see note 4 supra).

7 For the meaning of 'administrator' see PARA 747 note 3 ante.

8 In the case of the charge under Case VI of Schedule D, the rate of tax is 40% or such other rate (whether higher or lower) as may for the time being be specified by the Treasury by order: Income and Corporation Taxes Act 1988 s 596A(5) (as added: see note 4 supra). As to the charge to tax under Case VI of Schedule D generally see **INCOME TAXATION** vol 23(1) (Reissue) PARA 560 et seq.

9 Ibid s 596A(3) (as added: see note 4 supra).

10 For these purposes, the cash equivalent of a benefit in kind is (1) in the case of a benefit other than living accommodation, the amount which would be the cash equivalent of the benefit under ibid Pt V Ch II (ss 153-168G) (as amended) (benefits in kind) if it were chargeable under the appropriate provision of that Chapter (treating any sum made good by the recipient as made good by the employee); and (2) in the case of living accommodation, an amount equal to the value of the accommodation to the recipient determined in accordance with the following provisions less so much of any sum made good by him to those at whose cost the accommodation is provided as is properly attributable to the provision of the accommodation: s 596B(1) (s 596B added by the Finance Act Sch 6 paras 9, 18(7)). Where the cost of providing the accommodation does not exceed £75,000, the value of the accommodation to the recipient in any period is the rent which would have been payable for the period if the premises had been let to him at an annual rent equal to their annual value as ascertained under the Income and Corporation Taxes Act 1988 s 837 (annual value of land: see **INCOME TAXATION** vol 23(1) (Reissue) PARA 664); but for a period in which those at whose cost the accommodation is provided pay rent at an annual rate greater than the annual value as so ascertained, the value of the accommodation to the recipient is an amount equal to the rent payable by them for the period: s 596B(2), (3) (as so added). Where the cost of providing the accommodation exceeds £75,000, the value of the accommodation to the recipient must be taken to be the aggregate of the value of the accommodation to him determined in accordance with s 596B(2), (3) (as so added) and the additional value of the accommodation to him determined as follows: (a) the additional value of the accommodation to the recipient in any period is the rent which would have been payable for that period if the premises had been let to him at an annual rent equal to the appropriate percentage of the amount by which the cost of providing the accommodation exceeds £75,000; and (b) where throughout the period of six years ending with the date when the recipient first occupied the property any estate or interest in the property was held by a relevant person (whether or not it was the same estate, interest or person throughout), the additional value must be calculated as if the amount referred to in head (i) infra were the market value of that property as at that date and the amount referred to in head (ii) infra did not include expenditure on improvements made before that date: s 596B(4)-(6) (as so added). For these purposes, the cost of providing any living accommodation must be taken to be the aggregate of (i) the amount of any expenditure incurred in acquiring the estate or interest in the property held by a relevant person; and (ii) the amount of any expenditure incurred by a relevant person before the year of assessment in question on improvements to the property; and that aggregate amount must be reduced by the amount of any payment made by the recipient to a relevant person, so far as that amount represents a reimbursement of any such expenditure as is mentioned in heads (i) or (ii) supra or represents consideration for the grant to the recipient of a tenancy of the property: s 596B(7), (8) (as so added). Any of the following persons is a relevant person for these purposes, ie the person providing the accommodation and any person, other than the recipient, who is connected with a person providing the accommodation; and s 839 (meaning of 'connected': see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1258) applies: s 596B(9), (10) (as so added). 'The appropriate percentage' means the rate applicable for the purposes of s 160 (as amended) (beneficial loan arrangements: see **INCOME TAXATION** vol 23(1) (Reissue) PARA 723) as at the beginning of the year of assessment in question; 'market value', in relation to any property, means the price which that property might reasonably be expected to fetch on a sale in the open market with vacant possession, no reduction being made, in estimating the market value, on account of any option in respect of the property held by the recipient, or a person connected with him, or by any of the relevant persons; 'property', in relation to any living accommodation, means the property consisting of that living accommodation; and 'tenancy' includes a sub-tenancy: s 596B(10) (as so added).

11 Ibid s 596A(4) (as added: see note 4 supra).

12 Ie by virtue of ibid s 19(1) (as amended): see **INCOME TAXATION** vol 23(1) (Reissue) PARA 617 et seq.

13 Ie under ibid s 58 (as amended): see **INCOME TAXATION** vol 23(1) (Reissue) PARA 556.

14 Ibid s 596A(6) (as added: see note 4 supra; substituted by the Finance Act 1994 s 108(3), (6)).

15 Income and Corporation Taxes Act 1988 s 596A(7) (as added: see note 4 supra); amended by the Finance Act 1994 s 108(4), (6)).

16 Ie the Income and Corporation Taxes Act 1988 s 148: see **INCOME TAXATION** vol 23(1) (Reissue) PARA 688.

17 le by virtue of *ibid* s 595(1): see PARA 757 ante. For the meaning of 'employer' and 'employee' see PARA 741 note 8 ante.

18 le any person falling within *ibid* s 595(5) in relation to the employee: see PARA 757 ante.

19 *Ibid* s 596A(8) (s 596A(8), (9) substituted by the Finance Act 1994 s 108(5), (6)).

20 Subject as follows, the deduction applicable is the aggregate of (1) any sum or sums in respect of which the employee has been assessed as mentioned in head (b) in the text; and (2) any sum or sums paid by the employee, which in either case were paid by way of contribution to the provision of the lump sum: Income and Corporation Taxes Act 1988 s 596A(10) (s 596A(10)-(17) added by the Finance Act 1994 s 108(5), (6)). Where the lump sum is provided under the scheme on the disposal of a part of any asset or the surrender of any part of or share in any rights in any asset, and the employee, any person falling within the Income and Corporation Taxes Act 1988 s 595(5) in relation to the employee or any person connected with the employee has any right to receive or any expectation of receiving a further lump sum (or further lump sums) under the scheme on a further disposal of any part of the asset or a further surrender of any part of or share in any rights in the asset, the deduction applicable must be determined in accordance with the formula  $D = S \times (A \text{ divided by } B)$  where 'D' is the deduction applicable, 'S' is the aggregate amount of any sum or sums of a description mentioned in heads (1)-(2) supra, 'A' is the amount of the lump sum received in relation to which the deduction applicable falls to be determined, and 'B' is the market value of the asset in relation to which the disposal or surrender occurred, on the assumption that the valuation is made immediately before the disposal or surrender: s 596A(11)-(13) (as so added). An individual may not claim that a deduction is applicable in relation to a lump sum more than once: s 596A(14) (as so added). Section 839 (as amended) (meaning of 'connected': see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1258) applies for these purposes; and 'market value' is to be construed in accordance with the Taxation of Chargeable Gains Act 1992 s 272 (see **CAPITAL GAINS TAXATION** vol 5(1) (2004 Reissue) PARA 44): Income and Corporation Taxes Act 1988 s 596A(16), (17) (as so added).

21 *Ibid* s 596A(9) (as substituted: see note 19 supra). For these purposes, income and gains accruing to a scheme must not be regarded as brought into charge to tax merely because tax is charged in relation to the scheme in accordance with s 591C (as added) (tax charge on cessation of approval of certain schemes: see PARA 753 ante): s 591D(6) (added by the Finance Act 1995 s 61(1), (3)).

22 le under the Income and Corporation Taxes Act 1988 s 596A(10) or (11) (as added): see note 20 supra.

23 *Ibid* s 596A(15) (as added: see note 20 supra).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 758 Benefits under non-approved schemes

TEXT AND NOTES--1988 Act ss 596A-596C replaced by provisions of the Income Tax (Earnings and Pensions) Act 2003. For destination of replaced provisions, see table, **INCOME TAXATION** vol 23(2) (Reissue) PARA 1900A. The replaced provisions do not apply to a scheme established by an order under the Armed Forces (Pensions and

Compensation) Act 2004: Income Tax (Earnings and Pensions) Act 2003 s 393(1) (amended by Finance Act 2005 s 19(2)).

If an amount consisting of, or including, an amount representing the benefit of a loan (a 'taxable amount') counts as employment income of an individual in a tax year under the Income Tax (Earnings and Pensions) Act 2003 s 394(1), or the person who is (or any of the persons who are) the responsible person in relation to a scheme is charged to tax on a taxable amount under Schedule D Case VI under s 394(2), the individual or that person is treated for all purposes of the Tax Acts (other than these provisions) as having paid interest on the loan in the tax year equal to the amount representing the cash equivalent of the loan: Income Tax (Earnings and Pensions) Act 2003 s 399(1), (2) (s 399(1) amended by 2004 Act s 249(9); 2003 Act s 399(2) amended by 2004 Act s 249(10)). The interest is to be treated as accruing during the period in the tax year during which the loan is outstanding, and as paid at the end of that period: Income Tax (Earnings and Pensions) Act 2003 s 399(3). It is not to be treated as income of the person making the loan or as relevant loan interest to which the Income and Corporation Taxes Act 1988 s 369 (see **INCOME TAXATION** vol 23(2) (Reissue) PARA 1052) applies: s 399(4). For the meaning of 'the Tax Acts' see **INCOME TAXATION** vol 23(1) (Reissue) PARA 21).

TEXT AND NOTES 1-4--The Income Tax (Earnings and Pensions) Act 2003 s 394(2) (which replaces the 1988 Act s 596A(1)) does not apply in relation to the benefit if the total amount of the benefits to which these provisions would otherwise apply which are received by the individual in the relevant tax year does not exceed £100: Income Tax (Earnings and Pensions) Act 2003 s 394(1A) (added by 2004 Act s 249(5)).

TEXT AND NOTE 2--These provisions now apply to an employer-financed retirement benefits scheme, ie a scheme for the provision of benefits consisting of or including relevant benefits to or in respect of employees or former employees of an employer; but neither a registered pension scheme (see PARA 873B) nor a section 615(3) scheme is an employer-financed retirement benefits scheme: Income Tax (Earnings and Pensions) Act 2003 ss 393, 393A(1), (2) (s 393, 393A, 393B substituted by 2004 Act s 249(3)). 'Section 615(3) scheme' means a superannuation fund to which the 1988 Act s 615(3) applies, and 'scheme' includes a deed, agreement, series of agreements or other arrangements: Income Tax (Earnings and Pensions) Act 2003 s 393A(3), (4). 'Relevant benefits' means any lump sum, gratuity or other benefit (including a non-cash benefit) provided (or to be provided) (1) on or in anticipation of the retirement of an employee or former employee; (2) on the death of an employee or former employee; (3) after the retirement or death of an employee or former employee in connection with past service; (4) on or in anticipation of, or in connection with, any change in the nature of service of any employee; or (5) to any person by virtue of a pension sharing order or provision relating to an employee or former employee: s 393B(1). Benefits charged to tax under the Income Tax (Earnings and Pensions) Act 2003 Pt 9 (ss 565-654), benefits chargeable to tax by virtue of the 2004 Act Sch 34 (see PARA 873B.23), and excluded benefits are not relevant benefits: Income Tax (Earnings and Pensions) Act 2003 s 393B(2). 'Excluded benefits' are benefits (a) in respect of ill-health or disablement of an employee during service; (b) in respect of the death by accident of an employee during service; (c) under a relevant life policy; and (d) of any description prescribed by regulations made by the Commissioners for Her Majesty's Revenue and Customs: s 393B(3) (amended by Commissioners for Revenue and Customs Act 2005 Sch 4 para 102(2)). See the Armed Forces and Reserve Forces (Compensation Scheme) (Excluded Benefits for Tax Purposes) Regulations 2006, SI 2006/132; the Employer-Financed Retirement Benefits (Excluded Benefits for Tax Purposes) Regulations 2006, SI 2006/210; and the Employer-Financed Retirement Benefits (Excluded Benefits for Tax Purposes) Regulations 2007, SI 2007/3537. 'Relevant life policy' means (i) an excepted group life policy as defined in the Income

Tax (Trading and Other Income) Act 2005 s 480; (ii) a policy of life insurance the terms of which provide for the payment of benefits on the death of a single individual and with respect to which (A) condition A in s 481 would be met if paragraph (a) in that condition referred to the death, in any circumstances or except in specified circumstances, of that individual (rather than the death in any circumstances of each of the individuals insured under the policy) and if the condition did not include paragraph (b), and (B) conditions C and D in s 481 and conditions A and C in s 482 are met, or (iii) a policy of life insurance that would be within paragraph (a) or (b) but for the fact that it provides for a benefit which is an excluded benefit under or by virtue of s 482(3)(a), (b) or (d): Income Tax (Earnings and Pensions) Act 2003 s 393B(4). 'Pension sharing order or provision' means any such order or provision as is mentioned in the Welfare Reform and Pensions Act 1999 s 28(1) (see PARA 961A.2) or corresponding Northern Ireland legislation: Income Tax (Earnings and Pensions) Act 2003 s 393B(5); 2004 Act s 279(1).

TEXT AND NOTE 7--For 'administrator' read 'person who is (or persons who are) the responsible person in relation to': 2003 Act s 394(2) (amended by 2004 Act s 249(6)). The 'responsible person' in relation to an employer-financed retirement benefits scheme is (1) if there are one or more trustees of the scheme who are resident in the United Kingdom, that trustee or each of those trustees; (2) if there are one or more persons who control the management of the scheme, that person or each of those persons; (3) if alive or still in existence, the employer, or any of the employers, who established the scheme and any person by whom that employer, or any of those employers, has been directly or indirectly succeeded in relation to the provision of benefits under the scheme; (4) any employer of employees to or in respect of whom benefits are, or are to be, provided under the scheme; (5) if there are one or more trustees of the scheme who are not resident in the United Kingdom, that trustee or each of them: s 399A(1) (s 399A added by 2004 Act s 249(11)). If a person is, or persons are, the responsible person in relation to the scheme by virtue of being specified under any of heads (1)-(5), no-one is the responsible person in relation to the scheme by virtue of being specified under a later head: 2003 Act s 399A(2).

TEXT AND NOTES 16-23--Replaced. In the case of a relevant benefit under an employer-financed retirement benefits scheme in the form of a lump sum where, under the scheme, an employee has paid any sum or sums by way of contribution to the provision of that lump sum, the amount which, by virtue of *ibid* s 394, counts as employment income, or is chargeable to tax under Schedule D Case VI, is the amount of the lump sum reduced by the sum (or the aggregate of the sums) so paid by the employee: s 395(1), (2) (s 395 substituted by 2004 Act s 249(8)). A reduction under the 2003 Act s 395 may not be claimed in respect of the same contribution in relation to more than one lump sum: s 395(3) (as so substituted). It is to be assumed, unless the contrary is shown, that no reduction is applicable under s 395: s 395(4).

NOTE 21--1988 Act s 591D(6) repealed: 2003 Act Sch 6 para 71, Sch 8 Pt 1.

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### **759. Pensions; the charge to tax.**

Subject as follows, all pensions<sup>1</sup> paid under any scheme which is approved or is being considered for approval<sup>2</sup> must be charged to tax under Schedule E<sup>3</sup>, and the statutory provisions relating to PAYE<sup>4</sup> apply accordingly<sup>5</sup>. The Board<sup>6</sup> may, however, direct as respects any such scheme that, until such date as the Board may specify, pensions under the scheme are to be charged to tax as annual payments under Case III of Schedule D<sup>7</sup>, and tax is to be deductible<sup>8</sup> accordingly<sup>9</sup>.

Without prejudice to these provisions, where funds held for the purposes of any scheme which is approved or is being considered for approval are used to acquire an annuity, the annuity must be charged to tax under Schedule E<sup>10</sup> and not under Case III of Schedule D<sup>11</sup>.

1 'Pension' includes annuity: Income and Corporation Taxes Act 1988 s 612(1).

2 Ie under the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended): see PARA 747 et seq ante, 760 et seq post.

3 As to the charge to tax under Schedule E (PAYE) see **INCOME TAXATION** vol 23(1) (Reissue) PARA 605 et seq.

4 Ie the Income and Corporation Taxes Act 1988 s 203 (as amended): see **INCOME TAXATION** vol 23(1) (Reissue) PARA 754.

5 Ibid s 597(1).

6 For the meaning of 'the Board' see PARA 678 note 2 ante.

7 As to the charge to tax under Case III of Schedule D see **INCOME TAXATION** vol 23(1) (Reissue) PARA 464 et seq.

8 Ie under the Income and Corporation Taxes Act 1988 ss 348, 349 (as amended): see **INCOME TAXATION** vol 23(1) (Reissue) PARAS 528, 532.

9 Ibid s 597(2).

10 Ibid s 203 (as amended) applies accordingly: s 597(3) (added by the Finance Act 1994 s 110).

11 Income and Corporation Taxes Act 1988 s 597(3) (as added: see note 11 supra).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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## **760. Repayment of employee's contributions.**

Subject as follows, tax must be charged on any repayment to an employee<sup>1</sup> during his lifetime of any contributions (including interest on contributions, if any) if the payment is made under a scheme which is or has at any time been an exempt approved scheme<sup>2</sup> or under a relevant statutory scheme<sup>3</sup> established under a public general Act<sup>4</sup>. Where any payment is so chargeable to tax, the administrator<sup>5</sup> of the scheme must be charged to income tax under Case VI of Schedule D<sup>6</sup>. The tax must be charged on the amount paid or, if the rules permit the administrator to deduct the tax before payment, on the amount before deduction of tax, and the amount so charged to tax is not treated as income for any other purpose of the Tax Acts<sup>7</sup>.

These provisions do not apply where the employee's employment was carried out outside the United Kingdom<sup>8</sup>; nor do they apply in relation to a contribution made after a scheme has ceased to be an exempt approved scheme, unless it again becomes such a scheme<sup>9</sup>.

1 In relation to a statutory scheme, 'employee' for these purposes includes any officer: Income and Corporation Taxes Act 1988 s 598(7). For the meaning of 'employee' generally see PARA 741 note 8 ante.

2 For the meaning of 'exempt approved scheme' see PARA 754 ante.

3 For the meaning of 'relevant statutory scheme' see PARA 756 note 2 ante.

4 Income and Corporation Taxes Act 1988 s 598(1) (amended by the Finance Act 1989 s 75, Sch 6 paras 10, 18(1)).

5 For the meaning of 'administrator' see PARA 747 note 3 ante.

6 Income and Corporation Taxes Act 1988 s 598(2). The rate of tax was originally specified in the legislation as 10% but was increased by Treasury order to 20% with effect from 6 April 1988. The Treasury may by order from time to time increase or decrease that rate of tax: s 598(2), (3). At the date at which this volume states the law, no such order had been made, but, by virtue of the Interpretation Act 1978 s 17(2)(b), the Occupational Pension Schemes (Rate of Tax under Paragraph 2(2) of Part II of Schedule 5 to the Finance Act 1970) Order 1988, SI 1988/504, which increased the rate of tax from 10% to 20%, has effect as if so made. As to the charge to tax under Case VI of Schedule D see **INCOME TAXATION** vol 23(1) (Reissue) PARA 560 et seq.

7 Income and Corporation Taxes Act 1988 s 598(4). For the meaning of 'the Tax Acts' see PARA 693 note 4 ante.

8 Income and Corporation Taxes Act 1988 s 598(6).

9 See *ibid* s 598(5), disapplying s 598(1)(a) in such circumstances.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity

contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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### **761. Commutation of entire pension in special circumstances.**

Where a scheme which is or has at any time been an approved scheme<sup>1</sup>, or a relevant statutory scheme<sup>2</sup> established under a public general Act contains a rule allowing, in special circumstances, a payment in commutation of an employee's<sup>3</sup> entire pension<sup>4</sup>, and any pension is commuted, whether wholly or not, under the rule, tax must be charged on the amount by which the sum receivable exceeds:

- 1791 (1) the largest sum which would have been receivable in commutation of any part of the pension if the scheme had secured that the aggregate value of the relevant benefits<sup>5</sup> payable to an employee on or after retirement, excluding any pension which was not commutable, could not exceed three-eightieths of his final remuneration<sup>6</sup> (disregarding any excess of that remuneration over the permitted maximum)<sup>7</sup> for each year of service up to a maximum of 40<sup>8</sup>; or
- 1792 (2) the largest sum which would have been receivable in commutation of any part of the pension under any rule of the scheme authorising the commutation of part (but not the whole) of the pension, or which would have been so receivable but for those special circumstances<sup>9</sup>,

whichever gives the lesser amount chargeable to tax<sup>10</sup>. Where any amount is so chargeable to tax, the administrator<sup>11</sup> of the scheme must be charged to income tax under Case VI of Schedule D<sup>12</sup> on that amount<sup>13</sup>.

These provisions do not apply where the employee's employment was carried on outside the United Kingdom<sup>14</sup>.

1 For the meaning of 'approved scheme' see PARA 752 note 2 ante.

2 For the meaning of 'relevant statutory scheme' see PARA 756 note 2 ante.

3 In relation to a statutory scheme, 'employee' for these purposes includes officer: Income and Corporation Taxes Act 1988 s 599(5).

4 For the meaning of 'pension' see PARA 759 note 1 ante.

5 For the meaning of 'relevant benefits' see PARA 741 note 6 ante.

6 For the meaning of 'final remuneration' see PARA 751 note 8 ante.

7 'The permitted maximum' means, as regards a charge to tax arising under this provision in a particular year of assessment, the figure found for that year as follows, ie for the years 1988-89 and 1989-90 the figure is £60,000 and for any subsequent year of assessment the figure is the figure found for that year, for the purposes of the Income and Corporation Taxes Act 1988 s 590C (as added and amended), by virtue of s 590C(4)-(5A) (as added and amended) (see PARA 750 ante): s 599(10)-(12) (added by the Finance Act 1989 s 75, Sch 6 paras 11(3), (18)(8); the Income and Corporation Taxes Act 1988 s 599(12) amended by the Finance Act 1993 s 107(6), (8)).

8 Income and Corporation Taxes Act 1988 s 599(1)(a). For transitional provisions see s 599(9). In applying s 599(1)(a) or (b), the same considerations must be taken into account, including the provisions of any other relevant scheme, as would have been taken into account by the Board in applying s 590 (as amended)

(approval of scheme: see PARA 748 ante); and where the scheme has ceased to be an approved scheme, account must only be taken of the rules in force when the scheme was last an approved scheme: s 599(6).

9 Ibid s 599(1)(b); and see note 8 supra.

10 See ibid s 599(1), (2) (s 599(2) amended by the Finance Act 1989 Sch 6 paras 11(2), 18(1)).

11 Where the pension has been secured by means of an annuity contract with an insurance company and the sum receivable is payable under that contract by the insurance company, the references to the administrator of the scheme in this provision and in the Income and Corporation Taxes Act 1988 s 598(2), (4) (see PARA 760 ante) as applied by s 599(3) (see note 13 infra) are to be read as references to the insurance company; and 'insurance company' has the meaning given by s 659B (as added): s 599(7), (8) (s 599(8) substituted by the Finance (No 2) Act 1992 s 56, Sch 9 para 16). For the meaning of 'administrator' generally see PARA 747 note 3 ante.

12 As to the charge to tax under Case VI of Schedule D see **INCOME TAXATION** vol 23(1) (Reissue) PARA 560 et seq.

13 Income and Corporation Taxes Act 1988 599(3). Section 598(2), (3), (4) (see PARA 760 ante) applies as it applies to tax chargeable under s 598 (as amended) (see PARA 760 ante): s 599(3).

14 Ibid s 599(4). For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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## **762. Payments out of surplus funds.**

On the making of any payment<sup>1</sup> which is made to or for the benefit of an employee<sup>2</sup> or to his personal representatives out of funds which are or have been held for the purposes of a scheme which is or has at any time been an exempt approved scheme<sup>3</sup>, or a relevant statutory scheme established under a public general Act, and which is made in pursuance of a duty to return surplus funds<sup>4</sup>, the administrator<sup>5</sup> of the scheme must be charged to income tax under Case VI of Schedule D<sup>6</sup> at the relevant rate<sup>7</sup> on such amount as, after deduction of tax at that rate, would equal the amount of the payment<sup>8</sup>.

Where a payment made to or for the benefit of an employee is one to which the above provisions apply, it must be treated in computing the total income of the employee for the year in which it is made as income for that year which is received by him after deduction of income tax at the basic rate from a corresponding gross amount and chargeable to income tax under Case VI of Schedule D<sup>9</sup>, but no repayment of income tax must be made to the employee<sup>10</sup>. This applies whether or not the employee is the recipient of the payment<sup>11</sup>.

Any payment chargeable to tax under these provisions is not chargeable to tax under the statutory provisions relating to repayment of contributions<sup>12</sup>, commutation of the entire pension<sup>13</sup> or unauthorised payments to or for employees<sup>14</sup> or under the specified<sup>15</sup> regulations<sup>16</sup>.

1 For these purposes, references to any payment include references to any transfer of assets or other transfer of money's worth: Income and Corporation Taxes Act 1988 s 599A(10) (s 599A added by the Finance Act 1989 s 75, Sch 6 paras 12, 18(9)).

2 For these purposes, 'employee', in relation to a relevant statutory scheme, includes officer: Income and Corporation Taxes Act 1988 s 599A(10) (as added: see note 1 supra). For the meaning of 'relevant statutory scheme' see PARA 756 note 2 ante; and for the meaning of 'employee' generally see PARA 741 note 8 ante.

3 For the meaning of 'exempt approved scheme' see PARA 754 ante.

4 See the Income and Corporation Taxes Act 1988 s 599A(1) (as added: see note 1 supra).

5 For the meaning of 'administrator' see PARA 747 note 3 ante.

6 As to the charge to tax under Case VI of Schedule D see **INCOME TAXATION** vol 23(1) (Reissue) PARA 560 et seq.

7 The relevant rate was originally specified in the legislation as 35% but the Treasury may by order from time to time increase or decrease it: Income and Corporation Taxes Act 1988 s 599A(3), (4) (as added: see note 1 supra). In relation to payments made on or after 6 April 1997, the rate is 33%: see the Income Tax (Charge to Tax) (Payments out of Surplus Funds) (Relevant Rate) Order 1997, SI 1997/369, art 2.

8 Income and Corporation Taxes Act 1988 s 599A(2) (as added: see note 1 supra).

9 Ibid s 599A(5) (as added: see note 1 supra).

10 Ibid s 599A(6) (amended by the Finance Act 1996 ss 121(8), 122(7)(b), 205, Sch 41 Pt V(6)).

11 Income and Corporation Taxes Act 1988 s 599A(8) (as added: see note 1 supra).

12 Ie ibid s 598 (as amended); see PARA 760 ante.

13 Ie ibid s 599 (as amended): see PARA 761 ante.

14    le ibid s 600 (as amended): see PARA 753 post.

15    le under the Regulations dated 10 November 1921, SR & O 1921/1699, made under the Finance Act 1921 s 32 (repealed) but continuing in operation under the Finance Act 1971 Sch 3 para 8(5).

16    Income and Corporation Taxes Act 1988 s 599A(9) (as added: see note 1 supra).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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### **763. Unauthorised payments to or for employees.**

If any payment<sup>1</sup> to or for the benefit of an employee<sup>2</sup>, otherwise than in course of payment of a pension<sup>3</sup>, being a payment made out of funds which are held for the purposes of a scheme which is approved for the statutory purposes<sup>4</sup>, is not expressly authorised by the rules of the scheme or by virtue of the relevant statutory provision<sup>5</sup>, the employee (whether or not he is the recipient of the payment) is chargeable to tax on the amount of the payment under Schedule E<sup>6</sup> for the year of assessment<sup>7</sup> in which the payment is made<sup>8</sup>.

Any payment so chargeable to tax is not chargeable to tax under the statutory provisions relating to repayment of contributions<sup>9</sup> or commutation of the entire pension<sup>10</sup> or under the specified<sup>11</sup> regulations<sup>12</sup>.

Where a pilots' benefit fund<sup>13</sup> is approved as if it were a retirement benefits scheme<sup>14</sup> notwithstanding that it does not satisfy one or more of the prescribed conditions<sup>15</sup>, pensions paid out of the fund and any sums chargeable to tax in connection with the fund under these provisions are treated for income tax purposes as earned income<sup>16</sup>.

1 For these purposes, references to any payment include references to any transfer of assets or other transfer of money's worth: Income and Corporation Taxes Act 1988 s 600(4).

2 For the meaning of 'employee' see PARA 741 note 8 ante.

3 For the meaning of 'pension' see PARA 759 note 1 ante.

4 Ie approved for the purposes of the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended) (see PARA 747 et seq ante, 764 et seq post) or under the previous legislation (ie the Finance Act 1970 Pt II Ch II or the Income and Corporation Taxes Act 1970 s 208 or Pt IX Ch II (all repealed)).

5 Ie by virtue of the Finance Act 1989 Sch 6 para 33 (transitional provisions relating to additional voluntary contributions).

6 As to the charge to tax under Schedule E (PAYE) see **INCOME TAXATION** vol 23(1) (Reissue) PARA 605 et seq.

7 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

8 Income and Corporation Taxes Act 1988 s 600(1), (2) (amended by the Finance Act 1989 ss 75, 187, Sch 6 paras 13, 18(9), Sch 17 Pt IV).

9 Ie the Income and Corporation Taxes Act 1988 s 598 (as amended): see PARA 760 ante.

10 Ie ibid s 599 (as amended): see PARA 761 ante.

11 Ie under the Regulations dated 10 November 1921, SR & O 1921/1699, made under the Finance Act 1921 s 32 (repealed) but continuing in operation under the Finance Act 1971 Sch 3 para 8(5).

12 Income and Corporation Taxes Act 1988 s 600(3).

13 For the meaning of 'pilots' benefit fund' see PARA 748 note 20 ante.

14 For the meaning of 'retirement benefits scheme' see PARA 741 ante.

15 For the meaning of 'the prescribed conditions' see PARA 748 ante.

16 See the Income and Corporation Taxes Act 1988 s 607(2)(b). As to approval of such a fund see PARA 748 ante.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **763 Unauthorised payments to or for employees**

NOTE 8--A person who is both an employee and a director need not retire from both positions before he can be said to retire, becoming eligible to receive pension benefits: *Venables v Hornby (Inspector of Taxes)* [2003] UKHL 65, (2004) 75 TC 553 (pension payments to taxpayer retiring as executive director but continuing as non-executive director authorised by rules of pension scheme).

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#### **764. Payments to employers.**

Where a payment<sup>1</sup> is made to an employer<sup>2</sup> out of funds which are or have been held for the purposes of a scheme which is or has at any time been an exempt approved scheme<sup>3</sup> and whether or not the payment is made in pursuance of the relevant statutory provisions<sup>4</sup>, an amount equal to 40 per cent of the payment is recoverable by the Board<sup>5</sup> from the employer<sup>6</sup>. This does not, however, apply to any payment:

- 1793 (1) to the extent that, if these provisions had not been enacted, the employer would have been exempt, or entitled to claim exemption, from income tax or corporation tax in respect of the payment; or
- 1794 (2) made before the scheme became an exempt approved scheme; or
- 1795 (3) of any prescribed description<sup>7</sup>; or
- 1796 (4) made in pursuance of the winding up of the scheme where the winding up commenced on or before 18 March 1986; or
- 1797 (5) made in pursuance of an application which was made to the Board on or before that date and was not withdrawn before the making of the payment, and which sought the Board's assurance that the payment would not lead to a withdrawal of approval<sup>8</sup>.

Nor does it apply where the employer is a charity<sup>9</sup>.

Where any payment is made or becomes due to an employer out of funds which are or have been held for the purposes of a scheme which is or has at any time been an exempt approved scheme then:

- 1798 (a) if the scheme relates to a trade<sup>10</sup>, profession or vocation<sup>11</sup> carried on by the employer, the payment must be treated for the purposes of the Tax Acts<sup>12</sup> as a receipt of that trade, profession or vocation receivable when the payment falls due or on the last day on which the trade, profession or vocation is carried on by the employer, whichever is the earlier;
- 1799 (b) if the scheme does not relate to such a trade, profession or vocation, the employer must be charged to tax on the amount of the payment under Case VI of Schedule D<sup>13</sup>;

but this does not apply to a payment which fell due before the scheme became an exempt approved scheme or to a payment which is subject to the 40 per cent charge<sup>14</sup> or would be so subject but for head (1) above, or but for the fact that the employer is a charity<sup>15</sup>.

1 For these purposes, references to any payment include references to any transfer of assets or other transfer of money's worth: Income and Corporation Taxes Act 1988 s 601(6)(a).

2 For the meaning of 'employer' see PARA 741 note 8 ante.

3 For the meaning of 'exempt approved scheme' see PARA 754 ante.

4 In pursuance of the Income and Corporation Taxes Act 1988 s 603, Sch 22: see PARA 766 post.

5 For the meaning of 'the Board' see PARA 678 note 2 ante.

6 Income and Corporation Taxes Act 1988 s 601(1), (2).

7 'Prescribed' means prescribed by regulations made by the Treasury: *ibid* s 601(6)(b). At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Interpretation Act 1978 s 17(2)(b), the Pension Scheme Surpluses (Administration) Regulations 1987, SI 1987/352, have effect as if so made. The following descriptions of payment by the administrator are prescribed for these purposes: (1) any payment to the employer (a) by way of reimbursement of expenditure properly incurred by the employer in respect of an obligation of the administrator in respect of the scheme; (b) by way of interest on or repayment of a loan from the employer; (c) by way of loan or investment of scheme funds provided it is a loan or investment showing a reasonable commercial return; (d) which the administrator is obliged to make under the provisions of a scheme to enable the employer to obtain the discharge by a member of the scheme of some monetary obligation due to the employer which arises out of a criminal, negligent or fraudulent act or omission by the member concerned; (2) a reimbursement of a payment by the employer of a state scheme premium to which the Social Security Pensions Act 1975 s 42 or s 45 (both repealed) applies: Pension Scheme Surpluses (Administration) Regulations 1987, SI 1987/352, reg 4. As to contributions equivalent premium (replacing state scheme premium) see the Pensions Schemes Act 1993 s 55 (as amended) and PARA 922 post.

8 Income and Corporation Taxes Act 1988 s 601(3).

9 See *ibid* s 601(4). For the meaning of 'charity' see s 506; and **INCOME TAXATION** vol 23(2) (Reissue) PARA 1172.

10 For the meaning of 'trade' see **INCOME TAXATION** vol 23(1) (Reissue) PARA 105.

11 As to the meaning of 'profession or vocation' see **INCOME TAXATION** vol 23(1) (Reissue) PARAS 135-136.

12 For the meaning of 'the Tax Acts' see PARA 693 note 4 ante.

13 Income and Corporation Taxes Act 1988 s 601(5). As to the charge to tax under Case VI of Schedule D see **INCOME TAXATION** vol 23(1) (Reissue) PARA 560 et seq.

14 I.e. a payment to which *ibid* s 601(2) applies.

15 See *ibid* s 601(5).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 764 Payments to employers

NOTE 1--An unlawful transfer of funds to an employer which is subsequently repaid to the scheme is not a 'payment' for the purposes of the 1988 Act s 601: *Hilldown Holdings plc v IRC* (1999) Times, 13 May.

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#### **(iv) Pension Fund Surpluses**

##### **765. Power to make regulations.**

In relation to an amount recoverable by the Board<sup>1</sup> from an employer<sup>2</sup> in the specified circumstances<sup>3</sup>, the Treasury may by regulations make any of the following provisions<sup>4</sup>, that is to say, provision:

- 1800 (1) requiring the administrator<sup>5</sup> of the scheme or the employer (or both) to furnish to the Board, in respect of the amount recoverable and of the payment concerned, information of a prescribed kind<sup>6</sup>;
- 1801 (2) Enabling the Board to serve a notice or notices requiring the administrator or employer (or both) to furnish to the Board, in respect of the amount and payment, particulars of a prescribed kind<sup>7</sup>;
- 1802 (3) requiring the administrator to deduct out of the payment the amount recoverable and to account to the Board for it<sup>8</sup>;
- 1803 (4) as to circumstances in which the employer may be assessed in respect of the amount recoverable<sup>9</sup>;
- 1804 (5) that, in a case where the employer has been assessed in respect of an amount recoverable but has not paid it (or part of it) within a prescribed period, the administrator may be assessed and charged (in the employer's name) in respect of the amount (or part unpaid)<sup>10</sup>;
- 1805 (6) that, in a case where the amount recoverable (or part of it) has been recovered from the administrator by virtue of an assessment in the employer's name, the administrator is entitled to recover from the employer a sum equal to the amount (or part)<sup>11</sup>;
- 1806 (7) Enabling the employer or administrator (as the case may be) to appeal against an assessment made on him in respect of the amount recoverable<sup>12</sup>;
- 1807 (8) as to when any sum in respect of the amount recoverable is payable to the Board by the administrator or employer and as to interest to be paid on any sum so payable<sup>13</sup>;
- 1808 (9) that an amount paid to the Board by the administrator must be treated as paid on account of the employer's liability<sup>14</sup> under the relevant statutory provision<sup>15</sup>;

and for this purpose the amount recoverable must be treated as if it were an amount of income tax chargeable on the employer under Case VI of Schedule D for the year of assessment<sup>16</sup> in which the payment is made<sup>17</sup> or, where the employer is a company<sup>18</sup>, an amount of corporation tax chargeable on the company for the accounting period<sup>19</sup> in which the payment is made<sup>20</sup>. For the purpose of giving effect to any provision mentioned in heads (3) to (9) above, such regulations may also include provision applying (with or without modifications) provisions of the enactments relating to income tax and corporation tax<sup>21</sup>.

Subject to any provision of such regulations, a payment of an amount recoverable as mentioned above must not be treated as a profit or gain brought into charge to income tax or corporation tax and must not be treated as part of the employer's income for any purpose of the Income and Corporation Taxes Act 1988 and the amount recoverable must not be subject to any exemption or reduction (by way of relief, set-off or otherwise) or be available for set-off against other tax<sup>22</sup>. If the employer is a company and such a payment is made at a time not

otherwise within an accounting period of the company, an accounting period of the company is treated for these purposes as beginning immediately before the payment is made<sup>23</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 For the meaning of 'employer' see PARA 741 note 8 ante.

3 le recoverable as mentioned in the Income and Corporation Taxes Act 1988 s 601(2): see PARA 764 ante.

4 Ibid s 602(1). At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Interpretation Act 1978 s 17(2)(b), the Pension Scheme Surpluses (Administration) Regulations 1987, SI 1987/352, have effect as if so made. See notes 6-11 infra.

5 For the meaning of 'administrator' see PARA 747 note 3 ante.

6 Income and Corporation Taxes Act 1988 s 602(2)(a). The administrator must, within 14 days after making the surplus payment, make a return to the Board containing the following particulars: (1) the full name or description and tax office reference of the scheme; (2) the name and address and tax office reference of the employer concerned; (3) details of the surplus payment including the date when it was made, and where the surplus payment (or part) is a transfer of an asset or of money's worth, the market value of the asset or money's worth concerned; (4) the amount of the tax payment: Pension Scheme Surpluses (Administration) Regulations 1987, SI 1987/352, reg 3(1)(b), (2).

7 Income and Corporation Taxes Act 1988 s 602(2)(b). Where the Board has reason to believe that a surplus payment has been made to an employer in respect of which no return or an incorrect return has been made under the Pension Scheme Surpluses (Administration) Regulations 1987, SI 1987/352, reg 3 (see note 6 supra), it may, by notice in writing, require the administrator or the employer concerned, within the time limited by the notice, to furnish to the Board a return (or further return) containing the particulars to which reg 3 refers: reg 7.

8 Income and Corporation Taxes Act 1988 s 602(2)(c). On making a surplus payment to an employer, the administrator must deduct out of it the relevant tax payment: Pension Scheme Surpluses (Administration) Regulations 1987, SI 1987/352, reg 3(1)(a). The tax payment is due at the time by which the return under reg 3 (see note 6 supra) is to be made and unless the Board otherwise authorises must be made with that return; and it is payable by the administrator without the making of any assessment: reg 5(1), (2).

9 Income and Corporation Taxes Act 1988 s 602(2)(d). Subject to the following, the amount of the tax payment to which the Pension Scheme Surpluses (Administration) Regulations 1987, SI 1987/352, reg 3(1) refers (see note 8 supra) must be assessed upon the employer under Case VI of Schedule D as an amount of income tax or corporation tax, as the case may be, for the chargeable period in which the surplus payment is made: reg 6(1). The amount of tax charged and due under the assessment must be reduced by the amount paid to the Board by the administrator in respect of the tax payment payable under reg 5 (see note 8 supra) and, subject to any appeal, the reduced amount must in all respects be treated as an amount of tax due and payable under an assessment to which the Taxes Management Act 1970 applies as if the assessment were an assessment specified in s 55(1) (recovery of tax not postponed) and s 86(2) (interest on tax) and s 86(3), (4) were omitted and 'the reckonable date' for the purposes of s 86 were 7 May 1987 or the fifteenth day after the date when a surplus payment is made (whichever is later), and which is final and conclusive: Pension Scheme Surpluses (Administration) Regulations 1987, SI 1987/352, reg 6(2), (6).

10 Income and Corporation Taxes Act 1988 s 602(2)(e). If, by the end of the sixtieth day after the date of the notice of the assessment, the full amount of the tax due and payable under the assessment, together with interest payable, has not been paid to the Board, the amount of tax and interest remaining unpaid may be assessed upon the administrator (under Case VI of Schedule D) in the name of the employer: Pension Scheme Surpluses (Administration) Regulations 1987, SI 1987/352, reg 6(3). The amount of the tax and interest so charged by an assessment upon the administrator is (subject to any appeal within that period) due and payable by the administrator within 14 days after the date of the notice of that further assessment as an amount of tax due and payable under an assessment which is final and conclusive: reg 6(4). As to the charge to tax under Case VI of Schedule D see **INCOME TAXATION** vol 23(1) (Reissue) PARA 560 et seq.

11 Income and Corporation Taxes Act 1988 s 602(2)(f). Where an amount due and payable under the Pension Scheme Surpluses (Administration) Regulations 1987, SI 1987/352, reg 6(3) (see note 10 supra) has been paid by the administrator he may recover a sum equal to that amount from the employer: reg 6(5).

12 Income and Corporation Taxes Act 1988 s 602(2)(g).

13 Ibid s 602(2)(h). See note 8 supra.

14 le under ibid s 601(2): see PARA 764 ante.

15 Ibid s 602(2)(j). Any amount recoverable by the Board from an administrator or employer under the Pension Scheme Surpluses (Administration) Regulations 1987, SI 1987/352, whether by assessment or otherwise, must be treated as an amount recoverable from the administrator or employer, as the case may be, in a separate capacity from other amounts which may be recoverable under the Tax Acts: Pension Scheme Surpluses (Administration) Regulations 1987, SI 1987/352, reg 8.

16 For the meaning of 'year of assessment' see PARA 680 note 1 ante.

17 Income and Corporation Taxes Act 1988 s 602(1)(a).

18 For the meaning of 'company' see **INCOME TAXATION** vol 23(1) (Reissue) PARA 1.

19 For the meaning of 'accounting period' see **INCOME TAXATION** vol 23(1) (Reissue) PARA 837.

20 Income and Corporation Taxes Act 1988 s 602(1)(b).

21 Ibid s 602(3).

22 Ibid s 602(4).

## **UPDATE**

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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## **766. Reduction of surpluses.**

The Board<sup>1</sup> may make regulations providing for the following provisions to apply, as from a prescribed<sup>2</sup> date, in relation to any exempt approved scheme<sup>3</sup> which is of a prescribed kind<sup>4</sup> and for prescribed provisions<sup>5</sup> to apply, as from a prescribed date, in prescribed circumstances, and subject to any prescribed omissions or modifications, in relation to any exempt approved scheme of another prescribed kind<sup>6</sup>.

The administrator<sup>7</sup> of a scheme in relation to which these provisions apply must, in prescribed circumstances and at a prescribed time<sup>8</sup>, either produce to the Board a written valuation of the assets held for the purposes of the scheme and the liabilities of the scheme, determined in accordance with prescribed principles and fulfilling prescribed requirements, and signed by a person with qualifications of a prescribed kind, or give to the Board a certificate stating whether or not the value of the assets (as determined in accordance with prescribed principles) exceeds the value of the liabilities (as so determined) by a percentage which is more than a prescribed maximum<sup>9</sup>. The certificate must be in a prescribed form<sup>10</sup> and must be signed by a person with qualifications of a prescribed kind<sup>11</sup>. Where a valuation so produced shows, or a certificate so given states, that the value of the assets exceeds the value of the liabilities by a percentage which is more than the prescribed maximum, the administrator of the scheme must within a prescribed period<sup>12</sup> submit to the Board for its approval proposals for reducing or eliminating the excess in a way or ways set out in the proposals and falling within the permitted ways<sup>13</sup>. The proposals must be such as to secure that (1) by the end of a prescribed period<sup>14</sup> the percentage (if any) by which the value of the assets exceeds the value of the liabilities is no more than the prescribed maximum; and (2) if the way, or one of the ways, set out in the proposals is by way of making payments to an employer, there remains an excess which is of a level not less than the prescribed minimum<sup>15</sup>.

If the administrator of the scheme fails to submit proposals to the Board within the prescribed period, or if the proposals submitted to the Board within that period are not approved by the Board within a further prescribed period<sup>16</sup>, the Board may specify a percentage<sup>17</sup> equivalent to (a) its estimate of the value of the scheme's liabilities at the relevant time<sup>18</sup> increased by a prescribed percentage<sup>19</sup>, divided by (b) its estimate of the value of the assets held for the purposes of the scheme at that time<sup>20</sup>. Where it does so, certain tax reliefs<sup>21</sup> apply only to that specified percentage of any income derived in the relevant period from the assets held for the purposes of the scheme and of any underwriting commissions applied in the relevant period for the purposes of that scheme<sup>22</sup>, relief under Case VI of Schedule D is limited<sup>23</sup> and capital gains tax exemption<sup>24</sup> is also limited<sup>25</sup>.

Where a valuation has been produced under these provisions, the Board may serve on the administrator of the scheme a notice requiring him to furnish the Board, within a prescribed period<sup>26</sup>, with such particulars relating to the valuation as may be specified in the notice<sup>27</sup>; and where a certificate has been given under these provisions, the Board may serve on the administrator of the scheme a notice requiring him to produce to the Board, within a prescribed period<sup>28</sup>, a written valuation of the assets and liabilities of the scheme such as is mentioned above<sup>29</sup>. Where a valuation has been produced in compliance with a notice so served, the Board may serve on the administrator of the scheme a further notice requiring him to furnish the Board, within a prescribed period<sup>30</sup>, with such particulars relating to the valuation as may be specified in the notice<sup>31</sup>; and where particulars have been so furnished or such a valuation has been produced, the Board must, within a prescribed period<sup>32</sup>, serve on the administrator of the

scheme a notice (i) stating that the Board accepts the valuation produced under the above requirements; or (ii) stating that the Board does not accept the valuation so produced, and specifying its estimate of the value of the liabilities of the scheme at the relevant time<sup>33</sup> and its estimate of the value of the assets held for the purposes of the scheme at that time<sup>34</sup>.

The administrator of the scheme must within a prescribed period<sup>35</sup> submit to the Board for approval proposals for reducing or eliminating the excess which fulfil the statutory requirements<sup>36</sup> where:

1809 (A) in a case falling within head (i) above, the valuation shows that the value of the assets exceeds the value of the liabilities by a percentage which is more than the prescribed maximum; or

1810 (B) in a case falling within head (ii) above, the value of the assets as estimated by the Board exceeds the value of the liabilities as so estimated by a percentage which is more than the prescribed maximum<sup>37</sup>.

If the administrator of the scheme fails to submit proposals to the Board within the prescribed period, or if proposals submitted within that period are not approved by the Board within a further prescribed period<sup>38</sup>, the Board may specify a percentage as described in heads (a) and (b) above<sup>39</sup>, with the tax consequences already discussed in relation to that percentage<sup>40</sup>.

Where proposals are submitted to the Board under the above provisions and the Board approves them within the further prescribed period applicable, the administrator of the scheme must carry out the proposals within the statutory period<sup>41</sup> and if he fails to carry them out within that period, the Board may specify a percentage as described in heads (a) and (b) above, with the tax consequences already discussed in relation to that percentage<sup>42</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 For these purposes, 'prescribed' means prescribed by regulations made by the Board: Income and Corporation Taxes Act 1988 s 603, Sch 22 para 1(3). At the date at which this volume states the law, no such regulations had been made, but, by virtue of the Interpretation Act 1978 s 17(2)(b), the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412 (amended by SI 1989/992; SI 1989/2290) have effect as if so made.

3 For the meaning of 'exempt approved scheme' see PARA 754 ante.

4 Income and Corporation Taxes Act 1988 Sch 22 para 1(1). The prescribed kinds of schemes are (1) self-administered schemes, other than schemes which have less than 12 members and are simplified defined contribution schemes (or both); and (2) insured schemes, the policies in respect of which do not provide that levels of contributions require to take account of surpluses, other than schemes (a) the policies in respect of which provide only for lump sum benefits for members on death before normal retirement age; or (b) which are simplified defined contribution schemes: Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 3 (as amended: see note 2 supra). 'Self-administered scheme' means a scheme some or all of the income and other assets of which are invested otherwise than in insurance policies; and 'simplified defined contribution scheme' means a scheme approved by the Board under the Income and Corporation Taxes Act 1988 s 591 (as amended) (see PARA 751 ante) by reference to limitations on (i) the aggregate amount of the contributions which may be paid by a member and his employer; (ii) the maximum lump sum which may be provided under the scheme; and (iii) the benefits payable on death which may be provided under the scheme: Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 2 (the latter definition added by SI 1989/2290).

5 The prescribed provisions of the Income and Corporation Taxes Act 1988 Sch 22 (as amended): see the text and notes 6-42 infra.

6 Ibid Sch 22 para 1(2). Where a self-administered scheme or an insured scheme does not fulfil the conditions of the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 3 (as amended) (see note 4 supra) and the administrator intends to make a payment to an employer out of funds held for the purposes of a scheme which is or has at any time been an exempt approved scheme, then unless such a scheme is being wound up and not replaced, (1) the Income and Corporation Taxes Act 1988 Sch 22 para 2(2) applies for the purposes of a valuation of assets and liabilities; and (2) where such a valuation shows that the

value of the assets exceeds the value of the liabilities, Sch 22 paras 4, 5(1), (2), 7 and the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412 (as amended) apply to the scheme: reg 12.

7 For the meaning of 'administrator' see PARA 747 note 3 ante.

8 For the prescribed circumstances and time see the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 9.

9 Income and Corporation Taxes Act 1988 Sch 22 para 2(1)-(3). As to the principles and requirements in accordance with which valuations of assets and liabilities of a scheme are to be determined see the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, regs 4-8 (as amended: see note 2 supra). The prescribed maximum is 5%: see the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 10(4) (amended by SI 1989/2290).

10 For the prescribed form of certificate see the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 15, Schedule.

11 Income and Corporation Taxes Act 1988 Sch 22 para 2(3). The person signing the certificate must be qualified as an actuary: see the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 9(4).

12 Ie within six months after the date when the valuation or certificate is signed: see *ibid* reg 10(1).

13 Income and Corporation Taxes Act 1988 Sch 22 para 3(1), (2). The permitted ways of reducing or eliminating the excess are (1) making payments to an employer; (2) suspending for a period (of five years or less) set out in the proposals an employer's obligation to pay contributions under the scheme or reducing for such a period the amount of an employer's contributions under the scheme; (3) suspending for a period (of five years or less) set out in the proposals the obligation of employees to pay contributions under the scheme or reducing for such a period the amount of employees' contributions under the scheme; (4) improving existing benefits provided under the scheme; (5) providing new benefits under the scheme; (6) such other ways as may be prescribed: and omissions in or modifications to this list may be prescribed in certain circumstances: see Sch 22 para 3(3), (4). For the prescribed modifications see the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 11.

14 For the prescribed period see *ibid* reg 11(2) (amended by SI 1989/2290).

15 Income and Corporation Taxes Act 1988 Sch 22 para 3(2)(a), (b). The proposals may not have the effect of reducing the assets of the scheme to an amount less than is equal to 5% in excess of the liabilities: see the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 10(3).

16 Ie within six months after the date of the receipt of the proposals submitted to the Board: see *ibid* reg 13.

17 Ie under the Income and Corporation Taxes Act 1988 Sch 22 para 7(1): Sch 22 para 3(5).

18 For these purposes, the relevant time is the time specified (1) in the valuation produced or certificate given under *ibid* Sch 22 para 2 or, (2) where a valuation has been produced under Sch 22 para 4 (see the text and notes 26-31 *infra*), as the time by reference to which the values of the assets and liabilities are determined: Sch 22 para 7(2).

19 The prescribed percentage is 5%; see the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 11(5) (added by SI 1989/2290).

20 Income and Corporation Taxes Act 1988 Sch 22 para 7(1).

21 Ie under *ibid* s 592(2) or (3), as appropriate: see PARA 754 ante.

22 See *ibid* Sch 22 para 7(3)(a), (b).

23 Ie *ibid* s 56 does not apply, by virtue of s 56(3)(b), only to that percentage of any profits or gains arising to the scheme in the relevant period: Sch 22 para 7(3)(c). 'The relevant period' means the period beginning at the relevant time and ending when it is proved to the satisfaction of the Board that the value of the assets (as determined in accordance with prescribed principles) exceeds the value of the liabilities (as so determined) by a percentage which is no more than the prescribed maximum: Sch 22 para 7(10). As to the charge to tax under Case VI of Schedule D see INCOME TAXATION vol 23(1) (Reissue) PARA 560 et seq.

24 Ie the Taxation of Chargeable Gains Act 1992 s 271(1)(g) (see CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 241) applies only to that percentage of any gain accruing on the disposal in the relevant period of any of those assets: Income and Corporation Taxes Act 1988 Sch 22 para 7(3)(d) (amended by the Taxation of Chargeable Gains Act 1992 s 290(1), Sch 10 para 14(1), (60)).

- 25 See the Income and Corporation Taxes Act 1988 Sch 22 para 7(3).
- 26 Ie within 30 days: see the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 13.
- 27 Income and Corporation Taxes Act 1988 Sch 22 para 4(1). Where a notice has been served on the administrator of a scheme under Sch 22 para 4(1) or (2), Sch 22 para 3(1), (5) ceases to apply: Sch 22 para 4(4).
- 28 Ie within 60 days: see the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 13.
- 29 Income and Corporation Taxes Act 1988 Sch 22 para 4(2); and see note 27 supra.
- 30 See note 26 supra.
- 31 Income and Corporation Taxes Act 1988 Sch 22 para 4(3).
- 32 Ie within six months after the receipt by the Board of the particulars or the written valuation, as the case may be: see the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 13.
- 33 For these purposes, the relevant time is the time specified in the valuation produced under the Income and Corporation Taxes Act 1988 Sch 22 paras 2 or 4 as the time by reference to which the values of the assets and liabilities are determined: Sch 22 para 5(2).
- 34 Ibid Sch 22 para 5(1). The Board may make regulations providing that an appeal may be brought against such a notice as if it were notice of the decision of the Board on a claim made by the administrator of the scheme concerned; and such regulations may include provision that bringing an appeal suspends the operation of Sch 22 para 5(3), (4) and other provisions consequential on the provision that an appeal may be brought (including provisions modifying Sch 22: Sch 22 para 8(1), (2)). An appeal may be brought by the administrator against such a notice by a notice in writing given to the Board within 30 days after the date of the Board's notice; and during the period beginning with the receipt by the Board of the notice of appeal and ending with the determination of the appeal, the conditions of ibid Sch 22 para 5(3), (4) do not apply: see the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 14.
- 35 Ie within three months after the date of the notice to which the Income and Corporation Taxes Act 1988 Sch 22 para 5(1) refers or, where there is an appeal, 30 days after the final determination of the appeal: see the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 13.
- 36 Ie which comply with the Income and Corporation Taxes Act 1988 Sch 22 para 3(2)-(4): see the text and note 13 supra.
- 37 Ibid Sch 22 para 5(3).
- 38 Ie within six months after the receipt of the proposals submitted to the Board: see the Pension Scheme Surpluses (Valuation) Regulations 1987, SI 1987/412, reg 13.
- 39 Ie the Income and Corporation Taxes Act 1988 Sch 22 para 7(1) applies: see the text and notes 19-20 supra.
- 40 See ibid Sch 22 para 5(4).
- 41 Ie within the period mentioned in ibid Sch 22 para 3(2): see note 13 supra.
- 42 See ibid Sch 22 paras 6(1), (2), 7(1). Where a percentage has been specified under Sch 22 para 7, securities are transferred in the relevant period, and the transferor or transferee is such that, if he became entitled to any interest on them, exemption could be allowed under s 592(2) (see PARA 754 ante), then: (1) s 715(1)(k) does not apply; (2) where in consequence s 713(2)(a) or (3)(b) applies, the sum concerned must be treated as reduced by an amount equal to the specified percentage of itself; (3) where in consequence s 713(2)(b) or (3)(a) applies, the relief concerned must be treated as reduced by an amount equal to the specified percentage of itself; and (4) for the purposes of s 714(5), the amount of interest falling to be reduced by the amount of the allowance must be treated as the amount found after applying s 592(2): Sch 22 para 7(4)-(8). Expressions which also appear in ss 710-728 have the same meanings for these purposes as in those sections: Sch 22 para 7(9).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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## **(v) Information and Penalties**

### **767. Power to make regulations.**

The Board<sup>1</sup> may by regulations make any of the following provisions<sup>2</sup>, that is provision:

- 1811 (1) requiring prescribed persons<sup>3</sup> to furnish to the Board at prescribed times<sup>4</sup> information relating to any of these matters<sup>5</sup>:
- 171
230. (a) an approved scheme<sup>6</sup>;
231. (b) a relevant statutory scheme<sup>7</sup>;
232. (c) an annuity contract by means of which benefits provided under an approved scheme or a relevant statutory scheme have been secured<sup>8</sup>;
233. (d) a retirement benefits scheme<sup>9</sup> which is not an approved scheme but in relation to which an application for approval<sup>10</sup> has been made<sup>11</sup>;
- 172
- 1812 (2) Enabling the Board to serve a notice requiring prescribed persons to furnish to the Board, within a prescribed time, particulars relating to any of the matters referred to in heads (a) to (d) above<sup>12</sup>;
- 1813 (3) Enabling the Board to serve a notice requiring prescribed persons to produce to the Board, within a prescribed time, documents relating to any of those matters<sup>13</sup>;
- 1814 (4) Enabling the Board to serve a notice requiring prescribed persons<sup>14</sup> to make available for inspection on behalf of the Board books, documents and other records, being books, documents and records which relate to any of those matters<sup>15</sup>;
- 1815 (5) requiring prescribed persons<sup>16</sup> to preserve for a prescribed time<sup>17</sup> books, documents and other records, being books, documents and records which relate to any of those matters<sup>18</sup>.

A person who fails to comply with regulations made under head (5) above is liable to a penalty not exceeding £3,000<sup>19</sup>.

1 For the meaning of 'the Board' see PARA 678 note 2 ante.

2 Income and Corporation Taxes Act 1988 s 605(1A) (s 605(1A)-(1E) added by the Finance Act 1994 s 105(2)).

3 'Prescribed' means prescribed by regulations made under these provisions: Income and Corporation Taxes Act 1988 s 605(1E) (as added: see note 2 supra). Regulations so made may make different provision for different descriptions of case: s 605(1D) (as so added). For these purposes, 'the prescribed person' in relation to a retirement benefits scheme, means (1) the person who is, or the persons who are, for the time being the administrator in relation to the scheme by virtue of s 611AA (as added) (see PARA 747 ante); or (2) where s 606(1) (as substituted) (default of administrator etc: see PARA 770 post) applies at any time in relation to the scheme, the person who is, or the persons who are, by virtue of that section responsible at that time for the discharge of all duties imposed on the administrator under Pt XIV Ch I (ss 590-612) (as amended) (see PARA 747 et seq ante, 768 et seq post) (whenever arising) and liable for any tax due from the administrator in the administrator's capacity as such (whenever falling due); or (3) where s 599(7) (see PARA 761 ante) applies in relation to an insurance company (within the meaning of s 659B (as added), that insurance company: Retirement Benefits Schemes (Information Powers) Regulations 1995, SI 1995/3103, regs 2(1), 3.

4 The time prescribed is, for information relating to: (1) actuarial valuation reports in relation to self-administered schemes and insured schemes, (a) where the valuation report relates to a large self-administered scheme or an insured scheme, any time not later than two years after the date stated to be the effective date in the valuation; (b) where the valuation report relates to a small self-administered scheme, any time not later than one year after the date stated to be the effective date in the valuation (ibid reg 4(2)); (2) investment and borrowing transactions of small self-administered schemes, not later than 90 days after the date of the transaction in question (reg 5(2)); (3) specified events in relation to the participation of employers in a scheme, not later than 180 days after the end of the scheme year in which the event in question occurs (reg 6(2)); (4) special contributions by employers, not later than 180 days after the end of the scheme year in which the special contribution was paid to the scheme by the employer (reg 7(2)); (5) controlling directors as members of schemes, not later than 180 days after the end of the scheme year in which the event in question occurs (reg 8(2)); (6) benefits on the retirement of such directors due to incapacity or serious ill-health, any time not less than either 28 days prior to the proposed payment of benefits where the retirement is on ground of incapacity or 14 days prior to the proposed payment of the benefits where the retirement is on ground of serious ill-health (see reg 9(2), (3)); (7) chargeable events, not later than 30 days after the end of the year of assessment in which the event in question occurs (reg 10(2)); (8) certain events in relation to insurance companies, not later than 180 days after the end of the chargeable period of the insurance company in which the event in question occurs (see reg 11(2)). 'Self-administered scheme' means an approved scheme some or all of the income and other assets of which are invested otherwise than in insurance policies: reg 1(2).

5 Income and Corporation Taxes Act 1988 s 605(1A)(a) (as added: see note 2 supra).

6 Ibid s 605(1B)(a) (as added: see note 2 supra). For the meaning of 'approved scheme' see PARA 752 note 2 ante.

7 Ibid s 605(1B)(b) (as added: see note 2 supra). For the meaning of 'relevant statutory scheme' see PARA 756 note 2 ante.

8 Ibid s 605(1B)(c) (as added: see note 2 supra).

9 For the meaning of 'retirement benefits scheme' see PARA 741 ante.

10 Ie under the Income and Corporation Taxes Act 1988 Pt XIV Ch I (as amended): see PARA 747 ante.

11 Ibid s 605(1B)(d) (as added: see note 2 supra). For the prescribed heads of information to be provided see note 4 supra; and for the details prescribed see the Retirement Benefits Schemes (Information Powers) Regulations 1995, SI 1995/3103, regs 4-11.

12 Income and Corporation Taxes Act 1988 s 605(1A)(b) (as added: see note 2 supra). For the prescribed information, and the prescribed times within which it must be furnished, see the Retirement Benefits Schemes (Information Powers) Regulations 1995, SI 1995/3103, regs 12, 13.

13 Income and Corporation Taxes Act 1988 s 605(1A)(c) (as added: see note 2 supra). As to the production of documents see the Retirement Benefits Schemes (Information Powers) Regulations 1995, SI 1995/3103, regs 12, 13.

14 The prescribed persons for these purposes are: (1) the person who is, or the persons who are, for the time being by virtue of the Income and Corporation Taxes Act 1988 s 611AA (as added) (see PARA 747 note 3 ante) the administrator of the scheme which is the subject of the notice; (2) any person who was, or any persons who were, at any time prior to the relevant date, by virtue of that provision, the administrator of that scheme, other than an excluded person; (3) the trustee or trustees of that scheme, or any person who was, or any persons who were, at any time prior to the relevant date the trustee or trustees of that scheme, other than an excluded person; (4) any person who is, or has been at any time prior to the relevant date, an employer in relation to that scheme, other than an excluded person; (5) any person who is, or has been at any time prior to the relevant date, a scheme sponsor in relation to that scheme, other than an excluded person; (6) any person who provides, or has at any time prior to the relevant date provided, administrative services to that scheme, other than an excluded person: Retirement Benefits Schemes (Information Powers) Regulations 1995, SI 1995/3103, reg 14(2). 'Excluded person' means a person who, on ceasing to act in relation to the scheme or, as the case may be, provide administrative services to the scheme, transferred all documents in his possession or under his control relating to the scheme to another person who succeeded him in acting in relation to the scheme or providing administrative services to the scheme; and 'the relevant date' means the date on which the six-year period prescribed by reg 15(3)(f) for the retention of certain records ends: see regs 12(5), 14(3).

15 Income and Corporation Taxes Act 1988 s 605(1A)(d) (as added: see note 2 supra). As to the inspection of records see the Retirement Benefits Schemes (Information Powers) Regulations 1995, SI 1995/3103, reg 14.

16 The prescribed persons are: (1) the person who is, or the persons who are, for the time being by virtue of the Income and Corporation Taxes Act 1988 s 611AA (as added) (see PARA 747 note 3 ante) the administrator of

the scheme; (2) any person who was, or any persons who were, at any time prior to the relevant date, by virtue of s 611AA (as added) the administrator of that scheme, other than an excluded person; (3) the trustee or trustees of that scheme, or any person who was or any persons who were, at any time prior to the relevant date the trustee or trustees of that scheme, other than an excluded person; (4) any person who is, or has been at any time prior to the relevant date, an employer in relation to that scheme, other than an excluded person; (5) any person who is, or has been at any time prior to the relevant date, a scheme sponsor in relation to that scheme, other than an excluded person; (6) any person who provides, or has at any time prior to the relevant date provided, administrative services to that scheme, other than an excluded person: Retirement Benefits Schemes (Information Powers) Regulations 1995, SI 1995/3103, reg 15(2). As to excluded persons and the relevant date see note 14 supra.

17 The prescribed time is six years from the end of the scheme year in which the accounts and reports in question were signed or the transaction or other event in question to which the information relates occurred: see *ibid* reg 15.

18 Income and Corporation Taxes Act 1988 s 605(1A)(e) (as added: see note 2 supra).

19 *Ibid* s 605(1C) (as added: see note 2 supra). As to penalties under the Income and Corporation Taxes Act 1988 see generally INCOME TAXATION vol 23(2) (Reissue) PARAS 1683-1690, 1711 et seq.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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### **768. Duties to furnish information in relation to non-approved schemes.**

It is the duty of every employer<sup>1</sup>:

1816 (1) if there subsists in relation to any of his employees<sup>2</sup> a retirement benefits scheme<sup>3</sup> to which he contributes and which is neither an approved scheme<sup>4</sup> nor a relevant statutory scheme<sup>5</sup>, to deliver particulars of that scheme to the Board<sup>6</sup> within three months beginning with the date on which the scheme first comes into operation in relation to any of his employees<sup>7</sup>; and

1817 (2) when required to do so by notice given by the Board, to furnish within the time limited by the notice such particulars as the Board may require with regard to any retirement benefits scheme relating to the employer which is neither an approved scheme nor a relevant statutory scheme and the employees of his to whom any such scheme relates<sup>8</sup>.

It is the duty of the administrator<sup>9</sup> of a retirement benefits scheme which is neither an approved scheme nor a relevant statutory scheme, when required to do so by notice given by the Board, to furnish within the time limited by the notice such particulars as the Board may require with regard to the scheme<sup>10</sup>.

1 For the meaning of 'employer' see PARA 741 note 8 ante.

2 For the meaning of 'employee' see PARA 741 note 8 ante.

3 For the meaning of 'retirement benefits scheme' see PARA 741 ante.

4 For the meaning of 'approved scheme' see PARA 752 note 2 ante.

5 For the meaning of 'relevant statutory scheme' see PARA 756 note 2 ante.

6 For the meaning of 'the Board' see PARA 678 note 2 ante.

7 Income and Corporation Taxes Act 1988 s 605(3)(a) (s 605(3), (4) amended by the Finance Act 1989 s 75, Sch 6 paras 14, 18(1)).

8 Income and Corporation Taxes Act 1988 s 605(3)(b) (as amended: see note 7 supra).

9 For the meaning of 'administrator' see PARA 747 note 3 ante.

10 Income and Corporation Taxes Act 1988 s 605(4) (as amended: see note 7 supra).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

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The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent

legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

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### **769. False statements etc.**

A person who fraudulently or negligently makes a false statement or false representation on making an application for the approval<sup>1</sup> of a retirement benefits scheme<sup>2</sup> or an alteration in such a scheme<sup>3</sup> is liable to a penalty not exceeding £3,000<sup>4</sup>.

In a case where a person fraudulently or negligently makes a false statement or false representation, and in consequence that person, or any other person, obtains relief from or repayment of tax under the statutory provisions relating to retirement benefits schemes<sup>5</sup>, the person making the statement or representation is likewise liable to a penalty not exceeding £3,000<sup>6</sup>.

1    le under the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended): see PARA 747 et seq ante.

2    For the meaning of 'retirement benefits scheme' see PARA 741 ante.

3    As to alterations in a scheme see PARA 747 text and note 13 ante.

4    Income and Corporation Taxes Act 1988 s 605A(1) (s 605A added by the Finance Act 1994 s 106).

5    See note 1 supra.

6    Income and Corporation Taxes Act 1988 s 605A(2) (as added: see note 4 supra). As to penalties under the Income and Corporation Taxes Act 1988 see generally INCOME TAXATION vol 23(2) (Reissue) PARAS 1683-1690, 1711 et seq..

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

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### **770. Default of administrator.**

These provisions apply in relation to a retirement benefits scheme<sup>1</sup> if at any time:

- 1818 (1) there is no administrator<sup>2</sup> of the scheme; or
- 1819 (2) the person who is, or all of the persons who are, the administrator of the scheme cannot be traced; or
- 1820 (3) the person who is, or all of the persons who are, the administrator of the scheme is or are in default<sup>3</sup> for the statutory purposes<sup>4</sup>.

If the scheme is a trust scheme<sup>5</sup>, then, if head (2) or head (3) above applies and at the time in question there is at least one trustee of the scheme who can be traced, who is resident in the United Kingdom<sup>6</sup> and who is not in default, the trustee or trustees is or are at that time responsible for the discharge of all duties imposed<sup>7</sup> on the administrator (whenever arising) and liable for any tax due from the administrator in the administrator's capacity as such (whenever falling due)<sup>8</sup>. If, however, head (1) above applies, or if head (2) or head (3) above applies but at the time in question there is no trustee who fulfills these conditions, the employer<sup>9</sup> is at that time so responsible and liable<sup>10</sup>; and this applies to a person in his capacity as the employer even if he is also the administrator, or a trustee, of the scheme<sup>11</sup>.

If the scheme is a non-trust scheme<sup>12</sup>, then if head (2) or head (3) above applies and at the time in question there is at least one scheme sponsor<sup>13</sup> who can be traced, who is resident in the United Kingdom, and who is not in default, the scheme sponsor or scheme sponsors is or are at that time responsible for the discharge of all duties imposed<sup>14</sup> on the administrator (whenever arising) and liable for any tax due from the administrator in the administrator's capacity as such (whenever falling due)<sup>15</sup>. If, however, head (1) above applies, or if head (2) or head (3) above applies and at the time in question there is no scheme sponsor who fulfills these conditions, the employer is at that time so responsible and liable<sup>16</sup>; and this applies to a person in his capacity as the employer even if he is also the administrator of the scheme, or a scheme sponsor<sup>17</sup>.

Where by virtue of these provisions a person becomes responsible for the discharge of any duties, or liable for any tax, the Board must, as soon as is reasonably practicable, notify him of that fact; but any failure to give such notification does not affect that person's being so responsible or liable<sup>18</sup>.

Where at any time head (2) or head (3) above applies in relation to a scheme, and a person is by virtue of these default provisions responsible for the discharge of any duties, or liable for any tax, in relation to the scheme, then at that time the person or persons mentioned in that head is not, by reason only of being the administrator of the scheme, responsible for the discharge of those duties or liable for that tax<sup>19</sup>.

No liability incurred<sup>20</sup> by the administrator of a scheme, or by a person by virtue of these provisions, is affected by the termination of a scheme or by its ceasing to be an approved scheme<sup>21</sup> or to be an exempt approved scheme<sup>22</sup>.

These provisions do not apply for the purposes of the relevant legislation<sup>23</sup> relating to pension fund surpluses<sup>24</sup>.

- 1 For the meaning of 'retirement benefits scheme' see PARA 741 ante.
- 2 For the meaning of 'administrator' see PARA 747 note 3 ante.
- 3 A person is in default for these purposes if he has failed to discharge any duty imposed on him under the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended) (see PARA 747 et seq ante) or he has failed to pay any tax due from him by virtue of Pt XIV Ch I (as amended) and, in either case, the Board considers the failure to be of a serious nature: s 606(11) (s 606 substituted by the Finance Act 1994 s 106). For the meaning of 'the Board' see PARA 678 note 2 ante.
- 4 Income and Corporation Taxes Act 1988 s 606(1) (as substituted: see note 3 supra).
- 5 For the meaning of 'trust scheme' see ibid s 611AA (as added); and see PARA 747 ante (definition applied by s 606(12) (as substituted: see note 3 supra).
- 6 For the meaning of 'United Kingdom' see PARA 15 note 4 ante. As to residence for tax purposes see generally INCOME TAXATION vol 23(2) (Reissue) PARA 1260.
- 7 Ie under the Income and Corporation Taxes Act 1988 Pt XIV Ch I (as amended): see PARA 747 et seq ante.
- 8 Ibid s 606(2)(a), (3) (as substituted: see note 3 supra).
- 9 References for these purposes to the employer include, where the employer is resident outside the United Kingdom, references to any branch or agent of the employer in the United Kingdom; and 'branch or agent' has the meaning given by the Taxes Management Act 1970 s 118(1): Income and Corporation Taxes Act 1988 s 606(13) (as substituted: see note 3 supra); s 831(3).
- 10 Ibid s 606(2)(b) (as substituted: see note 3 supra). Where the scheme is a trust scheme and the employer is not a contributor to the scheme, s 606(2) (as so substituted) has effect as if for 'the employer', in the first place where those words occur, there were substituted 'the scheme sponsor or scheme sponsors' and for 'the employer', in the second place where those words occur, there were substituted 'scheme sponsor': s 606(7) (as so substituted).
- 11 Ibid s 606(2) (as substituted: see note 3 supra). See also note 10 supra.
- 12 For the meaning of 'non-trust scheme' see ibid s 611AA (as added); and PARA 747 ante (definition applied by s 606(12) (as substituted: see note 3 supra).
- 13 For the meaning of 'scheme sponsor' see ibid s 611AA (as added); and PARA 747 ante (definition applied by s 606(12) (as substituted: see note 3 supra).
- 14 See note 7 supra.
- 15 Income and Corporation Taxes Act 1988 s 606(4)(a), (5) (as substituted: see note 3 supra).
- 16 Ibid s 606(4)(b) (as substituted: see note 3 supra). Where the scheme is a non-trust scheme and the employer is not a contributor to the scheme, s 606(4) (as so substituted) has effect as if s 606(4)(b) (as so substituted) and the words after that paragraph were omitted: s 606(8) (as so substituted).
- 17 Ibid s 606(4) (as substituted: see note 3 supra).
- 18 Ibid s 606(10) (as substituted: see note 3 supra).
- 19 Ibid s 606(6) (as substituted: see note 3 supra).
- 20 See note 7 supra.
- 21 For the meaning of 'approved scheme' see PARA 752 note 2 ante.
- 22 For the meaning of 'exempt approved scheme' see PARA 754 ante.
- 23 Ie the Income and Corporation Taxes Act 1988 ss 602, 603, Sch 22 (as amended): see PARAS 765-766 ante.
- 24 Ibid s 606(14) (as substituted: see note 3 supra).

## UPDATE

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (3) EQUALITY/(i) European Community Law/771. The principle of equal treatment.

### **(3) EQUALITY**

#### **(i) European Community Law**

##### **771. The principle of equal treatment.**

Article 119 of the EC Treaty<sup>1</sup> requires each member state to ensure and maintain the application of the principle that men and women should receive equal pay for equal work<sup>2</sup>. For these purposes, 'pay' means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer<sup>3</sup>. Equal pay without discrimination based on sex means (1) that pay for the same work at piece rates is calculated on the basis of the same unit of measurement; and (2) that pay for work at time rates is the same for the same job<sup>4</sup>.

An individual can rely directly on this principle in a domestic court, in circumstances in which discrimination is identifiable solely by reference to the criterion of equal pay and equal work, without national or European Community measures being required to define them with greater precision in order to permit their application<sup>5</sup>.

In addition, the EC Council Directive on the implementation of the principle of equal treatment for men and women in occupational social security schemes<sup>6</sup> similarly provides for the principle of equal treatment within that specified field, as implying that there must be no discrimination on the basis of sex, either directly or indirectly, by reference in particular to marital or family status<sup>7</sup> for, inter alia, the fixing of different retirement ages<sup>8</sup> and the setting of different levels of benefit, except in so far as may be necessary to take account of actuarial calculation factors which differ according to sex<sup>9</sup>. This directive required member states to take all necessary steps to ensure that the provisions of occupational schemes contrary to the principle of equal treatment were revised by 1 January 1993<sup>10</sup>. This directive cannot, however, prevent a person from relying upon Article 119 of the EC Treaty directly and immediately before the national courts<sup>11</sup>.

1    I.e. the EC Treaty (Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)). As to the EC Treaty generally see EUROPEAN COMMUNITIES.

2    Ibid art 119 para 1. See also EC Council Directive 86/378 (OJ L225, 12.8.86, p 40) on the implementation of the principle of equal treatment for men and women in occupational social security schemes; and the text and notes 6-11 infra.

3    EC Treaty art 119 para 2.

4    Ibid art 119 para 3.

5    See Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, [1990] 2 CMLR 513, ECJ; and Case C-110/91 *Moroni v Collo GmbH* [1993] ECR I-6591, [1995] 2 CMLR 357, ECJ.

6    I.e. EC Council Directive 86/378 (OJ L225, 12.8.86, p 40). This directive applies to members of the working population, including self-employed persons, persons whose activity is interrupted by illness, maternity, accident or involuntary unemployment and persons seeking employment, to retired and disabled workers and to those claiming under them, in accordance with national law and/or practice: art 3 (substituted by EC Council Directive 96/97 (OJ L46, 17.2.97, p 20)). EC Council Directive 86/378 (OJ L225, 12.8.86, p 40) applies to occupational schemes which provide protection against old age, including early retirement: see art 4. As to the schemes to which this directive does not apply see art 2(2) (as substituted).

'Occupational social security schemes' means schemes, not governed by EC Council Directive 79/7 (OJ L6, 10.1.79, p 24) (as to which see PARA 452 et seq ante), whose purpose is to provide workers, whether employees or self-employed, in an undertaking or group of undertakings, area of economic activity, occupational sector or group of sectors, with benefits intended to supplement the benefits provided by statutory social security schemes or to replace them, whether membership of such schemes is compulsory or optional: EC Council Directive 86/378 (OJ L225, 12.8.86, p 40) art 2(1) (substituted by EC Council Directive 96/97 (OJ L46, 17.2.97, p 20)).

7 See EC Council Directive 86/378 (OJ L225, 12.8.86, p 40) art 5.

8 Ibid art 6(f) (art 6 substituted by EC Council Directive 96/97 (OJ L46, 17.2.97, p 20)).

9 See EC Council Directive 86/378 (OJ L225, 12.8.86, p 40) art 6(h) (as substituted: see note 8 supra).

10 See EC Council Directive 86/378 (OJ L225, 12.8.86, p 40) art 8 (substituted by EC Council Directive 96/97 (OJ L46, 17.2.97, p 20)). The directive was implemented in domestic law by the Social Security Act 1989 s 23, Sch 5 (as amended), certain provisions of which were brought into force on 23 June 1994: see PARA 782 note 3 post.

11 Case C-110/91 *Moroni v Collo GmbH* [1993] ECR I-6591, [1995] 2 CMLR 357, ECJ.

## UPDATE

### 741-873 Occupational Pension Schemes

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The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 771 The principle of equal treatment

TEXT AND NOTES--EC Council Directive 86/378 repealed (from 15 August 2009) and replaced (member state implementation measures to be in place by 15 August 2008) by European Parliament and EC Council Directive 2006/54 (OJ L204 26.7.2006 p 23) on the implementation of the principle of equal treatment of men and women in matters of employment and occupation. The new directive also repeals three other equal treatment directives (75/117: equal pay; 76/207: equal treatment; 97/80: burden of proof in sex discrimination cases). It brings together in one text the main provisions of all four repealed directives and certain developments arising out of ECJ case law.

NOTE 4--A woman on maternity leave is in a special position such that, for the purposes of the EC Treaty art 119, her pay cannot be compared to that of other employees, male or female, absent from work for other reasons: *Edwards v Derby CC* [1999] ICR 114, EAT.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (3) EQUALITY/(i) European Community Law/772. Pension schemes to which the principle of equal treatment applies.

## **772. Pension schemes to which the principle of equal treatment applies.**

The principle of equal treatment<sup>1</sup> applies to a private occupational pension scheme which results from an agreement between employees and employer or by a unilateral decision of the employer, which is a scheme governed by its own rules, and for which membership is not compulsory<sup>2</sup>. The principle applies not only to contracted-out occupational schemes but also to non-contracted-out schemes and there is no need to distinguish according to whether the contributions to the scheme are from the employer or the employees<sup>3</sup>.

In the event of the transfer of pension rights from one occupational scheme to another owing to a person's change of job, the second scheme is obliged, on the person reaching retirement age, to increase the benefits it undertook to pay him when accepting the transfer, so as to eliminate the effects contrary to the principle of equal pay suffered by him in consequence of the inadequacy of the capital transferred, this being due in turn to the discriminatory treatment suffered under the first scheme, and it must do so in relation to benefits payable in respect of periods of service subsequent to 17 May 1990<sup>4</sup>.

1    le the principle contained in the EC Treaty art 119: see PARA 771 ante.

2    See Case C-110/91 *Moroni v Collo GmbH* [1993] ECR I-6591, [1995] 2 CMLR 357, ECJ.

3    See Case C-200/91 *Collorol Pension Trustees Ltd v Russell* [1995] All ER (EC) 23, [1994] ECR I-4389, ECJ.

4    Case C-200/91 *Collorol Pension Trustees Ltd v Russell* [1995] All ER (EC) 23, [1994] ECR I-4389, ECJ. If necessary, the receiving scheme can make a claim against the other scheme under national law: see Case C-200/91 *Collorol Pension Trustees Ltd v Russell* supra. See also Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, [1990] 2 CMLR 513, ECJ.

## **UPDATE**

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A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

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The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

## **772 Pension schemes to which the principle of equal treatment applies**

NOTE 1--See Case C-227/04 P *Lindorfer v EU Council* [2009] All ER (EC) 569, ECJ.

NOTE 4--A member of an occupational pension scheme with mixed normal retirement dates who decides to retire on his or her sixtieth birthday is entitled to a pension in respect of the benefits accrued by reference to a normal retirement date of 60: *Foster Wheeler Ltd v Hanley* [2009] EWCA Civ 651, [2010] ICR 374, [2009] All ER (D) 82 (Jul).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (3) EQUALITY/(i) European Community Law/773. Parties.

### **773. Parties.**

The direct effect<sup>1</sup> of the principle of equal treatment<sup>2</sup> may be relied upon by both employees and their dependants against both the employer and the trustees of an occupational pension scheme<sup>3</sup>, who are bound, in the exercise of their powers and the performance of their obligations as laid down in the trust deed, to observe the principle of equal treatment<sup>4</sup>. The administrators of an occupational pension scheme must, like the employer, comply with the provisions and a person who is discriminated against may assert his rights directly against those administrators<sup>5</sup>.

1 As to the direct effect of the EC Treaty art 119 see generally Case C-110/91 *Moroni v Collo GmbH* [1993] ECR I-6591, [1995] 2 CMLR 357, ECJ; and DISCRIMINATION vol 13 (2007 Reissue) PARA 421.

2 Ie the EC Treaty art 119: see PARA 771 ante.

3 For the meaning of 'occupational pension scheme' see PARA 741 ante.

4 See Case C-200/91 *Collorol Pension Trustees Ltd v Russell* [1995] All ER (EC) 23, [1994] ECR I-4389, ECJ. This principle is equally applicable to survivors' pension provided for by occupational pension schemes: see Case C-200/91 *Collorol Pension Trustees Ltd v Russell* supra; and Case C-109/91 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879, [1995] 2 CMLR 357, ECJ; Case C-147/95 *Dimosia Epicheirisi Ilektrismou (DEI) v Evrenopoulos* [1997] All ER (EC) 543, [1997] 2 CMLR 407, ECJ.

5 See Case C-57/93 *Vroege v NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1995] All ER (EC) 193, [1994] ECR I-4541, ECJ.

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Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (3) EQUALITY/(i) European Community Law/774. Membership and benefits.

#### **774. Membership and benefits.**

The principle of equal treatment<sup>1</sup> applies both to membership of an occupational pension scheme<sup>2</sup> and to the benefits payable under it<sup>3</sup>.

<sup>1</sup> ie the EC Treaty art 119: see PARA 771 ante.

<sup>2</sup> See Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607, [1986] 2 CMLR 701, ECJ; and Case C-57/93 *Vroege v NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1995] All ER (EC) 193, [1994] ECR I-4541, ECJ. For the meaning of 'occupational pension scheme' see PARA 741 ante.

<sup>3</sup> See Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, [1990] 2 CMLR 513, ECJ; Case C-110/91 *Moroni v Collo GmbH* [1993] ECR I-6591, [1995] 2 CMLR 357, ECJ; Case C-408/92 *Smith v Advel Systems Ltd* [1994] ECR I-4435, [1995] ICR 596, ECJ; and Case C-109/91 *Ten Oever v Stichting Bedrijfspensioenfond voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879, [1995] 2 CMLR 357, ECJ.

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Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (3) EQUALITY/(i) European Community Law/775. Exclusions from the principle of equal treatment.

### **775. Exclusions from the principle of equal treatment.**

The use of actuarial factors varying according to sex in funded defined benefit occupational pension schemes<sup>1</sup> does not fall within the scope of the principle of equal treatment<sup>2</sup>; nor do inequalities in the amounts of the capital benefits or substitute benefits whose value can be determined only on the basis of the arrangements chosen for funding the scheme<sup>3</sup>. In addition, where an occupational pension scheme does no more than provide the membership with the necessary arrangements for management, additional benefits stemming from contributions paid by employees on a purely voluntary basis are not covered<sup>4</sup>. The principle of equal treatment is not applicable to schemes which have at all times had members of only one sex<sup>5</sup>. It is not contrary to the principle of equal treatment, when calculating the amount of bridging pensions paid by an employer to male or female employees who have taken early retirement on the grounds of ill health and which are intended to compensate, in particular, for loss of income resulting from the fact those persons have not yet reached the age required for payment of a state pension, to take account of the amount of state pension which they will subsequently receive and reduce the bridging pension accordingly<sup>6</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 741 ante.

2 I.e. the EC Treaty art 119: see PARA 771 ante.

3 See Case C-152/91 *Neath v Hugh Steeper Ltd* [1993] ECR I-6935, [1995] 2 CMLR 357, ECJ; and Case C-200/91 *Collorol Pension Trustees Ltd v Russell* [1995] All ER (EC) 23, [1994] ECR I-4389, ECJ.

4 Case C-200/91 *Collorol Pension Trustees Ltd v Russell* [1995] All ER (EC) 23, [1994] ECR I-4389, ECJ.

5 Case C-200/91 *Collorol Pension Trustees Ltd v Russell* [1995] All ER (EC) 23, [1994] ECR I-4389, ECJ.

6 See Case C-132/92 *Birds Eye Walls Ltd v Roberts* [1993] ECR I-5579, [1993] 3 CMLR 822, ECJ.

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### **775 Exclusions from the principle of equal treatment**

NOTE 6--See Case C-166/99 *Defreyne v Sabena SA* [2002] 1 CMLR 6, ECJ (additional pre-retirement payment was independent of general social security scheme: constituted pay within the meaning of EC Treaty art 119).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (3) EQUALITY/(i) European Community Law/776. Duties of trustees, employers and scheme administrators.

## **776. Duties of trustees, employers and scheme administrators.**

The trustees of an occupational pension scheme<sup>1</sup> are bound to observe the principle of equal treatment<sup>2</sup>, in the exercise of their powers and the performance of their obligations as laid down in the trust deed<sup>3</sup>. In so far as national law prohibits employers and trustees from acting beyond the scope of their respective powers or in disregard of the provisions of the trust deed, they are bound to use all the means available under domestic law, such as recourse to the national courts, in order to eliminate all discrimination in the matter of pay<sup>4</sup>. The administrators of an occupational pension scheme must, like the employer, comply with the provisions of the equal treatment principle and a person who is discriminated against may assert his rights directly against those administrators<sup>5</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 741 ante.

2 I.e. the EC Treaty art 119: see PARA 771 ante.

3 Case C-200/91 *Collorol Pension Trustees Ltd v Russell* [1995] All ER (EC) 23, [1994] ECR I-4389, ECJ.

4 Case C-200/91 *Collorol Pension Trustees Ltd v Russell* [1995] All ER (EC) 23, [1994] ECR I-4389, ECJ.

5 Case C-57/93 *Vroege v NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1995] All ER (EC) 193, [1994] ECR I-4541, ECJ.

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Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (3) EQUALITY/(i) European Community Law/777. Scheme membership.

### **777. Scheme membership.**

The principle of equal treatment<sup>1</sup> applies to the right to join an occupational pension scheme<sup>2</sup>. The exclusion of part-time employees from an occupational pension scheme where the majority of employees excluded are women infringes the principle of equal treatment unless the employer can show that the policy was based on objectively justified factors unrelated to any discrimination on the ground of sex<sup>3</sup>.

The fact that a person can claim retrospectively to join an occupational pension scheme does not allow him to avoid paying the contributions relating to the period of membership concerned and previous limitations on the effects in time<sup>4</sup> do not apply to the right to join a scheme<sup>5</sup>.

1    Ie the EC Treaty art 119: see PARA 771 ante.

2    Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607, [1986] 2 CMLR 701, ECJ; Case C-57/93 *Vroege v NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1995] All ER (EC) 193, [1994] ECR I-4541, ECJ. For the meaning of 'occupational pension scheme' see PARA 741 ante.

3    Case 170/84 *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607, [1986] 2 CMLR 701, ECJ.

4    Ie the limitations in time imposed by Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, [1990] 2 CMLR 513, ECJ: see PARA 780 post.

5    See Case C-57/93 *Vroege v NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1995] All ER (EC) 193, [1994] ECR I-4541, ECJ.

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### **777 Scheme membership**

NOTE 3--See *Trustees of Uppingham School Retirement Benefits Scheme for Non-teaching Staff v Shillcock* [2002] EWHC 641 (Ch), [2002] 2 CMLR 1029.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (3) EQUALITY/(i) European Community Law/778. Implementation of the principle of equal treatment.

### **778. Implementation of the principle of equal treatment.**

In relation to periods of service completed after a court's finding of discrimination but before the entry into force of the measures designed to eliminate it, correct implementation of the principle of equal treatment<sup>1</sup> requires that the disadvantaged employees should be granted the same advantages as those previously enjoyed by the other employees. However, as regards periods of service subsequent to the entry into force of those measures, the equal pay principle does not preclude equal treatment from being achieved by reducing the advantages which the advantaged employees used to enjoy<sup>2</sup>. The national court is bound to ensure correct implementation of the equal treatment principle, taking due account of the respective liabilities of the employers and trustees under the rules of domestic law<sup>3</sup>. Any problems arising because the funds held by the trustees are insufficient to equalise benefits must be resolved on the basis of national law, in the light of the equal treatment principle<sup>4</sup>. The step of raising the retirement age for women to that for men which an employer decides to take in order to remove discrimination in relation to occupational pensions as regards benefits payable in respect of future periods of service cannot be accompanied by measures, even if only transitional, designed to limit the adverse consequences which such a step may have for women<sup>5</sup>. The principle of equal treatment precludes an occupational scheme relying on its own difficulties, or on those of the undertaking concerned, from retrospectively raising the retirement age for women in relation to periods of service completed between 17 May 1990 and the date of entry into force of the measures by which equality is achieved in the scheme in question<sup>6</sup>. It also does not allow a situation of equality to be achieved otherwise than by applying to male employees the same arrangements enjoyed by female employees<sup>7</sup>.

1    I.e. the EC Treaty art 119: see PARA 771 ante.

2    See Case C-200/91 *Collorol Pension Trustees Ltd v Russell* [1995] All ER (EC) 23, [1994] ECR I-4389, ECJ; Case C-408/92 *Smith v Advel Systems Ltd* [1995] All ER (EC) 132, [1994] ECR I-4435, ECJ; and Case C-109/91 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879, [1995] 2 CMLR 357, ECJ.

3    Case C-200/91 *Collorol Pension Trustees Ltd v Russell* [1995] All ER (EC) 23, [1994] ECR I-4389, ECJ.

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5    Case C-408/92 *Smith v Advel Systems Ltd* [1995] All ER (EC) 132, [1994] ECR I-4435, ECJ.

6    Case C-408/92 *Smith v Advel Systems Ltd* [1995] All ER (EC) 132, [1994] ECR I-4435, ECJ. See also Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, [1990] 2 CMLR 513, ECJ.

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Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (3) EQUALITY/(i) European Community Law/779. Previous advantages.

### **779. Previous advantages.**

In relation to periods of service prior to 17 May 1990, the principle of equal treatment for men and women<sup>1</sup> imposes no obligation which would justify the retrospective reduction of the advantages which one sex enjoyed over the other<sup>2</sup>.

<sup>1</sup> I.e. the EC Treaty art 119: see PARA 771 ante.

<sup>2</sup> Case C-200/91 *Collorol Pension Trustees Ltd v Russell* [1995] All ER (EC) 23, [1994] ECR I-4389, ECJ; Case C-408/92 *Smith v Advel Systems Ltd* [1995] All ER (EC) 132, [1994] ECR I-4435, ECJ. See also Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, [1990] 2 CMLR 513, ECJ.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (3) EQUALITY/(i) European Community Law/780. Time limits in relation to benefits.

## **780. Time limits in relation to benefits.**

The principle of equal treatment<sup>1</sup> may be relied upon for the purpose of claiming equal pay in the matter of occupational pensions, only in relation to benefits payable in respect of periods of service subsequent to 17 May 1990, subject to the exception in favour of persons or those claiming under them who have, before that date, initiated legal proceedings or raised an equivalent claim under the applicable national law<sup>2</sup>. This limitation also applies to survivors' pensions and consequently equal pay can only be claimed in relation to periods of service subsequent to 17 May 1990<sup>3</sup>.

<sup>1</sup> ie the EC Treaty art 119: see PARA 771 ante.

<sup>2</sup> See Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, [1990] 2 CMLR 513, ECJ; Case C-109/91 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879, [1995] 2 CMLR 357, ECJ; Case C-110/91 *Moroni v Collo GmbH* [1993] ECR I-6591, [1995] 2 CMLR 357, ECJ; Case C-200/91 *Collorol Pension Trustees Ltd v Russell* [1995] All ER (EC) 23, [1994] ECR I-4389, ECJ; and Case C-408/92 *Smith v Advel Systems Ltd* [1995] All ER (EC) 132, [1994] ECR I-4435, ECJ.

<sup>3</sup> Case C-109/91 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf* [1993] ECR I-4879, [1995] 2 CMLR 357, ECJ.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (3) EQUALITY/(i) European Community Law/781. Time limits in relation to scheme membership.

### **781. Time limits in relation to scheme membership.**

The time limitations upon the application of the principle of equal treatment<sup>1</sup> which are applicable to scheme benefits<sup>2</sup> do not apply to the right to join an occupational pension scheme<sup>3</sup> and there is no scope for any analogous limitation<sup>4</sup>.

1    I.e. the EC Treaty art 119: see PARA 771 ante.

2    See PARA 780 ante.

3    For the meaning of 'occupational pension scheme' see PARA 741 ante.

4    Case Case C-57/93 *Vroege v NCIV Instituut voor Volkshuisvesting BV and Stichting Pensioenfonds NCIV* [1995] All ER (EC) 193, [1994] ECR I-4541, ECJ.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (3) EQUALITY/ (ii) Domestic Law/782. The equal treatment rule.

## (ii) Domestic Law

### 782. The equal treatment rule.

An occupational pension scheme<sup>1</sup> which does not contain an equal treatment rule must be treated as including one<sup>2</sup>. An equal treatment rule<sup>3</sup> is a rule which relates to the terms on which (1) persons become members<sup>4</sup> of the scheme; and (2) members of the scheme are treated<sup>5</sup>. An equal treatment rule has the effect that where:

- 1821 (a) a woman is employed on like work with a man in the same employment<sup>6</sup>;
- 1822 (b) a woman is employed on work rated as equivalent with that of a man in the same employment; or
- 1823 (c) a woman is employed on work which, not being work in relation to which head (a) or head (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision) of equal value to that of a man in the same employment;

but (apart from the rule) any of the terms so referred to is or becomes less favourable to the woman than it is to the man, the term must be treated as so modified<sup>7</sup> as not to be less favourable<sup>8</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 741 ante.

2 Pensions Act 1995 s 62(1).

3 An equal treatment rule has effect subject to the Social Security Act 1989 s 23, Sch 5 paras 5, 6 (Sch 5 para 5 amended by the Social Security Act 1990 s 21(1), Sch 6 para 29) (employment-related benefit schemes: maternity and family leave provisions): Pensions Act 1995 s 63(3). The Social Security Act 1989 Sch 5 paras 1-3 impose general requirements on employment-related benefit schemes to comply with the principle of equal treatment; Sch 5 para 8 extends the voluntary membership principle in the Pension Schemes Act 1993 s 160(1) (see PARA 559 ante) to self-employed earners; and the Social Security Act 1989 Sch 5 para 9 confers jurisdiction on the High Court or a county court to determine any question arising as to whether any provision of an employment-related benefit scheme does or does not comply with the principle of equal treatment or, whether, and with what effect, any such provision is overridden by the statutory provision for compulsory levelling up in the case of non-compliance. 'Employment-related benefit scheme' means any scheme or arrangement which is comprised in one or more instruments or agreements and which has, or is capable of having, effect in relation to one or more descriptions or categories of employments so as to provide service-related benefits to or in respect of employed or self-employed earners (1) who have qualifying service in an employment of any such description or category; or (2) who have made arrangements with the trustees or managers of the scheme to enable them to become members of the scheme, but does not include a limited scheme; and 'limited scheme' means (a) any personal scheme for employed earners to which the employer does not contribute; (b) any scheme which has only one member, other than a personal scheme for an employed earner to which his employer contributes; (c) any contract of insurance which is made for the benefit of employed earners only and to which the employer is not a party: Sch 5 para 7(a), (b). 'Service-related benefits' means benefits, in the form of pensions or otherwise, payable in money or money's worth in respect of termination of service, retirement, old age or death, interruptions of service by means of sickness or invalidity, accidents, injuries or diseases connected with employment, unemployment or expenses incurred in connection with children or other dependants, and includes, in the case of a member who is an employed earner, any other benefit so payable to or in respect of the member in consequence of his employment: Sch 5 para 7(e). The provisions of Sch 5 (as amended) were not in force at the date at which this volume states the law, except in order to give effect to Sch 5 paras 5, 6 (as amended): see the Social Security Act 1989 (Commencement No 5) Order 1994, SI 1994/1661. For the meaning of 'employed earner' and 'self-employed earner' see PARA 32 ante.

4 For the meaning of 'member' see PARA 612 note 5 ante.

5 Pensions Act 1995 ss 62(2), 124(1). The reference in s 62(2) to the terms on which members of a scheme are treated includes those terms as they have effect for the benefit of dependants of members: see s 63(1). Where the effect of any of the terms referred to in s 62(2) on persons of the same sex differs according to their family or marital status, the effect of the term is to be compared for the purposes of s 62 with its effect on persons of the other sex who have the same status: s 63(2).

In so far as it relates to the terms on which members of a scheme are treated, s 62 is to be treated as having had effect in relation to any pensionable service on or after 17 May 1990: s 63(6). See also Case C-262/88 *Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889, [1990] 2 CMLR 513, ECJ. 'Pensionable service', in relation to a member of an occupational pension scheme, means service in any description or category of employment to which the scheme relates which qualifies the member, on the assumption that it continues for the appropriate period, for pension or other benefits under the scheme; and in determining what is pensionable service for these purposes, service notionally attributable for any purposes of the scheme is to be disregarded and no account is to be taken of any rules of the scheme by which a period of service can be treated for any purpose as being longer or shorter than it actually is: Pensions Act 1995 s 124(1), (3).

The effect on terms of employment and the procedural rules which apply to equal treatment claims are similar to claims under the Equal Pay Act 1970, with appropriate modifications: see the Pensions Act 1995 s 66.

6 For the meaning of 'employment' and 'employed' see PARA 560 note 5 ante (definition applied by *ibid* s 124(5)).

7 For the meaning of 'modifications' see PARA 664 note 10 ante (definition as applied: see note 6 *supra*).

8 Pensions Act 1995 s 62(3). This provision is subject to s 62(6) (see PARA 783 note 4 *post*): see s 62(3). Section 62 must be construed as one with the Equal Pay Act 1970 s 1 (as amended) (requirement of equal treatment for men and women in the same employment); and ss 2, 2A (as amended and added) (disputes and enforcement) have effect for the purposes of the Pensions Act 1995 s 62 with appropriate modifications: see s 63(4). Regulations may make provision for the Equal Pay Act 1970 to have effect, in relation to an equal treatment rule, with prescribed modifications; and the Pensions Act 1995 s 63(4) has effect subject to any such regulations made: see s 63(5). As to the exercise of this power see the Occupational Pension Schemes (Equal Treatment) Regulations 1995, SI 1995/3183; and PARA 784 *post*.

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 782 The equal treatment rule

TEXT AND NOTES--As to the compatibility with Community law of time limits placed on applications by women for occupational pension schemes under the Equal Pay Act 1970 ss 2(4), (5), see Case C-78/98 *Preston v Wolverhampton Healthcare NHS Trust; Fletcher v Midland Bank* [2000] 2 CMLR 837, ECJ.

NOTE 3--1989 Act Sch 5 para 3 in force in part for the purposes of Sch 5 paras 5A, 5B: SI 2007/2445. See also 1989 Act Sch 5 para 5A (unfair paternity leave provisions) and Sch 5 para 5B (unfair adoption leave provisions) (both as added by Pensions Act 2004 s

265(1)) (in force 6 April 2005 except in relation to any period of paternity leave or adoption leave which began before that date: see SI 2005/275; 1989 Act Sch 5 para 5A amended by Work and Families Act 2006 Sch 1 para 1 (in force 6 April 2010: SI 2010/495)).

NOTE 5--Pensions Act 1995 s 63(2) amended: SI 2005/2053.

In the definition of 'pensionable service' in Pensions Act 1995 s 124(1) words 'or category' are prospectively repealed: Pensions Act 2004 Sch 13 Pt 1.

After 'longer or shorter than it actually is' add 'but, in its application for the purposes of the Pensions Act 1995 s 51 (see PARA 861), words 'no account is to be taken ... shorter than it actually is' do not affect the operation of any rules of the scheme by virtue of which a period of service is to be rounded up or down by a period of less than a month': s 124(3) (amended by the Welfare Reform and Pensions Act 1999 Sch 2 para 18).

NOTE 8--1995 Act s 63(4) amended: Pensions Act 2004 Sch 13 Pt 1 (not yet in force); Occupational Pension Schemes (Equal Treatment) (Amendment) Regulations 2005, SI 2005/1923. SI 1995/3183 amended: SI 2005/1923.

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### **783. The genuine material factor defence.**

An equal treatment rule<sup>1</sup> does not operate in relation to any difference as between a woman and a man in the operation of any of the terms on which persons become members of an occupational pension scheme and on which members of the scheme are treated<sup>2</sup>, if the trustees or managers<sup>3</sup> of the scheme prove that the difference is genuinely due to a material factor which is not the difference of sex, but is a material difference between the woman's case and the man's case<sup>4</sup>.

1 For the meaning of 'equal treatment rule' see PARA 782 ante.

2 I.e. the terms referred to in the Pensions Act 1995 s 62(2): see PARA 782 ante.

3 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

4 Pensions Act 1995 s 62(4). References in s 62(4) and ss 63-65 to the terms referred to in s 62(2), or the effect of any of those terms, include (1) a term which confers on the trustees or managers of an occupational pension scheme, or any other person, a discretion which, in a case within s 62(3)(a)-(c) (see PARA 782 ante) may be exercised so as to affect the way in which persons become members of the scheme, or members of the scheme are treated, and may (apart from the equal treatment rule) be so exercised in a way less favourable to the woman than to the man; and (2) the effect of any exercise of such a discretion; and references to the terms on which members of the scheme are treated are to be read accordingly: s 62(5). In the case of a term within head (1) supra, the effect of an equal treatment rule is that the term must be treated as so modified as not to permit the discretion to be exercised in a way less favourable to the woman than to the man: s 62(6). For the meaning of 'member' see PARA 612 note 5 ante.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

As from 6 April 2006, the Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988

and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (3) EQUALITY/ (ii) Domestic Law/785. Alteration of schemes.

### **785. Alteration of schemes.**

The trustees or managers<sup>1</sup> of an occupational pension scheme<sup>2</sup> may, if:

1824 (1) they do not (apart from this provision) have power to make such alterations to the scheme as may be required to secure conformity with an equal treatment rule<sup>3</sup>; or

1825 (2) they have such power but the procedure for doing so (a) is liable to be unduly complex or protracted; or (b) involves the obtaining of consents which cannot be obtained, or can only be obtained with undue delay or difficulty,

by resolution make such alterations to the scheme<sup>4</sup>. The alterations may have effect in relation to a period before they are made<sup>5</sup>.

1 For the meaning of 'trustees or managers' see PARA 612 note 10 ante. As to trustees generally see PARA 786 et seq post; and TRUSTS vol 48 (2007 Reissue) PARA 754 et seq.

2 For the meaning of 'occupational pension scheme' see PARA 741 ante.

3 For the meaning of 'equal treatment rule' see PARA 782 ante.

4 Pensions Act 1995 s 65(1).

5 Ibid s 65(2).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (3) EQUALITY/ (ii) Domestic Law/785A. Treatment of overseas residents.

### **785A. Treatment of overseas residents.**

The following provisions apply where an occupational pension scheme contains provisions contravening the two rules set out below<sup>1</sup>. Except so far as regulations otherwise provide, provisions of an occupational pension scheme contravene the first rule to the extent that they would (apart from these provisions) have an effect with respect to (1) the entitlement of any person to benefits under the scheme; or (2) the payment to any person of benefits under the scheme, which would be different according to whether or not a place outside the United Kingdom is specified by that person as the place to which he requires payments of benefits under the scheme to be made to him<sup>2</sup>. Except so far as regulations otherwise provide, provisions of an occupational pension scheme contravene the second rule to the extent that they would (apart from these provisions) have an effect with respect to (a) the entitlement of any person to remain a member of the scheme; (b) the eligibility of any person to remain a person by or in respect of whom contributions are made towards or under the scheme; or (c) the making by or in respect of any person who is a member of the scheme of any contributions towards or under the scheme, which would be different according to whether that person works wholly in the United Kingdom or wholly or partly outside the United Kingdom<sup>3</sup>. Provisions contravening the first rule have effect, in relation to all times after a specified date<sup>4</sup>, as if they made the same provision in relation to a person who requires payments of benefits to be made to a place outside the United Kingdom as they make in relation to a person in whose case all payments of benefits fall to be made to a place in the United Kingdom<sup>5</sup>. Provisions contravening the second rule have effect, in relation to all times after that date, as if they made the same provision in relation to persons working wholly or partly outside the United Kingdom as they make in relation to persons working wholly in the United Kingdom<sup>6</sup>. The above provisions are without prejudice to any enactment under which any amount is to be or may be deducted, or treated as deducted, from amounts payable by way of benefits under the scheme or treated as so payable; and do not apply in relation to so much of any provision of a scheme as is required for securing compliance with the conditions of any registration, exemption or relief given or available under the Tax Acts<sup>7</sup>.

<sup>1</sup> Pensions Act 1995 s 66A(1) (s 66A added by the Child Support, Pensions and Social Security Act 2000 s 55).

<sup>2</sup> Pensions Act 1995 s 66A(2).

<sup>3</sup> Ibid s 66A(3).

<sup>4</sup> I.e. 23 July 2001, the date on which the Child Support, Pensions and Social Security Act 2000 s 55 came into force: see the Pensions Act 1995 s 66A(4); and SI 2001/2295.

<sup>5</sup> Pensions Act 1995 s 66A(4).

<sup>6</sup> Ibid s 66A(5).

<sup>7</sup> Ibid s 66A(6) (s 66A(6) amended by the Taxation of Pension Schemes (Consequential Amendments) Order 2006, SI 2006/745).

### **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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## **(4) PENSION FUND TRUSTEES**

### **(i) In general**

#### **786. Pension fund trustees subject to the traditional law of trusts.**

Subject to certain statutory modifications<sup>1</sup>, the trustees of an occupational pension fund are subject to the traditional law of trusts<sup>2</sup>.

<sup>1</sup> See PARA 787 et seq post.

<sup>2</sup> See eg *London Regional Transport Pension Fund Co Ltd v Hatt* [1993] TLR 282; *Re Drexel Burham Lambert UK Pension Plan* [1995] 1 WLR 32; *Re William Makin & Sons* [1993] BCC 453, [1993] OPLR 171; *Wilson v Law Debenture Trust Corp plc* [1995] 2 All ER 337; *Stannard v Fisons Pension Trust Ltd* [1991] TLR 524, [1992] IRLR 27, CA; *Providence Capital Trustees Ltd v Ayres* [1996] 4 All ER 760.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (4) PENSION FUND TRUSTEES/(i) In general/787. Trustee not to be auditor or actuary of the scheme.

### **787. Trustee not to be auditor or actuary of the scheme.**

A trustee of a trust scheme<sup>1</sup>, and any person who is connected with, or an associate of, such a trustee, is ineligible to act as an auditor or actuary<sup>2</sup> of the scheme<sup>3</sup>. A person who is a director, partner or employee<sup>4</sup> of a firm<sup>5</sup> of actuaries is not, however, ineligible to act as an actuary of a trust scheme merely because another director, partner or employee of the firm is a trustee of the scheme<sup>6</sup>; nor is a person who falls within a prescribed<sup>7</sup> class or description ineligible to act as an auditor or actuary of a trust scheme<sup>8</sup>.

A person must not act as an auditor or actuary of a trust scheme if he is ineligible to do so<sup>9</sup> and any person who so acts while ineligible to do so is guilty of an offence and liable on summary conviction to a fine not exceeding the statutory maximum<sup>10</sup>, and on conviction on indictment to imprisonment or a fine, or to both<sup>11</sup>. Such an offence may be charged by reference to any day or longer period of time; and a person may be convicted of a second or subsequent offence by reference to any period of time following the preceding conviction of the offence<sup>12</sup>.

Acts done as an auditor or actuary of a trust scheme by a person who is ineligible to do so are not invalid merely because of that fact<sup>13</sup>.

Where a trustee of a trust scheme acts as auditor or actuary of the scheme, or a person acts as auditor or actuary of a trust scheme when he is ineligible to do so by reason of being connected with, or an associate of, a trustee of the scheme, the provisions relating to prohibition orders<sup>14</sup> apply to the trustee<sup>15</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 For every occupational pension scheme there must be (1) an individual, or a firm (see note 5 infra), appointed by the trustees or managers as auditor ('the auditor'); and (2) an individual appointed by the trustees or managers as actuary ('the actuary'): Pensions Act 1995 s 47(1). For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by s 176). See also PARA 598 note 7 ante.

3 Ibid s 27(1).

4 For the meaning of 'employee' see PARA 598 note 5 ante.

5 'Firm' means a body corporate or a partnership: Pensions Act 1995 s 124(1).

6 Ibid s 27(2). References to a trustee of a trust scheme do not include a trustee, or a trustee of a scheme, falling within a prescribed class or description: s 27(5). For these purposes, the prescribed class or description is any pensioner trustee: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 8. For the meaning of 'pensioner trustee' [sic] see PARA 751 note 24 ante (definition applied by reg 1(2)).

7 For the meaning of 'prescribed' see PARA 555 note 1 ante.

8 Pensions Act 1995 s 27(3). The prescribed class or description for these purposes is (1) any person who is a director, partner or employee of a firm which provides, amongst other services, actuarial services and who would be ineligible under s 27(1) to be the actuary merely because another director, partner or employee of that firm is a trustee of the scheme; (2) any person who is a director, partner or employee of a firm which provides, amongst other services, actuarial services and who is not a director of the company which is a trustee of the scheme, and who would be ineligible under s 27(1) to be the actuary merely because he is an associate of the company which is the trustee of the scheme by virtue of the Insolvency Act 1986 s 435(4), (6), (7); (3) any person who would be ineligible under the Pensions Act 1995 s 27(1) to act as the auditor or the actuary merely because he falls within the description of associate as specified in the Insolvency Act 1986 s 435(3): Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 7.

9 Pensions Act 1995 s 27(4).

10 As to the statutory maximum see PARA 403 note 2 ante.

11 Pensions Act 1995 s 28(1).

12 Ibid s 28(2).

13 Ibid s 28(3).

14 Ie the provisions of ibid s 3: see PARA 604 ante.

15 Ibid s 28(4). The Insolvency Act 1986 ss 249, 435 (connected and associated persons) and the Bankruptcy (Scotland) Act 1985 (associated persons) apply for these purposes: see the Pensions Act 1995 s 123.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **787 Trustee not to be auditor or actuary of the scheme**

NOTES 6, 8--See the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.

NOTE 6--SI 1996/1715 reg 8 amended: SI 2005/2426.

TEXT AND NOTE 15--Pensions Act 1995 s 28(4) repealed: Pensions Act 2004 Sch 12 para 44, Sch 13 Pt 1.

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### **788. Persons disqualified for being trustees.**

Subject to certain exceptions<sup>1</sup>, a person is disqualified for being a trustee of any trust scheme<sup>2</sup>:

- 1826 (1) if he has been convicted of any offence involving dishonesty or deception<sup>3</sup>;
- 1827 (2) if he has been adjudged bankrupt or sequestration of his estate has been awarded and (in either case) he has not been discharged<sup>4</sup>;
- 1828 (3) where the person is a company, if any director of the company is disqualified under these provisions<sup>5</sup>;
- 1829 (4) where the person is a Scottish partnership<sup>6</sup>, if any partner is disqualified under these provisions<sup>7</sup>;
- 1830 (5) if he has made a composition contract or an arrangement with, or granted a trust deed for the behoof of, his creditors and has not been discharged in respect of it<sup>8</sup>; or
- 1831 (6) if he is subject to a disqualification order under the Company Directors Disqualification Act 1986<sup>9</sup> or to an order made under specified provisions of the Insolvency Act 1986<sup>10</sup>.

Where a person:

- 1832 (a) is prohibited from being a trustee of a trust scheme by a prohibition order<sup>11</sup>; or
- 1833 (b) has been removed as a trustee of a trust scheme by an order<sup>12</sup> made by the High Court or the Court of Session on the grounds of misconduct or mismanagement in the administration of the scheme for which he was responsible or to which he was privy, or which he by his conduct contributed to or facilitated,

the Occupational Pensions Regulatory Authority<sup>13</sup> may, if in its opinion it is not desirable for him to be a trustee of any trust scheme, by order disqualify him for being a trustee of any trust scheme<sup>14</sup>.

The authority may by order disqualify a person for being a trustee of any trust scheme where in its opinion he is incapable of acting as such a trustee by reason of mental disorder<sup>15</sup> or where the person is a company which has gone into liquidation<sup>16</sup>. The authority may:

- 1834 (i) on the application of any person disqualified, give notice in writing to him waiving his disqualification<sup>17</sup>;
- 1835 (ii) in the case of a person disqualified by an order of the authority under the above provisions, revoke the order disqualifying him by a subsequent order<sup>18</sup>,

either generally or in relation to a particular scheme or particular class of schemes<sup>19</sup>. Such a notice given or revocation made at any time does not affect anything done before that time<sup>20</sup>.

A trustee of a trust scheme who becomes so disqualified must, while he is so disqualified, cease to be a trustee<sup>21</sup>. Where a trustee of a trust scheme becomes so disqualified, or in the case of a trustee of a trust scheme who has become so disqualified, his disqualification is waived or the order disqualifying him is revoked or he otherwise ceases to be disqualified, the

authority may exercise the same jurisdiction and powers as are exercisable by the High Court or, in relation to a trust scheme subject to the law of Scotland, the Court of Session for vesting any property in, or transferring any property to, the trustees<sup>22</sup>.

A person who purports to act as a trustee of a trust scheme while he is so disqualified is guilty of an offence and liable on summary conviction to a fine not exceeding the statutory maximum<sup>23</sup>, and on conviction on indictment to a fine or imprisonment, or to both<sup>24</sup>. Such an offence may be charged by reference to any day or longer period of time; and a person may be convicted of a second or subsequent offence by reference to any period of time following the preceding conviction of the offence<sup>25</sup>.

Things done by a person so disqualified while purporting to act as trustee of a trust scheme are not invalid merely because of that disqualification<sup>26</sup>; and nothing in these provisions affects the liability of any person for things done, or omitted to be done, by him while purporting to act as trustee of a trust scheme<sup>27</sup>.

The authority must keep, in such manner as it thinks fit, a register of all persons who are so disqualified; and the authority must, if requested to do so, disclose whether the name of a person specified in the request is included in the register in respect of a scheme so specified<sup>28</sup>.

1    Ie the exceptions provided for by the Pensions Act 1995 s 29(5): see the text and notes 17-19 infra.

2    For the meaning of 'trust scheme' see PARA 604 note 2 ante.

3    Pensions Act 1995 s 29(1)(a). Section 29(1)(a) applies whether the conviction occurred before or after 6 April 1997 but does not apply in relation to any conviction which is a spent conviction for the purposes of the Rehabilitation of Offenders Act 1974 (see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 660 et seq): Pensions Act 1995 s 29(2)(a).

4    Ibid s 29(1)(b). Section 29(1)(b) applies whether the adjudication of bankruptcy or the sequestration occurred before or after 6 April 1997: s 29(2)(b).

5    Ibid s 29(1)(c).

6    For the meaning of 'Scottish partnership' see PARA 604 note 9 ante.

7    Pensions Act 1995 s 29(1)(d).

8    Ibid s 29(1)(e). Section 29(1)(e) applies whether the composition contract or arrangement was made, or the trust deed was granted, before or after 6 April 1997: s 29(2)(c).

9    See COMPANIES vol 14 (2009) PARA 494.

10   Pensions Act 1995 s 29(1)(f). Section 29(1)(f) applies in relation to orders made before or after 6 April 1997: s 29(2)(d). The relevant provision of the Insolvency Act 1986 is s 429(2)(b) (failure to pay under county court administration order): see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 910.

11   Ie an order under the Pensions Act 1995 s 3: see the Occupational Pension Schemes (Prohibition of Trustees) Regulations 1997, SI 1997/663; and PARA 598 ante.

12   Ie whether made before or after 6 April 1997: see the Pensions Act 1995 s 29(3)(b).

13   As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

14   Pensions Act 1995 s 29(3).

15   Ie within the meaning of the Mental Health Act 1983 or, as respects Scotland, the Mental Health (Scotland) Act 1984: see MENTAL HEALTH vol 30(2) (Reissue) PARA 626.

16   Pensions Act 1995 s 29(4). As to going into liquidation see the Insolvency Act 1986 s 247(2); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 1 et seq.

17   Pensions Act 1995 s 29(5)(a).

- 18 Ibid s 29(5)(b).
- 19 Ibid s 29(5).
- 20 Ibid s 29(6).
- 21 Ibid s 30(1).
- 22 Ibid s 30(2).
- 23 As to the statutory maximum see PARA 403 note 2 ante.
- 24 Pensions Act 1995 s 30(3).
- 25 Ibid s 30(4).
- 26 Ibid s 30(5).
- 27 Ibid s 30(6).
- 28 Ibid s 30(7).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **788 Persons disqualified for being trustees**

TEXT AND NOTE 4--Now, he has not been discharged or he is the subject of a bankruptcy restrictions order or an interim order: Pensions Act 1995 s 29(1)(b) (amended by the Enterprise Act 2002 (Disqualification from Office: General) Order 2006, SI 2006/1722).

NOTE 4--Refers also to the making of the bankruptcy restrictions order or the interim order (see TEXT AND NOTE 4): 1995 Act s 29(2)(b) (amended by SI 2006/1722).

TEXT AND NOTE 9--Head (6) now refers to a disqualification order or disqualification undertaking (see COMPANIES vol 14 (2009) PARA 494): 1995 Act s 29(1)(f) (amended by the Insolvency Act 2000 Sch 4 para 19(3)(a); SI 2009/1941).

TEXT AND NOTES 12-20--1995 Act s 29(3), (4) repealed, s 29(5), (6) amended: Pensions Act 2004 Sch 13 Pt 1.

TEXT AND NOTE 19--In 1995 Act s 29(5) for 'class' read 'description': 2004 Act Sch 12 para 45.

TEXT AND NOTE 21--Where a person who is a trustee of a trust scheme becomes disqualified under the 1995 Act s 29 in relation to the scheme, his becoming so

disqualified has the effect of removing him as a trustee: s 30(1) (substituted by 2004 Act s 37).

TEXT AND NOTE 22--1995 Act s 30(2) amended: 2004 Act Sch 12 para 46(a), Sch 13 Pt 1.

TEXT AND NOTE 28--1995 Act s 30(7) repealed: 2004 Act Sch 12 para 46(b), Sch 13 Pt 1.

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### **789. Trustees not to be indemnified for fines or civil penalties.**

No amount may be paid out of the assets of a trust scheme<sup>1</sup> for the purpose of reimbursing, or providing for the reimbursement of, any trustee of the scheme in respect of (1) a fine imposed by way of penalty for an offence of which he is convicted<sup>2</sup>; or (2) a penalty which he is required to pay<sup>4</sup>. For these purposes, providing for the reimbursement of a trustee in respect of a fine or penalty includes (among other things) providing for the payment of premiums in respect of a policy of insurance where the risk is or includes the imposition of such a fine or the requirement to pay such a penalty<sup>5</sup>. Where any amount is paid out of the assets of a trust scheme in contravention<sup>6</sup> of these provisions, the provisions relating to prohibition orders<sup>7</sup> and civil penalties<sup>8</sup> apply to any trustee who fails to take all such steps as are reasonable to secure compliance<sup>9</sup>.

Where a trustee of a trust scheme is reimbursed, out of the assets of the scheme or in consequence of provision for his reimbursement made out of those assets, in respect of any of the matters referred to in head (1) or head (2) above, and knows, or has reasonable grounds to believe, that he has been so reimbursed, then, unless he has taken all such steps as are reasonable to secure that he is not so reimbursed, he is guilty of an offence<sup>10</sup> and liable on summary conviction to a fine not exceeding the statutory maximum<sup>11</sup>, and on conviction on indictment to imprisonment or a fine, or to both<sup>12</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 Pensions Act 1995 s 31(1)(a).

3 *Ie* under *ibid* s 10 (see PARA 611 ante) or under the Pension Schemes Act 1993 s 168(4) (as substituted) (see PARA 970 post).

4 Pensions Act 1995 s 31(1)(b).

5 *Ibid* s 31(2).

6 For the meaning of 'contravention' see PARA 611 note 10 ante.

7 *Ie* the provisions of the Pensions Act 1995 s 3: see PARA 604 ante.

8 *Ie* *ibid* s 10: see PARA 611 ante.

9 *Ibid* s 31(3).

10 *Ibid* s 31(4).

11 As to the statutory maximum see PARA 403 note 2 ante.

12 Pensions Act 1995 s 31(5).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

## **789 Trustees not to be indemnified for fines or civil penalties**

TEXT AND NOTES--Pensions Act 1995 s 31 prospectively repealed: Pensions Act 2004 Sch 13 Pt 1.

See Pensions Act 2004 s 256 (no indemnification for fines or civil penalties).

No amount may be paid out of the assets of an occupational or personal pension scheme for the purpose of reimbursing, or providing for the reimbursement of, any trustee or manager<sup>1</sup> of the scheme in respect of (1) a fine imposed by way of penalty for an offence of which he is convicted, or (2) a penalty which he is required to pay<sup>2</sup>. For these purposes<sup>3</sup>, providing for the reimbursement of a trustee or manager in respect of a fine or penalty includes (among other things) providing for the payment of premiums in respect of a policy of insurance where the risk is or includes the imposition of such a fine or the requirement to pay such a penalty<sup>4</sup>. Where any amount is paid out of the assets of an occupational or personal pension scheme in contravention<sup>5</sup> of these provisions, the civil penalty provisions in the Pensions Act 1995<sup>6</sup> apply to any trustee or manager who fails to take all reasonable steps to secure compliance<sup>7</sup>. Where a trustee or manager of an occupational or personal pension scheme (a) is reimbursed, out of the assets of the scheme or in consequence of provision for his reimbursement made out of those assets, in respect of any of the matters mentioned in head (1) or (2) above, and (b) knows, or has reasonable grounds to believe, that he has been reimbursed as mentioned in head (a) above, then, unless he has taken all reasonable steps to secure that he is not so reimbursed, he is guilty of an offence<sup>8</sup>.

1 For the meaning of 'managers' see PARA 636A.11.

2 Under or by virtue of the Pensions Act 1995 s 10 (see PARA 611) or the Pension Schemes Act 1993 s 168(4) (see PARA 970) (civil penalties): Pensions Act 2004 s 256(1). For the meaning of 'occupational pension scheme' and 'personal pension scheme' see PARA 636A.3.

3 Ie for the purposes of ibid s 256(1).

4 Ibid s 256(2).

5 For the meaning of 'contravention' see PARA 636A.11.

6 Ie the Pensions Act 1995 s 10 (see PARA 611).

7 Pensions Act 2004 s 256(3).

8 Ibid s 256(4). A person guilty of an offence under s 256(4) is liable (1) on summary conviction, to a fine not exceeding the statutory maximum, and (2) on conviction on indictment, to imprisonment for a term not exceeding two years, or a fine, or both: s 256(5). As to the statutory maximum see PARA 403.

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### **790. Decisions of pension fund trustees to be taken by majority.**

Decisions of the trustees of a trust scheme<sup>1</sup> may, unless the scheme provides otherwise, be taken by agreement of a majority of the trustees<sup>2</sup>. Where decisions of the trustees of a trust scheme may be taken by agreement of a majority of the trustees:

- 1836 (1) the trustees may, unless the scheme provides otherwise, by a determination require not less than the number of trustees specified in the determination to be present when any decision is so taken<sup>3</sup>; and
- 1837 (2) notice of any occasions at which decisions may be so taken must, unless the occasion falls within a prescribed<sup>4</sup> class or description, be given to each trustee to whom it is reasonably practicable to give such notice<sup>5</sup>.

Notice under head (2) above must be given in a prescribed manner and not later than the beginning of a prescribed period<sup>6</sup>. If the notice requirements are not complied with, the provisions in relation to prohibition orders<sup>7</sup> and civil penalties<sup>8</sup> apply to any trustee who has failed to take all such steps as are reasonable to secure compliance<sup>9</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 Pensions Act 1995 s 32(1). Section 32 is subject to s 8(4)(b) (see PARA 609 ante); s 16(3)(b) (see PARA 791 post); and s 25(2) (see PARA 795 post): s 32(4).

3 Ibid s 32(2)(a).

4 For the meaning of 'prescribed' see PARA 555 note 1 ante.

5 Pensions Act 1995 s 32(2)(b). For these purposes, the prescribed class or description of occasion is an occasion on which it is necessary as a matter of urgency to make a decision: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 9.

6 Pensions Act 1995 s 32(3). The prescribed manner and period are that the notice of the occasion must, unless the trustees agree otherwise, specify the date, time and place of the occasion and be sent to the last known address of each trustee no later than ten business days before the occasion: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 10.

7 Ie the provisions of the Pensions Act 1995 s 3: see PARA 604 ante.

8 Ie the provisions of ibid s 10: see PARA 611 ante.

9 Ibid s 32(5).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent

legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **790 Decisions of pension fund trustees to be taken by majority**

NOTE 2--Pensions Act 1995 s 32(4) amended: Pensions Act 2004 Sch 12 para 48(a).

NOTES 5, 6--See the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.

TEXT AND NOTE 9--1995 Act s 32(5) amended: 2004 Act Sch 12 para 48(b).

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## **(ii) Member-nominated Trustees and Directors**

### **791. Requirement for member-nominated trustees.**

The trustees of a trust scheme<sup>1</sup> must, subject to certain exceptions<sup>2</sup>, secure that such arrangements for persons selected by members<sup>3</sup> of the scheme to be trustees<sup>4</sup> of the scheme as are required are made<sup>5</sup>, and that those arrangements, and the appropriate rules, are implemented<sup>6</sup>. The arrangements must provide for any person who has been nominated and selected in accordance with the appropriate rules to become a trustee by virtue of his selection<sup>7</sup>, and for the removal of such a person to require the agreement of all the other trustees<sup>8</sup>. Where a vacancy for a member-nominated trustee is not filled because insufficient nominations are received, the arrangements must provide for the filling of the vacancy, or for the vacancy to remain, until the expiry of the next period in which persons may be nominated and selected in accordance with the appropriate rules<sup>9</sup>.

The arrangements must provide:

- 1838 (1) for the selection of a person as a member-nominated trustee to have effect for a period of not less than three nor more than six years<sup>10</sup>;
- 1839 (2) for the number of member-nominated trustees to be at least two or (if the scheme comprises less than 100 members) at least one, and at least one-third of the total number of trustees<sup>11</sup>;
- 1840 (3) that, if a member-nominated trustee who was a member of the scheme when he was appointed ceases to be a member of the scheme, he ceases to be a trustee by virtue of that fact<sup>12</sup>.

The arrangements must not provide for the functions of member-nominated trustees to differ from those of any other trustee<sup>13</sup>.

These statutory requirements for member-nominated trustees do not apply to a trust scheme if:

- 1841 (a) a proposal has been made by the employer for the continuation of existing arrangements, or the adoption of new arrangements, for selecting the trustees of the scheme<sup>14</sup>;
- 1842 (b) the arrangements referred to in the proposal are for the time being approved under the statutory consultation procedure<sup>15</sup>; and
- 1843 (c) such other requirements as may be prescribed are satisfied<sup>16</sup>.

Nor do they apply to a trust scheme if the trustees of the scheme consist of all the members, or it falls within a prescribed class<sup>17</sup>. Where the statutory requirements do not apply to a trust scheme, and the employer's proposal was for the adoption of new arrangements which, in consequence of head (b) above, are adopted, the trustees must secure that the proposed arrangements are made and implemented<sup>18</sup>.

The provisions relating to civil penalties<sup>19</sup> apply to any employer who makes such a proposal as is referred to in head (a) above, but fails to give effect to the statutory consultation procedure<sup>20</sup>.

Where a trust scheme to which the statutory requirements for member-nominated trustees apply provides for a maximum total number of trustees (or a maximum which applies in certain circumstances), the trustees may by resolution modify the scheme with a view to increasing that maximum by not more than the number of member-nominated trustees for which provision must be made<sup>21</sup> on the assumption that the total number of trustees is increased in accordance with the resolution<sup>22</sup>.

Subject to any provision of a trust scheme, the fact that the requirement for member-nominated trustees has ceased to apply to the scheme does not terminate the trusteeship of any member-nominated trustee of the scheme but, if he is a member of the scheme, he ceases to be a trustee if he ceases to be a member<sup>23</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 I.e. the exceptions contained in the Pensions Act 1995 s 17: see the text and notes 14-20 infra.

3 For the meaning of 'member' see PARA 612 note 5 ante.

4 Persons who become trustees under such arrangements are referred to in the Pensions Act 1995 Pt I (ss 1-25) as 'member-nominated trustees': s 16(2).

5 Ibid s 16(1)(a).

6 Ibid s 16(1)(b). As to implementation of the general requirements as to member-nominated trustees see the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 7.

For the purposes of the Pensions Act 1995 ss 16-21, the appropriate rules are rules which make the provision required or authorised by s 20 and no other provision and are for the time being approved under the statutory consultation procedure or, if no rules are for the time being so approved, are prescribed rules; and the arrangements required by s 16 or s 18 (see PARA 792 post) to be made must not make any provision which is required or authorised to be made by the rules: s 20(1). The appropriate rules: (1) must determine the procedure for the nomination and selection of a person to fill a vacancy as a member-nominated trustee; and (2) may determine, or provide for the determination of, the conditions required of a person for filling such a vacancy: s 20(2). They must provide for a member-nominated trustee to be eligible for re-selection at the end of his period of service: s 20(3). Where a vacancy for a member-nominated trustee is not filled because insufficient nominations are received, the appropriate rules must provide for determining the next period in which persons may be nominated and selected in accordance with the rules, being a period ending at a prescribed time: s 20(4). The next period must end at the time when, if there had been sufficient nominations for a person to be selected by nomination, his selection would have ceased to have effect in accordance with arrangements made under s 16(5) or, as the case may be, s 18(5) (see PARA 792 post): Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 21.

The appropriate rules must provide that, where the employer so requires, a person who is not a member of the scheme must have the employer's approval to qualify for selection as a member-nominated trustee: Pensions Act 1995 s 20(5). Where s 18 applies to a trust scheme, references in s 20 to a member-nominated trustee include a member-nominated director: s 20(6). For the meaning of 'trust scheme' see PARA 604 note 2 ante; and for the meaning of 'member-nominated director' see PARA 792 note 6 post.

The trustees of a scheme to which s 16 applies, or to which it would apply apart from the statutory exceptions, may at any time propose appropriate rules in respect of the scheme, and the statutory consultation procedure for such rules is set out in the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 8(2), Sch 1 (as amended), which also sets out the conditions which must be satisfied for the approval of such rules; and for those purposes 'the proposer', in relation to such rules, means the trustees of the scheme: reg 8(1)-(3). The prescribed rules for the purposes of the Pensions Act 1995 s 20(1)(b) (which are the appropriate rules for a scheme to which s 16 applies, if no other rules are for the time being approved) are the rules set out in the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 8(4), Sch 2 Pt I (as amended): reg 8(4).

7 Pensions Act 1995 s 16(3)(a).

8 Ibid s 16(3)(b).

9 Ibid s 16(4).

10 Ibid s 16(5).

11 Ibid s 16(6). The arrangements must not, however, provide for a greater number of member-nominated trustees than that required to satisfy that minimum unless the employer has given his approval to the greater number: see s 16(6). In determining at any time after the first scheme year, for the purposes of ss 16-21 in relation to the number of members which a scheme comprises or to the statutory consultation procedure, whether or not a person is a member or whether he is a member of a specified description, a person is treated as becoming or ceasing to be a member or, as the case may be, a member of that description at the beginning of the scheme year following that in which he actually becomes or ceases to be a member or, as the case may be, a member of that description: see the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 3(1) (reg 3 substituted by SI 1997/786). The trustees may determine that the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 3(1) (as so substituted) is not to apply in relation to the scheme at any time on or after the date of the determination: see reg 3(4)(a) (as so substituted). Such a determination may apply as respects all the provisions of the Pensions Act 1995 ss 16-21 or only to provisions specified in the determination, and may be revoked or amended by a further determination: Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 3(5) (as so substituted). For these purposes, 'member' in relation to a scheme, does not include any person whose service is only pensionable service by virtue of qualifying him for death benefits, unless by virtue of any other provision of reg 3 (as so substituted) he is at any time treated as a member by virtue of previous membership: reg 3(7) (as so substituted).

12 Pensions Act 1995 s 16(8).

13 Ibid s 16(7). For these purposes, any provision made by an order under s 8(4) (see PARA 609 ante) and s 25(2) (see PARA 795 post) must be disregarded: s 16(7).

14 For these purposes, the arrangements for selecting the trustees of a scheme include all matters relating to the continuation in office of the existing trustees, the selection or appointment of new trustees and the terms of their appointments and any special rules for decisions to be made by particular trustees: ibid s 17(3).

15 'The statutory consultation procedure' means the prescribed procedure for obtaining the views of members of schemes: see ibid s 21(7). Section 17(1) only applies if (1) the employer gives notice in writing to the trustees of the scheme at a permitted notice time that he intends to propose alternative arrangements; and (2) before the expiry of the approval period alternative arrangements are approved and the employer gives notice in writing to the trustees of the scheme of their approval, stating in the notice what those arrangements are and specifying all such matters relating to them as are required to be specified in a notice under the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, Sch 1 para 5(3): reg 9(1). As to the permitted notice time see reg 9(2), (4) (amended by SI 1997/786); and as to the approval period see the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 9(3), (4). For the prescribed procedure for giving notice see reg 21 (amended by SI 1997/786). For the meaning of 'prescribed' see PARA 555 note 1 ante.

The statutory consultation procedure in respect of proposals under the Pensions Act 1995 s 17(1) for the continuation of existing or adoption of new alternative arrangements is set out in the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, Sch 1 (as amended) (which also sets out the conditions which must be satisfied for the approval of such arrangements); and in Sch 1 (as amended) 'the proposer', in relation to such arrangements, means the employer: reg 9(5), (6). Where, by virtue of the Pensions Act 1995 s 17(1), s 16 does not apply to a trust scheme, the trustees must secure that the alternative arrangements are made no later than is necessary to secure that trustees can be selected immediately in pursuance of the arrangements to fill any vacancy arising after the appropriate time: Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 10(1). As to the appropriate time see reg 10(2).

16 Pensions Act 1995 s 17(1).

17 Ibid s 17(4). Section 16 does not apply to any trust scheme (1) each trustee of which is a company; (2) which is a relevant scheme in relation to a company in respect of which alternative arrangements under s 19(1) (see PARA 792 post) are for the time being approved; (3) which has less than two members; (4) the only benefits provided by which are death benefits; (5) to which s 22 (circumstances for application of requirement for an independent trustee: see PARA 795 post) applies; (6) which is an occupational pension scheme which provides relevant benefits, but is neither an approved scheme nor a relevant statutory scheme; (7) which is a relevant self-administered scheme; (8) which is a relevant approved centralised scheme; (9) which is a direct payment, paid-up insured scheme; (10) which is a former old code scheme (ie an approved scheme which was formerly approved under the Income and Corporation Taxes Act 1970 s 208 (repealed) and in respect of which certain conditions are satisfied: (see the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 2(1)); (11) which is a scheme with such a superannuation fund as is mentioned in the Income and Corporation Taxes Act 1988 s 615(6) (certain overseas pensions); (12) which is made under the Parliamentary and other Pensions Act 1987 s 2 (as amended) (power to provide for pensions for Members of the House of Commons etc: see PARLIAMENT vol 78 (2010) PARA 926); or (13) which has been

modified under the Coal Industry Act 1994 Sch 5 (see MINES, MINERALS AND QUARRIES): Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 4(1).

18 Pensions Act 1995 s 10(2).

19 Ie the provisions of *ibid* s 10: see PARA 611 ante.

20 *Ibid* s 17(5).

21 Ie in accordance with *ibid* s 16(6): see the text and note 11 *supra*.

22 Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 11.

23 *Ibid* reg 12.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **791-794 Member-nominated Trustees and Directors**

Pensions Act 1995 ss 16-21 replaced: see Pensions Act 2004 ss 241-243; and PARA 794A. The Child Support, Pensions and Social Security Act 2000 ss 43-46, which were not commenced, are also repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1216 replaced: Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 2006, SI 2006/714 (amended by SI 2007/814, SI 2009/615).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (4) PENSION FUND TRUSTEES/(ii) Member-nominated Trustees and Directors/792. Corporate trustees; member-nominated directors.

## **792. Corporate trustees; member-nominated directors.**

Where a company is a trustee of a trust scheme<sup>1</sup> and the employer<sup>2</sup> is connected with the company or prescribed<sup>3</sup> conditions are satisfied, the company must, subject to certain exceptions<sup>4</sup>, secure that such arrangements for persons selected by the members<sup>5</sup> of the scheme to be directors<sup>6</sup> of the company as are required by these provisions are made, and that those arrangements, and the appropriate rules<sup>7</sup>, are implemented<sup>8</sup>. The arrangements must provide for any person who has been nominated and selected in accordance with the appropriate rules to become a director by virtue of his selection, and for the removal of such a person to require the agreement of all the other directors<sup>9</sup>.

Where a vacancy for a member-nominated director is not filled because insufficient nominations are received, the arrangements must provide for the filling of the vacancy, or for the vacancy to remain, until the expiry of the next period in which persons may be nominated and selected in accordance with the appropriate rules<sup>10</sup>.

The arrangements must provide:

- 1844 (1) for the selection of a person as a member-nominated director to have effect for a period of not less than three nor more than six years<sup>11</sup>;
- 1845 (2) for the number of member-nominated directors to be at least two or (if the scheme comprises less than 100 members) at least one, and at least one-third of the total number of directors,

but must not provide for a greater number of member-nominated directors than that required to satisfy that minimum unless the employer has given his approval to the greater number<sup>12</sup>.

The arrangements must also provide that, if a member-nominated director who was a member of the scheme when he was appointed ceases to be a member of the scheme, he ceases to be a director by virtue of that fact<sup>13</sup>. Where the above provisions apply to a company which is a trustee of two or more trust schemes, and a wholly-owned subsidiary<sup>14</sup> of a company which is the employer in relation to those schemes, the above provisions together with other specified provisions<sup>15</sup> apply as if those schemes were a single scheme and the members of each of the schemes were members of that scheme<sup>16</sup>.

The statutory requirements for member-nominated directors do not apply to a company which is a trustee of a trust scheme if:

- 1846 (a) a proposal has been made by the employer for the continuation of existing arrangements, or the adoption of new arrangements, for selecting the directors of the company<sup>17</sup>;
- 1847 (b) the arrangements referred to in the proposal are for the time being approved under the statutory consultation procedure<sup>18</sup>; and
- 1848 (c) such other requirements as may be prescribed are satisfied<sup>19</sup>.

Nor do they apply to a company which is a trustee of a trust scheme if the scheme falls within a prescribed class<sup>20</sup>. Where those requirements do not apply to a company which is a trustee of a trust scheme, and the employer's proposal was for the adoption of new arrangements which, in

consequence of head (b) above, are adopted, the company must secure that the proposed arrangements are made and implemented<sup>21</sup>.

The provisions relating to civil penalties<sup>22</sup> apply to any employer who makes such a proposal as is referred to in head (a) above, but fails to give effect to the statutory consultation procedure<sup>23</sup>.

Subject to any provision made by the articles of association of a company, the fact that the requirement for member-nominated directors has ceased to apply to the company does not terminate the directorship of any member-nominated director of the company but, if he is a member of the scheme, he ceases to be a director if he ceases to be a member<sup>24</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 For the meaning of 'employer' see PARA 598 note 4 ante.

3 For the meaning of 'prescribed' see PARA 555 note 1 ante.

4 Ie the exceptions contained in the Pensions Act 1995 s 19: see the text and notes 17-23 infra.

5 For the meaning of 'member' see PARA 612 note 5 ante.

6 Persons who become directors under such arrangements are referred to in the Pensions Act 1995 Pt I (ss 1-125) as 'member-nominated directors': s 18(2).

7 For the meaning of 'the appropriate rules' see PARA 791 note 6 ante. A company to which *ibid* s 18 applies or to which it would apply apart from s 19(1) or the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 6 (as amended) may at any time propose appropriate rules in respect of the company; the statutory consultation procedure for such rules is set out in reg 14(2), Sch 1 (as amended) (which also sets out the conditions which must be satisfied for the approval of such rules), and 'the proposer', in relation to such rules, means the company: reg 14(1)-(3). The prescribed rules for the purposes of the Pensions Act 1995 s 20(1)(b) (see PARA 791 note 6 ante) (which are the appropriate rules for a company to which s 18 applies, if no other rules are for the time being approved) are the rules applicable by virtue of the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 14(4), Sch 2 Pt II: reg 14(4).

8 Pensions Act 1995 s 18(1). As to implementation of the general requirements as to member-nominated directors see the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 13 (amended by SI 1997/786). In addition to the case specified in the Pensions Act 1995 s 18(1), s 18 also applies where a company is a trustee of a trust scheme and either it is the sole trustee of the scheme or all the other trustees are companies, unless s 18 is disappplied by s 19 or the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 6 (as amended) (see note 20 infra): reg 5(1).

9 Pensions Act 1995 s 18(3).

10 *Ibid* s 18(4).

11 *Ibid* s 18(5).

12 *Ibid* s 18(6).

13 *Ibid* s 18(7).

14 Ie within the meaning of the Companies Act 1985 s 736 (as substituted): see COMPANIES vol 14 (2009) PARA 25.

15 Ie the provisions of the Pensions Act 1995 s 20 (see PARA 791 note 6 ante) and s 21(8) (see PARA 793 post).

16 *Ibid* s 18(8). Where a company is a trustee of two or more schemes which are treated as a single scheme by virtue of s 18(8), the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216 as amended, as they have effect in relation to such a company and such schemes (except regs 4-6) (as amended) apply as if those schemes were a single scheme and the members of each of the schemes were members of that scheme: reg 18.

17 For these purposes, the arrangements for selecting the directors of a company include all matters relating to the continuation in office of the existing directors, the selection or appointment of new directors and the terms of their appointments and any special rules for decisions to be made by particular directors: Pensions Act 1995 s 19(3).

18 The statutory consultation procedure in respect of proposals under *ibid* s 19(1) for the continuation of existing or adoption of new alternative arrangements is set out in the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, Sch 1 (as amended) (which also sets out the conditions which must be satisfied for the approval of such arrangements); and in Sch 1 (as amended) 'the proposer', in relation to such arrangements, means the employer: reg 15(5), (6). Where, by virtue of the Pensions Act 1995 s 19(1), s 18 does not apply to a company, the company must secure that the alternative arrangements are made no later than is necessary to secure that directors can be selected immediately in pursuance of the arrangements to fill any vacancy arising after the appropriate time: Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 16(1). As to the appropriate time see reg 16(2).

19 Pensions Act 1995 s 19(1). Section 19(1) only applies if (1) the employer gives notice in writing to the company at a permitted notice time that he intends to propose alternative arrangements; and (2) before the expiry of the approval period alternative arrangements are approved and the employer gives notice in writing to the company of their approval, stating in the notice what those arrangements are and specifying all such matters relating to them as are required to be specified in a notice under the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, Sch 1 para 5(3); reg 15(1). As to the permitted notice time see reg 15(2), (4) (amended by SI 1997/786) and as to the approval period see the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 15(3), (4). For the prescribed procedure for giving notice see reg 21 (amended by SI 1997/786).

20 Pensions Act 1995 s 19(4). Section 18 does not apply to any company by virtue of its being a trustee of a trust scheme (1) which has another trustee who is not a company; (2) in respect of which alternative arrangements under s 17(1) are for the time being approved; (3) which has less than two members; (4) the only benefits provided by which are death benefits; (5) to which s 22 (circumstances for application of requirement for an independent trustee: see PARA 795 post) applies; (6) which is an occupational pension scheme which provides relevant benefits, but is neither an approved scheme nor a relevant statutory scheme; (7) which is a relevant self-administered scheme; (8) which is a relevant approved centralised scheme; (9) which is a relevant executive pension scheme in relation to the company; (10) which is a direct payment, paid-up insured scheme; (11) which is a relevant wholly-insured scheme; (12) which is a former old code scheme (as to which see PARA 791 note 17 ante); (13) which is a scheme with such a superannuation fund as is mentioned in the Income and Corporation Taxes Act 1988 s 615(6) (certain overseas pensions); (14) which is made under the Parliamentary and other Pensions Act 1987 s 2 (as amended) (power to provide for pensions for Members of the House of Commons etc: see PARLIAMENT vol 78 (2010) PARA 926); or (15) which has been modified under the Coal Industry Act 1994 Sch 5 (see MINES): Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 6(1) (amended by SI 1997/786).

21 Pensions Act 1995 s 19(2).

22 *Ie* the provisions of *ibid* s 10: see PARA 611 ante.

23 *Ibid* s 19(5).

24 Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 17.

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

**791-794 Member-nominated Trustees and Directors**

Pensions Act 1995 ss 16-21 replaced: see Pensions Act 2004 ss 241-243; and PARA 794A. The Child Support, Pensions and Social Security Act 2000 ss 43-46, which were not commenced, are also repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1216 replaced: Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 2006, SI 2006/714 (amended by SI 2007/814, SI 2009/615).

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### **793. Member-nominated trustees and directors; supplementary provisions.**

If, in the case of a trust scheme<sup>1</sup> or of a company which is a trustee of a trust scheme:

- 1849 (1) such arrangements in relation to member-nominated trustees and directors as are required<sup>2</sup> to be made have not been made; or
- 1850 (2) such arrangements in relation to member-nominated trustees and directors as are required to be implemented are not being implemented; or
- 1851 (3) the appropriate rules<sup>3</sup> are not being implemented,

the provisions relating to prohibition orders<sup>4</sup> and civil penalties<sup>5</sup> apply to any trustee who has failed to take all such steps as are reasonable to secure compliance and also to the company<sup>6</sup>. No such arrangements or rules as are so required to be made or implemented are treated as effecting an alteration to the scheme in question for the purposes of cessation of approval<sup>7</sup> under the Income and Corporation Taxes Act 1988<sup>8</sup>.

Regulations may make provision for determining the time by which such arrangements (or further arrangements) are required to be made and trustees or directors are required to be selected in pursuance of the appropriate rules<sup>9</sup>, and for determining when any approval under the statutory consultation procedure<sup>10</sup> of the appropriate rules, or of arrangements for selecting the trustees of a scheme, or the directors of a company, given on a proposal by the employer<sup>11</sup>, is to cease to have effect<sup>12</sup>.

The Secretary of State<sup>13</sup> may by regulations modify<sup>14</sup> the provisions with regard to member-nominated trustees and directors<sup>15</sup> in their application to prescribed<sup>16</sup> cases<sup>17</sup>.

Approval of the appropriate rules, or of arrangements<sup>18</sup>, under the statutory consultation procedure must be given by the active<sup>19</sup> and pensioner<sup>20</sup> members of the scheme, and if the trustees so determine, such deferred members<sup>21</sup> of the scheme as the trustees may determine, taken as a whole<sup>22</sup>.

1 For the meaning of 'trust scheme' see para 604 note 2 ante.

2 Ie required by the Pensions Act 1995 s 16(1) or s 17(2) (see para 791 ante) or by s 18(1) or s 19(2) (see para 792 ante) as the case may be: see s 21(1), (2).

3 For the meaning of 'the appropriate rules' see para 791 note 6 ante.

4 Ie the provisions of the Pensions Act 1995 s 3: see para 604 ante.

5 Ie the provisions of *ibid* s 10: see para 611 ante.

6 *Ibid* s 21(1), (2). Adequate records must be kept by trustees, or by a company which is a trustee, of a trust scheme for enabling it to be determined whether such arrangements have been made or implemented or such rules implemented: see the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 22(1), (2).

7 Ie for the purposes of the Income and Corporation Taxes Act 1988 s 591B (as added): see para 752 ante.

8 Pensions Act 1995 ss 21(3), 124(1).

9 Ibid s 21(4).

10 For the meaning of 'statutory consultation procedure' see para 791 note 15 ante. All such records must be kept by employers of the steps taken by them to comply with the statutory consultation procedure specified in the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, regs 8(2), 14(2), Sch 1 (as amended) as are adequate for enabling it to be determined whether they have complied with that procedure: reg 22(3).

11 For the meaning of 'employer' see para 598 note 4 ante.

12 Pensions Act 1995 s 21(5). As to cessation of approval see the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 20 (amended by SI 1997/786).

13 As to the Secretary of State see para 1 ante.

14 For the meaning of 'modify' see para 664 note 10 ante (definition applied by the Pensions Act 1995 s 124(5)).

15 Ie the provisions of ibid ss 16-20: see paras 791-792 ante.

16 For the meaning of 'prescribed' see para 555 note 1 ante.

17 Pensions Act 1995 s 21(6). For the prescribed modifications see the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 19, Sch 3 (amended by SI 1997/786). For transitional provisions see the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216, reg 24, Sch 4.

18 References to the approval of appropriate rules, or of arrangements under the Pensions Act 1995 s 17 or s 19 (see paras 791-792 ante), by any persons under the statutory consultation procedure are to be prescribed conditions in respect of those rules or, as the case may be, arrangements being satisfied in the case of those persons in pursuance of the procedure, and those conditions may relate to the extent to which those persons have either endorsed, or not objected to, the rules or, as the case may be, arrangements: s 21(8)(b).

19 For the meaning of 'active member' see para 612 note 5 ante.

20 For the meaning of 'pensioner member' see para 612 note 5 ante.

21 For the meaning of 'deferred member' see para 612 note 5 ante.

22 Pensions Act 1995 s 21(8)(a).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **791-794 Member-nominated Trustees and Directors**

Pensions Act 1995 ss 16-21 replaced: see Pensions Act 2004 ss 241-243; and PARA 794A. The Child Support, Pensions and Social Security Act 2000 ss 43-46, which were

not commenced, are also repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1216 replaced: Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 2006, SI 2006/714 (amended by SI 2007/814, SI 2009/615).

**793 Member-nominated trustees and directors; supplementary provisions**

NOTES--SI 1996/1216 revoked: SI 2006/714.

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#### **794. Exercise of powers by member trustees.**

No rule of law that a trustee may not exercise the powers vested in him so as to give rise to a conflict between his personal interest and his duties to the beneficiaries applies to a trustee of a trust scheme<sup>1</sup>, who is also a member of the scheme, exercising the powers vested in him in any manner, merely because their exercise in that manner benefits, or may benefit, him as a member of the scheme<sup>2</sup>.

<sup>1</sup> For the meaning of 'trust scheme' see PARA 604 note 2 ante.

<sup>2</sup> Pensions Act 1995 s 39. This reverses the previous position at common law: see *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32; *Re William Makin & Sons* [1993] BCC 453, [1993] OPLR 171; and see also 565 HL Official Report (5th series), 12 July 1995, col 1693.

### **UPDATE**

#### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

#### **791-794 Member-nominated Trustees and Directors**

Pensions Act 1995 ss 16-21 replaced: see Pensions Act 2004 ss 241-243; and PARA 794A. The Child Support, Pensions and Social Security Act 2000 ss 43-46, which were not commenced, are also repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1216 replaced: Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 2006, SI 2006/714 (amended by SI 2007/814, SI 2009/615).

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## **794A. Requirements for Member-nominated Trustees and Directors.**

The Pensions Act 2004 ss 241-243 replace the Pensions Act 1995 ss 16-21.

For general and supplementary provision relating to the Pensions Act 2004 see PARA 636A.

### **1. Requirement for member-nominated trustees**

The trustees of an occupational trust scheme<sup>1</sup> must secure (1) that, within a reasonable period of the commencement date<sup>2</sup>, arrangements are in place which provide for at least one-third of the total number of trustees to be member-nominated trustees<sup>3</sup>, and (2) that those arrangements are implemented<sup>4</sup>. The arrangements may provide for a greater number of member-nominated trustees than that required to satisfy the one-third minimum mentioned in head (1) above only if the employer<sup>5</sup> has approved the greater number<sup>6</sup>. The arrangements (a) must provide for the nomination and selection process to take place within a reasonable period of any requirement arising under the arrangements to appoint a member-nominated trustee, (b) must provide, where a vacancy is not filled because insufficient nominations are received, for the nomination and selection process to be repeated at reasonable intervals until the vacancy is filled, (c) must provide that where the employer so requires, a person who is not a member of the scheme must have the employer's approval to qualify for selection as a member-nominated trustee, and (d) subject to head (c), may provide that, where the number of nominations received is equal to or less than the number of appointments required, the nominees are deemed to be selected<sup>7</sup>. The arrangements must provide that the removal of a member-nominated trustee requires the agreement of all the other trustees<sup>8</sup>. Nothing in the arrangements or in the provisions of the scheme may exclude member-nominated trustees from the exercise of functions exercisable by other trustees by reason only of the fact that they are member-nominated trustees<sup>9</sup>.

The above provisions do not apply in relation to an occupational trust scheme if (i) every member of the scheme is a trustee of the scheme and no other person is such a trustee, (ii) every trustee of the scheme is a company<sup>10</sup>, or (iii) the scheme is of a prescribed description<sup>11</sup>.

1 In the Pensions Act 2004 ss 241 and s 242 (see PARA 794A.2) 'occupational trust scheme' means an occupational pension scheme established under a trust: s 243(3). For the meaning of 'occupational pension scheme' see PARA 636A.3.

2 The 'commencement date', in relation to a scheme, is (1) the date upon which *ibid* s 241 first applies in relation to the scheme, or (2) in the case of a scheme to which s 241 has ceased to apply and then reapplies, the date on which s 241 reapplies to it: s 241(3).

3 'Member-nominated trustees' are trustees of an occupational trust scheme who (1) are nominated as the result of a process in which at least the following are eligible to participate (a) all the active members of the scheme or an organisation which adequately represents the active members, and (b) all the pensioner members of the scheme or an organisation which adequately represents the pensioner members, and (2) are selected as a result of a process which involves some or all of the members of the scheme: *ibid* s 241(2). For the meaning of 'active member' see PARA 659C.20. For the meaning of 'member' see PARA 636A.3.

4 *Ibid* s 241(1). If, in the case of an occupational trust scheme, the arrangements required by s 241(1) (1) are not in place as required by head (1) in the text, or (2) are not being implemented, the Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to any trustee who has failed to take all reasonable steps to secure compliance: Pensions Act 2004 s 241(9). See further NOTE 6.

5 For the meaning of 'employer' see PARA 636A.15.

6 Pensions Act 2004 s 241(4). The Secretary of State may, by order, amend head (1) in the text and s 241(4) by substituting, in each of those provisions, 'one-half' for 'one-third': s 243(1). Regulations may modify s 241 (including any of the provisions mentioned in s 243(1)) in its application to prescribed cases: s 243(2). For the meaning of 'prescribed' see PARA 636A.3. As to orders and regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

7 Pensions Act 2004 s 241(5).

8 Ibid s 241(6).

9 Ibid s 241(7).

10 In ibid ss 241 and s 242 (see PARA 794A.2) 'company' means a company as defined in the Companies Act 2006 s 1(1) or a company which may be wound up under the Insolvency Act 1986 Pt 5 (unregistered companies): Pensions Act 2004 s 243(3) (amended by SI 2009/1941).

11 Pensions Act 2004 s 241(8). As to schemes which are of a prescribed description see the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 2006, SI 2006/714, reg 2 (amended by SI 2007/814).

## **2. Requirement for member-nominated directors of corporate trustees**

Where a company is a trustee of an occupational trust scheme and every trustee of the scheme is a company, the company must secure (1) that, within a reasonable period of the commencement date<sup>1</sup>, arrangements are in place which provide for at least one-third of the total number of directors of the company to be member-nominated directors<sup>2</sup>, and (2) that those arrangements are implemented<sup>3</sup>. The arrangements may provide for a greater number of member-nominated directors than that required to satisfy the one-third minimum mentioned in head (1) above only if the employer has approved the greater number<sup>4</sup>. The arrangements (a) must provide for the nomination and selection process to take place within a reasonable period of any requirement arising under the arrangements to appoint a member-nominated director, (b) must provide, where a vacancy is not filled because insufficient nominations are received, for the nomination and selection process to be repeated at reasonable intervals until the vacancy is filled, (c) must provide that where the employer so requires, a person who is not a member of the scheme must have the employer's approval to qualify for selection as a member-nominated director, and (d) subject to head (c) above, may provide that, where the number of nominations received is equal to or less than the number of appointments required, the nominees are deemed to be selected<sup>5</sup>. The arrangements must provide that the removal of a member-nominated director requires the agreement of all the other directors<sup>6</sup>. Nothing in the arrangements may exclude member-nominated directors from the exercise of functions exercisable by other directors by reason only of the fact that they are member-nominated directors<sup>7</sup>. Where the same company is a trustee of two or more occupational trust schemes by reference to each of which these provisions<sup>8</sup> apply to the company, then<sup>9</sup> the preceding provisions have effect as if (i) the schemes were a single scheme, (ii) the members of each of the schemes were members of that single scheme, and (iii) the references to 'the employer' were references to all the employers in relation to the schemes<sup>10</sup>.

The above provisions do not apply in relation to an occupational trust scheme if the scheme is of a prescribed description<sup>11</sup>.

1 The 'commencement date', in relation to a company, is (1) the date upon which the Pensions Act 2004 s 242 first applies in relation to the company, or (2) in the case of a company to which s 242 has ceased to apply and then reapplies, the date on which s 242 reapplies to it: s 242(3).

2 'Member-nominated directors' are directors of the company in question who (1) are nominated as the result of a process in which at least the following are eligible to participate (a) all the active members of the occupational trust scheme or an organisation which adequately represents the active members, and (b) all the pensioner members of the occupational trust scheme or an organisation which adequately represents the

pensioner members, and (2) are selected as a result of a process which involves some or all of the members of that scheme: s 242(2).

3 Ibid s 242(1). If, in the case of a company which is a trustee of an occupational trust scheme, the arrangements required by s 242(1) (1) are not in place as required by head (1) in the text, or (2) are not being implemented, the Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to the company: Pensions Act 2004 s 242(11). See further NOTE 4.

4 Ibid s 242(4). The Secretary of State may, by order, amend head (1) in the text and s 242(4) by substituting, in each of those provisions, 'one-half' for 'one-third': s 243(1). Regulations may modify s 242 (including any of the provisions mentioned in s 243(1)) in its application to prescribed cases: s 243(2). As to orders and regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). The Treasury may by order vary the rate of charge; and such an order may make provision for there to be different rates in different circumstances: s 242(5), (6) (added by Finance Act 2009 Sch 2 para 17).

5 Pensions Act 2004 s 242(5).

6 Ibid s 242(6).

7 Ibid s 242(7).

8 Ie ibid s 242.

9 Subject to ibid s 242(9).

10 Ibid s 242(8). Where, apart from s 242(9), s 242(8) would apply in relation to a company, the company may elect that s 242(8) (1) is not to apply as mentioned in s 242(8), or (2) is to apply but only in relation to some of the schemes to which it would otherwise apply: s 242(9).

11 Ibid s 242(10). As to schemes which are of a prescribed description see the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 2006, SI 2006/714, reg 3 (amended by SI 2007/814, SI 2009/615).

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### **(iii) Independent Trustees**

#### **795. Requirement for independent trustee.**

The statutory requirement for an independent trustee<sup>1</sup> applies in relation to a trust scheme<sup>2</sup>:

- 1852 (1) if a person ('the practitioner') begins to act as an insolvency practitioner<sup>3</sup> in relation to a company<sup>4</sup> which, or an individual who, is the employer<sup>5</sup> in relation to the scheme<sup>6</sup>; or
- 1853 (2) if the official receiver becomes the liquidator or provisional liquidator of a company which is the employer in relation to the scheme, or the receiver and the manager, or the trustee, of the estate of a bankrupt<sup>7</sup> who is the employer in relation to the scheme<sup>8</sup>.

The requirement to have an independent trustee ceases to apply if some person other than the employer mentioned above becomes the employer, or if at any time neither the practitioner nor the official receiver is acting in relation to the employer, but the independent trustee requirement will apply in relation to the scheme on any subsequent occasion when the conditions specified in head (1) or head (2) above are satisfied in relation to it<sup>9</sup>.

While the independent trustee requirement applies in relation to a scheme, the practitioner or official receiver must:

- 1854 (a) satisfy himself that at all times at least one of the trustees of the scheme is an independent person<sup>10</sup>; and
- 1855 (b) if at any time he is not so satisfied, appoint, or secure the appointment of, an independent person as a trustee of the scheme<sup>11</sup>,

and the duty under head (b) above must be performed as soon as reasonably practicable and, if a period is prescribed<sup>12</sup> for those purposes, within that period<sup>13</sup>.

Where the above duties imposed in relation to a scheme would fall to be discharged at the same time by two or more persons acting in different capacities, those duties must be discharged:

- 1856 (i) if the employer is a company, by the person or persons acting as the company's liquidator, provisional liquidator or administrator<sup>14</sup>; or
- 1857 (ii) if the employer is an individual<sup>15</sup>, by the person or persons acting as his trustee in bankruptcy or interim receiver of his property or as permanent or interim trustee in the sequestration of his estate<sup>16</sup>.

If the above provisions apply in relation to a trust scheme, but the practitioner or official receiver neglects or refuses to discharge any duty so imposed on him in relation to the scheme, any member of the scheme may apply to the appropriate court<sup>17</sup> for an order requiring him to discharge his duties<sup>18</sup>. If, immediately before the appointment of an independent trustee, there is no trustee of the scheme other than the employer, the employer must cease to be a trustee upon the appointment of the independent trustee<sup>19</sup>.

While the independent trustee requirement applies in relation to a scheme:

- 1858 (A) any power vested in the trustees of the scheme and exercisable at their discretion may be exercised only by the independent trustee<sup>20</sup>; and  
 1859 (B) any power which the scheme confers on the employer (otherwise than as trustee of the scheme), and which is exercisable by him at his discretion but only as trustee of the power, may be exercised only by the independent trustee<sup>21</sup>,

but if, in either case, there is more than one independent trustee, the power may also be exercised with the consent of at least half of those trustees by any person who could exercise it apart from this provision<sup>22</sup>.

While the independent trustee requirement applies in relation to a scheme, no independent trustee of the scheme may be removed from being a trustee by virtue only of any provision of the scheme<sup>23</sup>.

If a trustee so appointed ceases to be an independent person, then he must immediately give written notice of that fact to the practitioner or official receiver by whom the duties under that provision fall to be discharged<sup>24</sup>, and he must cease to be a trustee of the scheme<sup>25</sup>. A trustee so appointed is entitled to be paid out of the scheme's resources<sup>26</sup> his reasonable fees for acting in that capacity and any expenses reasonably incurred by him in doing so, and to be so paid in priority to all other claims falling to be met out of the scheme's resources<sup>27</sup>.

While the independent trustee requirement applies in relation to a scheme, the practitioner or official receiver must<sup>28</sup> provide the trustees of the scheme, as soon as practicable after the receipt of a request, with any information which the trustees may reasonably require for the purposes of the scheme<sup>29</sup>. Any expenses incurred by the practitioner or official receiver in complying with such a request are recoverable by him as part of the expenses incurred by him in discharge of his duties<sup>30</sup>. The practitioner or official receiver is not required to take any action which involves expenses that cannot be so recovered, unless the trustees of the scheme undertake to meet them<sup>31</sup>.

The above provisions are modified<sup>32</sup> in relation to multi-employer schemes<sup>33</sup> and cases where a partnership is the employer<sup>34</sup>; and specified descriptions of scheme are exempted from their requirements<sup>35</sup>.

1    In the Pensions Act 1995 ss 22-26: see the text and notes 2-31 infra. As to the independent trustee in general see *Re Scientific Investment Plan, Clark v Hicks* [1992] PLR 37; and *Denny v Yeldon* [1995] 3 All ER 624, [1995] PLR 37. Regulations may provide for the Pensions Act 1995 ss 22-26 and s 117 (overriding requirements: see PARA 871 post) (so far as it applies to those sections) not to apply in relation to a trust scheme falling within a prescribed class or description: s 118(2).

2    For the meaning of 'trust scheme' see PARA 604 note 2 ante.

3    'Acting as an insolvency practitioner' and 'official receiver' must be construed in accordance with the Insolvency Act 1986 ss 388, 389 (as amended): Pensions Act 1995 s 22(3); and see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 43; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 8.

4    'Company' means a company within the meaning given by the Companies Act 1985 s 735(1) or a company which may be wound up under the Insolvency Act 1986 Pt V (ss 220-229) (as amended) (unregistered companies): Pensions Act 1995 s 22(3).

5    For the meaning of 'employer' see PARA 598 note 4 ante. For these purposes, where there are no members in employment to which the scheme in question relates, references to the employer include the person who last employed persons in the description or category of employment to which the scheme in question relates: Occupational Pension Schemes (Independent Trustee) Regulations 1997, SI 1997/252, reg 6.

6    Pensions Act 1995 s 22(1)(a).

7    'Bankrupt' has the meaning given by the Insolvency Act 1986 s 381: Pensions Act 1995 s 22(3).

8 Ibid s 22(1)(b).

9 Ibid s 22(2).

10 Ibid s 23(1)(a). For the purposes of s 23(1) a person is independent only if: (1) he has no interest in the assets of the employer or of the scheme, otherwise than as trustee of the scheme; (2) he is neither connected with, nor an associate of the employer, any person for the time being acting as an insolvency practitioner in relation to the employer, or the official receiver, acting in any of the capacities mentioned in s 22(1)(b) in relation to the employer; and (3) he satisfies any prescribed requirements: s 23(3). The Insolvency Act 1986 ss 249, 435 (connected and associated persons) and the Bankruptcy (Scotland) Act 1985 (associated persons) apply for the purposes of the Pensions Act 1995 s 23(3)(b): see s 123. The prescribed requirements are: (a) that the person has not provided services in relation to the scheme to the trustees or the employer at any time since the day which fell three years before s 22 started to apply in relation to the scheme and is not connected with, nor an associate of, a person who has provided such services since that day; and (b) that the person has had no interest in the assets of the employer or of the scheme (otherwise than as a trustee of the scheme) at any time since the day referred to in head (a) supra and is neither connected with, nor an associate of a person who has such an interest or has had at any time since that day: Occupational Pension Schemes (Independent Trustee) Regulations 1997, SI 1997/252, reg 2.

11 Pensions Act 1995 s 23(1)(b).

12 For the meaning of 'prescribed' see PARA 555 note 1 ante.

13 Pensions Act 1995 s 23(2).

14 Ibid s 23(4)(a).

15 References in ibid s 23 to an individual include, except where the context otherwise requires, references to a partnership and to any debtor within the meaning of the Bankruptcy (Scotland) Act 1985: Pensions Act 1995 s 23(5).

16 Ibid s 23(4)(b).

17 'The appropriate court' means, if the employer in question is a company: (1) where a winding-up order has been made or a provisional liquidator appointed, the court which made the order or appointed the liquidator; (2) in any other case, any court having jurisdiction to wind up the company: ibid s 24(2)(a). In any other case, 'the appropriate court' means, in England and Wales, the court as defined in the Insolvency Act 1986 s 385: Pensions Act 1995 s 24(2)(b).

18 Ibid s 24(1).

19 Ibid s 25(1).

20 Ibid s 25(2)(a).

21 Ibid s 25(2)(b).

22 Ibid s 25(2).

23 Ibid s 25(3).

24 Ibid s 25(4)(a).

25 Ibid s 25(4)(b). If, in a case where s 25(4) applies, there is no other trustee of the scheme than the former independent trustee, he must not cease by virtue of s 25(4) to be a trustee until such time as another trustee is appointed: s 25(5).

26 For the meaning of 'resources' see PARA 609 note 2 ante.

27 Pensions Act 1995 s 25(6).

28 Ie notwithstanding anything in the Insolvency Act 1986 s 155 (court orders for inspection etc): see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 1086.

29 Pensions Act 1995 s 26(1).

30 Ibid s 26(2).

31 Ibid s 26(3).

32 As to the Secretary of State's power to make regulations modifying or disapplying *ibid* ss 22-26 see PARAS 871-872 post.

33 See the Occupational Pension Schemes (Independent Trustee) Regulations 1997, SI 1997/252, reg 3.

34 See *ibid* reg 4.

35 The Pensions Act 1995 ss 22-26 do not apply to any of the following schemes: (1) a scheme of which each member is a trustee; (2) a money purchase scheme (see PARA 811 note 2 post); (3) a scheme the only benefits provided by which are death benefits and under the provisions of which no member has accrued rights; (4) a scheme under which all the benefits to be provided are secured by one or more policies of insurance or annuity contracts and such policies or contracts are specifically allocated to the provision of benefits for individual members or any other person who has a right to benefits under the scheme; (5) a scheme which would be a money purchase scheme but for the fact that it provides guaranteed minimum pensions; (6) a scheme which provides relevant benefits but is neither an approved scheme nor a relevant statutory scheme; (7) a section 615(6) scheme; and for these purposes 'approved scheme' means a scheme which is approved or was formerly approved under the Income and Corporation Taxes Act 1988 s 590 or s591 (as amended) (see PARAS 748-751 ante) or in respect of which an application for such approval has been duly made but has not been determined; 'guaranteed minimum pension' has the same meaning as in the Pension Schemes Act 1993 (see PARA 878 post); 'relevant benefits' has the same meaning as in the Income and Corporation Taxes Act 1988 s 612(1) (see PARA 741 note 6 ante); 'relevant statutory scheme' has the same meaning as in s 611A (as added) (see PARA 756 note 2 ante); and 'section 615(6) scheme' means a scheme with such a superannuation fund as is mentioned in s 615(6) (certain overseas pensions): Occupational Pension Schemes (Independent Trustee) Regulations 1997, SI 1997/252, reg 5.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **791-794 Member-nominated Trustees and Directors**

Pensions Act 1995 ss 16-21 replaced: see Pensions Act 2004 ss 241-243; and PARA 794A. The Child Support, Pensions and Social Security Act 2000 ss 43-46, which were not commenced, are also repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1216 replaced: Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 2006, SI 2006/714 (amended by SI 2007/814, SI 2009/615).

### **795 Requirement for independent trustee**

NOTES--SI 1997/252 revoked and replaced: SI 2005/703 (amended by SI 2009/615).

TEXT AND NOTES 1-9--Pensions Act 1995 s 22 further amended: Pensions Act 2004 Sch 12 para 40.

NOTE 1--1995 Act s 118(2) amended: 2004 Act Sch 12 para 67.

NOTE 4--Definition of 'company' amended: SI 2009/1941.

TEXT AND NOTE 8--In head (2) after 'in relation to the scheme,' omit 'or' and add 'the interim receiver of the property of a person who is the employer in relation to the scheme, or': 1995 Act s 22(1)(b)(ia) (added by 2004 Act s 36(2)(a)).

TEXT AND NOTE 9--1995 Act s 22(2) amended: 2004 Act s 36(2)(b).

To the extent that it does not already apply by virtue of the 1995 Act s 22(1), s 22 also applies in relation to a trust scheme (1) at any time during an assessment period (within the meaning of the 2004 Act s 132 (see PARA 659C.7)) in relation to the scheme, and (2) at any time, not within head (1), when the scheme is authorised under s 153 (see PARA 659C.22) (closed schemes) to continue as a closed scheme: 1995 Act s 22(2A) (added by 2004 Act s 36(2)(c)).

The responsible person must, as soon as reasonably practicable, give notice of an event within the 1995 Act s 22(2C) to (1) the Authority, (2) the Board of the Pension Protection Fund, and (3) the trustees of the scheme: s 22(2B) (s 22 (2B)-(2F) added by 2004 Act s 36(2)(d)). The events are (a) the practitioner beginning to act as mentioned in the 1995 Act s 22(1)(a), if immediately before he does so s 22 does not apply in relation to the scheme; (b) the practitioner ceasing to so act, if immediately after he does so s 22 does not apply in relation to the scheme; (c) the official receiver beginning to act in a capacity mentioned in s 22(1)(b)(i), (ia) or (ii), if immediately before he does so s 22 does not apply in relation to the scheme; (d) the official receiver ceasing to act in such a capacity, if immediately after he does so s 22 does not apply in relation to the scheme: s 22(2C). For the purposes of s 22(2B) 'the responsible person' means (i) in the case of an event within s 22(2C)(a) or (b) the practitioner, and (ii) in the case of an event within s 22(2C)(c) or (d), the official receiver: s 22(2D). Regulations may require prescribed persons in prescribed circumstances where s 22 begins or ceases to apply in relation to a trust scheme by virtue of s 22(2A) to give a notice to that effect to (A) the Authority, (B) the Board of the Pension Protection Fund, and (C) the trustees of the scheme: s 22(2E). A notice under s 22(2B), or regulations under s 22(2E), must be in writing and contain such information as may be prescribed: s 22(2F).

TEXT AND NOTES 10-18--1995 Act ss 23, 24 now s 23 (substituted by Pensions Act 2004 s 36(3)).

While the 1995 Act s 22 applies in relation to a trust scheme, the Authority may by order appoint as a trustee of the scheme a person who (1) is an independent person in relation to the scheme, and (2) is registered in the register maintained by the Authority in accordance with regulations under s 23(4): s 23(1). In relation to a particular trust scheme, no more than one trustee may at any time be an independent trustee appointed under s 23(1): s 23(2). For the purposes of s 23 a person is independent in relation to a trust scheme only if (a) he has no interest in the assets of the employer or of the scheme otherwise than as trustee of the scheme, (b) he is neither connected with, nor an associate of (i) the employer, (ii) any person for the time being acting as an insolvency practitioner in relation to the employer, or (iii) the official receiver acting in any of the capacities mentioned in s 22(1)(b) in relation to the employer, and (c) he satisfies any prescribed requirements; and any reference in Pt 1 to an independent trustee is to be construed accordingly: s 23(3). Regulations must provide for the Authority to compile and maintain a register of persons who satisfy the prescribed conditions for registration: s 23(4). Regulations under s 23(4) may provide (A) for copies of the register or of extracts from it to be provided to prescribed persons in prescribed circumstances; (B) for the inspection of the register by prescribed persons in prescribed circumstances: s 23(5). The circumstances which may be prescribed

under head (A) or (B) include the payment by the person to whom the copy is to be provided, or by whom the register is to be inspected, of such reasonable fee as may be determined by the Authority: s 23(6). Section 23 is without prejudice to the powers conferred by s 7 (see PARA 608): s 23(7).

TEXT AND NOTES 19-25--1995 Act s 25 further amended: 2004 Act Sch 12 para 41.

TEXT AND NOTE 22--1995 Act s 25(2) amended: 2004 Act Sch 13 Pt 1.

TEXT AND NOTE 24--1995 Act s 25(4)(a) substituted: 2004 Act s 36(4)(a). The 1995 Act s 10 (see PARA 611) applies to any person who, without reasonable excuse, fails to comply with s 25(4)(a): s 25(5A) (added by 2004 Act s 36(4)(b)).

TEXT AND NOTE 27--An order under the 1995 Act s 23(1) may provide for any fees and expenses of the trustee appointed under the order to be paid (1) by the employer, (2) out of the resources of the scheme, or (3) partly by the employer and partly out of those resources: s 25(6) (substituted by 2004 Act s 36(4)(c)). Such an order may also provide that an amount equal to the amount (if any) paid out of the resources of the scheme by virtue of head (2) or (3) is to be treated for all purposes as a debt due from the employer to the trustees of the scheme: 1995 Act s 25(7) (added by 2004 Act s 36(4)(c)). Where, by virtue of head (2) or (3), an order makes provision for any fees or expenses of the trustee appointed under the order to be paid out of the resources of the scheme, the trustee is entitled to be so paid in priority to all other claims falling to be met out of the scheme's resources: 1995 Act s 25(8).

TEXT AND NOTE 29--1995 Act s 26(1) amended: 2004 Act Sch 12 para 42.

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## **796. Disclosure requirements and penalty.**

The trustees of a scheme<sup>1</sup> to which the independent trustee requirement<sup>2</sup> applies must furnish the following information in accordance with the prescribed requirements<sup>3</sup>:

- 1860 (1) the name and address of any person who has been appointed as an independent trustee of the scheme<sup>4</sup>, which information must be furnished in writing to every member<sup>5</sup> or relevant trade union<sup>6</sup> as of course within two months of the appointment of the independent trustee<sup>7</sup>;
- 1861 (2) the scale of fees that will be chargeable by any independent trustee and payable by the scheme<sup>8</sup>;
- 1862 (3) details of the amounts charged to the scheme by any independent trustee in the past 12 months<sup>9</sup>;
- 1863 (4) the name and address of any trustee who is an independent person<sup>10</sup> for the statutory purposes<sup>11</sup>.

Where the independent trustee requirement applies in relation to a scheme and no independent trustee has been appointed<sup>12</sup>, the trustees must, as soon as practicable, and in any event within two months of the date on which the insolvency practitioner or official receiver<sup>13</sup> first advises any of the trustees that he is satisfied that at least one of the trustees of the scheme is an independent person, furnish in writing to each member the information referred to in head (4) above<sup>14</sup>.

The trustees must furnish any of the information referred to in heads (1) to (4) above in writing to any member or prospective member or relevant trade union on request<sup>15</sup> (not being a request made less than 12 months after the last occasion on which such information was furnished to the same person or trade union) as soon as practicable and in any event within two months after the request is made<sup>16</sup>.

Where a person fails, without reasonable excuse, to comply with any requirement imposed upon him by these provisions, the Occupational Pensions Regulatory Authority<sup>17</sup> may require him to pay, within 28 days, a penalty which in the case of an individual must not exceed £1,000 and in any other case must not exceed £10,000<sup>18</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 I.e the Pensions Act 1995 s 22: see PARA 795 ante.

3 Occupational Pension Schemes (Independent Trustee) Regulations 1997, SI 1997/252, reg 7(1).

4 I.e under the Pensions Act 1995 s 23(1)(b): see PARA 795 ante.

5 For these purposes, 'member' does not include a deferred member whose present address is not known to the trustees and in respect of whom correspondence sent by the trustees to his last known address has been returned: Occupational Pension Schemes (Independent Trustee) Regulations 1997, SI 1997/252, reg 7(7). For the meaning of 'deferred member' see PARA 612 note 5 ante.

6 For these purposes, 'relevant trade union' in relation to any scheme means an independent trade union recognised to any extent for the purposes of collective bargaining in relation to members and prospective members of the scheme in question; and any question as to whether an organisation is a relevant trade union must be referred to an industrial tribunal: *ibid* reg 7(7), (8). 'Prospective member' means any person who, under

the terms of his contract of service and the scheme rules (1) is able, at his own option, to become a member of the scheme; (2) will become so able if he continues in the same employment for a sufficiently long period; (3) will be admitted to it automatically unless he makes an election not to become a member; or (4) may be admitted to it subject to the consent of his employer: reg 7(7).

7 Ibid reg 7(2)(a), (3). Any information which reg 7 requires the trustees to furnish as of course to a member who is not in any employment to which the scheme relates is deemed to have been furnished if it was sent to him by post to his last address known to the trustees: reg 7(9).

8 Ibid reg 7(2)(b).

9 Ibid reg 7(2)(c).

10 Ie for the purposes of the Pensions Act 1995 s 23(1)(a): see PARA 795 ante.

11 Occupational Pension Schemes (Independent Trustee) Regulations 1997, SI 1997/252, reg 7(2)(d).

12 Ie under the Pensions Act 1995 s 23(1)(b): see PARA 795 ante.

13 For the meaning of 'insolvency practitioner' and 'official receiver' see PARA 795 note 3 ante.

14 Occupational Pension Schemes (Independent Trustee) Regulations 1997, SI 1997/252, reg 7(4).

15 The request must be made in writing: see ibid reg 7(7).

16 Ibid reg 7(5).

17 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

18 Occupational Pension Schemes (Independent Trustee) Regulations 1997, SI 1997/252, reg 7(6).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **796 Disclosure requirements and penalty**

NOTES--SI 1997/252 revoked and replaced: SI 2005/703 (amended by SI 2009/615).

NOTE 6--Industrial tribunals now called employment tribunals: Employment Rights (Dispute Resolution) Act 1998 s 1.

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#### **(iv) Miscellaneous Rights and Duties of Trustees**

##### **797. Additional rights of employee trustees.**

Employee trustees enjoy additional rights to time off for the performance of their duties<sup>1</sup> and training<sup>2</sup>; payment for time off<sup>3</sup>; and the right not to suffer detriment in their employment<sup>4</sup> or to be unfairly dismissed<sup>5</sup>.

- 1 See the Employment Rights Act 1996 s 58(1)(a).
- 2 See *ibid* s 58(1)(b).
- 3 See *ibid* s 59(1).
- 4 See *ibid* s 46.
- 5 See *ibid* s 102. As to employment rights see generally EMPLOYMENT.

#### **UPDATE**

##### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

##### **797-800 Miscellaneous Rights and Duties of Trustees**

See Pensions Act 2004 ss 247-249 (requirement for knowledge and understanding), s 249 (requirement for internal controls); and PARA 800A.

##### **797 Additional rights of employee trustees**

TEXT AND NOTES--Such additional rights are also now enjoyed by employees who are directors of companies which are trustees of relevant occupational pension schemes as they are enjoyed by employees who are trustees of such schemes: Employment Rights Act 1996 ss 58, 46, 102; Welfare Reform and Pensions Act 1999 Sch 2 para 19.



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### **798. Other responsibilities of trustees, employers etc.**

The trustees of any trust scheme<sup>1</sup> must, except in any prescribed circumstances<sup>2</sup>, keep any money received by them in a separate account kept by them at an institution authorised under the Banking Act 1987<sup>3</sup>. Regulations<sup>4</sup> may require the trustees of any trust scheme to keep records of their meetings (including meetings of any of their number), and books and records relating to any prescribed transaction<sup>5</sup>. If in the case of any trust scheme any requirements imposed by or under the above provisions are not complied with, the provisions relating to prohibition orders<sup>6</sup> and civil penalties<sup>7</sup> apply to any trustee who has failed to take all such steps as are reasonable to secure compliance<sup>8</sup>. Regulations may, in the case of any trust scheme, require the employer<sup>9</sup>, and any prescribed person acting in connection with the scheme, to keep books and records relating to any prescribed transaction<sup>10</sup>. Regulations may require books or records so kept to be kept in a prescribed form and manner and for a prescribed period<sup>11</sup>. Regulations must, in cases where payments of benefit to members<sup>12</sup> of trust schemes are made by the employer, require the employer to make into a separate account kept by him at an institution authorised under the Banking Act 1987 any payments of benefit which have not been made to the members within any prescribed period<sup>13</sup>. If in the case of any trust scheme any person fails to comply with any requirement so imposed<sup>14</sup> the provisions relating to civil penalties<sup>15</sup> apply to him<sup>16</sup>.

Where:

- 1864 (1) on making a payment of any earnings<sup>17</sup> in respect of any employment<sup>18</sup> there is deducted any amount corresponding to any contribution payable on behalf of an active member<sup>19</sup> of an occupational pension scheme<sup>20</sup>; and
- 1865 (2) the amount deducted is not, within a prescribed period<sup>21</sup>, paid to the trustees or managers<sup>22</sup> of the scheme and there is no reasonable excuse for the failure to do so,

the employer is guilty of an offence and liable, on summary conviction, to a fine not exceeding the statutory maximum<sup>23</sup> and on conviction on indictment to imprisonment or a fine, or to both<sup>24</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 For the meaning of 'prescribed' see PARA 555 note 1 ante. For these purposes, the prescribed circumstances are: (1) where the trustees have entered into an arrangement or contract with a person to the effect that the money is to be paid into a separate account held by that person and (a) it is a condition of that arrangement or contract that a record is to be kept by that person of the specified information and such records should be retained for a period of at least six years; and (b) any interest earned on the account is to be credited to the scheme in respect of which the money is deposited; (2) where the trustees have a separate account kept by them at any of the institutions specified in the Banking Act 1987 Sch 2 paras 1-6 and money received by them is to be held in that account: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 11(1). The specified information is the amount of money paid into the account, the date of payment and from whom it was received; the amount of money paid out of the account, the date of withdrawal and to whom payment was made; and the interest earned on the account of each scheme in respect of which money is deposited: reg 11(2). An employer is required, in cases where payments of benefits to members of trust schemes are made by him, to make into a separate account kept by him at an institution authorised under the Banking Act 1987, any payment of benefit which has not been made to a member within two business days from the date of receipt by the employer: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 15. 'Business days' means any day other than a Saturday, a Sunday, Christmas Day,

Good Friday, or a bank holiday within the meaning of the Banking and Financial Dealings Act 1971: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 1(2).

3 Pensions Act 1995 s 49(1).

4 For the meaning of 'regulations' see PARA 600 note 2 ante.

5 Pensions Act 1995 s 49(2).

6 le the provisions of ibid s 3: see PARA 604 ante.

7 le the provisions of ibid s 10: see PARA 611 ante.

8 Ibid s 49(6).

9 For the meaning of 'employer' see PARA 598 note 4 ante.

10 Pensions Act 1995 s 49(3).

11 Ibid s 49(4). For these purposes, the prescribed form and manner in the case of records of the meetings of trustees of any trust scheme, is that the record must be in writing and state: (1) the date, time and place of the meeting; (2) the names of all the trustees invited to the meeting; (3) the names of the trustees who attended the meeting and those who did not attend; (4) the names of any professional advisers or any other person who attended the meeting; (5) any decisions made at the meeting; and (6) whether since the previous meeting there has been any occasion when a decision has been made by the trustees and if so the time, place and date of such a decision, and the names of the trustees who participated in the decision, but these requirements do not apply in the case of a trust scheme which falls within the description referred to in the Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 3(1)(c), (f), (i) (see PARA 826 heads (3), (6), (9) post): reg 13(1), (2). The records must be kept by the trustees for at least six years from the end of the scheme year to which they relate: reg 14.

12 For the meaning of 'member' see PARA 612 note 5 ante.

13 Pensions Act 1995 s 49(5).

14 le imposed under ibid s 49(3) or (5).

15 See note 7 supra.

16 Pensions Act 1995 s 49(7).

17 For the meaning of 'earnings' see PARA 32 ante (definition applied by the Pension Schemes Act 1993 s 181(1) and the Pensions Act 1995 s 124(5)).

18 For the meaning of 'employment' see PARA 560 note 5 ante (definition applied by the Pensions Act 1995 s 124(5)).

19 For the meaning of 'active member' see PARA 612 note 5 ante.

20 For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

21 The prescribed period for these purposes is (1) in the case of minimum payments which are to be made in accordance with the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 32(1), the period mentioned in reg 32; and (2) otherwise, 19 days: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 16 (amended by SI 1997/786).

22 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

23 As to the statutory maximum see PARA 403 note 2 ante.

24 Pensions Act 1995 s 49(8).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

## **797-800 Miscellaneous Rights and Duties of Trustees**

See Pensions Act 2004 ss 247-249 (requirement for knowledge and understanding), s 249 (requirement for internal controls); and PARA 800A.

## **798 Other responsibilities of trustees, employers etc**

TEXT AND NOTES--As to the duty of the trustees or managers to keep certain written records, see the Pensions Act 1995 s 49A (added by the Child Support, Pensions and Social Security Act 2000 s 49; amended by Pensions Act 2004 Sch 12 para 55, Sch 13 Pt 1).

Where an amount corresponding to any contribution payable on behalf of an active member of an occupational pension scheme is deducted from that member's earnings in respect of any employment and is not paid to the trustees or managers of the scheme within the period of 19 days beginning on the first day of the month after which the deduction is made, the trustees or managers do not need to give notice of that failure to the Authority or member where (1) the scheme is exempt from the requirement to secure the preparation, maintenance and revision of a payment schedule for the purposes of the 1995 Act s 87(1) by virtue of SI 1996/1715 reg 17 (see PARA 864); (2) the scheme is exempt from the requirement to prepare, review and if necessary, revise a schedule of contributions under the Pensions Act 2004 s 227 (see PARA 824A.7) by virtue of any of the Occupational Pension Schemes (Scheme Funding) Regulations 2005, SI 2005/3377, reg 17(1)(a)-(i), (k)-(m): SI 1996/1745 reg 16A (substituted by SI 2005/2426).

A requirement is placed on the trustees of an occupational pension scheme based in the United Kingdom requiring them to limit its activities to those relating to providing retirement benefits; see PARA 798A.

NOTE 2--In head (1) for 'a separate account held by that person' read 'an account held by that person and separate from one held by or on behalf of the employer as employer'; and now, head (2) where the trustees have an account (a) kept by them with any of the persons specified in *ibid* reg 11(3); (b) separate from one held by or on behalf of the employer as employer; and (c) in which the money received by them is to be held: reg 11(1) (amended by SI 1999/3198, SI 2001/3649). For 'institution authorised under the Banking Act 1987' read 'deposit taker': SI 1996/1715 reg 15(1) (amended by SI 2001/3649). For the meaning of 'deposit taker' see SI 1996/1715 reg 15(2) (added by SI 2001/3649), which corresponds to the definition in TEXT AND NOTE 3 heads (1), (2) and is qualified as in TEXT AND NOTE 3 heads (a)-(c).

TEXT AND NOTE 3--For 'at an institution authorised under the Banking Act 1987' read 'with a deposit-taker': 1995 Act s 49(1) (amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649). 'Deposit-taker' means (1) a person who has permission under the Financial Services and Markets Act 2000 Pt IV (ss 40-55) to accept deposits; (2) an EEA firm of the kind mentioned in Sch 3 para 5(b) which has permission under Sch 3 para 15 (as a result of qualifying for authorisation under Sch 3 para 12) to accept deposits; (3) the Bank of England or the central bank of a member state other than the United Kingdom; (4) the National Savings Bank; or (5) a municipal bank, that is to say a company which was, immediately before the repeal of the Banking Act 1987 exempted from the prohibition in s 3 by virtue of s 4(1), Sch 2 para 4: 1995 Act s 49(8A) (added by SI 2001/3649). Heads (1) and (2) must be read with (a) the Financial Services and Markets Act 2000 s 22; (b) any relevant order under s 22; and (c) Sch 2: Pensions Act 1993 s 49(8B) (added by SI 2001/3649).

NOTES 3, 5, 11--See the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.

TEXT AND NOTE 8--1995 Act s 49(6) amended: Pensions Act 2004 Sch 12 para 54(a).

TEXT AND NOTE 13--For 'at an institution authorised under the Banking Act 1987' read 'with a deposit-taker': 1995 Act s 49(5) (amended by SI 2001/3649).

TEXT AND NOTES 17-24--Replaced. 1995 Act s 49(8) substituted, s 49(9)-(13) added: Welfare Reform and Pensions Act 1999 s 10(1). Where on making a payment of any earnings in respect of any employment there is deducted any amount corresponding to any contribution payable on behalf of an active member of an occupational pension scheme, the amount deducted is to be paid, within a prescribed period, to the trustees or managers of the scheme: 1995 Act s 49(8) (as substituted). If in any case there is a failure to comply with s 49(8) then (1) s 10 applies to the employer (see PARA 611); and (2) except in prescribed circumstances, the trustees or managers must give notice of the failure, within the prescribed period, to the Occupational Pensions Regulatory Authority and the member: s 49(9) (as so added). For head (2) read 'if the trustees or managers have reasonable cause to believe that the failure is likely to be of material significance in the exercise by the Authority of any of their functions, they must, except in prescribed circumstances, give notice of the failure to the Authority and the member within a reasonable period after the end of the prescribed period under s 49(8)': s 49(9) (as so added; amended by Pensions Act 2004 s 269(1)). If in any case the requirement in head (2) is not complied with s 10 applies to any trustee or manager who has failed to take all reasonable steps to secure compliance: s 49(10), as inserted (s 49(10) amended by Pensions Act 2004 Sch 12 para 54(b), Sch 13 Pt 1). If any person is knowingly concerned in the fraudulent evasion of the obligation imposed by the Pensions Act 2004 s 49(8) in any case, he is guilty of an offence: s 49(11) (as so added). A person guilty of such an offence is liable (i) on summary conviction, to a fine not exceeding the statutory maximum; and (ii) on conviction on indictment, to imprisonment for a term not exceeding seven years or a fine or both: s 49(12) (as so added). A person is not required by virtue of head (1) to pay a penalty under s 10 in respect of a failure if in respect of that failure he has been (A) required to pay a penalty under s 10 by virtue of the Welfare Reform and Pensions Act 1999 s 3(7) (failures in respect of stakeholder pensions: not yet in force); or (B) convicted of an offence under the Pensions Act 1995 s 49(11): s 49(13) (as so added).

NOTE 21--SI 1996/1715 reg 16 amended: SI 2000/679.

NOTE 24--See *R v Dixon* [2000] 2 Cr App Rep (S) 7, CA (in circumstances where there was no fraudulent evasion or payment, a financial penalty rather than a custodial

sentence was more appropriate for a company secretary guilty of offences under the 1995 Act s 49(8)).

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### **798A. Activities of occupational pension schemes.**

If an occupational pension scheme<sup>1</sup> has its main administration in the United Kingdom, the trustees or managers<sup>2</sup> of the scheme must secure that the activities of the scheme are limited to retirement-benefit activities<sup>3</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 636A.3.

2 For the meaning of 'managers' see PARA 636A.11.

3 Pensions Act 2004 s 255(1). In s 255 'retirement-benefit activities' means (1) operations related to retirement benefits, and (2) activities arising from operations related to retirement benefits: s 255(4). In s 255(4) 'retirement benefits' means (a) benefits paid by reference to reaching, or expecting to reach, retirement, and (b) benefits that are supplementary to benefits within head (a) and that are provided on an ancillary basis (i) in the form of payments on death, disability or termination of employment, or (ii) in the form of support payments or services in the case of sickness, poverty or need, or death: s 255(5).

Section 255(1) does not apply to a scheme if it is a prescribed scheme or a scheme of a prescribed description: s 255(2). See Occupational Pension Schemes (Trust and Retirement Benefits Exemption) Regulations 2005, SI 2005/2360. For the meaning of 'prescribed' see PARA 636A.3. The Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to a trustee or manager of a scheme to which the Pensions Act 2004 s 255(1) applies if (A) the scheme has activities that are not retirement-benefit activities, and (B) the trustee or manager has failed to take all reasonable steps to secure that the activities of the scheme are limited to retirement-benefit activities: s 255(3).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **797-800 Miscellaneous Rights and Duties of Trustees**

See Pensions Act 2004 ss 247-249 (requirement for knowledge and understanding), s 249 (requirement for internal controls); and PARA 800A.

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### **799. Requirement for trustees to keep books and records.**

Trustees of any trust scheme<sup>1</sup> must keep records of their meetings (including meetings of any of their number)<sup>2</sup> and books and records relating to any of the following transactions:

- 1866 (1) any amount received in respect of any contribution payable in respect of an active member<sup>3</sup> of the scheme;
- 1867 (2) the date on which a member joins the scheme;
- 1868 (3) payments of pensions and benefits;
- 1869 (4) payments made by or on behalf of the trustees to any person including a professional adviser<sup>4</sup> and such records to include the name and address of the person to whom payment was made and the reason for that payment;
- 1870 (5) any movement or transfer of assets from the trustees to any person including a professional adviser and such records to include the name and address of the person to whom the assets were moved or transferred and the reason for that transaction;
- 1871 (6) the receipt or payment of money or assets in respect of the transfer of members into or out of the scheme and such records to include, in the case of a member who has transferred into the scheme, the name of that member, the terms of the transfer, the name of the transferring scheme, the date of the transfer and date of receipt or payment of money or assets, and, in the case of a member who has transferred out of the scheme, the name of that member, the terms of the transfer, the name of the scheme transferred to, the date of the transfer, and the date of receipt or payment of money or assets;
- 1872 (7) in a case where an appropriate policy of insurance is taken out<sup>5</sup>, the name of the insurance company, the name of members in respect of which the appropriate policy of insurance is taken out, the payment of money or assets and the date of such payments;
- 1873 (8) payments made to a member who leaves the scheme, other than on a transfer, and such records to include the name of that member, the date of leaving, the member's entitlement at that date, the method used for calculating any entitlement under the scheme and how that entitlement was discharged;
- 1874 (9) payments made to the employer; and
- 1875 (10) other payments to, and withdrawals from, the scheme, including the name and address of the person the payment was made to or from whom it was received<sup>6</sup>.

These requirements do not, however, apply in the case of a trust scheme which falls within the specified descriptions<sup>7</sup> of schemes not required to appoint an auditor<sup>8</sup>.

1 For the meaning of 'trust scheme' see PARA 602 note 4 ante.

2 The records must be kept in accordance with the Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 13: see PARA 798 note 11 ante.

3 For the meaning of 'member' see PARA 612 note 5 ante.

4 For the meaning of 'professional adviser' see PARA 825 note 12 post.

5 le by virtue of the Pension Schemes Act 1993 s 32A (as added) (discharge of protected rights on winding up: insurance policies): see PARA 849 post.

6 Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 12(1). The books must be kept by the trustees for at least six years from the end of the scheme year to which they relate: reg 14.

7 le the descriptions referred to in *ibid* reg 3(1)(c), (f), (g), (i): see PARA 826 heads (3), (6)-(7), (9) post.

8 *Ibid* reg 12(2).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **797-800 Miscellaneous Rights and Duties of Trustees**

See Pensions Act 2004 ss 247-249 (requirement for knowledge and understanding), s 249 (requirement for internal controls); and PARA 800A.

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### **800. Provision of information and documents for members.**

Regulations<sup>1</sup> may require the trustees or managers<sup>2</sup> of an occupational pension scheme<sup>3</sup>:

- 1876 (1) to obtain at prescribed<sup>4</sup> times the documents mentioned in heads (i) to (iii) below<sup>5</sup>; and
- 1877 (2) to make copies of them, and of the documents mentioned in heads (A) and (B) below available to the following persons<sup>6</sup>.

The persons referred to are:

- 1878 (a) members<sup>7</sup> and prospective members<sup>8</sup> of the scheme;
- 1879 (b) spouses of members and of prospective members;
- 1880 (c) persons within the application of the scheme and qualifying or prospectively qualifying for its benefits;
- 1881 (d) independent trade unions<sup>9</sup> recognised to any extent for the purposes of collective bargaining in relation to members and prospective members of the scheme<sup>10</sup>.

The documents referred to in head (1) above are:

- 1882 (i) the accounts audited by the auditor<sup>11</sup> of the scheme;
- 1883 (ii) the auditor's statement about contributions under the scheme;
- 1884 (iii) a valuation by the actuary<sup>12</sup> of the assets and liabilities of the scheme, and a statement by the actuary concerning such aspects of the valuation as may be prescribed<sup>13</sup>.

The documents referred to in head (2) above are:

- 1885 (A) any valuation, or certificate of assets and liabilities together with a schedule of contributions<sup>14</sup>, prepared by the actuary of the scheme;
- 1886 (B) any report regarding the failure to meet the minimum funding requirement prepared by the trustees or managers<sup>15</sup>.

Regulations may in the case of certain occupational pension schemes<sup>16</sup> prescribe the persons who may act as auditors or actuaries for the purposes of heads (i) to (iii) above, or provide that the persons who may so act must be persons with prescribed professional qualifications or experience, or persons approved by the Secretary of State<sup>17</sup>.

The trustees of an occupational pension scheme which is, or was formerly, a tax approved scheme<sup>18</sup>, or in respect of which an application for tax approval has been made which has not been determined, or which is a public service pension scheme, and which has two or more members and fulfils other prescribed conditions<sup>19</sup>, have a duty to make provision for the disclosure<sup>20</sup> to specified persons and trade unions<sup>21</sup> of details of the trust deed or other document constituting the scheme<sup>22</sup> and of basic information<sup>23</sup> about the scheme<sup>24</sup>. They are

also under a duty to furnish in writing other prescribed information<sup>25</sup> to individual members and beneficiaries<sup>26</sup>.

More limited disclosure requirements are imposed on trustees of schemes which are not tax approved or public service pension schemes and on trustees of a scheme established by the Salvation Army Act 1963<sup>27</sup>.

Where any person fails, without reasonable excuse, to comply with any prescribed disclosure requirement<sup>28</sup>, the Occupational Pensions Regulatory Authority may require that person to pay a penalty within 28 days<sup>29</sup>.

1 For the meaning of 'regulations' see PARA 600 note 2 ante.

2 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

3 For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

4 For the meaning of 'prescribed' see PARA 555 note 1 ante. The prescribed time for making copies available is not more than seven months after the end of each scheme year: see the Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 6 (amended by SI 1997/786). 'Scheme year', in relation to a scheme, means: (1) a year specified for the purposes of the scheme in any document comprising the scheme or, if none, a period of 12 months commencing on 1 April or on such other date as the trustees select; or (2) such other period (if any) exceeding six months but not exceeding 18 months as is selected by the trustees (a) in connection with the commencement or termination of the scheme; or (b) in connection with a variation of the date on which the year or period referred to in head (1) supra is to commence: Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 1(2).

5 Pensions Act 1995 s 41(1)(a).

6 Ibid s 41(1)(b). The trustees of any scheme must make available a document which contains: (1) a copy of the audited accounts and the auditor's statement where required by regulations made under s 41(1), (2)(a), (b) for the scheme year to which the document relates; (2) a copy of the latest actuarial statement (whether or not a revised statement) where required by regulations made under s 41(1), (2)(c); (3) where s 56 (see PARA 811 post) applies to the scheme, a copy of the latest certificate by the actuary as to the adequacy of the contributions payable under the scheme; and (4) other information, consisting of or including the information specified in the Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 6, Sch 3 (as amended) (information to be included in annual report) so far as it applies to the scheme, to the persons, in the circumstances and in the manner specified below; but these requirements do not apply to a public service pension scheme (a) under the provisions of which there is no requirement for assets related to the intended rate or amount of benefit under the scheme to be set aside in advance (disregarding requirements relating to additional voluntary contributions); or (b) which is made under the Superannuation Act 1972 s 7 (superannuation of persons employed in local government service, etc: see PARA 875 post) or the Parliamentary and other Pensions Act 1987 s 2 (as amended) (power to provide for pensions for Members of the House of Commons, etc: see PARLIAMENT vol 78 (2010) PARA 926): Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 6(1), (2) (amended by SI 1997/786). A copy of the latest such document must be furnished free of charge on request (not being a second or subsequent request by the same person or, as the case may be, trade union, for a copy of the same document) to any person or trade union in the categories specified below within two months of the request being made; and a copy of any such document, being neither the latest nor one which relates to a scheme year which ended more than five years previously, must, within two months of a request being made by any such specified person or trade union, be made available free of charge for inspection at a place which is reasonable having regard to the circumstances of the request and of the person who or trade union which made it; or, at their option, be furnished to such person or trade union, and where a charge is levied it must not exceed the expense incurred in copying, posting and packing such copy: Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 6(3), (4). For transitional provisions see reg 6(5). The categories of persons and trade unions mentioned are the following, namely: (i) members and prospective members of the scheme; (ii) spouses of members and of prospective members of the scheme; (iii) beneficiaries under the scheme; (iv) independent trade unions recognised to any extent for the purposes of collective bargaining in relation to members and prospective members of the scheme: reg 6(6). When a copy of a document is furnished in accordance with these provisions, it must be accompanied by a written statement that further information about the scheme is available, giving the address to which inquiries about it should be sent: reg 6(7).

Subject as follows, the trustees of any scheme must make provision in the manner specified below for the disclosure of: (A) the latest actuarial valuation where required by regulations made under the Pensions Act 1995 s 41(1), (2)(c); (B) where s 56 (see PARA 811 post) applies to the scheme, the latest actuarial valuation required

under s 57(1)(a); (C) the schedule of contributions or payment schedule (in either case whether or not revised) where required under s 58 or s 87 (see PARAS 817, 864 post); and (D) the latest statement of the principles governing decisions about investments where required under s 35 (see PARA 804 post), to persons and trade unions in the categories specified below, but these requirements do not apply to a public service pension scheme such as is referred to in heads (a)-(b) supra: Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 7(1), (2). A copy of any such document, being the latest such document, must, within two months of a request being made by a person or a trade union in the specified categories, be made available free of charge for inspection at a place which is reasonable having regard to the circumstances of the request and of the person who or trade union which made it; or, at their option, be furnished to such person or trade union, and where a charge is levied it must not exceed the expense incurred in copying, posting and packing such copy: reg 7(3). The specified categories of persons and trade unions for these purposes are identical to those in reg 6(6) (see heads (i)-(iv) supra): see reg 7(4). When a copy of a document is furnished in accordance with this requirement, it must be accompanied by a written statement that further information about the scheme is available, giving the address to which inquiries about it should be sent: reg 7(5).

Any information or document which the Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655 (as amended) require the trustees of a scheme to give or furnish, any request for information or for a document to be given or furnished in pursuance of those regulations or any information to be given to the trustees of a scheme in relation to requirements imposed by those regulations, may be furnished, made or given by post; and any information or document which those regulations require the trustees of a scheme to give or furnish as of course to a beneficiary or a member who is not employed in relevant employment is deemed to have been given or furnished if it was sent to him by post to his last address known to the trustees: reg 10(1), (2).

There is no fiduciary obligation on a pension fund trustee to inform a member of his rights in relation to the scheme: see *Hamar v Pensions Ombudsman* [1996] PLR 1. However, where information is provided regarding the scheme by either the employer or the trustees it may give rise to a contractual obligation or an estoppel: see *Dorrell v May & Baker Ltd* [1991] PLR 31; *Icarus (Hertford) Ltd v Driscoll* [1990] PLR 1; *Mettoy Pension Trustees Ltd v Evans* [1991] 2 All ER 513, [1990] 1 WLR 1587; *ITN v Ward* [1997] PLR 131.

7 For the meaning of 'member' see PARA 612 note 5 ante.

8 For the meaning of 'prospective member' see PARA 612 note 5 ante.

9 For the meaning of 'independent trade union' see EMPLOYMENT vol 40 (2009) PARA 859 (definition applied by the Pension Schemes Act 1993 s 181(1); and by the Pensions Act 1995 s 124(5)). Regulations must make provision for referring to an industrial tribunal any question whether an organisation is such a trade union: s 41(6); and see the Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 9. For the meaning of 'industrial tribunal' see PARA 557 note 14 ante.

10 Pensions Act 1995 s 41(4).

11 For the meaning of 'the auditor' see PARA 787 note 2 ante.

12 For the meaning of 'the actuary' see PARA 787 note 2 ante.

13 Pensions Act 1995 s 41(2). Regulations may make provision as to the form and content of any such document as is referred to in heads (i)-(iii) in the text: s 41(6).

14 Ie prepared under ibid s 57 (see PARA 812 post) or s 58 (see PARA 817 post): see s 41(3)(a).

15 Ie prepared under ibid s 59(3) (see PARA 820 post): see s 41(3)(b).

16 Ie to which ibid s 47 (see PARA 825 post) does not apply: see s 41(5).

17 Ibid s 41(5). As to the Secretary of State see PARA 1 ante.

18 'Tax approved scheme' means a scheme which is approved by the Commissioners of the Inland Revenue for the purposes of the Income and Corporation Taxes Act 1988 s 590 or s591 (as amended) (see PARAS 748-751 ante) or a statutory scheme as defined in s 611A (as added) (see PARA 756 note 2 ante): Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 1(2).

19 Ie (1) it is not a scheme the only benefits provided by which are death benefits; (2) either it is established in the United Kingdom or it has one or more trustees resident in the United Kingdom: ibid reg 2(2) (amended by SI 1997/786). For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

20 Any document of which disclosure is required which is not in the English language must be accompanied by a translation in that language: Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 3(4). Nothing in these provisions requires the disclosure of any matter in relation to a

member, beneficiary or prospective member that is not relevant to that person's rights or prospective rights under the scheme, or, where disclosure is made to a trade union, of any matter which is not relevant to the rights or prospective rights of members or prospective members who are of a class of employee in relation to which the trade union is a recognised trade union for the purposes of collective bargaining: reg 4(5). Where any provision of an Act or statutory instrument has been set out in a document which is required to be disclosed, or has been incorporated in such a document by reference, that provision must be disclosed either by giving a reference to it and the Act or statutory instrument in which it is contained or by setting out its text: reg 4(6).

21 The persons and trade unions specified for these purposes are identical to those specified in *ibid* reg 6(6): see note 6 heads (i)-(v) *supra*. The Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655 (as amended) do not impose on the trustees of a scheme any duty in relation to (1) any member or prospective member if no person who employs him in relevant employment has informed the trustees that he is a member or prospective member; or (2) an independent trade union recognised to any extent for the purposes of collective bargaining in relation to members and prospective members of the scheme if no person who employs any such member or prospective member in relevant employment has informed the trustees that the trade union is so recognised: reg 2(4).

22 Disclosure must be made of (1) the contents of the trust deed constituting the scheme, if it is constituted by such a deed, or of any document constituting the scheme, if it is not constituted by a trust deed, and, if the rules of the scheme are not set out in a trust deed or other document the contents of which so fall to be disclosed, the contents of the rules; (2) the contents of any document which amends or supplements or wholly or partly supersedes a document the contents of which so fall to be disclosed; and (3) if the name and address of every person who employs any member of the scheme in relevant employment is not set out in any trust deed or other document the contents of which so fall to be disclosed, the contents of a document setting out the name and address of every such person: *ibid* reg 3(1). A copy of any of the documents referred to in heads (1)-(3) *supra* must, within two months of a request being made by a person or a trade union in the specified categories, (a) be made available free of charge for inspection at a place which is reasonable having regard to the circumstances of the request and of the person who or trade union which made it; or, at their option; (b) be furnished to such person or trade union, and where a charge is levied it must not exceed the expense incurred in copying, posting and packing such copy, so however that in the case of a document copies of which are publicly available, the trustees may, instead of furnishing a copy, advise the person who or trade union which has requested it where copies may be obtained: reg 3(2).

23 The basic information is that specified in *ibid* reg 4(1), Sch 1 (as amended) and comprises: (1) the categories of persons who are eligible to be members of the scheme; (2) whether persons who are eligible to be members of the scheme are admitted to it only on their own application or automatically unless the person in question makes an election not to be admitted or subject to the consent of their employer; (3) the conditions of eligibility for membership; (4) the period of notice (if any) which a member of the scheme must give to terminate his pensionable service; (5) whether, and if so upon what conditions (if any), a member of the scheme, whose pensionable service has terminated before normal pension age, may re-enter pensionable service; (6) how employers' contributions are determined; (7) how members' normal contributions, if any, are calculated; (8) what arrangements are made for the payment by members of additional voluntary contributions; (9) whether the scheme is a tax approved scheme, and if not whether an application for the scheme to become a tax approved scheme is under consideration by the Commissioners of Inland Revenue; (10) which of the relevant employments are, and which are not, contracted-out employments within the meaning of the Pension Schemes Act 1993 s 8 (as amended) (see PARA 878 *post*) and whether the scheme is contracted-out in relation to those employments by virtue of satisfying s 9(2) (as substituted) or s 9(3) (as amended) (see PARA 882 *post*) or by virtue of being one to which regulations made under the Pensions Act 1995 s 149 apply (mixed benefit contracted-out schemes: see PARA 930 *post*); (11) except in the case of a simplified defined contribution scheme, normal pension age under the scheme; (12) what benefits are payable under the scheme and how they are calculated (including how pensionable earnings are defined under the scheme and the rate at which rights to benefits accrue); (13) without prejudice to head (12) *supra*, where (a) the scheme is a money purchase contracted-out scheme, or a mixed benefit contracted-out scheme, but is not an insured scheme (as defined in the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172) (as amended)); (b) the amount of assets allocated for the provision of benefits to or in respect of a member which are payable by virtue of his protected rights under the scheme or, in the case of a mixed benefit contracted-out scheme, under the money purchase part of the scheme, is periodically increased by an amount which is not calculated directly by reference to the investment gain actually derived from the investment of those assets by the trustees of the scheme (whether over the period to which the increase relates or a longer period); and (c) if the increase is calculated by reference to the investment gain from investments in which those assets could be invested, they are not actually so invested or are only so invested to an extent which would not materially affect the actual investment gain from the assets as a whole, the following information, ie that the assets mentioned in head (b) *supra* are increased in the way there mentioned, the method used to calculate that increase and the reason why that method is used; and for the purposes of head (b) *supra*, a mixed benefit contracted-out scheme is to be treated as if the pensions falling within the Pensions Act 1995 s 149(1)(b) were provided by a separate part of the scheme ('the money purchase part') and for the purposes of heads (b)-(c) *supra* references to the investment gain from investments are to both the income and capital gain derived from investing in those investments; (14) whether there is a power under the scheme rules to increase pensions after they have

become payable, otherwise than in accordance with statutory requirements, and if so what it is, who may exercise it, and whether and to what extent it is discretionary; (15) where the scheme is one to which regulations made under s 149 apply, the circumstances, if any, in which the nature of a member's accrued rights, or the basis upon which a member accrues rights under the scheme, may alter as a result of the scheme being one to which those regulations apply, and a statement that the trustees will give notice to a member in circumstances where his rights are affected; (16) whether, and if so when and upon what conditions, survivors' benefits are payable under the scheme; (17) the conditions on which benefits, other than survivors' benefits, are payable under the scheme; (18) which benefits, if any, are payable only at some person's discretion; (19) the short title of the enactment (if any) which provides for both the setting up of the scheme, and the determination of the rate or amount of the benefits under the scheme; (20) what arrangements are made, and in what circumstances, for estimates of entitlement to a cash equivalent, statements of entitlement to a guaranteed cash equivalent, refunds of contributions, and preservation or transfer of accrued rights in relation to a member whose relevant employment or pensionable service in relevant employment terminates before he reaches normal pension age; (21) whether, and the circumstances in which, the trustees will accept cash equivalents and provide transfer credits within the meaning of the Pension Schemes Act 1993 Pt IV Ch III (ss 93-101) (as amended) (transfer values: see PARA 951 et seq post) and whether such acceptance is subject to the discretion of the trustees; (22) if the trustees have directed that any cash equivalent must not take into account any such additional benefits as might accrue to the member in question resulting from the exercise of any discretion vested in the trustees or the employer, a statement to this effect; (23) a statement summarising the way in which transfer values are calculated; (24) except in the case of a public service pension scheme such as is referred to in the Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 6(2) (see note 6 supra), a statement that a scheme annual report is available on request; (25) whether information about the scheme has been given to the Registrar of Occupational and Personal Pension Schemes (as to whom see PARA 661 ante); (26) what procedures the scheme has for the internal resolution of disputes (unless it is an exempt scheme by virtue of regulations made under the Pensions Act 1995 s 50(7): see PARA 839 post) and the address and job title of the person to be contacted in order to have recourse to these; (27) a statement that OPAS (The Pensions Advisory Service) is available to assist members and beneficiaries of the scheme in connection with difficulties which they have failed to resolve with the trustees or administrators of the scheme and the address at which it may be contacted; (28) a statement that the Pensions Ombudsman (as to whom see PARA 663 et seq ante) may investigate and determine any complaint or dispute of fact or law in relation to an occupational pension scheme made or referred in accordance with the Pension Schemes Act 1993 and the address at which he may be contacted; (29) a statement that the Occupational Pensions Regulatory Authority (as to which see PARA 598 et seq ante) is able to intervene in the running of schemes where trustees, employers or professional advisers have failed in their duties, giving the address at which it may be contacted; and (30) the address to which inquiries about the scheme generally or about an individual's entitlement to benefit should be sent: see the Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 4(1), Sch 1 (amended by SI 1997/786).

The information specified in heads (1)-(30) supra must be given as of course, where practicable, to every prospective member and where it has not been practicable so to do, such information must be given to a person within two months of his becoming a member of the scheme, and to the extent that any information so specified has not previously been given to a person who was an active or pensioner member of the scheme on 5 April 1997, such information must be given to that person by 5 April 1998: Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 4(2) (as so amended). That information must also be given on request to any member or prospective member of, or beneficiary under, the scheme, the spouse of any member or prospective member or any independent trade union recognised to any extent for the purposes of collective bargaining in relation to members and prospective members of the scheme, (except where the same information was furnished to that person or trade union in the 12 months prior to the request being made), as soon as practicable and in any event within two months of the request being made: reg 4(3). Where different information is applicable to different members, prospective members and beneficiaries, nothing in this provision must be construed as requiring the trustees to disclose information in relation to a member, prospective member or beneficiary that is not relevant to that person's rights or prospective rights under the scheme, or, where disclosure is made to a trade union, of any matter which is not relevant to the rights or prospective rights of members or prospective members who are of a class of employee in relation to which the trade union is a recognised trade union for the purposes of collective bargaining: reg 4(4). The trustees must notify all members and beneficiaries (except excluded persons) of any change in relation to the scheme which will result in a material alteration in the information referred to in heads (1)-(26), (30) supra before that change takes effect, where it is practicable so to do, and in any event not later than three months after that change has taken effect: reg 4(5). When any information specified in heads (1)-(30) supra is provided, it must be accompanied by a written statement that further information about the scheme is available, giving the address to which inquiries about it should be sent: reg 4(6).

24 See *ibid* regs 2-4 (as amended); and the text and notes 19-24 supra.

25 See the information specified in *ibid* reg 5, Sch 2 (as amended). The specified information is: (1) the amount of benefit which is payable to the person; (2) if a benefit is payable periodically, the conditions (if any) subject to which payment will be continued; (3) if a benefit is payable periodically, the provisions (if any) under which the amount payable will be altered; (4) in the case of (a) an active member, the information specified in either (the trustees having the option to choose which one) of heads (i) or (ii) *infra*, together with the

information specified in head (iii) *infra*, ie (i) the amounts of his own benefits and of his survivors' benefits which would be payable from normal pension age or death if his pensionable service were to terminate within one month of the date on which the information is furnished to him, calculated without regard to possible increases in his salary; (ii) the amounts of his own benefits and of his survivors' benefits which would be payable from normal pension age or death thereafter if his pensionable service were to terminate on his attaining normal pension age, calculated without regard to possible increases in his salary; (iii) except in the case of a simplified defined contribution scheme, the amount of any death in service benefits that would be payable if the member were to die on a specified date which is within one month of the date on which the information is furnished to him, with details of how those benefits are calculated; (b) a deferred member, the date pensionable service ceased and the amounts of his own benefits and of his survivors' benefits payable from normal pension age or death; and in either case, the information must include the date on which the member's pensionable service commenced, the accrual rate or formula for calculating the member's own benefits and any survivors' benefits, the amount of the member's pensionable remuneration on a specified date being, in the case of an active member, the date on which the information is furnished to him or a date within one month thereof, and in the case of a deferred member, the date pensionable service ceased and details of how any deduction from benefits is calculated; (5): (a) the amount of contributions (before the making of any deductions) credited to the member under the scheme during the immediately preceding scheme year and, where the scheme was for the whole or any part of the period a contracted-out scheme, the amount of those contributions which is attributable to (i) the minimum payments to the scheme made in respect of the member by his employer during the immediately preceding scheme year; (ii) the payments (if any) made to the scheme by the Secretary of State in accordance with the Social Security Act 1986 s 7(1) (repealed) (schemes becoming contracted-out between 1986 and 1993) in respect of the member during the immediately preceding scheme year; (iii) the age-related payments (if any) made to the scheme by the Secretary of State in accordance with the Pension Schemes Act 1993 s 42A(3) (as added) (see PARA 912 *post*) in respect of the member during the immediately preceding scheme year; and (iv) the date of birth used in determining the appropriate age-related percentage for the purposes of s 42A (as added) as disclosed to the trustees by the Secretary of State and the name of whom to contact and their address should the date of birth be incorrect; and (b) if the scheme is a simplified defined contribution scheme, the amount or fraction of contributions applied to insure benefits payable in the event of the member's death before starting to receive retirement benefits under the scheme; (6): (a) the value of (i) the member's protected rights under the scheme as at a specified date; and (ii) the member's accrued rights (other than his protected rights) under the scheme at the same or another specified date; (b) where the cash equivalent (calculated, as at the date specified for the purposes of head (a) *supra*, in accordance with s 97 (as amended) (see PARA 956 *post*) and regulations made thereunder), in respect of the transfer of the member's rights mentioned in head (a)(i) or (ii) *supra* or both would be different from the values to be specified under that head, that cash equivalent; (7) the date on which the earner's service begins to qualify him for benefits under the other part of the scheme and whether his rights in respect of his service on or after that date will be rights under the part of the scheme providing such pensions as are referred to in the Pensions Act 1995 s 149(1)(a) or (b) (see PARA 930 *post*); (8) the options available to the member within the scheme rules; (9) the date on which the scheme ceased to be a money purchase contracted-out scheme in relation to the member's employment; (10) the options available to the member within the scheme rules in respect of his protected rights; (11) an account of the amount by which the member's protected rights and accrued rights other than his protected rights have been reduced, and of the action taken by the trustees, or which it is open to the member to take, in order, so far as may be possible, to restore the value of his accrued rights under the scheme; (12) the rights and options (if any) available on the death of a member or beneficiary, and the procedures for exercising them; (13) the provisions (or, as the case may be, a statement that there are no provisions) under which any pension payable to a survivor of a member or beneficiary may or will be increased, and the extent to which such increases are dependent on the exercise of a discretion; (14) whether the member or prospective member is entitled to acquire transfer credits in exchange for a specified cash equivalent (within the meaning of the Pension Schemes Act 1993 Pt IV Ch IV (as amended)), provided by another scheme, and if so, a statement of those transfer credits; (15) whether the member or prospective member is entitled to acquire transfer credits in exchange for any transfer payment (within the meaning of Pt IV Ch IV (as amended)) provided by another scheme, and if so, a statement of those transfer credits; (16) what action is being taken to establish the scheme's liabilities and to recover any assets; when it is anticipated final details will be known; and (where the trustees have sufficient information) an indication of the extent to which, if at all, the actuarial value of accrued rights or benefits to which such person is entitled are likely to be reduced; and (17) an estimate of the amount of the member's own benefits and of his survivors' benefits which are expected to be payable from normal pension age or death: Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, Sch 2 (amended by SI 1997/786). Different conditions are prescribed for furnishing different heads of information: see the Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 5(1)-(12). When any such specified information is provided, it must be accompanied by a written statement that further information about the scheme is available, giving the address to which inquiries about it should be sent: reg 5(13).

26 See *ibid* reg 5; and note 25 *supra*.

27 See *ibid* reg 8.

28 le any requirement imposed (1) under *ibid* regs 4(2) (as amended), 5(2)-(12) or 8(2); or (2) under regs 3(2), (4), (6), 5(13), 6(3), (4), (7), 7(3), (5), 8(3), (4): see reg 11(1), (2) (amended by SI 1997/786).

29 See the Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 11 (as amended: see note 28 *supra*). The penalty is not to exceed (1) in the case of an individual, £1,000 in the case of failure to comply with a requirement mentioned in note 28 head (1) *supra* or £200 in the case of failure to comply with a requirement mentioned in note 28 head (2) *supra*; or (2) in any other case, £10,000 in the case of failure to comply with a requirement mentioned in note 28 head (1) *supra* or £1,000 in the case of failure to comply with a requirement mentioned in note 28 head (2) *supra*: see reg 11 (as so amended).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 797-800 Miscellaneous Rights and Duties of Trustees

See Pensions Act 2004 ss 247-249 (requirement for knowledge and understanding), s 249 (requirement for internal controls); and PARA 800A.

### 800 Provision of information and documents for members

NOTE 4--SI 1996/1655, reg 1(2) amended: SI 2008/2301.

NOTES 5, 6--See the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.

NOTE 6--SI 1996/1655 Sch 3 amended: SI 2000/2691. There is no duty on pension scheme administrators to dispense pension advice which highlights unfavourable aspects of the scheme: *Wirral BC v Evans* [2000] All ER (D) 1728.

SI 1996/1655 regs 6, 7 amended: SI 2005/2877, SI 2005/3377. SI 1996/1655 reg 7(1) amended: SI 2006/1733.

TEXT AND NOTE 10--Head (b) now refers to spouses or civil partners: Pensions Act 1995 s 41(4) (amended by SI 2005/2053).

TEXT AND NOTE 13--1995 Act s 41(2) amended: Pensions Act 2004 Sch 13 Pt 1.

NOTE 13--See the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.

TEXT AND NOTES 14, 15--1995 Act s 41(3) substituted: 2004 Act Sch 12 para 52(a).

TEXT AND NOTES 16, 17--Replaced. Regulations may in the case of occupational pension schemes provide for (1) prescribed persons; (2) persons with prescribed qualifications or experience; or (3) persons approved by the Secretary of State, to act for the

purposes of the 1995 Act s 41(2) (see heads (i)-(iii) of the text) instead of scheme auditors or actuaries: s 41(5) (s 41(5) substituted, s 41(5A), (5B) added, by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 12(1); 1995 Act s 41(5B) amended by 2004 Act Sch 12 para 52(b)). Regulations may impose duties on the trustees or managers of an occupational pension scheme to disclose information to, and make documents available to, a person acting under the 1995 Act s 41(5): s 41(5A) (as added). If any duty imposed under s 41(5A) is not complied with, ss 3 (see PARA 604), 10 (see PARA 611) apply to any trustee, and s 10 applies to any manager, who has failed to take all such steps as are reasonable to secure compliance: s 41(4B) (as added).

NOTE 18--'Tax approved scheme' includes a scheme which is approved by the Commissioners of the Inland Revenue under the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (repealed): SI 1996/1655 reg 1(2) (amended by SI 2000/1403).

NOTE 23--Head (13)(a) SI 1996/1172 further amended: see PARA 557.

In head (26) reference to 's 50(7)' now 's 50(8)': SI 1996/1655 Sch 1 para 25 (amended by SI 2008/649).

In head (27) the statement must now disclose that TPAS is available at any time to assist members and beneficiaries of the scheme in connection with any pensions query they may have, or any difficulty which they have failed to resolve with the trustees or administrators of the scheme, and the address at which TPAS may be contacted: SI 1996/1655 Sch 1 para 26 (amended by SI 1999/3198, SI 2008/649).

SI 1996/1655 Sch 1 further amended: SI 2005/704.

The Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655, reg 4(2) (amended by SI 1997/3038), required trustees to provide basic scheme information to persons who were deferred members of the scheme on 5 April 1997 on their becoming pensioner members of the scheme.

SI 1996/1655 reg 4(3) amended: SI 2005/2877.

NOTES 25, 26--SI 1996/1655 reg 5 amended: SI 2000/1403, SI 2000/2691, SI 2002/1383, SI 2005/3377, SI 2007/814.

NOTE 25--SI 1996/1655 reg 5(10) amended: SI 1997/3038. SI 1996/1655 reg 5(15) amended: SI 2005/706. SI 1996/1655 Sch 2 further amended: SI 2005/704, SI 2005/2877, SI 2005/3377, SI 2009/598.

Also, head (4)(c) a pension credit member, the amounts of his own benefits and of any survivors' benefits payable from normal benefit age or death'; for 'in either case' substitute 'in the case of an active member or a deferred member'; in the case of a pension credit member, the information must include the method or formula for calculating the member's own benefits and any survivors' benefits and details of how any deduction from benefits is calculated: SI 1996/1655 Sch 2 (amended by SI 2000/2691).

In head (5)(a)(iii), references to the Secretary of State now to the Inland Revenue: 1993 Act s 42A(3) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 46).

Heads (10), (11) refer also to safeguarded rights: SI 1996/1655 Sch 2 (amended by SI 2000/2691).

Heads (14), (15). 'Specified cash equivalent' and 'transfer payment' refer also to the Pension Schemes Act 1993 Pt IVA Ch II (ss 101F-101Q) (see PARA 961A.7): SI 1996/1655 Sch 2 (amended by SI 2000/2691).

Further heads:

(18)(a) the value of (i) the pension credit member's safeguarded rights under the scheme as at a specified date, and (ii) the pension credit member's accrued rights (other than his safeguarded rights) under the scheme at the same or another specified date; (b) where the cash equivalent (calculated, as at the date specified for the purposes of paragraph (a) above in accordance with the Pension Schemes Act 1993 s 101I and the Pension Sharing (Pension Credit Benefit) Regulations 2000, SI 2000/1054, reg 24, in respect of the transfer of any of the pension credit member's rights mentioned in PARAGRAPH (a) would be different from the values to be specified under that paragraph, that cash equivalent: SI 1996/1655 Sch 2 (amended by SI 2000/2691). 'Pension credit' means a credit under the Welfare Reform and Pensions Act 1999 s 29(1)(b) (see PARA 961A.3); and 'pension credit member' has the same meaning as in the Pensions Act 1995 s 124(1) (see PARA 843): SI 1996/1655 reg 1(2) (amended by SI 2000/2691).

(19) the date on which the scheme ceased to be a money purchase contracted-out scheme: SI 1996/1655 Sch 2 (amended by SI 2000/2691).

(20) an illustration of the amount of the pension an entitlement to which would be likely to accrue to the member, or be capable of being secured by him, at his retirement date in respect of rights to money purchase benefits that may arise under the scheme: SI 1996/1655 Sch 2 (amended by SI 2002/1383).

NOTE 27--SI 1996/1655 reg 8 amended: SI 2006/467.

NOTES 28, 29--SI 1996/1655 reg 11 further amended: SI 2005/704, SI 2009/615.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (4) PENSION FUND TRUSTEES/(iv) Miscellaneous Rights and Duties of Trustees/800A. Requirement for knowledge and understanding.

## **800A. Requirement for knowledge and understanding.**

### **1. Individual trustees**

The following provisions<sup>1</sup> apply to every individual who is a trustee of an occupational pension scheme<sup>2</sup>. An individual to whom these provisions apply must, in relation to each relevant scheme<sup>3</sup>, be conversant with (1) the trust deed and rules of the scheme, (2) any statement of investment principles for the time being maintained<sup>4</sup>, (3) in the case of a relevant scheme to which Part 3 of the Pensions Act 2004 (scheme funding)<sup>5</sup> applies, the statement of funding principles most recently prepared or revised<sup>6</sup>, and (4) any other document recording policy for the time being adopted by the trustees relating to the administration of the scheme generally<sup>7</sup>. An individual to whom these provisions apply must have knowledge and understanding of (a) the law relating to pensions and trusts, (b) the principles relating to (i) the funding of occupational pension schemes, and (ii) investment of the assets of such schemes, and (c) such other matters as may be prescribed<sup>8</sup>.

The requirements above<sup>9</sup> do not apply to trustees of schemes with fewer than twelve members where all the members are trustees of the scheme and either (A) the provisions of the scheme provide that all decisions which fall to be made by the trustees are made by unanimous agreement by the trustees who are members of the scheme; or (B) the scheme has a trustee who is independent in relation to the scheme for specified purposes<sup>10</sup>, and is registered in the register maintained by the Authority, in accordance with certain provisions<sup>11</sup>, nor do the requirements apply to any individual who is a trustee of a relevant scheme for a period of six months beginning with the date of his appointment as such a trustee, unless he is an independent trustee who meets specified requirements<sup>12</sup>, or he was appointed as a consequence of holding himself out as having expertise in any of the specified matters<sup>13</sup>.

Supplementary provision is made<sup>14</sup>.

1    Ie the Pensions Act 2004 s 247.

2    Ibid s 247(1). For the meaning of 'occupational pension scheme' see PARA 636A.3.

3    In ibid s 247, 'relevant scheme', in relation to an individual, means any occupational pension scheme of which he is a trustee: s 247(2).

4    Ie the Pensions Act 1995 s 35: see PARA 804.

5    Ie the Pensions Act 2004 ss 221-233: see PARA 824A.

6    Ie ibid s 223.

7    Ibid s 247(3).

8    Ibid s 247(4). For the meaning of 'prescribed' see PARA 636A.3. The degree of knowledge and understanding required by s 247(4) is that appropriate for the purposes of enabling the individual properly to exercise his functions as trustee of any relevant scheme: s 247(5).

9    Ie the requirements of ibid s 247(3), (4).

10   Ie for the purposes of the 1995 Act s 23: see PARA 795.

11 Occupational Pension Schemes (Trustees' Knowledge and Understanding) Regulations 2006, SI 2006/686, reg 2(1) (amended by SI 2007/814), which refers to regulations made under the 1995 Act s 23(4) (see PARA 795).

12 I.e. the requirements of *ibid* s 23(1): see PARA 795.

13 SI 2006/686 reg 3. The specified matters are those listed in the 2004 Act s 247(4) or in any regulations made under s 247(4)(c).

14 *Ibid* s 249. For general and supplementary provision relating to the Pensions Act 2004 see PARA 636A.

## 2. Corporate trustees

The following provisions<sup>1</sup> apply to any company<sup>2</sup> which is a trustee of an occupational pension scheme<sup>3</sup>. A company to which these provisions apply must, in relation to each relevant scheme<sup>4</sup>, secure that each individual who exercises any function<sup>5</sup> which the company has as trustee of the scheme is conversant with each of the documents mentioned below<sup>6</sup> so far as it is relevant to the exercise of the function<sup>7</sup>. Those documents are (1) the trust deed and rules of the scheme, (2) any statement of investment principles<sup>8</sup>, (3) in the case of a relevant scheme to which Part 3 of the Pensions Act 2004 (scheme funding)<sup>9</sup> applies, the statement of funding principles most recently prepared or revised<sup>10</sup>, and (4) any other document recording policy for the time being adopted by the trustees relating to the administration of the scheme generally<sup>11</sup>. A company to which these provisions apply must secure that any individual who exercises any function which the company has as trustee of any relevant scheme has knowledge and understanding of (a) the law relating to pensions and trusts, (b) the principles relating to (i) the funding of occupational pension schemes, and (ii) investment of the assets of such schemes, and (c) such other matters as may be prescribed<sup>12</sup>.

The requirements above<sup>13</sup> do not apply to trustees of schemes with fewer than twelve members where a company is a trustee of the scheme and all of the members of the scheme are directors of the company and either (A) the provisions of the scheme provide that any decision made by the company in its capacity as trustee is made by the unanimous agreement of all the directors who are members of the scheme; or (B) one of the directors is a trustee who is independent in relation to the scheme for specified purposes<sup>14</sup> and is registered in the register maintained by the Authority in accordance with certain provisions<sup>15</sup>, nor do the requirements apply to any individual, who exercises any function which a company has as trustee of a relevant scheme, for a period of six months beginning with the date of his appointment to the company, unless he is an independent trustee who meets the specified requirements<sup>16</sup>, or he was appointed as a consequence of holding himself out as having expertise in any of the specified matters<sup>17</sup>.

Supplementary provision is made<sup>18</sup>.

1 I.e. the Pensions Act 2004 s 248.

2 In *ibid* s 248 'company' means a company as defined in the Companies Act 2006 s 1(1) or a company which may be wound up under the Insolvency Act 1986 Pt 5 (ss 220-229): Pensions Act 2004 s 248(8) (amended by SI 2009/1941).

3 Pensions Act 2004 s 248(1).

4 In *ibid* s 248, 'relevant scheme', in relation to a company, means any occupational pension scheme of which it is a trustee: s 248(2).

5 References in *ibid* s 248 to the exercise by an individual of any function of a company are to anything done by the individual on behalf of the company which constitutes the exercise of the function by the company: s 248(7).

6 I.e. mentioned in *ibid* s 248(4).

- 7 Ibid s 248(3).
- 8 Ie the time being maintained under the Pensions Act 1995 s 35: see PARA 804.
- 9 Ie the Pensions Act 2004 ss 221-233: see PARA 824A.
- 10 Ie under ibid s 223.
- 11 Ibid s 248(4).
- 12 Ibid s 248(5). The degree of knowledge and understanding required by s 248(5) is that appropriate for the purposes of enabling the individual properly to exercise the function in question: s 248(6).
- 13 Ie the requirements of ibid s 248(3), (5).
- 14 Ie for the purposes of the Pensions Act 1995 s 23: see PARA 795.
- 15 Occupational Pension Schemes (Trustees' Knowledge and Understanding) Regulations 2006, SI 2006/686, reg 2(2) (amended by SI 2007/814), which refers to regulations made under the 1995 Act s 23(4) (see PARA 795).
- 16 Ie the requirements of ibid s 23(1): see PARA 795.
- 17 SI 2006/686 reg 4. The specified matters are those listed in the 2004 Act s 248(5) or in any regulations made under s 248(5)(c).
- 18 Ibid s 249. For general and supplementary provision relating to the Pensions Act 2004 see PARA 636A.

### 3. Internal controls

The trustees or managers of an occupational pension scheme must establish and operate internal controls<sup>1</sup> which are adequate for the purpose of securing that the scheme is administered and managed in accordance with the scheme rules, and in accordance with the requirements of the law<sup>2</sup>. The above requirement does not apply in relation to (1) a scheme which is established by or under an enactment (including a local Act), and is guaranteed by a public authority<sup>3</sup>; (2) a pay-as-you-go scheme<sup>4</sup>; (3) a pensions scheme for members of the House of Commons<sup>5</sup>.

1 'Internal controls' means (1) arrangements and procedures to be followed in the administration and management of the scheme; (2) systems and arrangements for monitoring that administration and management; and (3) arrangements and procedures to be followed for the safe custody and security of the assets of the scheme: Pensions Act 2004 s 249A(5) (s 249A added by SI 2005/3379).

2 Pensions Act 2004 s 249A(1). Nothing in s 249A affects any other obligation of the trustees or managers of an occupational pension scheme to establish or operate internal controls, whether imposed by or by virtue of any enactment, the scheme rules or otherwise: s 249A(2). 'Enactment' includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament: s 249A(5).

3 Ibid s 249(3)(a). 'Public authority' means (1) a minister of the Crown; (2) a government department (including any body or authority exercising statutory functions on behalf of the Crown); (3) the Scottish Ministers; (4) the National Assembly for Wales; or (5) a local authority: s 249A(5). 'Local authority' means (a) in relation to England, a county council, a district council, a London borough council, the Greater London Authority, the Common Council of the City of London in its capacity as a local authority or the Council of the Isles of Scilly; (b) in relation to Wales, a county council or county borough council; (c) an administering authority as defined in the Local Government Pension Scheme Regulations 1997, SI 1997/1612, Sch 1 (replaced by Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007, SI 2007/1166, reg 1 (definition added by SI 2008/1083)): Pensions Act 2004 s 249A(5).

4 Ibid s 249(3)(b). 'Pay-as-you-go scheme' means an occupational pension scheme under which there is no requirement for assets to be set aside in advance for the purpose of providing benefits under the scheme (disregarding any requirements relating to additional voluntary contributions): s 249A(5).

5 Ibid s 249A(2)(c), referring to a scheme which is made under the Parliamentary and other Pensions Act 1987 s 2. However, the Pensions Act 2004 s 249A(3) does not disapply s 249A in relation to any scheme the

trustees or managers of which are (1) authorised under s 288 (see PARA 969A.2); or (2) approved under s 289 (see PARA 969A.3) in relation to a European employer: s 249A(4).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **797-800 Miscellaneous Rights and Duties of Trustees**

See Pensions Act 2004 ss 247-249 (requirement for knowledge and understanding), s 249 (requirement for internal controls); and PARA 800A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(5) INVESTMENTS/801. General application of the law of trusts and the law governing the relevant types of investment.

## **(5) INVESTMENTS**

### **801. General application of the law of trusts and the law governing the relevant types of investment.**

Apart from the legislation<sup>1</sup> which applies specifically to pension schemes, the investment of pension fund resources is subject to the normal law of trusts and the law governing the relevant types of investment<sup>2</sup>.

<sup>1</sup> For the legislative provisions see PARA 803 et seq post. For special rules applicable to contracting out see PARA 877 et seq post.

<sup>2</sup> *Cowan v Scargill* [1985] Ch 270, [1984] 2 All ER 750; and see generally TRUSTS.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(5) INVESTMENTS/802. General principles of investment.

## **802. General principles of investment.**

The trustees<sup>1</sup> of a pension fund must not use the funds of the scheme to make moral statements and in normal circumstances the interests of the beneficiaries are best served by the trustees seeking to obtain a maximum return within appropriate investment criteria<sup>2</sup>. In certain circumstances ethical criteria may be taken into account when considering investments if appropriate advice is taken and the investment does not involve any financial detriment to the trust<sup>3</sup>.

<sup>1</sup> As to trustees generally see PARA 786 et seq ante.

<sup>2</sup> *Cowan v Scargill* [1985] Ch 270, [1984] 2 All ER 750.

<sup>3</sup> See *R v London Borough of Lewisham, ex p Shell UK Ltd* [1988] 1 All ER 938; *Harries v Church Comrs for England* [1993] 2 All ER 300, [1992] 1 WLR 1241.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(5) INVESTMENTS/803. General investment powers; duty of care and delegation.

### **803. General investment powers; duty of care and delegation.**

Liability for breach of an obligation under any rule of law to take care or exercise skill in the performance of any investment functions, where the function is exercisable by a trustee of a trust scheme<sup>1</sup>, or by a person to whom the function has been delegated, cannot be excluded or restricted<sup>2</sup> by any instrument or agreement<sup>3</sup>; but this does not apply to a scheme falling within any prescribed<sup>4</sup> class or description, or to any prescribed description of exclusion or restriction<sup>5</sup>.

The trustees of a trust scheme have, subject to any restriction imposed by the scheme, the same power to make an investment of any kind as if they were absolutely entitled to the assets of the scheme<sup>6</sup>. Any discretion of the trustees of a trust scheme to make any decision about investments:

- 1887 (1) may be delegated by or on behalf of the trustees to a fund manager<sup>7</sup> to be exercised in accordance with the provisions relating to the choosing of investments<sup>8</sup>; but
- 1888 (2) may not otherwise be delegated except under specified provisions of the Trustee Act 1925<sup>9</sup> or the provisions set out below<sup>10</sup>.

The trustees are not responsible for the act or default of any fund manager in the exercise of any discretion delegated to him under head (1) above if they have taken all such steps as are reasonable to satisfy themselves, or the person who made the delegation on their behalf has taken all such steps as are reasonable to satisfy himself:

- 1889 (a) that the fund manager has the appropriate knowledge and experience for managing the investments of the scheme; and
- 1890 (b) that he is carrying out his work competently and complying with the provisions relating to the choosing of investments<sup>11</sup>.

Subject to any restriction imposed by a trust scheme:

- 1891 (i) the trustees may authorise two or more of their number to exercise on their behalf any discretion to make any decision about investments; and
- 1892 (ii) any such discretion may, where giving effect to the decision would not constitute carrying on investment business in the United Kingdom<sup>12</sup>, be delegated by or on behalf of the trustees to a fund manager<sup>13</sup> to be exercised in accordance with the provisions relating to the choosing of investments<sup>14</sup>,

but in either case the trustees are liable for any acts or defaults in the exercise of the discretion if they would be so liable if they were the acts or defaults of the trustees as a whole<sup>15</sup>.

The above provisions relating to the duty of care do not prevent the exclusion or restriction of any liability of the trustees of a trust scheme for the acts or defaults of a fund manager in the exercise of a discretion delegated to him under head (ii) above where the trustees have taken all such steps as are reasonable to satisfy themselves, or the person who made the delegation on their behalf has taken all such steps as are reasonable to satisfy himself, that the fund manager has the appropriate knowledge and experience for managing the investments of the

scheme, and that he is carrying out his work competently and complying with the provisions relating to the choosing of investments<sup>16</sup>.

The above provisions override any restriction inconsistent with the provisions imposed by any rule of law or by or under any enactment<sup>17</sup>, other than an enactment contained in, or made under, Part I of the Pensions Act 1995<sup>18</sup> or the Pension Schemes Act 1993<sup>19</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 For these purposes, references to excluding or restricting liability include: (1) making the liability or its enforcement subject to restrictive or onerous conditions; (2) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy; or (3) excluding or restricting rules of evidence or procedure: Pensions Act 1995 s 33(2).

3 Ibid s 33(1).

4 For the meaning of 'prescribed' see PARA 555 note 1 ante.

5 Pensions Act 1995 s 33(3).

6 Ibid s 34(1).

7 'Fund manager', in relation to an occupational pension scheme means a person who manages the investments held for the purposes of the scheme: *ibid* s 124(1). Section 34(3) applies to a fund manager who, in relation to the decisions in question, falls, or is treated as falling, within the Financial Services Act 1986 s 191(2) (a)-(c) (occupational pension schemes: exemptions where decisions taken by authorised and other persons): Pensions Act 1995 s 34(3). For the meaning of 'occupational pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

8 *Ie* the provisions of *ibid* s 36: see PARA 805 post.

9 *Ie* the Trustee Act 1925 s 25 (as amended) (delegation of trusts during absence abroad): see TRUSTS vol 48 (2007 Reissue) PARA 984.

10 Pensions Act 1995 s 34(2).

11 *Ibid* s 34(4); and see note 8 supra.

12 *Ie* within the meaning of the Financial Services Act 1986 s 1(3). For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

13 *Ie* a fund manager to whom the Pensions Act 1995 s 34(3) (see note 7 supra) does not apply.

14 See note 8 supra.

15 Pensions Act 1995 s 34(5).

16 *Ibid* s 34(6); and see note 8 supra. Section 33(2) (see note 2 supra) applies for the purposes of s 34(6) as it applies for the purpose of s 33: s 33(6).

17 For the meaning of 'enactment' see PARA 612 note 16 ante.

18 *Ie* the Pensions Act 1995 Pt I (ss 1-125): see PARA 598 et seq ante, 804 et seq post.

19 *Ibid* s 34(7).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **803 General investment powers; duty of care and delegation**

TEXT AND NOTES--As to the restriction on borrowing by trustees see Pensions Act 1995 s 36A and PARA 803A.

TEXT AND NOTE 6--Pensions Act 1995 s 34(1) amended: Pensions Act 2004 Sch 12 para 49.

NOTE 7--1995 Act s 34(3) now applies to a fund manager who, in relation to the investments, may take the decisions in question without contravening the prohibition imposed by the Financial Services and Markets Act 2000 s 19 (prohibition on carrying on regulated activities unless authorised or exempt): 1995 Act s 34(3) (substituted by Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649).

TEXT AND NOTE 15--1995 Act s 34(5) amended: SI 2001/3649.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(5) INVESTMENTS/803A. Restriction on borrowing by trustees.

### **803A. Restriction on borrowing by trustees.**

Regulations may prohibit the trustees of a trust scheme, or the fund manager to whom any discretion has been delegated<sup>1</sup>, from borrowing money or acting as a guarantor, except in prescribed cases<sup>2</sup>.

<sup>1</sup> Under the Pensions Act 1995 s 34 (see PARA 803).

<sup>2</sup> Ibid s 36A (added by Pensions Act 2004 s 246). See the Occupational Pension Schemes (Investment) Regulations 2005, SI 2005/3378, regs 5, 7.

### **UPDATE**

#### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(5) INVESTMENTS/804. Investment principles.

#### **804. Investment principles.**

The trustees of a trust scheme<sup>1</sup> must secure that there is prepared, maintained and from time to time revised a written statement of the principles governing decisions about investments for the purposes of the scheme<sup>2</sup>. The statement must cover, among other things, the trustees' policy for securing compliance with the provisions relating to choosing investments<sup>3</sup> and minimum funding requirements<sup>4</sup>, and their policy about the following matters<sup>5</sup>. Those matters are:

- 1893 (1) the kinds of investments to be held;
- 1894 (2) the balance between different kinds of investments;
- 1895 (3) risk;
- 1896 (4) the expected return on investments;
- 1897 (5) the realisation of investments; and
- 1898 (6) such other matters as may be prescribed<sup>6</sup>.

Neither the trust scheme nor the statement may impose restrictions (however expressed) on any power to make investments by reference to the consent of the employer<sup>7</sup>. The trustees of a trust scheme must, before such a statement is prepared or revised:

- 1899 (a) obtain and consider the written advice of a person who is reasonably believed by the trustees to be qualified by his ability in and practical experience of financial matters and to have the appropriate knowledge and experience of the management of the investments of such schemes; and
- 1900 (b) consult the employer<sup>8</sup>.

If, in the case of any trust scheme, such a statement has not been prepared or is not being maintained, or the trustees have not obtained and considered such advice, the provisions relating to prohibition orders<sup>9</sup> and civil penalties<sup>10</sup> apply to any trustee who has failed to take all such steps as are reasonable to secure compliance<sup>11</sup>.

The above provisions do not apply to any scheme which falls within a prescribed class or description<sup>12</sup>. They do not apply to a trust scheme which is:

- 1901 (i) neither approved for the purposes of the provisions relating to the taxation of retirement benefit schemes<sup>13</sup> nor the subject of an application for such approval which has not been determined;
- 1902 (ii) a superannuation fund falling within certain statutory provisions relating to taxation<sup>14</sup>;
- 1903 (iii) a scheme which has fewer than 12 members each of whom is a trustee of the scheme and the rules of which provide that before any investment of the resources of the scheme is made each of the members<sup>15</sup> must agree in writing to the making of that investment;
- 1904 (iv) a scheme in respect of which any Minister of the Crown has given a guarantee or made any other arrangements for the purposes of securing that the assets of the scheme are sufficient to meet its liabilities; or
- 1905 (v) a wholly insured scheme<sup>16</sup> in respect of which the prescribed requirements<sup>17</sup> are satisfied<sup>18</sup>.

- 1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.
- 2 Pensions Act 1995 s 35(1).
- 3 Ie the provisions of *ibid* s 36: see PARA 805 post.
- 4 Ie the provisions of *ibid* s 56: see PARA 811 post.
- 5 *Ibid* s 35(2).
- 6 *Ibid* s 35(3). For the meaning of 'prescribed' see PARA 555 note 1 ante.
- 7 *Ibid* s 35(4). In the Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127 (as amended), except where the context otherwise requires, and for the purposes of the Pensions Act 1995 ss 35, 40 (see PARA 806 post), 'employer' includes, in relation to a scheme in respect of which there are no active members, the person who was the employer immediately before the occurrence of the event after which the scheme ceased to have such members: Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 1A (added by SI 1997/819). For the meaning of 'employer' generally see PARA 598 note 4 ante; and for the meaning of 'active member' see PARA 612 note 5 ante.
- 8 Pensions Act 1995 s 35(5). In the application of s 35 to a scheme in relation to which there is more than one employer, the requirement imposed by s 35(5)(b) (see head (b) in the text) is, where a person has been nominated by all the employers to act as their representative for those purposes, to consult that person: Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 11(1)(a). Where no person has been so nominated but the employers have not all notified the trustees that they need not be consulted, the requirement is to consult all the employers; but where the trustees specify a reasonable period (not being less than 28 days) within which they must receive representations from the employers, they are not required to consider any representations received after the end of that period: reg 11(1)(b), (2). Where no person has been so nominated and the employers have all notified the trustees that they need not be consulted, the requirement imposed by head (b) in the text does not apply: reg 11(1)(c).
- 9 Ie the provisions of the Pensions Act 1995 s 3: see PARA 604 ante.
- 10 Ie the provisions of *ibid* s 10: see PARA 611 ante.
- 11 *Ibid* s 35(6).
- 12 *Ibid* s 35(7).
- 13 Ie the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended): see PARA 747 et seq ante.
- 14 Ie falling within *ibid* s 615(6) (certain overseas pensions).
- 15 For the meaning of 'member' see PARA 612 note 5 ante (definition applied by the Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 1(2)).
- 16 'Wholly insured scheme' means a trust scheme which has no investments other than policies of insurance the effecting of which constitutes the carrying on of long term business falling within the Insurance Companies Act 1982 s 1, Sch 1 Class I or Class III: Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 10(1). For these purposes, 'investments' do not include: (1) cash held on deposit by the trustees or managers pending payment to the insurance company or to members of the scheme; or (2) cash held on deposit by the trustees or managers to meet accrued liabilities or administrative expenses; or (3) any investments arising from voluntary contributions: reg 10(5). In relation to a trust scheme which has policies of insurance with more than one insurance company, a reference for the purposes of reg 10 to an insurance company is to any of the insurance companies with which a policy of insurance is taken out: reg 10(2).
- 17 The prescribed requirements are that:
  - 182 (1) the policies of insurance constituting the investments of the scheme are taken out with an insurance company which is (a) authorised under the Insurance Companies Act 1982 s 3 or s 4 (authorisation to carry on insurance business in the United Kingdom) to carry on ordinary long term insurance business as defined in that Act; or (b) an EC company as defined in s 2(6) (restriction on carrying on insurance business) which carries on ordinary long term insurance business (as defined in the Insurance Companies Act 1982) in the United Kingdom through a branch in respect of which such of the requirements of Sch 2F Pt I (as added) (recognition in the

United Kingdom of EC and EFTA companies: EC companies carrying on business etc in the United Kingdom) as are applicable have been complied with or which provides ordinary long term insurance (within the meaning of that Act) in the United Kingdom and such of the requirements of Sch 2F Pt I (as added) as are applicable have been complied with in respect of the insurance; or (c) a friendly society which is authorised under the Friendly Societies Act 1992 s 32 (grant of authorisation by Commission: general) to carry on long term business under any of the Classes specified in Sch 2 Head A (activities of a friendly society: long term business) (see the Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 10(4)(a), applying reg 6(2)(b)(i)-(iii));

- 183 (2) the terms of the policies of insurance and the rules of the scheme, taken together, are such that the trustees have no discretion as to how any of the moneys held by the insurance company for the benefit of the trustees, members or any other beneficiaries under the scheme (except moneys held solely in order to provide benefits arising from voluntary contributions) are invested nor as to whether any assets purchased with such moneys (except moneys held solely in order to provide benefits arising from voluntary contributions) are retained or disposed of by the insurance company (reg 10(4)(b)).

The requirement in head (2) *supra* is deemed to be satisfied where the trustees may choose in which of a number of investment funds held by the insurance company moneys held for the benefit of the trustees, members or other beneficiaries are invested provided that: (i) the trustees have no other discretion as to how those moneys (except moneys held solely in order to provide benefits arising from voluntary contributions) are invested nor as to whether any assets purchased with such moneys (except moneys held solely in order to provide benefits arising from voluntary contributions) are retained or disposed of by the insurance company; and (ii) moneys held by the insurance company for the benefit of the trustees, members or any other beneficiaries of more than one scheme are held in each such investment fund (and for these purposes if the employer in relation to one scheme is connected with or an associate of the employer in relation to another scheme those schemes must be treated as one scheme); and (iii) the investment management in relation to each such investment fund is undertaken by the insurance company without direction or influence by the trustees; and (iv) no individual asset held in any such fund is attributed to moneys invested for the benefit of the trustees, members or any other beneficiaries of any particular scheme: reg 10(6).

18 Ibid reg 10(3).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 804 Investment principles

TEXT AND NOTES--SI 1996/3127 replaced: Occupational Pension Schemes (Investment) Regulations 2005, SI 2005/3378 (amended by SI 2007/814, SI 2009/615).

TEXT AND NOTES 1-12--Pensions Act 1995 s 35 substituted: Pensions Act 2004 s 244.

The trustees of a trust scheme must secure (1) that a statement of investment principles is prepared and maintained for the scheme, and (2) that the statement is reviewed at such intervals, and on such occasions, as may be prescribed and, if necessary, revised: Pensions Act 1995 s 35(1). In s 35 'statement of investment

principles', in relation to a trust scheme, means a written statement of the investment principles governing decisions about investments for the purposes of the scheme: s 35(2). Before preparing or revising a statement of investment principles, the trustees of a trust scheme must comply with any prescribed requirements: s 35(3). A statement of investment principles must be in the prescribed form and cover, amongst other things, the prescribed matters: s 35(4). Neither a trust scheme nor a statement of investment principles may impose restrictions (however expressed) on any power to make investments by reference to the consent of the employer: s 35(5). If in the case of a trust scheme (a) a statement of investment principles has not been prepared, is not being maintained or has not been reviewed or revised, as required by s 35, or (b) the trustees have not complied with the obligation imposed on them by s 35(3), s 10 (see PARA 611) applies to any trustee who has failed to take all reasonable steps to secure compliance: s 35(6). Regulations may provide that s 35 is not to apply to any scheme which is of a prescribed description: s 35(7). The trustees of a trust scheme must secure that a statement of investment principles is reviewed at least every three years, and without delay after any significant change in investment policy: Occupational Pension Schemes (Investment) Regulations 2005, SI 2005/3378, reg 2(1) (reg 2 modified in respect of wholly-insured schemes (see reg 8)). As to the prescribed requirements and form of the statement of investment principles and the matter which it must cover, see reg 2(2), (3). As to the application of reg 2 to multi-employer schemes, see reg 3.

The Pensions Act 1995 s 35 does not apply to occupational pension schemes which (i) have fewer than 100 members; or (ii) are established by or under an enactment (including a local Act), and are guaranteed by a public authority: see SI 2005/3378 reg 6.

NOTE 12--See the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403; and PARA 873A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(5) INVESTMENTS/805. Choosing investments.

### **805. Choosing investments.**

The trustees of a trust scheme<sup>1</sup> must exercise their powers of investment in accordance with the following provisions and any fund manager<sup>2</sup> to whom any discretion has been delegated<sup>3</sup> must exercise the discretion as follows<sup>4</sup>. The trustees or fund manager must have regard:

- 1906 (1) to the need for diversification of investments, in so far as appropriate to the circumstances of the scheme; and
- 1907 (2) to the suitability to the scheme of investments of the description of investment proposed and of the investment proposed as an investment of that description<sup>5</sup>.

Before investing in any manner<sup>6</sup> the trustees must obtain and consider proper advice<sup>7</sup> on the question whether the investment is satisfactory having regard to the matters mentioned in heads (1) and (2) above and the principles contained in the statement of principles governing decisions about investments<sup>8</sup>. Trustees retaining any investment must determine at what intervals the circumstances, and in particular the nature of the investment, make it desirable to obtain such advice, and obtain and consider such advice accordingly<sup>9</sup>.

The trustees, or the fund manager to whom any discretion has been delegated<sup>10</sup>, must exercise their powers of investment with a view to giving effect to the principles contained in the statement of principles<sup>11</sup> so far as reasonably practicable<sup>12</sup>. Trustees must not be treated as having complied with the above requirements to obtain proper advice<sup>13</sup> unless the advice was given or has subsequently been confirmed in writing<sup>14</sup>. If the trustees of a trust scheme do not obtain and consider advice in accordance with these provisions, the provisions relating to prohibition orders<sup>15</sup> and civil penalties<sup>16</sup> apply to any trustee who has failed to take all such steps as are reasonable to secure compliance<sup>17</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 For the meaning of 'fund manager' see PARA 803 note 7 ante.

3 Ie delegated under the Pensions Act 1995 s 34: see PARA 803 ante.

4 Ibid s 36(1).

5 Ibid s 36(2).

6 Ie other than a manner mentioned in the Trustee Investments Act 1961 Sch I Pt 1 (as amended): see TRUSTS vol 48 (2007 Reissue) PARA 1022.

7 For these purposes, 'proper advice' means: (1) where giving the advice constitutes carrying on investment business in the United Kingdom (within the meaning of the Financial Services Act 1986), advice (a) given by a person authorised under Pt I Ch III (ss 7-34) (as amended); (b) given by a person exempted under Pt III Ch IV (ss 140, 141 Sch 11) (as amended) who, in giving the advice, is acting in the course of the business in respect of which he is exempt; (c) given by a person where, by virtue of Sch 1 para 27 (as amended), Sch 1 para 15 does not apply to giving the advice; or (d) given by a person who, by virtue of the Banking Co-ordination (Second Council Directive) Regulations 1992, SI 1992/3218, reg 5 (as amended), may give the advice though not authorised as mentioned in head (a) supra; (2) in any other case, the advice of a person who is reasonably believed by the trustees to be qualified by his ability in and practical experience of financial matters and to have the appropriate knowledge and experience of the management of the investments of trust schemes: Pensions Act 1995 s 36(6).

8 Ibid s 36(3). As to the statement of principles governing decisions about investments see s 35; and PARA 804 ante.

9 Ibid s 36(4).

10 See note 3 supra.

11 See note 8 supra.

12 Pensions Act 1995 s 36(5).

13 Ie the provisions of ibid s 36(3) or (4): see the text and notes 8-9 supra.

14 Ibid s 36(7).

15 Ie the provisions of ibid s 3: see PARA 604 ante.

16 Ie the provisions of ibid s 10: see PARA 611 ante.

17 Ibid s 36(8).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **805 Choosing investments**

TEXT AND NOTES--Regulations may exclude the application of any of the provisions of the Pensions Act 1995 s 36(1)-(8) to any scheme which is of a prescribed description: s 36(9) (added by Pensions Act 2004 s 245(6)).

TEXT AND NOTE 4--The trustees of a trust scheme must exercise their powers of investment in accordance with regulations and in accordance with the Pensions Act 1995 s 36(3) and (4), and any fund manager to whom any discretion has been delegated under s 34 must exercise the discretion in accordance with regulations: s 36(1) (substituted by Pensions Act 2004 s 245(2)). Regulations under the Pensions Act 1995 s 36(1) may, in particular (1) specify criteria to be applied in choosing investments, and (2) require diversification of investments: s 36(1A) (added by Pensions Act 2004 s 245(2)). As to obligations imposed on trustees of a trust scheme in relation to the exercise of their powers of investment see the Occupational Pension Schemes (Investment) Regulations 2005, SI 2005/3378, regs 4, 7, 9.

TEXT AND NOTE 5--Pensions Act 1995 s 36(2) repealed: Pensions Act 2004 s 245(3), Sch 13 Pt 1.

NOTE 7--Meaning of 'proper advice' in Pensions Act 1995 s 36(6) amended: SI 2001/3649.

TEXT AND NOTE 8--Pensions Act 1995 s 36(3) amended: Pensions Act 2004 s 245(4).

TEXT AND NOTE 17--If the trustees of a trust scheme (1) fail to comply with regulations under the Pensions Act 1995 s 36(1), or (2) do not obtain and consider advice in accordance with s 36, s 10 (see PARA 611) applies to any trustee who has failed to take all reasonable steps to secure compliance: s 36(8) (substituted by Pensions Act 2004 s 245(5)).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(5) INVESTMENTS/806. Restrictions on employer-related investments.

## **806. Restrictions on employer-related investments.**

The trustees or managers<sup>1</sup> of an occupational pension scheme<sup>2</sup> must secure that the scheme complies with any prescribed<sup>3</sup> restrictions with respect to the proportion of its resources<sup>4</sup> that may at any time be invested in, or in any description of, employer-related investments<sup>5</sup>. The prescribed restrictions are that, subject to certain exceptions<sup>6</sup>, not more than five per cent of the current market value of the resources of a scheme may at any time be invested in employer-related investments and none of the resources of a scheme may at any time be invested in any employer-related loan<sup>7</sup>. Nor may any of the resources of a scheme at any time be invested in any employer-related investment the making of which involves the entering by the trustees or managers into a transaction at an undervalue where the agreement to enter into that transaction is made on or after 6 April 1997<sup>8</sup>.

If in the case of a trust scheme the above provision is not complied with, the provisions relating to prohibition orders<sup>9</sup> and civil penalties<sup>10</sup> apply to any trustee who fails to take all such steps as are reasonable to secure compliance<sup>11</sup>. If any resources of an occupational pension scheme are invested in contravention<sup>12</sup> of the above provision, any trustee or manager who agreed in the determination to make the investment is guilty of an offence and liable on summary conviction to a fine not exceeding the statutory maximum<sup>13</sup>, and on conviction on indictment to a fine or imprisonment, or to both<sup>14</sup>.

To the extent (if any) that sums due and payable by a person to the trustees or managers of an occupational pension scheme remain unpaid:

- 1908 (1) they must be regarded for these purposes as loans made to that person by the trustees or managers<sup>15</sup>; and
- 1909 (2) resources of the scheme must be regarded as invested accordingly<sup>16</sup>.

1 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

2 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

3 For the meaning of 'prescribed' see PARA 555 note 1 ante. The prescribed restrictions apply to schemes: (1) which are either approved for the purposes of the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612 (as amended)) (retirement benefit schemes: see PARA 747 et seq ante) or are the subject of an application for such approval which has not been determined, or which are exempt from income tax by virtue of s 608 (exemption for superannuation funds approved before 6 April 1980); and (2) which have at least one member in the United Kingdom and either are established in the United Kingdom or have one or more trustees resident in the United Kingdom: Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 2(1). They do not apply to schemes which have fewer than 12 members each of whom is a trustee of the scheme and the rules of which provide that, before any investment of the resources of the scheme is made in employer-related investments, each member shall agree in writing to the making of that investment: reg 2(2). For the meaning of 'employer-related investments' see note 5 infra.

4 For the meaning of 'resources' see PARA 609 note 2 ante.

5 Pensions Act 1995 s 40(1). For these purposes 'employer-related investments' means: (1) shares or other securities issued by the employer or by any person who is connected with, or an associate of, the employer; (2) land which is occupied or used by, or subject to a lease in favour of, the employer or any such person; (3) property (other than land) which is used for the purposes of any business carried on by the employer or any such person; (4) loans to the employer or any such person; and (5) other prescribed investments: s 40(2). For

the meaning of 'employer' for these purposes see PARA 805 note 7 ante. 'Securities' means any asset, right or interest falling within the Financial Services Act 1986 Sch 1 paras 1, 2, 4 or 5.

For these purposes, the following are prescribed as employer-related investments:

- 184 (a) the proportion attributable to the scheme's resources (whether directly or through any intervening collective investment scheme) of any investments which (i) have been made by the operator of any collective investment scheme, and which (ii) would have been employer-related investments if they had been made by the scheme (Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 4(a));
- 185 (b) any guarantee of, or security given to secure, obligations of the employer or of any person who is connected with, or an associate of, the employer; and for these purposes a guarantee or security given by the trustees or managers is regarded as an investment of resources of the scheme equal to the amount of the obligations guaranteed or secured (reg 4(b));
- 186 (c) any loan arrangement entered into with any person whereby the trustees' or managers' right to or expectation of repayment depends on the employer's actions or situation unless it was not the trustees' or managers' purpose in entering into the arrangement to provide financial assistance to the employer (reg 4(c));
- 187 (d) where any of a scheme's resources are invested in a policy of insurance the terms of which permit the premiums or other consideration for the rights acquired under the policy, or any moneys otherwise credited to or for the benefit of the trustees or managers or the members, to be invested in a fund created only for the purposes of that policy, the proportion of the scheme's resources invested in that policy which is the same proportion as B is of A where 'A' represents all the assets of the insurer held in the fund and 'B' represents that part of A which would, if invested by the scheme, be employer-related investments (reg 4(d)); and
- 188 (e) where any of a scheme's resources are invested in a policy of insurance (not being resources invested in a fund created only for the purposes of that policy) the terms of which permit the trustees or managers or the employer to direct that some or all of the premiums or other consideration for the rights acquired under the policy, or any moneys otherwise credited to or for the benefit of the trustees or managers or the members, are invested in employer-related investments, any investments made by the insurer from those premiums or other consideration or moneys, which would have been employer-related investments if they had been made by the scheme (reg 4(e)).

6 See PARA 807 post.

7 Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 5(1). For these purposes, 'employer-related loan' means: (1) a loan mentioned in the Pensions Act 1995 s 40(2)(d) (including, for these purposes only, one which falls within section 40(2)(d) by virtue of section 40(3)); (2) a security mentioned in section 40(2)(a) which falls within the Financial Services Act 1986 Sch 1 para 2 (investments and investment business), except any such security which is listed on a recognised stock exchange; and (3) an employer-related investment prescribed as such by the Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 4(b) or (c) (see note 5 heads (b), (c) supra): reg 5(3). If, however, either a loan or a security falling within the Financial Services Act 1986 Sch 1 para 2 becomes an employer-related loan on or after 6 April 1997 as a result of a change in the ownership of the employer or the person to whom the loan was made, the loan or security may be retained until whichever is the latest of (a) the date falling two years after the date on which it became an employer-related loan; (b) 6 April 2002; or (c) where repayment cannot by virtue of contractual or other legal obligations be required or, in the case of securities, disinvestment effected before the latest of the dates mentioned in heads (a)-(b) supra, the earliest date on which repayment can be enforced, or disinvestment effected: reg 8(1). For the purposes of reg 8(1), 'loan' does not include any sum regarded as a loan under the Pensions Act 1995 s 40(3); and 'retained' means left undischarged: Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 8(2).

8 Ibid reg 5(2).

9 Ie orders under the Pensions Act 1995 s 3: see PARA 604 ante.

10 Ie orders under ibid s 10: see PARA 611 ante.

11 Ibid s 40(4).

12 For the meaning of 'contravention' see PARA 611 note 10 ante.

13 As to the statutory maximum see PARA 403 note 2 ante.

14 Pensions Act 1995 s 40(5).

15 Ibid s 40(3)(a).

16 Ibid s 40(3)(b). The Insolvency Act 1986 ss 249, 435 (connected and associated persons) COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 5 and the Bankruptcy (Scotland) Act 1985 (associated persons) apply for the purposes of the Pensions Act 1995 s 40 with any prescribed modifications: see s 123. For the meaning of 'modifications' see PARA 664 note 10 ante (definition applied by the Pensions Act 1995 s 124(5)). The prescribed modifications are that: (1) the Insolvency Act 1986 s 249 (connected persons) is modified in its application for these purposes so that a company is not connected with another company solely by reason of one or more of its directors being a director of that other company; and (2) the Bankruptcy (Scotland) Act 1985 s 74 (associated persons) is modified in its application for these purposes to apply as if it contained the same provisions as the Insolvency Act 1986 s 249 (as modified: see head (1) supra) and s 435: Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 3(1), (2).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 806 Restrictions on employer-related investments

TEXT AND NOTES 3, 5-8, 16--SI 1996/3127 regs 2-5, 8 replaced by Occupational Pension Schemes (Investment) Regulations 2005, SI 2005/3378, regs 10-12, 15 (reg 12 amended by SI 2007/814, SI 2009/615). SI 2005/3378 reg 15A added: SI 2009/615.

NOTE 5--Definition of 'securities' in Pensions Act 1995 s 40(2) repealed: SI 2001/3649. See now 1995 Act s 40(2A), (2B) (added by SI 2004/355).

TEXT AND NOTE 11--Pensions Act 1995 s 40(4) amended: Pensions Act 2004 Sch 12 para 51.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(5) INVESTMENTS/807. Investments to which restrictions do not apply.

### **807. Investments to which restrictions do not apply.**

The prescribed restrictions on employer-related investments<sup>1</sup> do not restrict or prohibit the following investments<sup>2</sup>:

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- 1910 (1) certain investments prescribed as employer-related investments<sup>3</sup> where:
234. (a) the effecting of the policy of insurance constitutes the carrying on of a specified class of long term business<sup>4</sup>; and
235. (b) the policy of insurance is issued by an insurance company which is the employer and is either an insurance company which is authorised<sup>5</sup> to carry on ordinary long term insurance business<sup>6</sup> or an EC company<sup>7</sup> or a friendly society which is authorised<sup>8</sup> to carry on long term business under any of the specified classes<sup>9</sup>;
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- 1911 (2) any employer-related investment of resources in an account (including a current, deposit or share account) with a building society<sup>10</sup> or an institution authorised under Part I of the Banking Act 1987<sup>11</sup>;
- 1912 (3) any employer-related investment of resources which derives from a member's<sup>12</sup> voluntary contributions and is invested in employer-related investments with the written agreement of the member who paid those contributions<sup>13</sup>;
- 1913 (4) sums due from the employer to the trustees by virtue of a provision in an order appointing trustees<sup>14</sup> such as is permitted by the provision allowing certain sums to be treated as a debt due from the employer to the trustees<sup>15</sup>;
- 1914 (5) sums which fall or fell to be treated as debts due from the employer to the trustees or managers by virtue of certain specified statutory provisions<sup>16</sup> and sums which would fall to be so treated were they not already debts due from the employer to the trustees or managers<sup>17</sup>;
- 1915 (6) a loan to the employer or a company associated with the employer if:
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236. (a) the scheme provides benefits for directors of a company which is the employer, or such directors and others;
237. (b) there is a policy of insurance taken out under the scheme which is specifically allocated to the provision of benefits under the scheme and the directors' interests under which are used as security for the loan;
238. (c) the policy is effected with an insurance company such as is mentioned in head (1)(b) above;
239. (d) Inland Revenue requirements concerning the loan have been satisfied; and
240. (e) the directors agreeing to their interests under the policy concerned being used as security for the loan have so agreed in writing<sup>18</sup>.
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The investments made by the operator of any collective investment scheme<sup>19</sup> are not taken into account<sup>20</sup> in certain circumstances<sup>21</sup>.

Where the disposal of assets on the winding up of a scheme would otherwise result in a contravention of the restrictions on employer-related investments, any employer-related investments held before the commencement of the winding up may be retained while the scheme is being wound up, but there must be no new investment in employer-related

investments while the resources so retained exceed five per cent of the current market value of the resources of the scheme<sup>22</sup>. This does not, however, apply to permit the retention of employer-related investments which were, prior to the commencement of the winding up, held in contravention of the statutory restrictions, or employer-related loans to which certain transitional provisions<sup>23</sup> apply<sup>24</sup>.

1    Ie the Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 5(1): see PARA 806 note 7 ante.

2    Ibid reg 6(1).

3    Ie prescribed by ibid reg 4(e) but not by reg 4(d): see PARA 806 note 5 heads (e), (d) respectively ante.

4    Ie long term business falling within the Insurance Companies Act 1982 Sch 1 Class I or Class III: see INSURANCE vol 25 (2003 Reissue) PARA 21.

5    Ie under ibid s 3 or s 4. As to authorisation see FINANCIAL SERVICES AND INSTITUTIONS.

6    Ie as defined in the Insurance Companies Act 1982: see also INCOME TAXATION vol 23(1) (Reissue) PARA 881.

7    Ie an EC company as defined in ibid s 2(6) (as added) and which (1) carries on ordinary long term insurance business (as defined in the Insurance Companies Act 1982) in the United Kingdom through a branch in respect of which such of the requirements of Sch 2F Pt I (as added) (recognition in the United Kingdom of EC and EFTA companies: EC companies carrying on business etc in the United Kingdom) as are applicable have been complied with; or (2) provides ordinary long term insurance (within the meaning of that Act) in the United Kingdom and such of the requirements of Sch 2F Pt I (as added) as are applicable have been complied with in respect of the insurance: Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 6(2) (b), (3).

8    Ie under the Friendly Societies Act 1992 s 32.

9    Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 6(2). The specified classes referred to are those specified in the Friendly Societies Act 1992 s 32 Sch 2 Head A: see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2096.

10   Ie as defined in the Building Societies Act 1986: see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1856.

11   Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 6(4). As to authorised institutions see the Banking Act 1987 Pt I (ss 1-49) (as amended).

12   For the meaning of 'member' see PARA 612 note 5 ante; and as to the application of this definition see PARA 805 note 15 ante.

13   Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 6(5).

14   Ie under the Pensions Act 1995 s 7: see PARA 608 ante.

15   Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 6(6). The provision referred to is the Pensions Act 1995 s 8(1): see PARA 609 ante.

16   The specified statutory provisions are: the Pensions Act 1995 s 59(2) (determination of contributions: supplementary; contributions remaining unpaid after the due date: see PARA 820 post); s 60(5) (serious underprovision; amount of shortfall not met by an increase in the value of the scheme assets: see PARA 921 post); s 75(1) (deficiencies in the assets: see PARA 850 post); s 88(2) (schedules of payments to money purchase schemes; supplementary; amounts not paid in accordance with the payment schedule: see PARA 864 post); or the Pension Schemes Act 1993 s 144(1) (repealed): Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 6(7)(a)-(e).

17   Ibid reg 6(7).

18   Ibid reg 6(8) (substituted by SI 1997/819).

19   'Collective investment scheme' has the same meaning as in the Financial Services Act 1986 s 75 but includes arrangements of the types described in s 75(6)(a), (c): Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 1(2).

20 le for the purposes of *ibid* reg 4(a): see PARA 806 note 5 ante.

21 *Ibid* reg 6(9). Such a scheme is not taken into account for those purposes if: (1) the collective investment scheme in question is operated by a person who may lawfully carry on investment business in the United Kingdom (within the meaning of the Financial Services Act 1986 s 1(3) (investments and investment business)) consisting of or including the operation of collective investment schemes; and (2) there are at least ten participants in the collective investment scheme in question; and (3) not more than 10% of the assets of the collective investment scheme in question are attributable, whether directly or through any intervening collective investment scheme, to the scheme's resources; and (4) not more than 10% of the investments of the collective investment scheme in question are invested in securities falling within the Financial Services Act 1986 Sch 1 para 1 and issued by any one issuer: Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 6(9). All schemes in relation to which the respective employers are within the same group of companies are treated as a single participant for the purposes of head (2) *supra* and as one scheme for the purposes of head (3) *supra*; and for the purposes of head (4) *supra* all issues within a group of companies are treated as issued by a single issuer: reg 6(10).

22 *Ibid* reg 6(11).

23 le *ibid* reg 7(2)(c): see PARA 808 post.

24 *Ibid* reg 6(12).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 807 Investments to which restrictions do not apply

TEXT AND NOTES--SI 1996/3127 reg 6 replaced by Occupational Pension Schemes (Investment) Regulations 2005, SI 2005/3378, reg 13 (amended by SI 2006/778, SI 2009/615).

TEXT AND NOTE 11--Banking Act 1987 repealed: SI 2001/3649.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(5) INVESTMENTS/808. Transitional provisions.

### **808. Transitional provisions.**

Where on 6 April 1997 the resources of an occupational pension scheme were invested in (1) certain employer-related loans<sup>1</sup> which were in being on 18 December 1996 and which are not excepted from the prescribed restrictions on employer-related investments<sup>2</sup>; or (2) certain other employer-related investments<sup>3</sup> to the extent that they exceed five per cent of the current market value of the resources of the scheme, those investments may be retained in accordance with the following provisions<sup>4</sup>. To the extent that those employer-related investments consist of:

- 1916 (a) certain employer-related loans<sup>5</sup> they may, where by virtue of contractual or other legal obligations repayment cannot be required immediately, be retained until the earliest date on which repayment can be enforced<sup>6</sup>;
- 1917 (b) certain securities of a prescribed type<sup>7</sup> which, immediately before 6 April 1997, were employer-related investments which could be retained without limit of time under the previous legislation<sup>8</sup> or which could not be so retained but which did not contravene that legislation, they may be held until 6 April 2002, or, if by virtue of contractual or other legal obligations, disinvestment cannot be effected by that date, until the earliest date on which disinvestment may be effected<sup>9</sup>;
- 1918 (c) an employer-related loan the terms of which have, before 1 January 1996, been specifically approved by a court having jurisdiction in relation to the scheme as being in the interests of the members of the scheme, then, provided that the terms of the loan as so approved are not changed, such part of the loan, repayment of which cannot be required other than on the commencement of the winding up of the scheme, may be retained until the winding up of the scheme commences<sup>10</sup>;
- 1919 (d) any employer-related loans which do not contravene the previous legislation and to which heads (a) to (c) above do not apply, they may be retained until 6 April 2002 or, if by virtue of contractual or other legal obligations repayment cannot be required by that date, be retained until the earliest date on which repayment can be enforced<sup>11</sup>;
- 1920 (e) other investments mentioned in head (2) above (excluding, for the avoidance of doubt, investments in a collective investment scheme<sup>12</sup>), they may be retained without limit of time<sup>13</sup>.

If any investment referred to in heads (a) to (e) above is listed on a recognised stock exchange<sup>14</sup> it may be retained for a period of no more than six calendar months beginning with the date on which it was listed, if that date is on or after 6 April 1997<sup>15</sup>.

There must be no new investment in employer-related investments while the resources of a scheme retained in employer-related investments (other than investments to which the statutory restrictions do not apply<sup>16</sup>) exceed five per cent of the current market value of the resources of the scheme<sup>17</sup>.

<sup>1</sup> ie including such loans as are mentioned in the Occupational Pension Schemes (Investment of Scheme's Resources) Regulations 1992, SI 1992/246, reg 5(2)(a) (revoked) (loans which were in being on 17 February 1992 and which were authorised to be retained until 8 March 1994 or, where repayment could not be required before that date, until the earliest date on which repayment could be enforced): Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 7(1)(a). For the meaning of 'employer-related loan' see PARA

806 note 7 ante. For these purposes, however, 'loans' does not include any sums regarded as loans under the Pensions Act 1995 s 40(3) (see PARA 806 ante): Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 7(5).

2 As to exceptions see *ibid* reg 6; and PARA 807 ante.

3 *Ie* such investments to which the Occupational Pension Schemes (Investment of Scheme's Resources) Regulations 1992, SI 1992/246, reg 5(2)(b) (revoked) applied immediately before 6 April 1997 (*ie* investments which could be retained without limit of time): Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 7(1)(b).

4 *Ibid* reg 7(1). 'Retained', in relation to a loan, means left undischarged: reg 7(5). See also *Wright v Ginn* [1995] PLR 33.

5 *Ie* such loans to which the Occupational Pension Schemes (Investment of Scheme's Resources) Regulations 1992, SI 1992/246, reg 5(2)(a) (revoked) applied before 6 April 1997: see note 1 *supra*.

6 Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 7(2)(a).

7 *Ie* securities referred to in *ibid* reg 5(3)(b): see PARA 806 note 7 ante.

8 See note 3 *supra*.

9 Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 7(2)(b).

10 *Ibid* reg 7(2)(c).

11 *Ibid* reg 7(2)(d) (amended by SI 1997/819).

12 For the meaning of 'collective investment scheme' see PARA 807 note 19 ante.

13 Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 7(2)(e).

14 For these purposes, 'recognised stock exchange' has the same meaning as in the Income and Corporation Taxes Act 1988 s 841 (see INCOME TAXATION vol 23(1) (Reissue) PARA 512): Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 1(2).

15 *Ibid* reg 7(3)(a). If the date on which it was listed was before 6 April 1997 it could only be retained until 6 April 1997: see reg 7(3)(b).

16 *Ie* investments authorised by *ibid* reg 6: see PARA 807 ante.

17 *Ibid* reg 7(4).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 808 Transitional provisions

TEXT AND NOTES--SI 1996/3127 reg 7 replaced by Occupational Pension Schemes (Investment) Regulations 2005, SI 2005/3378, reg 14.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(5) INVESTMENTS/809. Multi-employer schemes.

### **809. Multi-employer schemes.**

Where an occupational pension scheme in relation to which there is more than one employer is divided into two or more sections and the provisions of the scheme are such that:

- 1921 (1) different sections of the scheme apply to different employers or groups of employers (whether or not more than one section applies to any particular employer or groups including any particular employer); and
- 1922 (2) contributions payable to the scheme by an employer, or by a member in employment under that employer, are allocated to that employer's section (or, if more than one section applies to the employer, to the section which is appropriate in respect of the employment in question); and
- 1923 (3) a specified part or proportion of the assets of the scheme is attributable to each section and cannot be used for the purposes of any other section,

then the prescribed restrictions on employer-related investments<sup>1</sup> apply as if each section of the scheme were a separate scheme<sup>2</sup>. Furthermore, where:

- 1924 (a) a scheme which has been such a scheme as is mentioned above is divided into two or more sections some or all of which apply only to members who are not in pensionable service under the section; and
- 1925 (b) the provisions of the scheme have not been amended so as to prevent the conditions mentioned in heads (1) to (3) above being satisfied in relation to two or more sections; but
- 1926 (c) those conditions have ceased to be satisfied in relation to one or more sections (whether before or after 6 April 1997) by reason only of there being no members in pensionable service under the section and no contributions which are to be allocated to it,

then those restrictions apply as if the section in relation to which those conditions have ceased to be satisfied were a separate scheme<sup>3</sup>.

Where there is more than one employer in relation to a scheme, other than a scheme to which the above provisions apply, and at least two of those employers are persons who are neither a company and a person connected with that company nor associates of each other, the statutory restrictions on employer-related investments apply with certain other prescribed modifications<sup>4</sup>.

<sup>1</sup> I.e. the Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, regs 2-8 (as amended): see PARAS 804-808 ante.

<sup>2</sup> Ibid reg 9(1); and see note 3 infra.

<sup>3</sup> Ibid reg 9(2). For the purposes of reg 9(1), (2) there must be disregarded any provisions of the scheme by which contributions or transfers of assets may be made to make provision for death benefits; and where reg 9(1) or (2) applies and contributions or transfers are so made to a section ('the death benefits section') the assets of which may only be applied for the provision of death benefits, the death benefits section must also be treated as if it were a separate scheme for the purposes of regs 2-8 (as amended): reg 9(2A) (added by SI 1997/786). For the purposes of the Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 9(1)-(2A) (reg 9(2A) as so added), there must be disregarded any provisions of the scheme by

virtue of which on the winding up of the scheme assets attributable to one section may be used for the purposes of another section: reg 9(2B) (as so added).

4 Ibid reg 9(3). The modifications are prescribed by reg 9(3) and are that (1): reg 5(1)(a) (see PARA 806 ante) applies with the substitution for the words 'employer-related investments' of the words 'investments which are employer-related investments in relation to a particular employer and not more than 20% overall of that value may be invested in employer-related investments'; and (2) for reg 7(4) there is to be substituted:

189 '(4) There shall be no new investment in employer-related investments while: (a) the resources of a scheme retained in investments which are employer-related investments in relation to a particular employer (other than investments authorised by regulation 6) exceed 5% of the current market value of the resources of the scheme; or (b) more than 20% overall of the current market value of the resources of the scheme is retained under this regulation in employer-related investments.'

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **809 Multi-employer schemes**

TEXT AND NOTES--SI 1996/3127 reg 9 replaced by Occupational Pension Schemes (Investment) Regulations 2005, SI 2005/3378, reg 16 (amended by SI 2009/615).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(5) INVESTMENTS/810. Restitution.

### **810. Restitution.**

If, on the application of the Occupational Pensions Regulatory Authority<sup>1</sup>, the High Court is satisfied that any act or omission of the trustees or managers<sup>2</sup> of an occupational pension scheme<sup>3</sup> was in contravention of the statutory restriction on employer-related investments<sup>4</sup>, the court may order the employer and any other person who appears to the court to have been knowingly concerned in the contravention to take such steps as the court may direct for restoring the parties to the position in which they were before the act or omission occurred<sup>5</sup>.

1 As to the Occupational Pensions Regulatory Authority see PARA 598 et seq ante.

2 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

3 For the meaning of 'occupational pension scheme' see PARA 741 ante.

4 I.e. in contravention of the Pensions Act 1995 s 40: see PARA 806 ante.

5 See *ibid* s 14(1)(b); and PARA 615 ante.

### **UPDATE**

#### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (6) FUNDING/811. Minimum funding requirement.

## **(6) FUNDING**

### **811. Minimum funding requirement.**

Every occupational pension scheme<sup>1</sup> other than a money purchase scheme<sup>2</sup>, or a scheme falling within a prescribed<sup>3</sup> class or description<sup>4</sup>, is subject to a requirement ('the minimum funding requirement') that the value of the assets of the scheme is not less than the amount of the liabilities of the scheme<sup>5</sup>. For these purposes, the liabilities and assets to be taken into account, and their amount or value, must be determined, calculated and verified by a prescribed person and in the prescribed manner<sup>6</sup>. In calculating the value of any liabilities for those purposes, a provision of the scheme which limits the amount of its liabilities by reference to the amount of its assets is to be disregarded<sup>7</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

2 'Money purchase scheme' means a pension scheme under which all the benefits that may be provided are money purchase benefits; and 'money purchase benefits', in relation to a member of a personal or occupational pension scheme or the widow or widower of a member of such a scheme, means benefits the rate or amount of which is calculated by reference to a payment or payments made by the member or by any other person in respect of the member and which are not average salary benefits: Pension Schemes Act 1993 s 181(1) (definition applied by the Pensions Act 1995 s 124(5)).

3 For the meaning of 'prescribed' see PARA 555 note 1 ante.

4 The minimum funding requirement does not apply:

190 (1) to a public service pension scheme (as to which see PARA 874 ante): (a) under the provisions of which there is no requirement for assets related to the intended rate or amount of benefit under the scheme to be set aside in advance (disregarding requirements relating to additional voluntary contributions); or (b) which is made under the Superannuation Act 1972 s 7 (superannuation of persons employed in local government service etc) or the Parliamentary and other Pensions Act 1987 s 2 (as amended) (power to provide for pensions for members of the House of Commons etc);

191 (2) to any occupational pension scheme in respect of which any Minister of the Crown has given a guarantee or made any other arrangements for the purpose of securing that the assets of the scheme are sufficient to meet its liabilities;

192 (3) to an occupational pension scheme which provides relevant benefits, but is neither an approved scheme nor a relevant statutory scheme;

193 (4) to a scheme with such a superannuation fund as is mentioned in the Income and Corporation Taxes Act 1988 s 615(6);

194 (5) to a scheme with less than two members;

195 (6) to a scheme: (a) the only benefits provided by which (other than money purchase benefits) are death benefits; and (b) under the provisions of which no member has accrued rights (other than rights to money purchase benefits);

196 (7) to a relevant lump sum retirement benefits scheme; or

197 (8) to the scheme established by the Salvation Army Act 1963;

and for these purposes, 'approved scheme' means a scheme which is approved or was formerly approved under the Income and Corporation Taxes Act 1988 s 590 or s 591 (as amended) or in respect of which an application

for such approval has been duly made but has not been determined; 'lump sum benefits' does not include benefits paid by way of commuted retirement pension; 'relevant benefits' has the meaning given in s 612(1); 'relevant lump sum retirement benefits scheme' means an approved scheme: (i) which has been categorised by the Commissioners of Inland Revenue for the purposes of its approval as a centralised scheme for non-associated employers; (ii) which is not contracted-out; and (iii) under the provisions of which the only benefits which may be provided on or after retirement (other than money purchase benefits derived from the payment of additional contributions by any person) are lump sum benefits which are not calculated by reference to any member's salary; and 'relevant statutory scheme' has the meaning given in s 611A (as added) (see PARA 756 note 2 ante): Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 28(1), (2).

Where a debt under the Pensions Act 1995 s 75 arises, in the case of a scheme to which s 56 applies, at an applicable time (as defined in s 75(3)) immediately before an insolvency event occurs in relation to a person who is at that time the sole employer in relation to the scheme, or to persons who are at that time the only employers in relation to the scheme, ss 57-60 do not apply to the scheme, but this does not affect any rights or obligations arising under ss 56-61 before that time and, if s 60(2) (see PARA 821 post) has applied in relation to the scheme and the employer has secured the increase required by s 60 by a method specified in the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 22, Sch 4 (see PARA 821 post), this provision does not affect the operation of Sch 4 or anything done under it: reg 28(3), (5) (amended by SI 1997/786).

5 Pensions Act 1995 s 56(1), (2). In ss 57-61, in relation to any occupational pension scheme to which s 56 applies, the amount of the liabilities referred to in s 56(1) is referred to as 'the amount of the scheme liabilities' and the value of the assets referred to in that subsection is referred to as 'the value of the scheme assets': s 56(5)(a), (b).

6 Ibid s 56(3). Regulations made by virtue of s 56(3) may provide for the values of the assets and the amounts of the liabilities to be calculated and verified in accordance with guidance prepared and from time to time revised by a prescribed body, and approved by the Secretary of State: s 119. For the meaning of 'regulations' see PARA 555 note 1 ante. In exercise of the power so conferred, the Secretary of State has made the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536 (amended by SI 1996/3127; and SI 1997/786): see notes 4 supra, 7 infra; and PARA 812 et seq post.

7 Pensions Act 1995 s 56(4). Regulations may modify s 56 as it applies in prescribed circumstances: s 61. Section 56 is modified in relation to (1) multi-employer schemes; (2) schemes which have no active members; (3) schemes covering both United Kingdom and foreign employment; and (4) schemes with a partial government guarantee: see the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 29, Sch 5 paras 1, 3-6.

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 811-824 Funding

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement; see PARA 824A.

### **811 Minimum funding requirement**

NOTE 2--Definition of 'money purchase benefits' amended: SI 2005/2053.

Defined benefit pension schemes which are calculated by reference to average earnings and not contributions are not money purchase schemes: *Aon Trust Corpn Ltd v KPMG (a firm)* [2005] EWCA Civ 1004, [2005] All ER (D) 441 (Jul). See also *Bridge Trustees Ltd v Houldsworth* [2010] EWCA Civ 179, [2010] All ER (D) 67 (Mar).

NOTE 6--Pensions Act 1995 s 119 amended: Pensions Act 2004 Sch 12 para 68, Sch 13 Pt 1; Pensions Act 2007 Sch 5 para 8.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (6) FUNDING/812. Valuation and certification of assets and liabilities.

## **812. Valuation and certification of assets and liabilities.**

The trustees or managers<sup>1</sup> of an occupational pension scheme<sup>2</sup> to which the minimum funding requirement<sup>3</sup> applies must:

- 1927 (1) obtain, within a prescribed period<sup>4</sup>, an actuarial valuation<sup>5</sup> and afterwards obtain such a valuation before the end of prescribed intervals<sup>6</sup>; and
- 1928 (2) on prescribed occasions or within prescribed periods, obtain a certificate prepared by the actuary<sup>7</sup> of the scheme:
- 177 241. (a) stating whether or not in his opinion the contributions payable towards the scheme are adequate for the purpose of securing that the minimum funding requirement will continue to be met throughout the prescribed period or, if it appears to him that it is not met, will be met by the end of that period; and
- 242. (b) indicating any relevant changes that have occurred since the last actuarial valuation was prepared<sup>8</sup>.
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The trustees or managers must:

- 1929 (i) if the actuary states in such a certificate that in his opinion the contributions payable towards the scheme are not adequate for the purpose of securing that the minimum funding requirement will continue to be met throughout the prescribed period or, if it appears to him that it is not met, will be met by the end of that period; or
- 1930 (ii) in prescribed circumstances,

obtain an actuarial valuation within the period set out below<sup>9</sup>.

The trustees or managers must secure that any valuation or certificate so obtained is made available to the employer<sup>10</sup> within seven days of their receiving it<sup>11</sup>. Where, in the case of an occupational pension scheme to which the minimum funding requirement applies, the above provisions are not complied with: the provisions relating to prohibition orders<sup>12</sup> apply to any trustee who has failed to take all such steps as are reasonable to secure compliance<sup>13</sup>; and the provisions relating to civil penalties<sup>14</sup> apply to any trustee or manager who has failed to take all such steps<sup>15</sup>.

In a case within head (a) above the trustees or managers are not required to obtain an actuarial valuation if:

- 1931 (A) in the opinion of the actuary of the scheme, the value of the scheme assets<sup>16</sup> is not less than 90 per cent of the amount of the scheme liabilities<sup>17</sup>; and
- 1932 (B) since the date on which the actuary signed the certificate referred to in head (a) above, the schedule of contributions<sup>18</sup> for the scheme has been revised<sup>19</sup>.

If the trustees or managers obtain such a valuation they must do so in the case of a valuation required by head (i) above, within the period of six months beginning with the date on which

the certificate was signed, and in any other case, within a prescribed period<sup>20</sup>. A valuation or certificate so obtained must be prepared in such manner, give such information and contain such statements as may be prescribed<sup>21</sup>.

1 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

2 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

3 Ie the provisions of ibid s 56: see PARA 811 ante. As to the 'minimum funding requirement' see PARA 811 text and note 1 ante.

4 For the meaning of 'prescribed' see PARA 555 note 1 ante. For the prescribed time limits see PARA 814 post.

5 An 'actuarial valuation' means a written valuation prepared and signed by the actuary of the scheme of the assets and liabilities referred to in the Pensions Act 1995 s 56(1) (see PARA 40 ante): s 56(5)(c).

6 Ibid s 57(1)(a).

7 As to the requirement to appoint an actuary see PARA 787 note 2 ante.

8 Pensions Act 1995 s 57(1)(b). Where a scheme to which section 56 applies is being wound up, s 57(1)(b), (2)-(4) does not apply to it; but this does not affect any rights or obligations arising under ss 56-61 before the time when the scheme begins to be wound up; and if s 60(2) has applied in relation to the scheme and the employer has secured the increase required thereby by a method specified in the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 22, Sch 4 (see PARA 821 post), this provision does not affect the operation of Sch 4 or anything done under it: reg 28(4), (5).

9 Pensions Act 1995 s 57(2). See also note 8 supra.

10 For the meaning of 'employer' see PARA 598 note 4 ante.

11 Pensions Act 1995 s 57(6).

12 Ie the provisions of ibid s 3: see PARA 604 ante.

13 Ibid s 57(7)(a).

14 Ie the provisions of ibid s 10: see PARA 611 ante.

15 Ibid s 57(7)(b).

16 As to 'the value of the scheme assets' see PARA 811 note 5 ante.

17 As to 'the amount of the scheme liabilities' see PARA 811 note 5 ante.

18 As to the 'schedule of contributions' see the Pensions Act 1995 s 58(1); and PARA 817 post.

19 Ibid s 57(3). See also note 8 supra. The revision is made under s 58(3)(b): see PARA 817 post.

20 Ibid s 57(4). See also note 8 supra.

21 Ibid s 57(5). Regulations may modify s 57 as it applies in prescribed circumstances: s 61. For the meaning of 'regulations' see PARA 600 note 2 ante. Section 57 is modified in relation to (1) multi-employer schemes; (2) schemes which have no active members; (3) schemes covering both United Kingdom and foreign employment; and (4) schemes with a partial government guarantee: see the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 29, Sch 5 paras 1, 3-6.

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **811-824 Funding**

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement; see PARA 824A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (6) FUNDING/813. Method of valuation of assets and liabilities.

### **813. Method of valuation of assets and liabilities.**

The liabilities and assets of an occupational pension scheme<sup>1</sup> which are to be taken into account for the purposes of the minimum funding requirement<sup>2</sup> and their amount and value must be determined, calculated and verified by the actuary in the specified manner<sup>3</sup>, in accordance with the mandatory guidelines<sup>4</sup> and, in the case of any valuation for the purpose of forming an opinion as to whether the minimum funding requirement is met on a relevant date, on the following general assumptions<sup>5</sup>:

- 1933 (1) that no contributions will become due to the scheme from the employer or the members on or after the relevant date<sup>6</sup>;
- 1934 (2) that all pensionable service under the scheme ceased immediately before that date;
- 1935 (3) that liabilities in respect of members will be so secured that the benefits of pensioner members will be equal in value to those under the scheme and the benefits of active members and deferred members will be reasonably likely to be equal in value to those payable in respect of their accrued rights under the scheme; and
- 1936 (4) that liabilities in respect of members will include such amounts in respect of the expenses involved in meeting them as are indicated by the mandatory guidelines<sup>7</sup>.

Where arrangements are being made by the scheme for the transfer to or from it of accrued rights, until such time as the trustees or managers of the scheme to which the transfer is being made ('the receiving scheme') have received assets of the full amount agreed by them as consideration for the transfer, it must be assumed:

- 1937 (a) that the rights have not been transferred; and
- 1938 (b) that any assets transferred in respect of the transfer of those rights are assets of the scheme making the transfer and not of the receiving scheme and have such a value as is determined in accordance with the mandatory guidelines<sup>8</sup>.

1 'Scheme', in the cases mentioned in the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 29, Sch 5 paras 1, 4-6 (sectionalised and partly approved or guaranteed schemes) must be construed in accordance with those paragraphs (and 'employer' and 'member' must be construed accordingly): reg 2(1).

2 I.e. for the purposes of the Pensions Act 1995 ss 56-61: see PARAS 811-812 ante, 817 et seq post.

3 I.e. in the manner specified in the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, regs 4-9 (as amended). For detailed rules as to determination and valuation of assets see reg 4; as to valuation of insurance contracts see reg 5; and for detailed rules as to the determination and valuation of liabilities see reg 7 (amended by SI 1997/786). There must be excluded from the value of the scheme assets: (1) any resources invested (or treated as invested by or under the Pensions Act 1995 s 40) in contravention of s 40(1) (employer-related investments: see PARA 806 ante); (2) any amounts treated as a debt due to the trustees or managers under s 59(2), s 60(5) or s 75(1), or under the Pension Schemes Act 1993 s 144(1) (repealed), which are unlikely to be recovered without disproportionate cost or within a reasonable time; (3) except for the purposes of the Pensions Act 1995 s 60(2)-(7) (see PARA 821 post), any increase in value to which the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, Sch 4 applies: reg 6(1) (amended by SI 1996/3127; and SI 1997/786). At any time after the transitional period, there must also be excluded any

resources which would fall into head (1) supra if their retention were not permitted by the Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 7 or reg 8 or if reg 9(3) were omitted; and in determining at any such time whether any resources fall within head (1) supra or within this provision, the current market value of the resources of the scheme for the purposes of reg 5(1)(a) (see PARA 806 ante) is to be taken not to include the value of any investment (a) which is prohibited by reg 5(1)(b) or (2); (b) the retention of which is permitted by reg 7 or reg 8; or (c) which falls within head (2) or (3) supra: Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 6(2), (3) (substituted by SI 1996/3127).

The assets and liabilities of the scheme must be valued by reference to the same date: Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 8(1). In calculating the amount of any liability by reference to any date for the purpose of forming an opinion as to whether the minimum funding requirement is met on a relevant date, the actuary must, in such manner as is indicated in the mandatory guidelines, apply such demographic assumptions as are specified by that guidance for the scheme by reference to the members of the scheme, in the case of any scheme where in accordance with reg 7(4), (5), any liabilities in respect of the pensions payable to or in respect of members who are pensioner members on that date may be assumed to be met from investments in equities, and in accordance with that guidance it is appropriate to do so: reg 8(2)(a). In the case of any other scheme, he must apply such demographic assumptions as are specified for the scheme in question by reference to such tables as are specified by that guidance for the scheme: reg 8(2)(b). In calculating the value of any asset or the amount of any liability as at any future time, in order to form an opinion as to the adequacy of rates of contributions to a scheme for the purpose of securing that the minimum funding requirement will continue to be met by the scheme throughout any period, or will be met by the scheme by the end of any period, the actuary must take into account (in addition to the matters mentioned in regs 3-8 (as amended) so far as they are relevant) such assumptions as are specified by the mandatory guidelines as appropriate for the purposes of such a calculation: reg 9(1). In forming an opinion as to the adequacy of rates of contributions shown in a schedule of contributions for a scheme for the purpose of securing that the minimum funding requirement will continue to be met throughout or, as the case may be, will be met by the end of the schedule period, the actuary may make such adjustments to the value of the assets of the scheme and the amount of the liabilities of the scheme, as shown in the last minimum funding valuation for the scheme, as are in his opinion, in accordance with the mandatory guidelines, appropriate to reflect changes in the assets and liabilities of the scheme after the relevant date of that valuation: reg 9(2). As to the mandatory guidance see note 4 infra.

4 References to the guidance in GN 27 are to the mandatory guidelines on minimum funding requirement (GN 27), prepared and published by the Institute of Actuaries and the Faculty of Actuaries and approved for these purposes by the Secretary of State, with such revisions as have been so approved (1) in the case of guidance applicable in relation to a minimum funding valuation, as at the date of signing of the valuation; and (2) in the case of guidance applicable to a certificate under the Pensions Act 1995 s 57(1)(b) or a certificate under s 58 of the rates of contributions shown in a schedule of contributions, as at the relevant date: Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 2(3). Where in the 1996 Regulations there is a reference to the value of any asset or the amount of any liability being calculated or verified in accordance with the opinion of the actuary or as he thinks appropriate, he must comply with any relevant provisions in that guidance in making that calculation or verification: reg 3(1). 'The transitional period' means the period of five years beginning with 6 April 1997: reg 2(1).

5 Ibid reg 3(1).

6 'The relevant date' means, in relation to a minimum funding valuation, the effective date; and in relation to a certificate under the Pensions Act 1995 s 57(1)(b) or a certificate under s 58 of the rates of contributions shown in a schedule of contributions, the date the certificate is signed; and 'minimum funding valuation' means an actuarial valuation required by s 57(1)(a) or s 57(2): Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 2(1). 'The effective date', (1) in relation to a minimum funding valuation, has the meaning given in the Pensions Act 1995 s 56(5) (ie the date on which the assets and liabilities are valued); (2) in relation to a valuation obtained under the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 30, means the date as at which the assets and liabilities are valued; (3) in relation to a disclosure valuation, means the date as at which the valuation was made: reg 2(1). For the meaning of 'disclosure valuation' see PARA 814 note 2 post.

7 Ibid reg 3(2).

8 Ibid reg 3(3).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **811-824 Funding**

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement; see PARA 824A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (6) FUNDING/814. Time limits for minimum funding valuations.

#### **814. Time limits for minimum funding valuations.**

In the case of an occupational pension scheme<sup>1</sup> which commences on or after 6 April 1997, in relation to which there was no disclosure valuation<sup>2</sup> before that date or to which the minimum funding requirement<sup>3</sup> first applies after that date, the first minimum funding valuation<sup>4</sup> to be obtained in relation to the scheme must be by reference to an effective date<sup>5</sup> no later than the first anniversary of the date on which the scheme commences or, as the case may be, the minimum funding requirement first applies to it and must be obtained by the trustees or managers before the end of the period of one year beginning with its effective date<sup>6</sup>.

In the case of any other scheme the first minimum funding valuation to be obtained in relation to the scheme must be by reference to an effective date no later than the third anniversary of the effective date of the last disclosure valuation in relation to the scheme before 6 April 1997 and must be obtained by the trustees or managers before the end of the period of one year beginning with its effective date<sup>7</sup>.

Any subsequent minimum funding valuation in relation to the scheme<sup>8</sup> must be obtained by the trustees or managers:

- 1939 (1) in a case where the effective date of the valuation is not later than the third anniversary of the effective date of the last minimum funding valuation, before the end of the period of four years beginning with the effective date of the last minimum funding valuation;
- 1940 (2) otherwise, before the end of the period of three years beginning with the date on which the last minimum funding valuation was signed<sup>9</sup>.

A minimum funding valuation must be signed before the end of the period of one year beginning with its effective date<sup>10</sup>.

1 For the meaning of 'scheme' see PARA 813 note 1 ante.

2 'Disclosure valuation' means an actuarial valuation required by the Occupational Pension Schemes (Disclosure of Information) Regulations 1986, SI 1986/1046, reg 8 (revoked): Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 2(1).

3 I.e. the Pensions Act 1995 s 56: see PARA 811 ante.

4 I.e. under ibid s 57(1)(a): see PARA 812 ante. For the meaning of 'minimum funding valuation' see PARA 813 note 6 ante.

5 For the meaning of 'effective date' see PARA 813 note 6 ante.

6 Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 10(1).

7 Ibid reg 10(2).

8 I.e. under the Pensions Act 1995 s 57(1)(a): see PARA 812 ante.

9 Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 10(3) (amended by SI 1997/786).

10 Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 10(4).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **811-824 Funding**

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement; see PARA 824A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (6) FUNDING/815. Minimum funding valuation statements.

### **815. Minimum funding valuation statements.**

Each minimum funding valuation<sup>1</sup> must contain a statement made by the actuary<sup>2</sup> set out in the prescribed form<sup>3</sup>. Provision is made for the actuary to make modifications to the prescribed form in certain circumstances<sup>4</sup>.

1 For the meaning of 'minimum funding valuation' see PARA 813 note 6 ante.

2 Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 14, Sch 1 Pt I para 1.

3 Ibid Sch 1 Pt I para 2. For the prescribed form see Sch 1 Pt II.

4 See ibid Sch 1 Pt I paras 3-6.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **811-824 Funding**

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement; see PARA 824A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (6) FUNDING/816. Duty to obtain minimum funding valuations in certain circumstances.

### **816. Duty to obtain minimum funding valuations in certain circumstances.**

If during any schedule period<sup>1</sup> it appears to the trustees or managers of an occupational pension scheme<sup>2</sup>, having consulted the actuary and obtained his opinion, that, by reason of any event which has had a significant effect on the value of the scheme's assets or the amount of its liabilities, or of a series of events which together have had such an effect, there is a serious risk that the minimum funding requirement<sup>3</sup> will not continue to be met throughout the schedule period or, in a case where the last minimum funding valuation<sup>4</sup> for the scheme showed that on the effective date<sup>5</sup> of that valuation that requirement was not met, that it will not be met by the end of that period, then they must obtain a minimum funding valuation before the end of the period of six months beginning with the date on which the actuary gives his opinion<sup>6</sup>. This obligation does not, however, apply if before the end of that period of six months the schedule of contributions has been revised<sup>7</sup> and the revision certified<sup>8</sup> by the actuary, or in the case of an opinion given by an actuary during the transitional period<sup>9</sup>.

If, when the actuary is giving a certificate under the statutory provisions relating to occasional and periodic certification of the adequacy of contributions<sup>10</sup> in relation to a scheme, in a case where the latest certificate<sup>11</sup> of the rates of contributions shown in the scheme's schedule of contributions was given:

- 1941 (1) in a case when the minimum funding requirement appeared to be met<sup>12</sup>; or
- 1942 (2) in a case when the minimum funding requirement appeared not to be met<sup>13</sup>, but in respect of rates calculated to secure that the scheme would meet the minimum funding requirement on or before the relevant date of the certificate,

the actuary is of the opinion that a minimum funding valuation for the scheme as at that date would be a serious shortfall valuation<sup>14</sup>, then he must include a statement of that opinion in the certificate<sup>15</sup>. If the actuary does state in such a certificate that he is of that opinion, the trustees or managers must obtain a minimum funding valuation before the end of the period of six months beginning with the relevant date of the certificate<sup>16</sup>, except where the relevant date of the certificate falls in the transitional period<sup>17</sup>.

If, in the case of a scheme in relation to which there is more than one employer, an event occurs in relation to one or more, but not all, of the employers, by virtue of which a debt may be treated as having arisen<sup>18</sup> from that employer, or those employers, to the trustees or managers of the scheme, and:

- 1943 (a) the last minimum funding valuation for the scheme before the applicable time<sup>19</sup> showed that on the effective date of that valuation the minimum funding requirement was not met; or
- 1944 (b) the last certificate<sup>20</sup> before the applicable time of the rates of contributions shown in the scheme's schedule of contributions was given in a case when the minimum funding requirement appeared not to be met<sup>21</sup> in respect of rates which were not calculated to secure that the scheme would meet the minimum funding requirement on or before that time; or
- 1945 (c) the last certificate<sup>22</sup> before the applicable time was a certificate that the contributions were inadequate contributions<sup>23</sup>,

the trustees or managers must obtain a minimum funding valuation<sup>24</sup>. The valuation must be obtained before the end of the period of six months beginning with the applicable time, in a case where the effective date of the valuation coincides with that time, and otherwise, before the end of the period of three months beginning with that time<sup>25</sup>.

- 1 For the meaning of 'schedule period' see PARA 817 note 10 post.
- 2 For the meaning of 'scheme' see PARA 813 note 1 ante.
- 3 As to the minimum funding requirement see PARA 811 ante.
- 4 For the meaning of 'minimum funding valuation' see PARA 813 note 6 ante.
- 5 For the meaning of 'effective date' see PARA 813 note 6 ante.
- 6 Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 11(1).
- 7 *Ie* under the Pensions Act 1995 s 58(3)(b): see PARA 817 post.
- 8 *Ie* under *ibid* s 58: see PARA 817 post.
- 9 Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 11(2).
- 10 *Ie* under the Pensions Act 1995 s 57(1)(b): see PARA 812 ante.
- 11 See note 8 *supra*.
- 12 *Ie* in the case mentioned in the Pensions Act 1995 s 58(6)(a): see PARA 817 post.
- 13 *Ie* in the case mentioned in *ibid* s 58(6)(b): see PARA 817 post.
- 14 'Serious shortfall valuation', in relation to a scheme, means a minimum funding valuation for the scheme as a result of which *ibid* s 60 (serious underfunding: see PARA 821 post) applies: Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 2(1).
- 15 *Ibid* reg 12(1). For the prescribed form of wording of the statement see reg 18(2), Sch 3 Pt I para 5.
- 16 *Ibid* reg 12(2).
- 17 *Ibid* reg 12(3). For the meaning of 'transitional period' see PARA 813 note 4 ante.
- 18 *Ie* under the Pensions Act 1995 s 75(1) (deficiencies in the assets): see PARA 850 post.
- 19 For these purposes, 'the applicable time' has the same meaning as in *ibid* s 75(3) (see PARA 850 note 3 post): Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 13(3).
- 20 *Ie* under the Pensions Act 1995 s 58: see PARA 817 post.
- 21 *Ie* in the case mentioned in *ibid* s 58(6)(b): see PARA 817 post.
- 22 *Ie* under *ibid* s 57(1)(b): see PARA 812 ante.
- 23 *Ie* such a certificate as is mentioned in *ibid* s 57(2)(a): see PARA 812 ante.
- 24 Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 13(1).
- 25 *Ibid* reg 13(2).

## UPDATE

### 741-873 Occupational Pension Schemes

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The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **811-824 Funding**

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement; see PARA 824A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (6) FUNDING/817. Schedules of contributions.

### **817. Schedules of contributions.**

The trustees or managers<sup>1</sup> of an occupational pension scheme<sup>2</sup> to which the minimum funding requirement<sup>3</sup> applies must secure that there is prepared, maintained and from time to time revised a schedule (referred to as a 'schedule of contributions') showing the rates of contributions payable towards the scheme by or on behalf of the employer<sup>4</sup> and the active members<sup>5</sup> of the scheme, and the dates on or before which such contributions are to be paid<sup>6</sup>. The schedule of contributions for a scheme must satisfy prescribed<sup>7</sup> requirements<sup>8</sup>.

The schedule of contributions for a scheme:

- 1946 (1) must be prepared before the end of a prescribed period beginning with the signing of the first actuarial valuation<sup>9</sup> for the scheme<sup>10</sup>;
- 1947 (2) may be revised from time to time where the revisions are previously agreed by the trustees or managers and the employer and any revision in the rates of contributions is certified by the actuary<sup>11</sup> of the scheme<sup>12</sup>; and
- 1948 (3) must be revised before the end of a prescribed period beginning with the signing of each subsequent actuarial valuation<sup>13</sup>.

The matters shown in the schedule of contributions for a scheme:

- 1949 (a) must be matters previously agreed by the trustees or managers and the employer<sup>14</sup>; or
- 1950 (b) if no such agreement has been made as to all the matters shown in the schedule, must be:
  - 179 243. (i) rates of contributions determined by the trustees or managers, being such rates as in their opinion are adequate for the purpose of securing that the minimum funding requirement will continue to be met throughout the prescribed period or, if it appears to them that it is not met, will be met by the end of that period; and
  - 244. (ii) other matters determined by the trustees or managers;
- 180

and the rates of contributions shown in the schedule must be certified by the actuary of the scheme<sup>15</sup>.

The actuary may not certify the rates of contributions shown in the schedule of contributions:

- 1951 (A) in a case where on the date he signs the certificate it appears to him that the minimum funding requirement is met, unless he is of the opinion that the rates are adequate for the purpose of securing that the requirement will continue to be met throughout the prescribed period<sup>16</sup>; and
- 1952 (B) in any other case, unless he is of the opinion that the rates are adequate for the purpose of securing that the requirement will be met by the end of that period<sup>17</sup>.

The Occupational Pensions Regulatory Authority<sup>18</sup> may in prescribed circumstances extend (or further extend) the period referred to above<sup>19</sup>. Where, in the case of any occupational pension

scheme to which the minimum funding requirement applies, the above requirements are not complied with, the provisions relating to prohibition orders<sup>20</sup> apply to any trustee who has failed to take all such steps as are reasonable to secure compliance, and those relating to civil penalties<sup>21</sup> apply to any trustee or manager who has failed to take all such steps<sup>22</sup>.

1 For the meaning of 'trustees or managers' see PARA 611 note 10 ante.

2 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

3 Ie the provisions of *ibid* s 56: see PARA 811 ante.

4 For the meaning of 'employer' see PARA 598 note 4 ante.

5 For the meaning of 'active member' see PARA 612 note 5 ante.

6 Pensions Act 1995 s 58(1).

7 For the meaning of 'prescribed' see PARA 555 note 1 ante.

8 Pensions Act 1995 s 58(2). As to the content and certification of schedules of contributions see the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 17 (amended by SI 1997/786).

9 For the meaning of 'actuarial valuation' see PARA 812 note 5 ante.

10 Pensions Act 1995 s 58(3)(a). The prescribed period is 12 weeks: see the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 15(1). As to the periods covered by schedules of contributions (referred to as 'schedule periods') see reg 16. The authority may extend the schedule period which would otherwise apply, subject to certain conditions: see regs 25, 27 (reg 25 amended by SI 1997/786).

11 As to the requirement to appoint an actuary see PARA 798 note 2 ante.

12 Pensions Act 1995 s 58(3)(b).

13 *Ibid* s 58(3)(c). The schedule must be revised before the end of the period of 12 weeks beginning with the signing of each subsequent minimum funding valuation for the scheme: Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 15(2).

14 An agreement for the purposes of head (a) in the text is one which is made by the trustees or managers and the employer during the prescribed period beginning with the signing of the last preceding actuarial valuation for the scheme: Pensions Act 1995 s 58(5). Such an agreement as to the matters to be shown in the schedule of contributions must be made before the end of the period of eight weeks beginning with the signing of the last preceding minimum funding valuation for the scheme: Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 15(3).

15 Pensions Act 1995 s 58(4). Section 58(4) is modified in relation to a multi-employer scheme: see the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 29, Sch 5 para 2(1) (amended by SI 1997/786).

16 Pensions Act 1995 s 58(6)(a). For the prescribed form of certificate see the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 17(6), Sch 2 Pt I para 1, Pt II.

17 Pensions Act 1995 s 58(6)(b). For the prescribed form of certificate see the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 17(6), Sch 2 Pt I paras 2-5, Pt II (Sch 2 para 5 added by SI 1997/786).

18 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

19 Pensions Act 1995 s 58(7).

20 Ie the provisions of *ibid* s 3: see PARA 604 ante.

21 Ie the provisions of *ibid* s 10: see PARA 611 ante.

22 Ibid s 58(8). Regulations may modify s 58 as it applies in prescribed circumstances: s 61. For the meaning of 'regulations' see PARA 600 note 2 ante. Section 58 is modified in relation to (1) multi-employer schemes; (2) schemes which have no active members; (3) schemes covering both United Kingdom and foreign employment; and (4) schemes with a partial government guarantee: see the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 29, Sch 5 paras 1, 2(1), 3-6 (Sch 5 para 2(1) amended by SI 1997/786).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **811-824 Funding**

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement; see PARA 824A.

### **817 Schedules of contributions**

NOTE 4--See *Alitalia-Linee Aeree Italiane SPA v Rotunno* [2008] EWHC 185 (Ch), [2008] All ER (D) 130 (Feb).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (6) FUNDING/818. Occasional and periodic certification of adequacy of contributions.

### **818. Occasional and periodic certification of adequacy of contributions.**

The trustees or managers of an occupational pension scheme to which the minimum funding requirement<sup>1</sup> applies must, not earlier than 21 days before and not later than 21 days after each anniversary of the relevant date<sup>2</sup> of the last certificate<sup>3</sup> of the rates of contributions shown in the schedule of contributions for the scheme, obtain a certificate prepared by the actuary of the scheme:

- 1953 (1) stating whether or not in his opinion the contributions payable towards the scheme are adequate for the purpose of securing, in a case where it appears to him that the minimum funding requirement is met, that it will continue to be met throughout the remainder of the schedule period<sup>4</sup> which is current on the relevant date of the certificate, or otherwise, that it will be met by the end of that period<sup>5</sup>; and
- 1954 (2) indicating any relevant changes since that valuation was prepared<sup>6</sup>.

1    Ie the Pensions Act 1995 s 56: see PARA 811 ante. For the meaning of 'trustees or managers' see PARA 611 note 10 ante.

2    For the meaning of 'relevant date' see PARA 813 note 6 ante.

3    Ie under the Pensions Act 1995 s 58: see PARA 817 ante.

4    For the meaning of 'schedule period' see PARA 817 note 10 ante.

5    Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 18(1)(a). For the prescribed forms of certificate see reg 18(2), Sch 3 Pt I paras 1-3, Pt II.

6    Ibid reg 18(1)(b). If the actuary is of the opinion that no changes which are relevant have occurred since the last minimum funding valuation, he may word the certificate accordingly: see Sch 3 Pt I para 4.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **811-824 Funding**

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement; see PARA 824A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (6) FUNDING/819. Records.

### **819. Records.**

The trustees or managers of an occupational pension scheme to which the minimum funding requirement<sup>1</sup> applies must keep records of all contributions made to the scheme by any person, showing separately:

- 1955 (1) the aggregate amounts of contributions paid by or on behalf of active members<sup>2</sup> of the scheme (whether by deduction from their earnings or otherwise) and the dates on which they are paid, distinguishing voluntary contributions from other contributions, and showing the amounts of voluntary contributions paid by each member; and
- 1956 (2) the aggregate amounts of contributions paid by or on behalf of each person who is an employer in relation to the scheme and the dates on which they are paid<sup>3</sup>.

Such trustees or managers must also keep a separate record of all contributions and payments made to secure any increase required<sup>4</sup> to be secured<sup>5</sup> and must keep records of any action taken by them to recover:

- 1957 (a) the amount of any contributions which are not paid on the date on which they are due;
- 1958 (b) the amount of any debt which has arisen by reason of the employer's failure to secure the increase required as a result of a serious shortfall valuation within the prescribed period<sup>6</sup>; and
- 1959 (c) the amount of any debt which has arisen<sup>7</sup> where there is a deficiency in the assets<sup>8</sup>.

1    Ie the Pensions Act 1995 s 56: see PARA 811 ante.

2    For the meaning of 'active member' see PARA 612 note 5 ante.

3    Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 19(1).

4    Ie by the Pensions Act 1995 s 60(2): see PARA 829 post.

5    Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 19(2).

6    Ie any debt which has arisen under the Pensions Act 1995 s 60(5): see PARA 821 post.

7    Ie under *ibid* s 75(1): see PARA 850 post.

8    Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 19(3).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **811-824 Funding**

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement; see PARA 824A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (6) FUNDING/820. Determination of contributions; suupplementary provisions.

## **820. Determination of contributions; suupplementary provisions.**

Except in prescribed<sup>1</sup> circumstances, the trustees or managers<sup>2</sup> of an occupational pension scheme<sup>3</sup> to which the minimum funding requirement<sup>4</sup> applies must, where any amounts payable by or on behalf of the employer<sup>5</sup> or the active members<sup>6</sup> of the scheme in accordance with the schedule of contributions<sup>7</sup> have not been paid on or before the due date, give notice of that fact, within the prescribed period, to the Occupational Pensions Regulatory Authority<sup>8</sup> and to the members<sup>9</sup> of the scheme<sup>10</sup>. Any such amounts which for the time being remain unpaid after that date (whether payable by the employer or not) must, if not a debt due from the employer to the trustees or managers apart from this provision, be treated as such a debt<sup>11</sup>. If, in the case of an occupational pension scheme to which the minimum funding requirement applies, it appears to the trustees or managers at the end of any prescribed period that the minimum funding requirement is not met, they must prepare a report giving the prescribed information about the failure to meet that requirement<sup>12</sup>; and if in the case of any such scheme the above provisions are not complied with, the provisions relating to prohibition orders<sup>13</sup> apply to any trustee who has failed to take all such steps as are reasonable to secure compliance<sup>14</sup>, and those relating to civil penalties<sup>15</sup> apply to any trustee or manager who has failed to take all such steps<sup>16</sup>.

1 For the meaning of 'prescribed' see PARA 555 note 1 ante.

2 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

3 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

4 Ie the provisions of ibid s 56: see PARA 811 ante.

5 For the meaning of 'employer' see PARA 598 note 4 ante.

6 For the meaning of 'active member' see PARA 612 note 5 ante.

7 As to the 'schedule of contributions' see the Pensions Act 1995 s 58(1); and PARA 817 ante.

8 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

9 For the meaning of 'member' see PARA 612 note 5 ante.

10 Pensions Act 1995 s 59(1). A notice under s 59(1) that any amount payable in accordance with a schedule of contributions has not been paid on or before the due date must be given to the authority before the end of the period of 30 days beginning with that date; and must be given to the members before the end of the period of 90 days beginning with that date; but no notice need be given to the members if payment has been made before the end of the period of 60 days beginning with the due date: Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 23(1), (2). Where a schedule of contributions provides for payments to be made by any date or within a period after that date, for these purposes the due date must be taken to be the last day of that period: reg 23(3).

11 Pensions Act 1995 s 59(2).

12 Ibid s 59(3).

13 Ie the provisions of ibid s 3: see PARA 604 ante.

14 Ibid s 59(4)(a).

15 le the provisions of *ibid* s 10: see PARA 611 ante.

16 *Ibid* s 59(4)(b). Regulations may modify s 59 as it applies in prescribed circumstances: s 61. For the meaning of 'regulations' see PARA 602 note 2 ante. Section 59 is modified in relation to (1) multi-employer schemes; (2) schemes which have no active members; (3) schemes covering both United Kingdom and foreign employment; and (4) schemes with a partial government guarantee: see the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 29, Sch 5 paras 1, 3-6.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **811-824 Funding**

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement; see PARA 824A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (6) FUNDING/821. Serious underprovision.

### **821. Serious underprovision.**

Where, in the case of an occupational pension scheme<sup>1</sup> to which the minimum funding requirement<sup>2</sup> applies, an actuarial valuation<sup>3</sup> shows that, on the effective date<sup>4</sup> of the valuation, the value of the scheme assets<sup>5</sup> is less than 90 per cent of the amount of the scheme liabilities<sup>6</sup> (the difference shown in the valuation being referred to as 'the shortfall') the employer<sup>7</sup> must:

- 1960 (1) by making an appropriate payment to the trustees or managers<sup>8</sup>; or
- 1961 (2) by a prescribed<sup>9</sup> method,

secure an increase in the value of the scheme assets which, taken with any contributions paid, is not less than the shortfall<sup>10</sup>.

The required increase in that value must be secured before the end of a prescribed period beginning with the signing of the valuation, or if the actuarial valuation was obtained by reason of such a statement in a specified certificate<sup>11</sup>, before the end of a prescribed period beginning with the signing of the certificate<sup>12</sup>. The Occupational Pensions Regulatory Authority<sup>13</sup> may in prescribed circumstances extend (or further extend) the period so applicable<sup>14</sup>. Except in prescribed circumstances, if the employer fails to secure the required increase in value before the end of the period so applicable, the trustees or managers must, within the period of 14 days (or such longer period as is prescribed) beginning with the end of that period, give written notice of that fact to the authority and to the members<sup>15</sup> of the scheme<sup>16</sup>. If this requirement is not complied with, the provisions relating to prohibition orders<sup>17</sup> apply to any trustee who has failed to take all such steps as are reasonable to secure compliance<sup>18</sup>, and those relating to civil penalties<sup>19</sup> apply to any trustee or manager who has failed to take all such steps<sup>20</sup>.

If the employer fails to secure the required increase in value before the end of the period so applicable, then so much of the shortfall as, at any subsequent time, has not been met by such an increase in value made:

- 1962 (a) by making an appropriate payment to the trustees or managers;
- 1963 (b) by a prescribed method; or
- 1964 (c) by contributions made before the end of that period,

must, if not a debt due from the employer to the trustees or managers apart from this provision, be treated at that time as such a debt<sup>21</sup>.

In any case where there has been a valuation by virtue of which the requirements to secure an increase in the value of scheme assets<sup>22</sup> have applied in relation to a scheme, but the actuary of the scheme certifies at the time when he certifies the rates of contributions shown in the schedule of contributions for the scheme which is prepared or revised<sup>23</sup> following the valuation that in his opinion on the date he signs the certificate:

- 1965 (i) the value of the scheme assets is no longer less than 90 per cent of the amount of the scheme liabilities; or
- 1966 (ii) the amount by which that value is less than 90 per cent of the amount of those liabilities ('the difference') has decreased,

those requirements cease to apply or, as the case may be, both they and the requirement to treat the shortfall as a due debt<sup>24</sup> apply as if the shortfall were the difference on that date<sup>25</sup>.

Where an increase in value is secured by a prescribed method, the increase is to be treated for these purposes as being of an amount determined in accordance with regulations<sup>26</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

2 I.e. the provisions of *ibid* s 56: see PARA 811 ante.

3 For the meaning of 'actuarial valuation' see PARA 812 note 5 ante.

4 The 'effective date' of an actuarial valuation is the date by reference to which the assets and liabilities are valued: Pensions Act 1995 s 56(5)(d).

5 As to 'the value of the scheme assets' see PARA 811 note 5 ante.

6 As to 'the amount of the scheme liabilities' see PARA 811 note 5 ante.

7 For the meaning of 'employer' see PARA 598 note 4 ante.

8 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

9 For the meaning of 'prescribed' see PARA 555 note 1 ante. Instead of or in addition to making an appropriate payment to the trustees or managers, the employer may secure the required increase in the value of the scheme assets by (1) arranging for an appropriate letter of credit to be given to the trustees or managers which satisfies the prescribed requirements; (2) arranging, with the agreement of the trustees or managers of the scheme, for the payment of a sum into a deposit account with a relevant institution on the prescribed terms; (3) arranging, with the agreement of the trustees or managers of the scheme, for the trustees or managers to be given a charge over assets, which are otherwise free from incumbrances, being a charge in respect of which the prescribed requirements are satisfied: see the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 22, Sch 4 paras 2-4. 'Relevant institution' means an institution authorised under the Banking Act 1987, a building society incorporated under the Building Societies Act 1986 or a European deposit-taker within the meaning of the Banking Co-ordination (Second Council Directive) Regulations 1992, SI 1992/3218, reg 82(3): Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, Sch 4 para 1(1). Expenses incurred by the trustees or managers in connection with securing any arrangement under Sch 4 may not be paid out of the assets of the scheme: Sch 4 para 5. An increase in value secured by the method specified: (a) in head (1) *supra* must at any time be treated for the purposes of the Pensions Act 1995 s 60 as being of an amount equal to the amount specified in the appropriate letter of credit as the maximum amount the institution guarantees, or the section 60 shortfall at that time, whichever is less; (b) in head (2) *supra* must at any time be treated for those purposes as being of an amount equal to the amount standing to the credit of the account at that time or the section 60 shortfall at that time, whichever is less; (c) in head (3) *supra* must at any time be treated for those purposes as being of an amount equal to the amount specified in the charge as the maximum amount to be secured by it or the section 60 shortfall at that time, whichever is less: Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, Sch 4 para 6(1)-(3). 'The section 60 shortfall', in relation to a scheme, means the increase in the value of the scheme assets required by the Pensions Act 1995 s 60(2) as a result of a serious shortfall valuation (after taking s 60(7A) (as added) into account in any case where it applies), less any payment made to the trustees or managers by or on behalf of the employer since the valuation (or, in a case where s 60(7A) (as added) applies, the date the actuary signed the certificate) to secure the whole or part of that increase: Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, Sch 4 para 1(1) (amended by SI 1997/786). For the meaning of 'serious shortfall valuation' see PARA 816 note 14 ante.

10 Pensions Act 1995 s 60(1), (2). Where there has been a serious shortfall valuation for a scheme, the period before the end of which the employer must secure the increase in the value of the scheme assets mentioned in s 60(2) is: (1) subject to the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 20(3), in so far as the increase is secured as mentioned in the Pensions Act 1995 s 60(2)(a) (payments to trustees or managers), the period of one year beginning with the appropriate date; and (2) in so far as the increase is secured as mentioned in s 60(2)(b) by a method specified in the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 22, Sch 4, the period of 12 weeks beginning with the date on which that valuation was signed: reg 20(1). In head (1) *supra*, 'the appropriate date' means: (a) if the serious shortfall valuation was obtained under the Pensions Act 1995 s 57(2) (see PARA 812 ante), the date with which

the period within which the valuation was required to be obtained began (being the period specified by or under s 57(4)); and (b) otherwise, the date on which that valuation was signed: Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 20(2).

If a minimum funding valuation shows that on its effective date, being a date falling in the transitional period, there was such a difference between the value of the scheme assets and the amount of its liabilities as is mentioned in the Pensions Act 1995 s 60(1) (serious underprovision), the period of one year mentioned in head (1) supra is extended so as to end with the expiry of the period of six years beginning with 6 April 1997; and s 60(4), (5), (7) applies accordingly: Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 20(3). Where the increase in the value of the scheme assets required to be secured by the Pensions Act 1995 s 60(2) is secured as mentioned in s 60(2)(b) within the period mentioned in head (2) supra, nothing in head (1) supra is to be taken as preventing the employer from making a payment to the trustees or managers at any time to secure the whole or part of the required increase: Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 20(4). The authority may extend the period for meeting serious shortfalls in certain circumstances: see regs 26, 27.

11    Ie a certificate referred to in the Pensions Act 1995 s 57(2): see PARA 812 text and note 9 ante.

12    Ibid s 60(3).

13    As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

14    Pensions Act 1995 s 60(7). For the purposes of s 60(4), (5), (7) the period applicable under s 60(3) must be taken to be the period mentioned in the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 20(1)(a) (see note 10 head (1) supra): reg 20(1). See also note 10 supra.

15    For the meaning of 'member' see PARA 612 note 5 ante.

16    Pensions Act 1995 s 60(4). See also notes 10, 14 supra. Section 60(4) does not apply in any case where a subsequent minimum funding valuation shows that on the effective date of that valuation there is no longer such a difference between the value of the scheme assets and the amount of its liabilities as is mentioned in s 60(1); and in those circumstances s 60(5) (unpaid shortfall treated as debt from employer to trustees or managers: see the text to note 21 infra) has effect with the addition at the end of the words 'until the effective date of a subsequent actuarial valuation which does not show such a difference as is mentioned in subsection (1)': Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 20(5).

17    Ie the provisions of the Pensions Act 1995 s 3: see PARA 604 ante.

18    Ibid s 60(8)(a).

19    Ie the provisions of ibid s 10: see PARA 611 ante.

20    Ibid s 60(8)(b).

21    Ibid s 60(5). See also notes 10, 14, 16 supra.

22    Ie ibid s 60(2): see the text and notes 1-10 supra.

23    Ie under ibid s 58(3): see PARA 817 ante.

24    Ie ibid s 60(5): see the text and note 21 supra.

25    Ibid s 60(7A) (added by the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 20(6) (added by SI 1997/786)).

26    Pensions Act 1995 s 60(6). For the meaning of 'regulations' see PARA 600 note 2 ante. Regulations may modify s 60 as it applies in prescribed circumstances: s 61. Section 60 is modified in relation to (1) multi-employer schemes; (2) schemes which have no active members; (3) schemes covering both United Kingdom and foreign employment; and (4) schemes with a partial government guarantee: see the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 29, Sch 5 paras 1, 3-6.

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **811-824 Funding**

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

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## **822. Failure reports.**

If it appears to the trustees or managers of an occupational pension scheme<sup>1</sup> that the minimum funding requirement<sup>2</sup> is not met at the end of any period:

- 1967 (1) beginning with their receiving a minimum funding valuation<sup>3</sup> in relation to the scheme which shows that on the effective date<sup>4</sup> the minimum funding requirement is met; and
- 1968 (2) Ending with their receiving the next subsequent such valuation ('the second valuation'), being a valuation which shows that on the effective date the minimum funding requirement is not met,

or that the minimum funding requirement is not met at the end of any period:

- 1969 (a) beginning with their receiving a minimum funding valuation in relation to the scheme ('the first valuation') which shows that on the effective date the minimum funding requirement is not met; and
- 1970 (b) Ending with their receiving the next subsequent such valuation ('the second valuation'), being a valuation which shows that on the effective date the minimum funding requirement is not met, and the amount by which the value of the scheme assets falls short of the amount of the scheme liabilities is a greater percentage of the liabilities than was shown in the first valuation,

they must prepare a report stating the reasons for the failure to meet that requirement on the effective date of the second valuation and for the deterioration in the funding of the scheme<sup>5</sup>.

If the trustees or managers receive a request in writing from any specified person<sup>6</sup> for a copy of a report so prepared by them, they must make a copy of the report available to him before the expiry of the period of one month beginning with the date on which they receive the request<sup>7</sup>.

1 For the meaning of 'scheme' see PARA 813 note 1 ante.

2 For the meaning of 'minimum funding requirement' see PARA 811 ante.

3 For the meaning of 'minimum funding valuation' see PARA 813 note 6 ante.

4 For the meaning of 'effective date' see PARA 813 note 6 ante.

5 Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 21(1).

6 Ie any such person as is mentioned in the Pensions Act 1995 s 41(4): see PARA 800 ante.

7 Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 21(2).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **811-824 Funding**

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement; see PARA 824A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (6) FUNDING/823. Modification of shared cost schemes.

### **823. Modification of shared cost schemes.**

The trustees of a shared cost scheme<sup>1</sup> to which the minimum funding requirement<sup>2</sup> applies may by resolution modify the scheme with a view to making such provision that, if there is a serious shortfall valuation<sup>3</sup> for the scheme, then the cost of any payments which the employer is obliged to make<sup>4</sup> as a result of that valuation is borne by the employer and the members in the appropriate proportions (in the case of the members, either by provision for them to make payments or for their rights to benefits under the scheme to be modified or both), unless the employer and the trustees or managers agree:

- 1971 (1) that the cost of the payments resulting from that valuation is to be borne by the employer alone; or  
 1972 (2) that he should bear a greater proportion of it than would otherwise fall to be borne by him<sup>5</sup>.

1 For these purposes, 'shared cost scheme' means a scheme under the provisions of which: (1) the level of benefits expected to be provided is defined; (2) contributions are payable by the employer and the active members in specified proportions; and (3) if it appears to the trustees or managers, or an actuarial valuation shows, that otherwise the assets of the scheme will (or are likely to) fall short of the liabilities of the scheme, the rates of contributions payable by both the active members and the employer may be increased in those specified proportions; and 'the appropriate proportions' means those specified proportions: Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 24(2). Voluntary contributions by members and any associated contributions by the employer must be disregarded for these purposes, as must any temporary suspension of the liability to make contributions or alteration in the proportions in which the contributions are payable under any provision of the scheme allowing such a suspension or alteration in any circumstances: reg 24(3).

2 For the meaning of 'minimum funding requirement' see PARA 811 ante.

3 For the meaning of 'serious shortfall valuation' see PARA 816 note 14 ante.

4 Ie under the Pensions Act 1995 s 60: see PARA 821 ante.

5 Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 24(1).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

## **811-824 Funding**

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement; see PARA 824A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (6) FUNDING/824. Ongoing actuarial valuations and statements.

#### **824. Ongoing actuarial valuations and statements.**

The trustees or managers of any occupational pension scheme<sup>1</sup> to which the minimum funding requirement<sup>2</sup> applies (other than a scheme which is being wound up) must obtain a valuation prepared and signed by the actuary of the assets and liabilities of the scheme as at a date ('the effective date') specified in the valuation<sup>3</sup>. Such a valuation must:

- 1973 (1) be so expressed as to enable the expected future course of the scheme's contribution rates and funding level to be understood;
- 1974 (2) state whether it has been prepared in accordance with the guidelines published by the Institute of Actuaries and the Faculty of Actuaries and current on the date of signature of the valuation<sup>4</sup>; and
- 1975 (3) if it has not been so prepared, indicate where there are any material departures from those guidelines<sup>5</sup>.

In the case of a scheme:

- 1976 (a) which commences on or after 6 April 1997;
- 1977 (b) in relation to which there was no disclosure valuation<sup>6</sup> before that date; or
- 1978 (c) to which the minimum funding requirement first applies after that date,

the first such valuation to be obtained in relation to the scheme under these provisions must be by reference to an effective date no later than the first anniversary of the date on which the scheme commences or, as the case may be, the minimum funding requirement first applies to it, and must be obtained by the trustees or managers before the end of the period of one year beginning with its effective date<sup>7</sup>. In the case of any other scheme the first such valuation to be obtained in relation to the scheme under these provisions must be by reference to an effective date no later than the third anniversary of the effective date of the last disclosure valuation in relation to the scheme before 6 April 1997 and must be obtained by the trustees or managers before the end of the period of one year beginning with its effective date<sup>8</sup>.

Any subsequent valuation under these provisions must be obtained by the trustees or managers:

- 1979 (i) in a case where the effective date of the valuation is not later than the third anniversary of the effective date of the last such valuation, before the end of the period of four years beginning with the effective date of the last such valuation; and
- 1980 (ii) otherwise, before the end of the period of three years beginning with the date on which the last such valuation was signed<sup>9</sup>.

Each such valuation must be signed before the end of the period of one year beginning with its effective date<sup>10</sup> and must be accompanied by a statement made by the actuary<sup>11</sup>. He may issue a revised statement at any time before the next such valuation is made<sup>12</sup>.

1 For the meaning of 'scheme' see PARA 813 note 1 ante.

- 2 For the meaning of 'minimum funding requirement' see PARA 811 ante.
- 3 Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 30(1) (amended by SI 1997/786).
- 4 See the guidelines *Retirement Benefit Schemes - Actuarial Reports* (GN 9) copies of which may be obtained from the Faculty of Actuaries, 40-44 Thistle Street, Edinburgh EH2 1EN.
- 5 Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 30(2).
- 6 For the meaning of 'disclosure valuation' see PARA 814 note 2 ante.
- 7 Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 30(3).
- 8 Ibid reg 30(4).
- 9 Ibid reg 30(5) (amended by SI 1997/786).
- 10 Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 30(6).
- 11 Ibid reg 30(7). Any such statement or revised statement (see the text to note 12 *infra*) must be in the form set out in reg 30(8), Sch 6, except that (1) if the first paragraph of the prescribed statement does not correctly set out the actuary's opinion, he must substitute a negative or qualified opinion, giving reasons; and (2) in the case of a revised statement, the line which begins with the words 'Effective date of valuation' may be omitted: reg 30(8).
- 12 Ibid reg 30(8); and see note 11 *supra*.

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 811-824 Funding

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement; see PARA 824A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (6) FUNDING/824A. Scheme Funding.

## **824A. Scheme Funding.**

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement. Regulations may modify the provisions of Pt 3 as they apply in prescribed circumstances: s 232 (see the Occupational Pension Schemes (Regulatory Own Funds) Regulations 2005, SI 2005/3380, reg 5). Part 3 is to be construed as one with the Pensions Act 1995 Pt 1: Pensions Act 2004 s 233. For modifications to Pt 3 see the Occupational Pension Schemes (Scheme Funding) Regulations 2005, SI 2005/3377, reg 19, Sch 2; and PARA 824A.1.

For general and supplementary provision relating to the Pensions Act 2004 see PARA 636A.

### **1. Application**

The provisions of Part 3 of the Pensions Act 2004<sup>1</sup> apply to every occupational pension scheme<sup>2</sup> other than (1) a money purchase scheme<sup>3</sup>, or (2) a prescribed<sup>4</sup> scheme or a scheme of a prescribed description<sup>5</sup>. Regulations under head (2) above may provide for exemptions from all or any of the provisions of Part 3 of the Pensions Act 2004<sup>6</sup>.

1    le the Pensions Act 2004 ss 221-233.

2    For the meaning of 'occupational pension scheme' see PARA 636A.3.

3    For the meaning of 'money purchase scheme' see PARA 636A.19.

4    For the meaning of 'prescribed' see PARA 636A.3.

5    Pensions Act 2004 s 221(1). See the Occupational Pension Schemes (Scheme Funding) Regulations 2005, SI 2005/3377, Sch 2 (amended by SI 2007/3014, SI 2008/731, SI 2009/615).

6    Pensions Act 2004 s 221(2). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). See SI 2005/3377 regs 17, 18 (modified by SI 2005/3380; SI 2005/3377 reg 17 amended by SI 2006/1733, SI 2007/814, SI 2009/615).

### **2. The statutory funding objective**

Every scheme is subject to a requirement ('the statutory funding objective') that it must have sufficient and appropriate assets to cover its technical provisions<sup>1</sup>. For the purposes of Part 3 of the Pensions Act 2004<sup>2</sup> (1) the assets to be taken into account and their value must be determined, calculated and verified in a prescribed manner, and (2) the liabilities to be taken into account must be determined in a prescribed manner and the scheme's technical provisions must be calculated in accordance with any prescribed methods and assumptions<sup>3</sup>. Regulations may (a) provide for alternative prescribed methods and assumptions, (b) provide that it is for the trustees or managers<sup>4</sup> to determine which methods and assumptions are to be used in calculating a scheme's technical provisions, and (c) require the trustees or managers, in making their determination, to take into account prescribed matters and follow prescribed principles<sup>5</sup>. Any provision of the scheme rules<sup>6</sup> that limits the amount of the scheme's liabilities by reference to the value of its assets must be disregarded<sup>7</sup>.

1 Pensions Act 2004 s 222(1). A scheme's 'technical provisions' means the amount required, on an actuarial calculation, to make provision for the scheme's liabilities: s 222(2). Where an occupational pension scheme and not any employer in relation to that scheme (1) underwrites any liability to cover against liability risks linked to death, disability and longevity, (2) guarantees an investment performance, or (3) guarantees a level of benefits, that scheme must hold on a permanent basis specified additional assets above the aggregate of the scheme's technical provisions, in order to absorb discrepancies between the anticipated and actual expenses and profits of the scheme: see the Occupational Pension Schemes (Regulatory Own Funds) Regulations 2005, SI 2005/3380 (amended by SI 2007/814).

2 I.e. the Pensions Act 2004 ss 221-233.

3 Ibid s 222(3). As to the determination of the assets and liabilities of a scheme, and the calculation of their value, see the Occupational Pension Schemes (Scheme Funding) Regulations 2005, SI 2005/3377, regs 3-5.

4 For the meaning of 'managers' see PARA 636A.11.

5 Pensions Act 2004 s 222(4). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12), and NOTE 3.

6 As to the scheme rules see PARA 636A.19.

7 Pensions Act 2004 s 222(5).

### 3. Statement of funding principles

The trustees or managers must prepare, and from time to time review and if necessary revise, a written statement of (1) their policy for securing that the statutory funding objective is met, and (2) such other matters as may be prescribed<sup>1</sup>. This is referred to in Part 3 of the Pensions Act 2004<sup>2</sup> as a 'statement of funding principles'<sup>3</sup>. The statement must, in particular, record any decisions by the trustees or managers as to (a) the methods and assumptions to be used in calculating the scheme's technical provisions, and (b) the period within which, and manner in which, any failure to meet the statutory funding objective is to be remedied<sup>4</sup>. Provision may be made by regulations (i) as to the period within which a statement of funding principles must be prepared, and (ii) requiring it to be reviewed, and if necessary revised, at such intervals, and on such occasions, as may be prescribed<sup>5</sup>. Where any requirement of these provisions is not complied with, the civil penalty provisions in the Pensions Act 1995<sup>6</sup> apply to a trustee or manager who has failed to take all reasonable steps to secure compliance<sup>7</sup>.

1 Pensions Act 2004 s 223(1). See also the Occupational Pension Schemes (Regulatory Own Funds) Regulations 2005, SI 2005/3380, reg 9.

2 I.e. the Pensions Act 2004 ss 221-233.

3 Ibid s 223(1). As to the prescribed statement of funding principles, see the Occupational Pension Schemes (Scheme Funding) Regulations 2005, SI 2005/3377, reg 6 (modified by SI 2005/3380).

4 Pensions Act 2004 s 223(2).

5 Ibid s 223(3). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12), and see NOTE 3.

6 I.e. the Pensions Act 1995 s 10: see PARA 611.

7 Pensions Act 2004 s 223(4).

### 4. Actuarial valuations and reports

The trustees or managers must obtain actuarial valuations<sup>1</sup> (1) at intervals of not more than one year or, if they obtain actuarial reports<sup>2</sup> for the intervening years, at intervals of not more than three years, and (2) in such circumstances and on such other occasions as may be prescribed<sup>3</sup>. The intervals referred to in head (1) above are between effective dates of the

valuations, and (a) the effective date of the first actuarial valuation<sup>4</sup> must be not more than one year after the establishment of the scheme, and (b) the effective date of any actuarial report<sup>5</sup> must be not more than one year after the effective date of the last actuarial valuation, or, if more recent, the last actuarial report<sup>6</sup>. The trustees or managers must ensure that a valuation or report obtained by them is received by them within the prescribed period after its effective date<sup>7</sup>. Nothing in these provisions affects any power or duty of the trustees or managers to obtain actuarial valuations or reports at more frequent intervals or in other circumstances or on other occasions<sup>8</sup>. An actuarial valuation or report (whether obtained under these provisions or in pursuance of any other power or duty) must be prepared in such a manner, give such information, contain such statements and satisfy such other requirements as may be prescribed<sup>9</sup>. The trustees or managers must secure that any actuarial valuation or report obtained by them (whether obtained under these provisions or in pursuance of any other power or duty) is made available to the employer<sup>10</sup> within seven days of their receiving it<sup>11</sup>.

1 In the Pensions Act 2004 Pt 3 (ss 221-233) an 'actuarial valuation' means a written report, prepared and signed by the actuary, valuing the scheme's assets and calculating its technical provisions: s 224(2)(a).

2 In ibid Pt 3 an 'actuarial report' means a written report, prepared and signed by the actuary, on developments affecting the scheme's technical provisions since the last actuarial valuation was prepared: s 224(2)(c).

3 Ibid s 224(1). See NOTE 11.

4 In ibid Pt 3 the effective date of an actuarial valuation is the date by reference to which the assets are valued and the technical provisions calculated: s 224(2)(b).

5 In ibid Pt 3 the effective date of an actuarial report is the date by reference to which the information in the report is stated: s 224(2)(d).

6 Ibid s 224(3).

7 Ibid s 224(4). See NOTE 11.

8 Ibid s 224(5).

9 Ibid s 224(6).

10 For the meaning of 'employer' see PARA 636A.15.

11 Pensions Act 2004 s 224(7). Where s 224(1), (4) or (7) is not complied with, the Pensions Act 1995 s 10 (see PARA 611) applies to a trustee or manager who has failed to take all reasonable steps to secure compliance: Pensions Act 2004 s 224(8). As to the prescribed actuarial valuations and reports, see the Occupational Pension Schemes (Scheme Funding) Regulations 2005, SI 2005/3377, reg 7, Sch 1 (reg 7 modified by SI 2005/3380).

## 5. Certification of technical provisions

When an actuarial valuation is carried out, the calculation of the technical provisions must be certified by the actuary<sup>1</sup>. The certificate must state that in the opinion of the actuary the calculation is made in accordance with regulations<sup>2</sup>. If the actuary cannot give the certificate required by the above provision<sup>3</sup> he must report the matter in writing to the Regulator<sup>4</sup> within a reasonable period after the end of the period within which the valuation must be received by the trustees or managers<sup>5</sup>.

1 Pensions Act 2004 s 225(1).

2 In accordance with regulations under ibid s 222 (see PARA 824A.2): s 225(2). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

3 Ie required by Pensions Act 2004 s 225(2).

4 As to the Regulator see PARA 636A.2.

5 Pensions Act 2004 s 225(3). The Pensions Act 1995 s 10 (see PARA 611) applies to the actuary if he fails without reasonable excuse to comply with the Pensions Act 2004 s 225(3): s 225(3).

## 6. Recovery plan

If having obtained an actuarial valuation it appears to the trustees or managers of a scheme that the statutory funding objective was not met on the effective date of the valuation, they must, within the prescribed time (1) if there is no existing recovery plan in force, prepare a recovery plan; (2) if there is an existing recovery plan in force, review and if necessary revise it<sup>1</sup>. A recovery plan must set out (a) the steps to be taken to meet the statutory funding objective, and (b) the period within which that is to be achieved<sup>2</sup>. A recovery plan must comply with any prescribed requirements and must be appropriate having regard to the nature and circumstances of the scheme<sup>3</sup>. In preparing or revising a recovery plan the trustees or managers must take account of prescribed matters<sup>4</sup>. Provision may be made by regulations as to other circumstances in which a recovery plan may or must be reviewed and if necessary revised<sup>5</sup>. The trustees or managers must, except in prescribed circumstances, send a copy of any recovery plan to the Regulator within a reasonable period after it is prepared or, as the case may be, revised<sup>6</sup>. Where any requirement of the above provisions is not complied with, the civil penalty provisions in the Pensions Act 1995<sup>7</sup> apply to a trustee or manager who has failed to take all reasonable steps to secure compliance<sup>8</sup>.

1 Pensions Act 2004 s 226(1). As to recovery plans, see the Occupational Pension Schemes (Scheme Funding) Regulations 2005, SI 2005/3377, reg 8 (amended by SI 2006/1733).

2 Pensions Act 2004 s 226(2).

3 Ibid s 226(3).

4 Ibid s 226(4).

5 Ibid s 226(5). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

6 Pensions Act 2004 s 226(6). The copy of any recovery plan sent to the Regulator must be accompanied by the prescribed information: s 226(6).

7 Ie the Pensions Act 1995 s 10: see PARA 611.

8 Pensions Act 2004 s 226(7).

## 7. Schedule of contributions

The trustees or managers must prepare, and from time to time review and if necessary revise, a schedule of contributions<sup>1</sup>. Provision may be made by regulations (1) as to the period within which, after the establishment of a scheme, a schedule of contributions must be prepared, (2) requiring the schedule of contributions to be reviewed, and if necessary revised, at such intervals, and on such occasions, as may be prescribed, and (3) as to the period for which a schedule of contributions is to be in force<sup>2</sup>. The schedule of contributions must satisfy prescribed requirements<sup>3</sup>. The schedule of contributions must be certified by the actuary and (a) the duty to prepare or revise the schedule is not fulfilled, and (b) the schedule will not come into force, until it has been so certified<sup>4</sup>. The certificate must state that, in the opinion of the actuary (i) the schedule of contributions is consistent with the statement of funding principles, and (ii) the rates shown in the schedule are such that (A) where the statutory funding objective was not met on the effective date of the last actuarial valuation, the statutory funding objective can be expected to be met by the end of the period specified in the recovery plan, or (B) where

the statutory funding objective was met on the effective date of the last actuarial valuation, the statutory funding objective can be expected to continue to be met for the period for which the schedule is to be in force<sup>5</sup>. Where the statutory funding objective was not met on the effective date of the last actuarial valuation, the trustees or managers must send a copy of the schedule of contributions to the Regulator within a reasonable period after it is prepared or, as the case may be, revised<sup>6</sup>. Where any requirement of the preceding provisions is not complied with, the civil penalty provisions in the Pensions Act 1995<sup>7</sup> apply to a trustee or manager who has failed to take all reasonable steps to secure compliance<sup>8</sup>.

1 Pensions Act 2004 s 227(1). A 'schedule of contributions' means a statement showing (1) the rates of contributions payable towards the scheme by or on behalf of the employer and the active members of the scheme, and (2) the dates on or before which such contributions are to be paid: s 227(2). For the meaning of 'active member' see PARA 659C.20. For the meaning of 'member' see PARA 636A.3.

2 Ibid s 227(3). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). As to schedules of contributions, and the requirement to keep records of contributions, see the Occupational Pension Schemes (Scheme Funding) Regulations 2005, SI 2005/3377, regs 9-11, Sch 1 (regs 9, 10 modified by SI 2005/3380).

3 Pensions Act 2004 s 227(4).

4 Ibid s 227(5).

5 Ibid s 227(6). If the actuary is unable to give the certificate required by s 227(6), he must report the matter in writing to the Regulator within a reasonable period after the end of the period within which the schedule is required to be prepared or, as the case may be, revised: s 227(9). The Pensions Act 1995 s 10 (see PARA 611) applies to the actuary if he fails without reasonable excuse to comply with s 227(9): s 227(9). The Treasury may by order vary the rate of charge; and such an order may make provision for there to be different rates in different circumstances: s 227(5A), (5B) added by Finance Act 2009 Sch 2 para 15). As to the making of such orders see PARA 873B.1.

6 Pensions Act 1995 s 227(7).

7 Ie the Pensions Act 1995 s 10: see PARA 611.

8 Pensions Act 2004 s 227(8).

The provisions of s 227(1), (3), (5)-(9) do not apply in relation to a schedule of contributions imposed by the Regulator under s 231 (see PARA 824A.11) or, as the case may be, where such a schedule of contributions is in force: s 227(10).

## 8. Failure to make payments

The following provisions<sup>1</sup> apply where an amount payable in accordance with the schedule of contributions by or on behalf of the employer or an active member of a scheme is not paid on or before the due date<sup>2</sup>. If the trustees or managers have reasonable cause to believe that the failure is likely to be of material significance in the exercise by the Regulator of any of its functions, they must, except in prescribed circumstances, give notice of the failure to the Regulator and to the members within a reasonable period<sup>3</sup>. The amount unpaid (whether payable by the employer or not), if not a debt due from the employer to the trustees or managers apart from this provision<sup>4</sup>, must be treated as such a debt<sup>5</sup>.

The above provisions apply in relation to a schedule of contributions imposed by the Regulator<sup>6</sup> as in relation to one agreed between the trustees or managers and the employer<sup>7</sup>.

1 Ie the Pensions Act 2004 s 228.

2 Ibid s 228(1).

3 Ibid s 228(2). See further NOTE 5. As to the circumstances in which the trustees or managers are not required to notify the Regulator, see the Occupational Pension Schemes (Scheme Funding) Regulations 2005, SI 2005/3377, reg 12.

4 Ie apart from the Pensions Act 2004 s 228(3).

5 Ibid s 228(3).

The Pensions Act 1995 s 10 (see PARA 611) applies (1) where s 228(2) is not complied with, to a trustee or manager who has failed to take all reasonable steps to secure compliance with s 228(2); (2) to the employer if he fails without reasonable excuse to make a payment required of him (a) in accordance with the schedule of contributions, or (b) by virtue of s 228(3): s 228(4).

6 Ie under ibid s 231: see PARA 824A.11.

7 Ibid s 228(5).

## 9. Matters requiring agreement of the employer

The trustees or managers must obtain the agreement of the employer to (1) any decision as to the methods and assumptions to be used in calculating the scheme's technical provisions<sup>1</sup>; (2) any matter to be included in the statement of funding principles<sup>2</sup>; (3) any provisions of a recovery plan<sup>3</sup>; (4) any matter to be included in the schedule of contributions<sup>4</sup>. If it appears to the trustees or managers that it is not otherwise possible to obtain the employer's agreement within the prescribed time to any such matter, they may (if the employer agrees) by resolution modify the scheme as regards the future accrual of benefits<sup>5</sup>. No modification<sup>6</sup> may be made<sup>7</sup> that on taking effect would or might adversely affect any subsisting right<sup>8</sup> of (a) any member of the scheme, or (b) any survivor<sup>9</sup> of a member of the scheme<sup>10</sup>. Any such modification must be (i) recorded in writing by the trustees or managers, and (ii) notified to the active members within one month of the modification taking effect<sup>11</sup>.

1 See Pensions Act 2004 s 222(4); and PARA 824A.2.

2 See ibid s 223; and PARA 824A.3.

3 See ibid s 226; and PARA 824A.6.

4 See ibid s 227; and PARA 824A.7: s 229(1). If the trustees or managers are unable to reach agreement with the employer within the prescribed time on any such matter as is mentioned in s 229(1), they must report the failure in writing to the Regulator within a reasonable period: s 229(5). See further NOTE 11. The prescribed time is within 15 months after the effective date of the actuarial valuation: Occupational Pension Schemes (Scheme Funding) Regulations 2005, SI 2005/3377, reg 13 (modified by SI 2005/3380).

5 Pensions Act 2004 s 229(2).

6 For the meaning of 'modifications' see PARA 636A.16.

7 Ie under the Pensions Act 2004 s 229(2).

8 For this purpose 'subsisting right' has the meaning given by the Pensions Act 1995 s 67A (see PARA 833A.1): Pensions Act 2004 s 229(3).

9 For this purpose 'survivor' has the meaning given by the Pensions Act 1995 s 67A (see PARA 833A.1): Pensions Act 2004 s 229(3).

10 Ibid s 229(3).

11 Ibid s 229(4). As to the service of notifications and electronic working under the Pensions Act 2004 see ss 303-305.

Where s 229(1), (4) or (5) is not complied with, the Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to a trustee or manager who has failed to take all reasonable steps to secure compliance: Pensions Act 2004 s 229(6).

## 10. Matters on which advice of actuary must be obtained

The trustees or managers must obtain the advice of the actuary before doing any of the following (1) making any decision as to the methods and assumptions to be used in calculating the scheme's technical provisions<sup>1</sup>; (2) preparing or revising the statement of funding principles<sup>2</sup>; (3) preparing or revising a recovery plan<sup>3</sup>; (4) preparing or revising the schedule of contributions<sup>4</sup>; (5) modifying the scheme as regards the future accrual of benefits<sup>5</sup>. Regulations may require the actuary to comply with any prescribed requirements when advising the trustees or managers of a scheme on any such matter<sup>6</sup>. The regulations may require the actuary to have regard to prescribed guidance<sup>7</sup>.

1 See Pensions Act 2004 s 222(4); and PARA 824A.2.

2 See *ibid* s 223; and PARA 824A.3.

3 See *ibid* s 226; and PARA 824A.6.

4 See *ibid* s 227; and PARA 824A.7.

5 *Ibid* s 230(1), referring to the accrual of benefits under s 229(2) (see 824A.9). Where s 230(1) is not complied with, the Pensions Act 1995 s 10 (see PARA 611) applies to a trustee or manager who has failed to take all reasonable steps to secure compliance: Pensions Act 2004 s 230(4).

6 *Ibid* s 230(2). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

7 Pensions Act 2004 s 230(3). 'Prescribed guidance' means guidance that is prepared and from time to time revised by a prescribed body: s 230(3) (amended by Pensions Act 2007 Sch 5 para 9, Sch 7 Pt 8). The actuary must have regard to the guidance note *Occupational Pension Schemes--scheme funding matters on which advice of actuary must be obtained* (GN49) (with such revisions as have been approved by the Secretary of State): Occupational Pension Schemes (Scheme Funding) Regulations 2005, SI 2005/3377, reg 15 (amended by SI 2007/60, SI 2008/2301).

## 11. Powers of the Regulator

The powers conferred by the following provisions<sup>1</sup> are exercisable where it appears to the Regulator with respect to a scheme (as a result of a report made to it or otherwise) (1) that the trustees or managers, when determining the methods and assumptions to be used in calculating the scheme's technical provisions, have failed to comply with a requirement<sup>2</sup>; (2) that the trustees or managers have failed to comply with requirements<sup>3</sup> with respect to the preparation or revision of a statement of funding principles; (3) that the trustees or managers have failed to obtain an actuarial valuation<sup>4</sup>; (4) that the actuary is unable, on an actuarial valuation<sup>5</sup>, to certify the calculation of the scheme's technical provisions; (5) that the trustees or managers have failed to comply with requirements<sup>6</sup> with respect to the preparation or revision of a recovery plan; (6) that the trustees or managers have failed to comply with requirements<sup>7</sup> with respect to the preparation or revision of a schedule of contributions; (7) that the actuary is unable to certify a schedule of contributions<sup>8</sup>; (8) that the employer has failed to make payments in accordance with the schedule of contributions, or that are required of him<sup>9</sup>, and the failure is of material significance; (9) that the trustees or managers have been unable to reach agreement with the employer within the prescribed time as to a matter in relation to which such agreement is required<sup>10</sup>. In any of those circumstances the Regulator may by order exercise all or any of the following powers (a) it may modify the scheme as regards the future accrual of benefits; (b) it may give directions as to (i) the manner in which the scheme's technical provisions are to be calculated, including the methods and assumptions to be used in calculating the scheme's technical provisions, or (ii) the period within which, and manner in which, any failure to meet the statutory funding objective is to be remedied; (c) it may impose a schedule of contributions specifying (A) the rates of contributions payable towards the

scheme by or on behalf of the employer and the active members of the scheme, and (B) the dates on or before which such contributions are to be paid<sup>11</sup>.

In exercising any of the powers conferred by the above provisions the Regulator must comply with any prescribed requirements<sup>12</sup>. The powers conferred by the above provisions are in addition to any other powers exercisable by the Regulator under the Pensions Act 2004 or the Pensions Act 1995<sup>13</sup>.

1    Ie the Pensions Act 2004 s 231.

2    Ie a requirement imposed under the Pensions Act 2004 s 222(4)(c): see PARA 824A.2.

3    Ie the requirements of ibid s 223: see PARA 824A.3.

4    Ie as required by ibid s 224(1): see PARA 824A.4.

5    Ie required by ibid s 224(1).

6    Ie the requirements of ibid s 226: see PARA 824A.6.

7    Ie the requirements of ibid s 227: see PARA 824A.7.

8    See ibid s 227(6).

9    Ie by virtue of ibid s 228(3): see 824A.8.

10   Ibid s 231(1) (amended by Pensions Act 2008 s 132), referring to the requirement under s 229(5) (see PARA 824A.9).

11   Ibid s 231(2). No modification may be made under head (a) in the text that on taking effect would or might adversely affect any subsisting right of (1) any member of the scheme, or (b) any survivor of a member of the scheme: s 231(3). For this purpose 'subsisting right' and 'survivor' have the meanings given by the Pensions Act 1995 s 67A (see PARA 833A.1): Pensions Act 2004 s 231(3).

12   Ibid s 231(4). See the Occupational Pension Schemes (Scheme Funding) Regulations 2005, SI 2005/3377, reg 14.

13   Pensions Act 2004 s 231(5).

## **12. Requirements for winding up procedure**

Where an occupational pension scheme in respect of which a recovery plan has been prepared<sup>1</sup> begins to wind up during the recovery period<sup>2</sup>, the trustees or managers of the scheme must as soon as reasonably practicable prepare a winding up procedure<sup>3</sup>. A winding up procedure must (1) set out the action to be taken to establish the liabilities to or in respect of the members of the scheme, in respect of pensions or other benefits, and to recover any assets of the scheme; (2) give an estimate of the amount of time it will take to establish those liabilities and to recover any such assets; (3) give an indication of which of the accrued rights or benefits (if any), to which a person is entitled under the scheme, are likely to be affected by a reduction in actuarial value; (4) specify which one or more of the ways mentioned in the Pensions Act 1995<sup>4</sup> will be used to discharge the liabilities to or in respect of the members of the scheme in respect of pensions or other benefits; (5) give an estimate of the amount of time it will take to discharge those liabilities<sup>5</sup>. A winding up procedure must be appropriate having regard to the nature and circumstances of the scheme<sup>6</sup>. A winding up procedure may be reviewed, and if necessary revised, where the trustees or managers consider that there are reasons that may justify a variation to it<sup>7</sup>. The trustees or managers must send a copy of any winding up procedure to the Regulator as soon as reasonably practicable after it has been prepared or, as the case may be, revised<sup>8</sup>.

Where any requirement of the above provisions is not complied with, the civil penalty provisions in the Pensions Act 1995<sup>9</sup> apply to a trustee or manager who has failed to take all reasonable steps to secure compliance<sup>10</sup>.

1    Ie under the Pensions Act 2004 s 226: see PARA 824A.6.

2    In ibid s 231A 'recovery period', in relation to an occupational pension scheme, means the period specified in the scheme's recovery plan in accordance with s 226(2)(b): s 231A(8) (added by SI 2006/1733).

3    2004 Act s 231A(1).

4    Ie the ways mentioned in the Pensions Act 1995 s 74(3)(a)-(e).

5    Pensions Act 2004 s 231A(2). The requirement imposed by head (3) in the text applies only to the extent that the trustees or managers have sufficient information to give such an indication: s 231A(3).

6    Ibid s 231A(4).

7    Ibid s 231A(5).

8    Ibid s 231A(6).

<sup>9</sup>    Ie the Pensions Act 1995 s 10: see PARA 611.

10   Pensions Act 2004 s 231A(7).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **811-824 Funding**

Pensions Act 1995 ss 56-61 repealed: Pensions Act 2004 Sch 13 Pt 1. SI 1996/1536 revoked, subject to savings: SI 2005/3377.

The Pensions Act 2004 Pt 3 (ss 221-233) sets out the statutory framework for the scheme funding requirements which replace the minimum funding requirement; see PARA 824A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(7) PROFESSIONAL ADVISERS/825. In general.

## **(7) PROFESSIONAL ADVISERS**

### **825. In general.**

An auditor and actuary must be appointed for every occupational pension scheme<sup>1</sup>; and where the assets of such a scheme consist of or include investments<sup>2</sup> there must be an individual or a firm<sup>3</sup> appointed by or on behalf of the trustees or managers<sup>4</sup> as fund manager<sup>5</sup>. If in the case of an occupational pension scheme any person:

1981 (1) is appointed otherwise than by the trustees or managers as legal adviser or to exercise any prescribed functions<sup>6</sup> in relation to the scheme; or

1982 (2) is appointed otherwise than by or on behalf of the trustees or managers as a fund manager,

the provisions relating to prohibition orders<sup>7</sup> and civil penalties<sup>8</sup> apply to any trustee, and the provisions relating to civil penalties apply to any manager, who in exercising any of his functions places reliance on the skill or judgment of that person<sup>9</sup>.

These provisions do not apply to an occupational pension scheme falling within a prescribed class or description<sup>10</sup>; and regulations<sup>11</sup> may make exceptions to them and specify the qualifications and experience, or approval, required for appointment as a professional adviser<sup>12</sup>. Regulations may also make provision as to the manner in which professional advisers may be appointed and removed<sup>13</sup>, and the terms on which professional advisers may be appointed (including the manner in which the professional advisers may resign)<sup>14</sup>.

Subject to regulations so made, professional advisers must be appointed on such terms as the trustees or managers may determine<sup>15</sup>. If in the case of an occupational pension scheme an auditor<sup>16</sup>, actuary<sup>17</sup> or fund manager<sup>18</sup> is required under these provisions to be appointed but the appointment has not been made, or not been made in accordance with any requirements imposed under them, the provisions relating to prohibition orders and civil penalties apply to any trustee, and the provisions relating to civil penalties apply to any manager, who has failed to take all such steps as are reasonable to secure compliance<sup>19</sup>.

Regulations may, in the case of occupational pension schemes:

1983 (a) impose duties on any person who is or has been the employer<sup>20</sup>, and on any person who acts as auditor or actuary to such a person, to disclose information to the trustees or managers and to the scheme's professional advisers<sup>21</sup>;

1984 (b) impose duties on the trustees or managers to disclose information to, and make documents available to, the scheme's professional advisers<sup>22</sup>.

If in the case of an occupational pension scheme a person fails to comply with any duty imposed under head (a) above, the provisions relating to civil penalties apply to him<sup>23</sup>. If in the case of an occupational pension scheme any duty imposed under head (b) above is not complied with, the provisions relating to prohibition orders and civil penalties apply to any trustee, and the provisions relating to civil penalties apply to any manager, who has failed to take all such steps as are reasonable to secure compliance<sup>24</sup>.

1 See the Pensions Act 1995 s 47(1)(a), (b); and PARA 787 note 2 ante. For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by s 176). See also PARA 598 note 7 ante.

2 le within the meaning of the Financial Services Act 1986: see generally FINANCIAL SERVICES AND INSTITUTIONS.

3 For the meaning of 'firm' see PARA 787 note 5 ante.

4 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

5 Pensions Act 1995 s 47(2). For the meaning of 'fund manager' see PARA 803 note 7 ante. Section 47(2) does not apply to (1) relevant schemes of a kind described in the Financial Services Act 1986 (Occupational Pension Schemes) (No 2) Order 1988, SI 1988/724, art 3(2); (2) wholly insured schemes; and (3) schemes mentioned in the Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 3(1)(a)-(g), (i), (n) (see PARA 826 heads (1)-(7), (10), (15) post): reg 3(3). 'Wholly insured scheme' means an occupational pension scheme under which all the benefits provided are secured by a policy or policies of insurance or an annuity contract or contracts: reg 1(2).

6 For the meaning of 'prescribed' see PARA 555 note 1 ante. For these purposes, the prescribed functions are: (1) the examination of, and the expression of an opinion on, the financial statements and accounts of the scheme and any other matter relating to the audit of the scheme; (2) the provision of advice on financial questions relating to the funding of, and assets of, the scheme and on questions in respect of probabilities relating to mortality and other contingencies, and any other matter relating to the actuarial affairs of the scheme; (3) the custody of cash, securities and any other documents of title to scheme assets: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 2.

7 le the provisions of the Pensions Act 1995 s 3: see PARA 604 ante.

8 le the provisions of *ibid* s 10: see PARA 611 ante.

9 *Ibid* s 47(3) does not apply to schemes mentioned in the Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 3(1)(a)-(g), (i), (n) (see PARA 826 heads (1)-(7), (10), (15) post): reg 3(4).

10 Pensions Act 1995 s 47(3).

11 For the meaning of 'regulations' see PARA 600 note 2 ante.

12 Pensions Act 1995 s 47(5). In Pt I (ss 1-125) (see PARA 598 et seq ante, 845 et seq post), in relation to an occupational pension scheme (1) the auditor, actuary and legal adviser appointed by the trustees or managers; (2) any fund manager appointed by or on behalf of the trustees or managers; and (3) any person appointed by the trustees or managers to exercise any of the functions referred to in head (1) in the text, are referred to as 'professional advisers': see s 47(4).

13 *Ibid* s 47(6)(a).

14 *Ibid* s 47(6)(b).

15 *Ibid* s 47(7).

16 The qualifications and experience or approval required for appointment as the auditor are those specified in the Companies Act 1989 s 25, or approval by the Secretary of State: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 4(1)(a). A person must not be appointed as the auditor where: (1) he is a member of the scheme; (2) he is employed under a contract of service by the trustees or managers of the scheme; (3) he is an employer in relation to the scheme; or (4) he is, by virtue of the Companies Act 1989 s 27, ineligible to audit the accounts of a company which is an employer in relation to the scheme: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 4(2).

17 For these purposes, the qualifications and experience or approval required for appointment as the actuary are Fellowship of the Institute of Actuaries or of the Faculty of Actuaries, or approval by the Secretary of State: *ibid* reg 4(1)(b).

18 For the meaning of 'fund manager' see PARA 803 note 7 ante.

19 Pensions Act 1995 s 47(8).

20 For the meaning of 'employer' see PARA 598 note 4 ante.

21 Pensions Act 1995 s 47(9)(a).

22 Ibid s 47(9)(b).

23 Ibid s 47(10).

24 Ibid s 47(11).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **825 In general**

TEXT AND NOTE 5--Pensions Act 1995 s 47(2) amended: SI 2001/3649. See further 1995 Act s 47(2A) (added by SI 2001/3649).

NOTE 5--SI 1996/1715 reg 3(3) amended: SI 2001/3649. 'Wholly insured scheme' now means a trust scheme other than a stakeholder pension scheme within the meaning of the Welfare Reform and Pensions Act 1999, which has no investments other than specified insurance policies with specified insurers and for these purposes 'investments' will not include (1) cash held on deposit by the trustees or managers pending payment to the insurer or to members of the scheme; (2) cash held on deposit by the trustees or managers to meet accrued liabilities or administrative expenses; or (3) investments arising from voluntary contributions: SI 1996/1715 reg 1(2) (amended by SI 2005/2426).

NOTE 9--For further exceptions to the 1995 Act s 47(3), see PARA 825A.

TEXT AND NOTES 10, 19, 24--Ibid s 47(3), (8), (11) amended: Pensions Act 2004 Sch 12 para 53.

NOTES 12, 14, 22--See the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.

NOTE 16--SI 1996/1715 reg 4(1)(a), (2) amended to take account of the coming into force of the Companies Act 2006: SI 2008/948.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(7) PROFESSIONAL ADVISERS/825A. Exemptions from the professional advisers requirements.

### **825A. Exemptions from the professional advisers requirements.**

The professional advisers requirements<sup>1</sup> do not apply with respect to any reliance placed on the skill or judgment of the appointed person<sup>2</sup> in the exercise of any of the functions given to the appointed person, where the trustees or managers of a scheme appoint a custodian<sup>3</sup> on terms:

(1) which allow the custodian to use the services of an appointed person; and

(2) which (a) in the case of a custodian appointed before the relevant date<sup>4</sup>, set out in writing, or (b) in the case of a custodian appointed on or after the relevant date, specify that, before taking up the appointment the custodian must disclose in writing to the trustees or managers, whether, and if so, the extent to which the custodian accepts liability in respect of functions exercised or exercisable on his behalf by an appointed person; and

(3) which require that, immediately upon any subsequent change in the extent of the liability accepted by the custodian in respect of functions exercised or exercisable on his behalf by an appointed person, the custodian must disclose in writing to the trustees or managers whether and, if so, the extent to which his liability has changed<sup>5</sup>.

The professional advisers requirements may not be disapplied in a case where head (2)(b) applies, or where a change of the kind in head (3) applies, unless the custodian has made the disclosure required by the relevant head<sup>6</sup>.

1    I.e. the provisions of the Pensions Act 1995 s 47(3): see PARA 825.

2    'Appointed person' means any person appointed by a custodian, or by any other person empowered by the terms of his own appointment to appoint another person, to exercise any of the functions given to the custodian: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 3(7) (reg 3 added by SI 1998/1494). For the meaning of 'custodian' see NOTE 3.

3    'Custodian' means a person appointed by the trustees or managers to exercise any of the functions set out in SI 1996/1715 reg 2 (see PARA 825 NOTE 2): reg 3(7).

4    The relevant date is 22 July 1998: *ibid* reg 3(7).

5    *Ibid* reg 3(5).

6    *Ibid* reg 3(6).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004

Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and  
PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a  
trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(7) PROFESSIONAL ADVISERS/826. Exemption from requirement to appoint an auditor.

## **826. Exemption from requirement to appoint an auditor.**

The requirement to appoint an auditor<sup>1</sup> does not apply to:

- 1985 (1) any occupational pension scheme in respect of which any Minister of the Crown has given a guarantee or made any other arrangements for the purpose of securing that the assets of the scheme are sufficient to meet its liabilities;
- 1986 (2) the scheme established by the Salvation Army Act 1963;
- 1987 (3) occupational pension schemes which provide relevant benefits<sup>2</sup> but are neither approved schemes<sup>3</sup> nor relevant statutory schemes<sup>4</sup>;
- 1988 (4) public service pension schemes<sup>5</sup> under the provisions of which there is no requirement for assets related to the intended rate or amount of benefit under the scheme to be set aside in advance (disregarding requirements relating to additional voluntary contributions) or which are made under the statutory provisions relating to the superannuation of persons employed in local government and related service<sup>6</sup> or to pensions for members of the House of Commons<sup>7</sup>;
- 1989 (5) unfunded occupational pension schemes<sup>8</sup>;
- 1990 (6) occupational pension schemes with less than two members;
- 1991 (7) occupational schemes in which the only benefits provided are death benefits and under the provisions of which no member has accrued rights;
- 1992 (8) money purchase schemes<sup>9</sup> which are small self-administered schemes<sup>10</sup> in which all members of the scheme are trustees and all decisions are made only by the trustees who are members of the scheme by unanimous agreement<sup>11</sup>;
- 1993 (9) relevant ear-marked schemes<sup>12</sup>;
- 1994 (10) occupational pension schemes with a specified type of superannuation fund<sup>13</sup>;
- 1995 (11) the Devonport Royal Dockyard Pension Scheme;
- 1996 (12) the Rosyth Royal Dockyard Pension Scheme;
- 1997 (13) the Rosyth Royal Dockyard Superannuation Scheme for Senior Executives;
- 1998 (14) the Atomic Weapons Establishment Scheme; and
- 1999 (15) the BR Shared Cost Section of the Railways Pension Scheme<sup>14</sup>.

<sup>1</sup> ie the Pensions Act 1995 s 47(1)(a): see PARA 787 note 2 ante.

<sup>2</sup> For the meaning of 'relevant benefits' see the Income and Corporation Taxes Act 1988 s 612(1); and PARA 741 note 6 ante (definition applied by the Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 1(2)).

<sup>3</sup> 'Approved scheme' means a scheme which is approved or was formerly approved under the Income and Corporation Taxes Act 1988 s 590 or s 591 (as amended) (see PARAS 748-751 ante) or in respect of which an application for such approval has been duly made which has not been determined: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 1(2).

<sup>4</sup> For the meaning of 'relevant statutory scheme' see the Income and Corporation Taxes Act 1988 s 611A (as added); and PARA 756 note 2 ante (definition applied by the Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 1(2)).

<sup>5</sup> For the meaning of 'public service pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 874 post (definition applied by the Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 1(2)).

6 le under the Superannuation Act 1972 s 7: see PARA 875 post.

7 le under the Parliamentary and other Pensions Act 1987 s 2 (as amended): see PARLIAMENT vol 78 (2010) PARA 926.

8 'Unfunded occupational pension scheme' means an occupational pension scheme under which there is no requirement to set aside in advance resources related to the intended rate or amount of benefits: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 1(2).

9 'Money purchase scheme' means a pension scheme under which all the benefits that may be provided other than death benefits are money purchase benefits; and 'money purchase benefits' has the same meaning as in the Pension Schemes Act 1993 s 181(1) (see PARA 811 note 2 ante): Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 1(2) (definitions substituted by SI 1997/786).

10 'Small self-administered scheme' has the same meaning as in the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Small Self-administered Schemes) Regulations 1991, SI 1991/1614, reg 2(1) (see PARA 751 note 17 ante): Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 1(2).

11 For the purpose of head (8) in the text, the participation of a pensioner trustee in the making of a decision may be disregarded: *ibid* reg 3(h)(ii). For the meaning of 'pensioner trustee' [sic] see PARA 751 note 24 ante (definition applied by reg 1(2)).

12 'Relevant ear-marked scheme' means an occupational pension scheme (1) which is a money purchase scheme; (2) under which all the benefits are secured by one or more contracts of insurance or annuity contracts specifically allocated to the provision of benefits to or in respect of individual members; (3) all the members of which are trustees; and (4) under the provisions of which decisions to be made by the trustees must be unanimous or unanimous if any trustees who are not members are disregarded: *ibid* reg 1(2) (definition added by SI 1997/786).

13 le such a fund as is mentioned in the Income and Corporation Taxes Act 1988 s 615(6) (certain overseas pensions).

14 Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 3(1) (amended by SI 1997/786). The scheme referred to in head (15) in the text is that made under the Railways Act 1993 s 134, Sch 11: see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES vol 39(1A) (Reissue) PARA 6 et seq.

## UPDATE

### 741-873 Occupational Pension Schemes

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The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 826 Exemption from requirement to appoint an auditor

TEXT AND NOTES--Now head (1) a scheme which is provided for, or by, or under and enactment, and guaranteed by a minister of the Crown or other public authority: 1996/1715 reg 3(1)(a) (substituted by SI 2005/2426). Heads (2), (4), (7) revoked: SI

2005/2426. Now head (3) an occupational pension scheme which provides relevant benefits and which on or after 6 April 2006 is not a registered scheme: SI 1996/1715 reg 3(1)(c) (substituted by SI 2005/2426). Heads (8) and (9) now apply where there are fewer than 12 members: SI 1996/1715 reg 3(1)(h), (hh) (amended by SI 2005/2426). Heads (12) and (13) revoked: SI 2005/2426. Now head (14) the AWE Pension Scheme established by a deed made on 29 March 1993: SI 1996/1715 reg 3(1)(m) (substituted by SI 2005/2426). Head (15) revoked: SI 2005/2426.

Also, head (16) the Babcock Naval Services Pension Scheme established by a deed made on 29 August 2002: SI 1996/1715 reg 3(1)(o) (substituted by SI 2005/2426).

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## **827. Exemption from requirement to appoint an actuary.**

The requirement to appoint an actuary<sup>1</sup> does not apply to:

- 2000 (1) money purchase schemes<sup>2</sup>;
- 2001 (2) approved schemes<sup>3</sup>:
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  - 245. (a) which have been categorised by the Commissioners of Inland Revenue for the purpose of their approval as centralised schemes for non-associated employers;
  - 246. (b) which are not contracted-out; and
  - 247. (c) under the provisions of which the only benefits which may be provided on or after retirement (other than money purchase benefits derived from the payment of additional contributions by any person) are lump sum benefits (not including benefits paid by way of commuted retirement pension) which are not calculated by reference to any member's salary;
- 182
  - 2002 (3) specified schemes<sup>4</sup> to which the requirement to appoint an auditor does not apply<sup>5</sup>.

1 le the Pensions Act 1995 s 47(1)(b): see PARA 787 note 2 ante.

2 For the meaning of 'money purchase scheme' see PARA 826 note 9 ante.

3 'Approved scheme' means a scheme which is approved or was formerly approved under the Income and Corporation Taxes Act 1988 s 590 or s 591 (as amended) (see PARA 747 et seq ante) or in respect of which an application for such approval has been duly made but has not been determined: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 2(1).

4 le schemes mentioned in ibid reg 3(1)(a)-(g), (i), (n): see PARA 826 heads (1)-(7), (10), (15) ante.

5 Ibid reg 3(2).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

**827 Exemption from requirement to appoint an actuary**

NOTE 5--SI 1996/1715 reg 3(2) amended: SI 2006/778.

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## **828. Manner and terms of appointment and removal of professional advisers.**

An appointment of a professional adviser<sup>1</sup> must be made in writing ('the notice of appointment') and must specify the date the appointment is due to take effect, to whom the professional adviser is to report and from whom the professional adviser is to take instructions<sup>2</sup>. A person appointed as a professional adviser must acknowledge in writing receipt of the notice of appointment within one month of receipt and must confirm in writing:

- 2003 (1) in the case of a fund manager<sup>3</sup>, or a person carrying out functions in relation to the custody of cash, securities and other documents of title to scheme assets<sup>4</sup>, who is a member of a self-regulating organisation<sup>5</sup> which imposes requirements in relation to conflicts of interest or who holds a certificate issued<sup>6</sup> by a recognised professional body which imposes such requirements, that he will notify the trustees or managers<sup>7</sup> of any conflict of interest to which he is or may be subject in relation to the scheme in accordance with those requirements; and
- 2004 (2) in the case of any other professional adviser, that he will notify the trustees or managers of any conflict of interest to which he is subject immediately he becomes aware of its existence<sup>8</sup>.

The resignation of a professional adviser must be made by serving on the trustees or managers a notice of resignation in writing<sup>9</sup> which must, in the case of the auditor or actuary, contain either a statement by the auditor or actuary specifying any circumstances connected with the resignation which, in his opinion, significantly affect the interests of the members or prospective members of, or beneficiaries under, the scheme, or a declaration by the auditor or actuary that he knows of no such circumstances<sup>10</sup>. The resignation is effective from the date (if any) specified in the notice by the professional adviser as the date from which he wishes his resignation to be effective or, if no date is specified, the date on which the trustees or managers receive the notice<sup>11</sup>.

Trustees or managers wishing to remove a professional adviser must do so by serving on him a notice in writing stating the date with effect from which his appointment terminates<sup>12</sup>. Where the auditor or actuary is so removed he must, within 14 days of receipt of the removal notice, provide the trustees or managers with either a statement specifying any circumstances connected with the removal which, in his opinion, significantly affect the interests of the members or prospective members of, or beneficiaries under, the scheme, or a declaration that he knows of no such circumstances<sup>13</sup>.

Where the auditor or actuary is removed by the trustees or managers, or resigns, or dies, the trustees or managers must appoint a replacement auditor or actuary (as the case may be) within three months from the date of the removal, resignation or death<sup>14</sup>.

These provisions do not apply in the case of an appointment of a person as a professional adviser to a scheme which falls within a specified description<sup>15</sup> of exempt scheme<sup>16</sup>.

1 For the meaning of 'professional adviser' see PARA 825 note 12 ante.

2 Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 5(1).

3 For the meaning of 'fund manager' see PARA 803 note 7 ante.

- 4    le functions referred to in the Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 2(c): see PARA 825 note 6 head (3) ante.
- 5    le as defined in the Financial Services Act 1986 s 8.
- 6    le for the purposes of ibid Pt I Ch III (ss 7-34).
- 7    For the meaning of 'trustees or managers' see PARA 612 note 10 ante.
- 8    Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 5(2) (amended by SI 1997/819).
- 9    Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 5(3).
- 10   Ibid reg 5(4). Where a statement or declaration is made in accordance with reg 5(4) or reg 5(7) (see the text and note 13 infra), the trustees or managers must furnish the succeeding auditor or actuary and, whichever the case may be, the remaining auditor or actuary to the scheme with a copy of the statement or declaration, where it is reasonably practical to do so on or before the day he is appointed, and in any event no later than the fourteenth day after the trustees or managers receive the statement or declaration: reg 5(10).
- 11   Ibid reg 5(5).
- 12   Ibid reg 5(6).
- 13   Ibid reg 5(7). See also note 10 supra.
- 14   Ibid reg 5(8). In such a case, the Pensions Act 1995 s 47(1)(a) (where the replacement is to be an auditor) or s 47(1)(b) (where the replacement is to be an actuary) does not apply pending the appointment of the replacement: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 5(9). As to the requirements imposed by the Pensions Act 1995 s 47(1) see PARA 787 note 2 ante.
- 15   le a scheme which falls within the description referred to in the Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 3(1)(b)-(g), (i): see PARA 826 heads (2)-(7), (10) ante.
- 16   Ibid reg 5(11).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 828 Manner and terms of appointment and removal of professional advisers

TEXT AND NOTES 3-8--Head (1) substituted as a consequence of the coming into force of the Financial Services and Markets Act 2000 and Financial Services Act 1986 repealed: Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649.



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(7) PROFESSIONAL ADVISERS/829. Duty to disclose information.

### **829. Duty to disclose information.**

It is the duty of any person:

- 2005 (1) who is the employer or has been the employer in relation to an occupational pension scheme and any person who acts as auditor or actuary<sup>1</sup> to such a person, to disclose on request to the trustees or managers<sup>2</sup> such information as is reasonably required for the performance of the duties of trustees or managers or professional advisers<sup>3</sup>;
- 2006 (2) who is the employer in relation to an occupational pension scheme within one month of the occurrence, to disclose to the trustees or managers the occurrence of any event relating to the employer which there is reasonable cause to believe will be of material significance in the exercise by the trustees or managers or professional advisers of any of their functions<sup>4</sup>.

It is the duty of the trustees or managers of an occupational pension scheme:

- 2007 (a) to disclose to the professional advisers such information as may reasonably be required for the performance of their duties; and
- 2008 (b) to make available to the professional advisers such of the scheme's books, accounts and records<sup>5</sup> as may reasonably be required for the performance of their duties<sup>6</sup>.

These provisions do not apply in relation to an occupational pension scheme which falls within a specified description<sup>7</sup> of exempt scheme<sup>8</sup>.

1 As to the requirement to appoint an auditor and an actuary see PARA 787 note 2 ante.

2 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

3 In a case where the employer makes provision for the administration of the scheme, the information referred to in head (1) in the text includes information in respect of who administers the scheme and the terms on which administrative services are provided: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 6(2).

4 Ibid reg 6(1).

5 Ie including any books and records which the trustees are required to keep under the Pensions Act 1995 s 49(2) (receipts, payments and records): see PARA 798 ante.

6 Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 6(3).

7 Ie which falls within the description referred to in ibid reg 3(1)(b)-(g), (i): see PARA 826 heads (2)-(7), (10) ante.

8 Ibid reg 6(4).

### **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(7) PROFESSIONAL ADVISERS/830. Requirement of trustees or managers to obtain audited accounts and auditor's statement.

**830. Requirement of trustees or managers to obtain audited accounts and auditor's statement.**

Where the statutory requirement<sup>1</sup> to appoint an individual or a firm as auditor applies, the trustees or managers<sup>2</sup> of an occupational pension scheme must obtain, not more than seven months after the end of each scheme year<sup>3</sup> which ends on or after 6 April 1997:

- 2009 (1) accounts, prepared in accordance with the prescribed requirements<sup>4</sup>,  
audited by the auditor;
- 2010 (2) the auditor's statement<sup>5</sup> about contributions under the scheme<sup>6</sup>.

Where the trustees or managers fail to obtain accounts audited by the auditor or the auditor's statement in accordance with these provisions, and there is no reasonable excuse for the failure to do so, they are guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>7</sup>. The requirement to obtain accounts in accordance with head (1) above does not, however, apply to the trustees or managers of an ear-marked scheme<sup>8</sup>.

1 le the requirement of the Pensions Act 1995 s 47(1)(a): see PARA 787 note 2 ante.

2 For the meaning of 'manager' see PARA 612 note 10 ante.

3 'Scheme year' means: (1) a year specified for the purposes of the scheme in any document comprising the scheme or, if none, a period of 12 months commencing on 1 April or on such date as the trustees or managers select; or (2) such other period (if any) exceeding six months but not exceeding 18 months as is selected by the trustees or managers in connection with (a) the commencement or termination of the scheme, or (b) a variation of the date on which the year or period referred to in head (1) supra is to commence: Occupational Pension Schemes (Requirement to obtain Audited Accounts and a Statement from the Auditor) Regulations 1996, SI 1996/1975, reg 1(2).

4 The prescribed requirements are that the accounts must: (1) contain the information specified in ibid reg 3, Schedule (amended by SI 1997/786); (2) show a true and fair view of the financial transactions of the scheme during the scheme year, the amount and disposition of the assets at the end of the scheme year and the liabilities of the scheme, other than the liabilities to pay pensions and benefits, after the end of the scheme year; and (3) contain a report by the auditor as to whether or not in his opinion the requirements of heads (1)-(2) supra are satisfied: Occupational Pension Schemes (Requirement to obtain Audited Accounts and a Statement from the Auditor) Regulations 1996, SI 1996/1975, regs 2(1)(a), 3.

5 The auditor's statement about contributions under the scheme must contain a statement as to whether or not in his opinion contributions have been paid in accordance with the schedule of contributions or payment schedule and, if that statement is negative or qualified, a statement of the reasons: ibid regs 2(1)(b), 4(1) (reg 4(1) renumbered by SI 1997/786). Where there is no schedule of contributions or payment schedule in relation to the whole or part of the scheme year, the auditor's statement about contributions must contain (1) a statement as to whether or not in his opinion contributions payable to the scheme during that year or that part have been paid in accordance with the scheme rules or contracts under which they were payable and, where appropriate, with the recommendation of the actuary; and (2) if the statement is negative or qualified, a statement of the reasons: Occupational Pension Schemes (Requirement to obtain Audited Accounts and a Statement from the Auditor) Regulations 1996, SI 1996/1975, reg 4(2) (added by SI 1997/786).

6 Occupational Pension Schemes (Requirement to obtain Audited Accounts and a Statement from the Auditor) Regulations 1996, SI 1996/1975, reg 2(1).

7 Ibid reg 2(3). As to the standard scale see PARA 172 note 3 ante.

8 Ibid reg 2(2). 'Ear-marked scheme' means an occupational pension scheme under which all the benefits other than death benefits are money purchase benefits and all the benefits are secured by one or more policies of insurance or annuity contracts and such policies or contracts are specifically allocated to the provision of benefits for individual members or any other person who has a right to benefits under the scheme; and 'money purchase scheme' and 'money purchase benefits' have the same meanings as in the Pension Schemes Act 1993 s 181(1) (see PARA 811 note 2 ante); Occupational Pension Schemes (Requirement to obtain Audited Accounts and a Statement from the Auditor) Regulations 1996, SI 1996/1975, reg 1(2) (definitions added and amended respectively by SI 1997/786).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **830 Requirement of trustees or managers to obtain audited accounts and auditor's statement**

TEXT AND NOTES--Where the requirements under the Pensions Act 1995 s 47(1)(a) do not apply to a scheme, the prescribed requirements (see NOTE 4) or the requirement to obtain an auditor's statement in accordance with SI 1996/1975 reg 2(1)(b) (see NOTE 5) will apply (1) to such schemes which fall without the Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 3(1)(c) or (i) (see PARA 798), which have 100 members or more; and to such schemes as fall within reg 3(1)(j), (m) or (o) (see PARA 789): SI 1996/1975 reg 2(2B) (added by SI 2005/2426).

NOTE 4--SI 1996/1975 Schedule further amended: SI 1997/3038.

TEXT AND NOTE 7--A failure to obtain accounts audited by the auditor of the scheme or a statement from the auditor about contributions to the scheme is now subject to a civil penalty not exceeding £5,000 in the case of an individual and £50,000 in any other case: SI 1996/1975 reg 2(3) (substituted by SI 2000/833).

TEXT AND NOTE 8--In the case of an ear-marked scheme, the prescribed requirements (see NOTE 4) will not apply and the trustees and managers of such a scheme must (1) on receiving a written request from a person specified by the 1995 Act s 41(4) make (a) available a copy of the most recent accounts published in relation to insurance companies, whether as part of a group of companies or otherwise, with which they hold ear-marked policies of insurance or annuity contracts in relation to that person; and (b) that information available to the person who requested it within a reasonable time of receiving the request; and (2) provide that each scheme member within 12 months of the end of each scheme year with a statement detailing the amount of contributions credited to him during that scheme year: SI 1996/1975 reg 2(2) (substituted by SI 2005/2426).

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### **831. 'Blowing the whistle'; in general.**

If the auditor<sup>1</sup> or actuary<sup>2</sup> of any occupational pension scheme<sup>3</sup> has reasonable cause to believe that:

- 2011 (1) any duty relevant to the administration of the scheme imposed by any enactment<sup>4</sup> or rule of law on the trustees or managers<sup>5</sup>, the employer<sup>6</sup>, any professional adviser<sup>7</sup> or any prescribed<sup>8</sup> person acting in connection with the scheme has not been or is not being complied with; and
- 2012 (2) the failure to comply is likely to be of material significance in the exercise by the Occupational Pensions Regulatory Authority<sup>9</sup> of any of its functions,

he must immediately give a written report of the matter to the authority<sup>10</sup>. The auditor or actuary of any occupational pension scheme must, in any prescribed circumstances, immediately give a written report of any prescribed matter to the authority<sup>11</sup>. The provisions relating to civil penalties<sup>12</sup> apply to any auditor or actuary who fails to comply with the above provisions<sup>13</sup>. If it appears to the authority that an auditor or actuary has failed to comply with the above provisions the authority may by order disqualify him for being the auditor or, as the case may be, actuary of any occupational pension scheme specified in the order<sup>14</sup>. Such an order may specify the scheme to which the failure relates, all schemes falling within any class or description of occupational pension scheme or all occupational pension schemes<sup>15</sup>.

No duty to which the auditor or actuary of any occupational pension scheme is subject may be regarded as contravened<sup>16</sup> merely because of any information or opinion contained in a written report under these provisions<sup>17</sup>. If in the case of any occupational pension scheme any professional adviser (other than the auditor or actuary), any trustee or manager or any person involved in the administration of the scheme has reasonable cause to believe as mentioned in heads (1) and (2) above he may give a report of the matter to the authority<sup>18</sup>. In the case of any such scheme, no duty to which any such adviser, trustee or manager or other person is subject may be regarded as contravened merely because of any information or opinion contained in a report under these provisions; but this provision does not apply to any information disclosed in such a report by the legal adviser of an occupational pension scheme if he would be entitled to refuse to produce a document containing the information in any proceedings in any court on the grounds that it was the subject of legal professional privilege or, in Scotland, that it contained a confidential communication made by or to an advocate or solicitor in that capacity<sup>19</sup>.

The authority may, on the application of any person disqualified under these provisions who satisfies the authority that he will in future comply with the above requirements, by order revoke the order disqualifying him; but a revocation made at any time cannot affect anything done before that time<sup>20</sup>. An auditor or actuary of an occupational pension scheme who becomes so disqualified must, while he is so disqualified, cease to be auditor or, as the case may be, actuary of any scheme specified in the order disqualifying him<sup>21</sup>. A person who, while he is so disqualified, purports to act as auditor or actuary of an occupational pension scheme specified in the order disqualifying him is guilty of an offence and liable on summary conviction to a fine not exceeding the statutory maximum<sup>22</sup> and on conviction on indictment to a fine or imprisonment, or both<sup>23</sup>. Such an offence may be charged by reference to any day or longer

period of time; and a person may be convicted of a second or subsequent offence by reference to any period of time following the preceding conviction of the offence<sup>24</sup>.

1 As to the requirement to appoint an auditor see PARA 787 note 2 ante.

2 As to the requirement to appoint an actuary see PARA 787 note 2 ante.

3 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante. Section 48(1)-(5) applies to any occupational pension scheme to which s 47 (see PARAS 787, 825 ante) applies: s 48(6).

4 For the meaning of 'enactment' see PARA 612 note 16 ante.

5 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

6 For the meaning of 'employer' see PARA 598 note 4 ante.

7 For the meaning of 'professional adviser' see PARA 825 note 12 ante.

8 For the meaning of 'prescribed' see PARA 555 note 1 ante.

9 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

10 Pensions Act 1995 s 48(1).

11 Ibid s 48(2).

12 Ie the provisions of ibid s 10: see PARA 611 ante.

13 Ibid s 48(7).

14 Ibid s 48(8).

15 Ibid s 48(9).

16 For the meaning of 'contravention' see PARA 611 note 10 ante.

17 Pensions Act 1995 s 48(3).

18 Ibid s 48(4).

19 Ibid s 48(5).

20 Ibid s 48(10).

21 Ibid s 48(11).

22 As to the statutory maximum see PARA 403 note 2 ante.

23 Pensions Act 1995 s 48(12).

24 Ibid s 48(13).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity

contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **831 'Blowing the whistle'; in general**

TEXT AND NOTES--Pensions Act 1995 s 48 repealed: Pensions Act 2004 Sch 13 Pt 1.

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## **(8) MODIFICATION AND AMENDMENT**

### **832. General application of the law of trusts.**

Apart from certain statutory modifications<sup>1</sup>, the modification or amendment of an occupational pension scheme is subject to the general law of trusts<sup>2</sup>.

<sup>1</sup> Ie under the Pensions Act 1995 ss 67-71: see PARA 833 et seq post.

<sup>2</sup> See *UEB Industries v WS Brabant* [1991] PLR 109; *Kearns v Hill* [1991] PLR 161; *Lloyd's Bank Pension Trust Corp'n Ltd v Lloyds Bank plc* [1996] PLR 263; *London Regional Transport Pension Fund Trustee Co Ltd v Hatt* [1993] PLR 227; *Thrells Ltd (in liquidation) v Lomas* [1993] 2 All ER 546, [1992] PLR 233.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(8) MODIFICATION AND AMENDMENT/833. Restriction on powers to alter schemes.

### **833. Restriction on powers to alter schemes.**

These provisions apply to any power conferred on any person by an occupational pension scheme<sup>1</sup> (other than a public service pension scheme<sup>2</sup>) to modify<sup>3</sup> the scheme<sup>4</sup>. The power cannot be exercised on any occasion in a manner which would or might affect any entitlement or accrued right<sup>5</sup> of any member<sup>6</sup> of the scheme acquired before the power is exercised unless the following requirements are satisfied<sup>7</sup>. Those requirements are that, in respect of the exercise of the power in that manner on that occasion, the trustees have satisfied themselves that the certification requirements<sup>8</sup> or the requirements for consent<sup>9</sup> are met in respect of that member, and where the power is exercised by a person other than the trustees, the trustees have approved the exercise of the power in that manner on that occasion<sup>10</sup>. Where a power to which these provisions apply may not otherwise be exercised without the consent of any person, regulations<sup>11</sup> may make provision for treating such consent as given in prescribed circumstances<sup>12</sup>.

Where any person fails to comply with certain prescribed certification or consent requirements<sup>13</sup>, the Occupational Pensions Regulatory Authority<sup>14</sup> may require that person to pay within 28 days a penalty which, in the case of an individual, may not exceed £5,000, and in any other case, may not exceed £50,000<sup>15</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

2 For the meaning of 'public service pension scheme' see PARA 874 post (definition applied by *ibid* s 124(1)).

3 For the meaning of 'modify' see PARA 664 note 10 ante (definition applied by *ibid* s 124(5)).

4 *Ibid* s 67(1).

5 For the meaning of 'accrued rights' see PARA 843 note 6 post.

6 For the meaning of 'member' generally see PARA 612 note 5 ante. In a case where a member has died, that meaning of 'member' is extended for these purposes to include the widow or widower or, in the case where there is no widow or widower, any other person who has an entitlement to a payment under the scheme in respect of the deceased member: Occupational Pension Schemes (Modification of Schemes) Regulations 1996, SI 1996/2517, reg 2.

7 Pensions Act 1995 s 67(2). Section 67(2) does not apply to the exercise of a power in a prescribed manner: s 67(5). The prescribed manner is, in the case of an occupational pension scheme which is not a trust scheme, the exercise of the power by the managers with the member's consent: Occupational Pension Schemes (Modification of Schemes) Regulations 1996, SI 1996/2517, reg 6.

8 'The certification requirements' means prescribed requirements for the purpose of securing that no power to which the Pensions Act 1995 s 67 applies is exercised in any manner which, in the opinion of an actuary, would adversely affect any member of the scheme (without his consent) in respect of his entitlement or accrued rights acquired before the power is exercised: s 67(4)(a). The prescribed requirement is that an actuary must certify to the trustees of the scheme that, in his opinion, the exercise of the power in the proposed manner to modify the scheme would not adversely affect any member of the scheme (without his consent) in respect of his entitlement or accrued rights acquired before that power is exercised: Occupational Pension Schemes (Modification of Schemes) Regulations 1996, SI 1996/2517, reg 3(1). This reference to an actuary means (1) in a case where the requirement of the Pensions Act 1995 s 47(1)(b) (appointment of professional advisers) applies (see PARA 747 note 2 ante), the individual appointed by the trustees or managers as actuary in accordance with the requirements of s 47; and (2) in any other case, a Fellow of the Institute of Actuaries, a Fellow of the Faculty of Actuaries, or a person with actuarial qualifications who is approved by the Secretary of State: Occupational

Pension Schemes (Modification of Schemes) Regulations 1996, SI 1996/2517, reg 3(2). As to the Secretary of State see PARA 1 ante.

9 'The consent requirements' means prescribed requirements for the purpose of obtaining the consent of members of a scheme to the exercise of a power to which the Pensions Act 1995 s 67 applies: s 67(4)(b). The prescribed requirement is that the consent of the member of a scheme to the proposed exercise of the power to modify is to be in writing: Occupational Pension Schemes (Modification of Schemes) Regulations 1996, SI 1996/2517, reg 4.

10 Pensions Act 1995 s 67(3).

11 For the meaning of 'regulations' see PARA 600 note 2 ante.

12 Pensions Act 1995 s 67(6). For the meaning of 'prescribed' see PARA 555 note 1 ante. Such consent may be treated as given where: (1) the trustees have sent written notification ('the first notification') to the member's last known address of the proposed exercise of the power to modify the scheme; (2) a further written notification ('the second notification') was sent by the trustees at least two months after the date the first notification was sent; and (3) no response was received from the member in respect of both the first notification and second notification before the end of a period of one month from the date the second notification was sent: Occupational Pension Schemes (Modification of Schemes) Regulations 1996, SI 1996/2517, reg 5.

13 Ie the requirements in a case where *ibid* reg 3 or reg 4 applies: see notes 8-9 *supra*.

14 As to the Occupational Pensions Regulatory Authority see PARA 598 *et seq* ante.

15 Occupational Pension Schemes (Modification of Schemes) Regulations 1996, SI 1996/2517, reg 8 (amended by SI 1997/786).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **833-835 Restriction on powers to alter schemes ... Grounds for applying modifications**

SI 1996/2517 revoked: SI 2006/759 (amended by SI 2007/60).

### **833 Restriction on powers to alter schemes**

TEXT AND NOTES--Pensions Act 1995 s 67 replaced: see Pensions Act 2004 s 262; and PARA 833A.

NOTE 8--The fact that, under a proposal, a member's entitlement or accrued rights under the scheme might be replaced by an entitlement under another scheme does not, of itself, take the proposed alteration outside the scope of the certification

requirements: *Merchant Navy Ratings Pension Fund Trustees Ltd v Chambers* [2002] ICR 359.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(8) MODIFICATION AND AMENDMENT/833A. Modification of pension rights.

### **833A. Modification of pension rights.**

The following provisions come into force on 1 November 2005 for the purpose only of conferring power to make regulations and 6 April 2006 for all other purposes: SI 2005/2447. As to prescribed requirements which must be met where an occupational pension scheme is modified using a power conferred on any person by a scheme and where the subsisting rights provisions apply, see the Occupational Pension Schemes (Modification of Schemes) Regulations 2006, SI 2006/759.

#### **1. The subsisting rights provisions**

The subsisting rights provisions<sup>1</sup> apply to any power conferred on any person by an occupational pension scheme to modify the scheme, other than a power conferred by (1) a public service pension scheme, or (2) a prescribed scheme or a scheme of a prescribed description<sup>2</sup>. Any exercise of such a power to make a regulated modification<sup>3</sup> is voidable<sup>4</sup> unless the following are satisfied in respect of the modification (a) in the case of each affected member<sup>5</sup> (i) if the modification is a protected modification<sup>6</sup>, the consent requirements<sup>7</sup>, (ii) if it is not, either the consent requirements or the actuarial equivalence requirements<sup>8</sup>, (b) the trustee approval requirement<sup>9</sup>, and (c) the reporting requirement<sup>10</sup>. The subsisting rights provisions do not apply in relation to the exercise of a power (A) for a purpose connected with debits<sup>11</sup>, or (B) in a prescribed manner<sup>12</sup>.

1 References in the Pensions Act 1995 s 67 and ss 67A-67I (see *infra* and PARAS 833A.2-833A.8) to 'the subsisting rights provisions' are to s 67 and ss 67A-67I: Pensions Act 1995 s 67(4) (substituted by Pensions Act 2004 s 262).

'Subsisting right' means (1) in relation to a member of an occupational pension scheme, at any time (a) any right which at that time has accrued to or in respect of him to future benefits under the scheme rules, or (b) any entitlement to the present payment of a pension or other benefit which he has at that time, under the scheme rules, and (2) in relation to the survivor of a member of an occupational pension scheme, at any time, any entitlement to benefits, or right to future benefits, which he has at that time under the scheme rules in respect of the member: Pensions Act 1995 s 67A(1), (6) (added by Pensions Act 2004 s 262). For this purpose, 'right' includes a pension credit right: Pensions Act 1995 s 67A(6). For the meaning of 'scheme rules' see s 67A(1), (8), and for the meaning of 'survivor' see s 67A(10). For further interpretation provisions see s 67A.

2 Pensions Act 1995 s 67(1).

3 For the meaning of 'regulated modification' see *ibid* s 67A(1), (2) (added by Pensions Act 2004 s 262).

4 In accordance with the Pensions Act 1995 s 67G (see PARA 833A.6).

5 For the meaning of 'affected member' see *ibid* s 67A(1), (5).

6 For the meaning of 'protected modification' see *ibid* s 67A(1), (3).

7 See *ibid* s 67B and PARA 833A.2.

8 See *ibid* s 67C and PARA 833A.3.

9 See *ibid* s 67E and PARA 833A.4.

10 See *ibid* s 67F and PARA 833A.5: s 67(2).

Section 67(6) applies in relation to the exercise of a power to which the subsisting rights provisions apply to make a regulated modification where a member of the scheme dies before the requirements mentioned in s 67(2), so far as they apply in his case, have been complied with in respect of the modification if (1) before he died he had given his consent to the modification in accordance with s 67B(4)(b) (see PARA 833A.2), or (2) before he died, or before the trustees of the scheme had become aware that he had died, the trustees had complied with s 67C(4)(a), (b) and (d) (see PARA 833A.3) in respect of the modification in his case: s 67(5). Any of the requirements mentioned in s 67(2), as it applies in respect of the modification (a) which is satisfied in the case of the member, or (b) which would have been satisfied in his case had he not died before it was satisfied, is to be taken to be satisfied in the case of any survivor of the member in respect of the modification: s 67(6).

11 Under the Welfare Reform and Pensions Act 1999 s 29(1) (see PARA 961A).

12 Pensions Act 1995 s 67(3).

## 2. The consent requirements

References in the subsisting rights provisions to the consent requirements, in respect of a regulated modification, are to be read in accordance with the following provisions<sup>1</sup>. The consent requirements apply in the case of an affected member (1) if the modification is a protected modification; (2) if it is not a protected modification, unless the actuarial equivalence requirements apply in his case<sup>2</sup>. The consent requirements consist of the informed consent requirement<sup>3</sup>, and the timing requirement<sup>4</sup>. The informed consent requirement is satisfied in the case of an affected member if before the modification is made (a) the trustees have (i) given him information in writing adequate to explain the nature of the modification and its effect on him, (ii) notified him in writing that he may make representations to the trustees about the modification, (iii) afforded him a reasonable opportunity to make such representations, and (iv) notified him in writing that the consent requirements apply in his case in respect of the modification, and (b) after the trustees have complied with head (i), (ii) and (iv) above, the affected member has given his consent in writing to the modification<sup>5</sup>. The timing requirement is satisfied in the case of an affected member if the modification takes effect within a reasonable period after the member has given his consent to the modification in accordance with head (b) above<sup>6</sup>.

1 In accordance with the Pensions Act 1995 s 67B: s 67B(1) (added by Pensions Act 2004 s 262).

2 Pensions Act 1995 s 67B(2).

3 See *ibid* s 67B(4).

4 See *ibid* s 67B(6): s 67B(3).

5 *Ibid* s 67B(4). If (1) the modification is not a protected modification, and (2) before the modification is made the trustees notify an affected member in writing that (a) if he gives his consent to the modification for the purposes of the consent requirements, those requirements apply in his case in respect of the modification, but (b) otherwise, the actuarial equivalence requirements apply in his case in respect of the modification, the trustees are to be taken to have complied with head (iv) in the text in respect of him: s 67B(5).

6 *Ibid* s 67B(6).

## 3. The actuarial equivalence requirements

References in the subsisting rights provisions to the actuarial equivalence requirements, in respect of a detrimental modification<sup>1</sup> which is not a protected modification, are to be read in accordance with the following provisions<sup>2</sup>. The actuarial equivalence requirements apply in the case of an affected member only if (1) the modification is not a protected modification, and (2) the trustees of the scheme determine that they are to apply in his case<sup>3</sup>. The actuarial equivalence requirements consist of (a) the information requirement<sup>4</sup>, (b) the actuarial value requirement<sup>5</sup>, and (c) the actuarial equivalence statement requirement<sup>6</sup>. The information requirement is satisfied in the case of an affected member if before the modification is made

the trustees have taken all reasonable steps to (i) give him information in writing adequate to explain the nature of the modification and its effect on him, (ii) notify him in writing that he may make representations to the trustees about the modification, (iii) afford him a reasonable opportunity to make such representations, and (iv) notify him in writing that the actuarial equivalence requirements apply in his case in respect of the modification<sup>7</sup>. The actuarial value requirement is satisfied in the case of an affected member if before the modification is made the trustees have made such arrangements, or taken such steps, as are adequate to secure that actuarial value will be maintained<sup>8</sup>. The actuarial equivalence statement requirement is satisfied in the case of an affected member if the trustees have, within a reasonable period beginning with the date on which the modification takes effect, obtained an actuarial equivalence statement relating to the affected member in respect of the modification<sup>9</sup>.

Further provision relating to the actuarial equivalence requirements is made<sup>10</sup>.

1 For the meaning of 'detrimental modification' see Pensions Act 1995 s 67A(1), (4) (added by Pensions Act 2004 s 262).

2 In accordance with the Pensions Act 1995 s 67C and 67D: s 67C(1) (added by Pensions Act 2004 s 262).

3 Pensions Act 1995 s 67C(2).

4 See *ibid* s 67C(4).

5 See *ibid* s 67C(5).

6 See *ibid* s 67C(6): s 67C(3).

7 *Ibid* s 67C(4).

8 *Ibid* s 67C(5). See further NOTE 9.

9 *Ibid* s 67C(6). For the purposes of s 67C(6) 'actuarial equivalence statement' means a statement in writing which (1) is given by (a) the actuary appointed in relation to the scheme under s 47(1)(b) (see PARA 825), or (b) a person with prescribed qualifications or experience or who is approved by the Secretary of State, and (2) certifies that actuarial value has been maintained: s 67C(7).

For the purposes of s 67C(5) and (7) as they apply in relation to an affected member, actuarial value is maintained if the actuarial value, immediately after the time at which the modification takes effect, of the affected member's subsisting rights is equal to or greater than the actuarial value of his subsisting rights immediately before that time: s 67C(8).

10 See *ibid* s 67D (amended by Pensions Act 2007 Sch 5 para 7).

#### **4. The trustee approval requirement**

The trustee approval requirement is satisfied<sup>1</sup> in relation to the exercise of a power to make a regulated modification if (1) the trustees of the scheme have determined to exercise the power to make the modification, or (2) if the power is exercised by another person, the trustees have consented to the exercise of the power to make the modification, and the making of the determination, or giving of consent, complies with the provisions below<sup>2</sup>. The trustees must not make a determination, or give their consent<sup>3</sup> unless, in the case of each affected member (a) if the modification is a protected modification, the informed consent requirement is satisfied<sup>4</sup>, or (b) if it is not a protected modification (i) the informed consent requirement is satisfied, or (ii) the information and actuarial value requirements are satisfied<sup>5</sup>, in respect of the modification<sup>6</sup>. The trustees must not make a determination, or give their consent<sup>7</sup> more than a reasonable period after the first consent given by an affected member<sup>8</sup> in respect of the modification was given<sup>9</sup>.

1 In for the purposes of the Pensions Act 1995 s 67(2)(b) (see PARA 833A.1).

2    Ie ibid s 67E(2) and (3): s 67E(1) (added by Pensions Act 2004 s 262).

3    For the purposes of the Pensions Act 1995 s 67E(1).

4    Within the meaning of ibid s 67B (see PARA 833A.2).

5    Within the meaning of ibid s 67C (see PARA 833A.3).

6    Ibid s 67E(2).

7    For the purposes of ibid s 67E(1).

8    Under ibid s 67B(4)(b).

9    Ibid s 67E(3).

## 5. The reporting requirement

The reporting requirement is satisfied<sup>1</sup> in relation to the exercise of a power to which the subsisting rights provisions apply to make a regulated modification if the trustees have<sup>2</sup> (1) notified each affected member in whose case the consent requirements apply in respect of the modification, and (2) taken all reasonable steps to notify each affected member in whose case the actuarial equivalence requirements apply in respect of the modification, that they have made a determination, or given their consent<sup>3</sup> in relation to the exercise of the power to make the modification<sup>4</sup>. The trustees must give (or, where the actuarial equivalence requirements apply, take all reasonable steps to give) the notification (a) within a reasonable period beginning with the date of the determination or giving of consent<sup>5</sup>, and (b) before the date on which the modification takes effect<sup>6</sup>.

1    Ie for the purposes of the Pensions Act 1995 s 67(2)(c) (see PARA 833A.1).

2    In accordance with ibid s 67F(2).

3    For the purposes of ibid s 67E(1) (see PARA 833A.4).

4    Ibid s 67F(1) (added by Pensions Act 2004 s 262).

5    Mentioned in the Pensions Act 1995 s 67F(1).

6    Ibid s 67F(2).

## 6. Powers of the Authority: voidable modifications

The Authority may make an order declaring that the provision below<sup>1</sup> applies in relation to the regulated modification<sup>2</sup>. Where the Authority make an order declaring that this provision applies in relation to a modification of a scheme, or the grant of any rights under the scheme, the modification or grant is void to the extent specified in the order, and in respect of the specified persons, as from the time when it would, disregarding the order, have taken effect<sup>3</sup>.

1    Ie the Pensions Act 1995 s 67G(6).

2    Ibid s 67G(2) (added by Pensions Act 2004 s 262). The Pensions Act 1995 s 67G(2) applies in relation to a regulated modification made in exercise of a power to which the subsisting rights provisions apply which is voidable by virtue of (1) s 67(2) (see PARA 833A.1), or (2) s 67H(3) (see PARA 833A.7): s 67G(1).

An order under s 67G(2) relating to a regulated modification may also declare that s 67G(6) applies in relation to (1) any other modification of the scheme made by the exercise of the power mentioned in s 67G(1), or (2) the grant of any rights under the scheme (whether by virtue of the attribution of notional periods as pensionable service or otherwise) in connection with the regulated modification: s 67G(3). An order under s

67G(2) relating to a regulated modification must specify the affected member or affected members or description of affected members in respect of whom s 67G(6) applies ('the specified persons'): s 67G(4). An order under s 67G(2) relating to a regulated modification may also (a) require the trustees to take, within the time specified in the order, such steps as are so specified for the purpose of giving effect to the order; (b) declare that s 67G(7) applies in relation to anything done by the trustees after the time at which the modification would, disregarding the order, have taken effect which (i) would not have contravened any provision of the scheme rules if the modification had taken effect at that time, but (ii) as a result of the modification being void to any extent by virtue of the order, would (but for s 67G(7)) contravene such a provision: s 67G(5). This is without prejudice to s 174(3): s 67G(5). Where, by virtue of head (b), the Authority make an order under s 67G(2) declaring that s 67G(7) applies in relation to anything done by the trustees, that thing is to be taken, for such purposes as are specified in the order, not to have contravened any provision of the trust deed or scheme rules: s 67G(7). An order under s 67G(2) relating to a regulated modification, or other modification, of a scheme or the grant of any rights under the scheme may be made before or after the time at which the modification or grant would, disregarding the order, have taken effect: s 67G(8).

3 Ibid s 67G(6).

## 7. Powers of the Authority to intervene

The following provision<sup>1</sup> applies where the Authority have reasonable grounds to believe that a power to which the subsisting rights provisions apply (1) will be exercised, or (2) has been exercised, to make a regulated modification in circumstances where the modification will be voidable<sup>2</sup>. The Authority may by order (a) in a case within head (1) above, direct the person on whom the power is conferred not to exercise the power to make the regulated modification; (b) require the trustees to take, within the time specified in the order, such steps as are so specified for the purpose of securing that any of the specified requirements<sup>3</sup> is satisfied<sup>4</sup>. A regulated modification made in exercise of a power to which the subsisting rights provisions apply is voidable<sup>5</sup> if (i) the exercise of the power contravened an order under head (a) above, or (ii) the trustees fail to comply with a requirement imposed by an order under head (b) above relating to any exercise of the power to make the modification<sup>6</sup>.

1 Ie the Pensions Act 1995 s 67H(2).

2 By virtue of ibid s 67(2) (see PARA 833A.1): s 67H(1) (added by Pensions Act 2004 s 262).

3 Ie any of the requirements mentioned in the Pensions Act 1995 s 67(2).

4 Ibid s 67H(2).

5 In accordance with ibid s 67G (see PARA 833A.6).

6 Ibid s 67H(3).

## 8. Civil penalties

The circumstances where the Regulator may impose a civil penalty for a failure to comply with the subsisting rights provisions are set out<sup>1</sup>.

1 See Pensions Act 1995 s 67I (added by Pensions Act 2004 s 262).

### UPDATE

#### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

**833-835 Restriction on powers to alter schemes ... Grounds for applying modifications**

SI 1996/2517 revoked: SI 2006/759 (amended by SI 2007/60).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(8) MODIFICATION AND AMENDMENT/834. Power of trustees to modify schemes by resolution.

### **834. Power of trustees to modify schemes by resolution.**

The trustees of a trust scheme<sup>1</sup> may by resolution modify<sup>2</sup> the scheme with a view to achieving any of the following purposes<sup>3</sup>:

- 2013 (1) to extend the class of persons who may receive benefits under the scheme in respect of the death of a member<sup>4</sup> of the scheme;
- 2014 (2) to enable the scheme to conform with specified arrangements<sup>5</sup>;
- 2015 (3) to enable the scheme to comply with such terms and conditions as may be imposed by the Pensions Compensation Board<sup>6</sup> in relation to any compensation payment<sup>7</sup> made by them;
- 2016 (4) to enable the scheme to conform with certain statutory requirements<sup>8</sup>; and
- 2017 (5) prescribed<sup>9</sup> purposes<sup>10</sup>.

No modification may be made by virtue of head (1) above without the consent of the employer<sup>11</sup>. Modifications made by virtue of head (2) above may include in particular modification of any limit on the number of, or of any category of, trustees, or provision for the transfer or vesting of property<sup>12</sup>. Regulations<sup>13</sup> may provide that the above provisions do not apply to trust schemes falling within a prescribed class or description<sup>14</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 For the meaning of 'modify' see PARA 664 note 10 ante (definition applied by the Pensions Act 1995 s 124(5)).

3 Ibid s 68(1).

4 For the meaning of 'member' see PARA 612 note 5 ante.

5 Ie such arrangements as are required by the Pensions Act 1995 s 16(1) (see PARA 791 ante) or s 17(2) (see PARA 791 ante): see s 68(2)(b).

6 As to the Pensions Compensation Board see ibid s 78(1); and PARA 637 ante.

7 Ie any payment made by the board under ibid s 83 or s 84: see PARAS 644, 646 ante.

8 Ie the requirements of ibid s 37(2) (see PARA 860 post); s 76(2) (see PARA 851 post); s 91 (see PARA 865 post) or s 92 (see PARA 866 post): see s 68(2)(d). Nothing done by virtue of s 68(2)(d), or any corresponding provisions in force in Northern Ireland, may be treated as effecting an alteration to the scheme in question for the purposes of the Income and Corporation Taxes Act 1988 s 591B (as added) (cessation of approval: see PARA 752 ante): Pensions Act 1995 s 68(5).

9 For the meaning of 'prescribed' see PARA 555 note 1 ante. In the case of a trust scheme, whether or not a money purchase scheme, which could not otherwise be modified for the purpose of making provision for the total amount of a debt due under ibid s 75(1) (see PARA 850 post) to be apportioned amongst the employers in different proportions from those which would otherwise apply by virtue of s 75(1A) (as added, for specified purposes only, by the Occupational Pension Schemes (Deficiency on Winding Up etc) Regulations 1996, SI 1996/3128, reg 4(2) or reg 8) (see PARA 850 note 22 post), such a modification of the scheme is a modification for a prescribed purpose: Occupational Pension Schemes (Deficiency on Winding Up etc) Regulations 1996, SI 1996/3128, reg 12.

10 Pensions Act 1995 s 68(2).

11 Ibid s 68(3). For the meaning of 'employer' see PARA 598 note 4 ante.

12 Ibid s 68(4).

13 For the meaning of 'regulations' see PARA 660 note 2 ante.

14 Pensions Act 1995 s 68(6). For these purposes, the prescribed class or description is any trust scheme (1) in respect of which any Minister of the Crown has given a guarantee or made arrangements for the purpose of securing that the assets of the scheme are sufficient to meet its liabilities; or (2) which is a public service pension scheme: Occupational Pension Schemes (Modification of Schemes) Regulations 1996, SI 1996/2517, reg 7. For the meaning of 'public service pension scheme' see PARA 874 post.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **833-835 Restriction on powers to alter schemes ... Grounds for applying modifications**

SI 1996/2517 revoked: SI 2006/759 (amended by SI 2007/60).

### **834 Power of trustees to modify schemes by resolution**

TEXT AND NOTES 4-10--Also, head (6) to enable the scheme to accommodate persons with pension credits or pension credit rights (see PARA 843): Pensions Act 1995 s 68(2) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 para 54; Pensions Act 2004 Sch 12 para 5).

NOTES 9, 10--See the Occupational Pension Scheme (Revaluation) Regulations 1991, SI 1991/168, reg 13A (added by SI 2009/615); and the Occupational Pension Schemes (Indexation) Regulations 1996, SI 1996/1679, reg 5 (added by SI 2009/615), which prescribe purposes for which the trustees of a trust scheme may by resolution modify the scheme.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(8) MODIFICATION AND AMENDMENT/835. Grounds for applying modifications.

### **835. Grounds for applying modifications.**

The Occupational Pensions Regulatory Authority<sup>1</sup> may, on an application made to it by persons competent to do so<sup>2</sup>, make an order in respect of an occupational pension scheme<sup>3</sup> (other than a public service pension scheme<sup>4</sup>):

- 2018 (1) authorising the modification<sup>5</sup> of the scheme with a view to achieving any specified purpose<sup>6</sup>; or
- 2019 (2) modifying the scheme with a view to achieving any such purpose<sup>7</sup>.

Regulations<sup>8</sup> may make provision about the manner of dealing with such applications<sup>9</sup> and may provide that in prescribed<sup>10</sup> circumstances these provisions do not apply to occupational pension schemes falling within a prescribed class or description or apply to them with prescribed modifications<sup>11</sup>.

The authority may not make such an order unless it is satisfied that the purposes for which the application for the order was made cannot be achieved otherwise than by means of such an order, or can only be achieved in accordance with a procedure which is liable to be unduly complex or protracted, or involves the obtaining of consents which cannot be obtained, or can only be obtained with undue delay or difficulty<sup>12</sup>. The extent of the authority's powers to make such an order is not limited, in relation to any purposes for which they are exercisable, to the minimum necessary to achieve those purposes<sup>13</sup>. The authority may not make such an order with a view to achieving the specified purpose<sup>14</sup> unless it is satisfied that it is reasonable in all the circumstances to make it<sup>15</sup>.

An order under head (1) above may enable those exercising any power conferred by the order to exercise it retrospectively<sup>16</sup> (whether or not the power could otherwise be so exercised) and an order under head (2) above may modify a scheme retrospectively<sup>17</sup>. Any modification of a scheme made in pursuance of an order of the authority is as effective in law as if it had been made under powers conferred by or under the scheme<sup>18</sup>.

Such an order may be made and complied with in relation to a scheme:

- 2020 (a) in spite of any enactment<sup>19</sup> or rule of law, or any rule of the scheme, which would otherwise operate to prevent the modification being made; or
- 2021 (b) without regard to any such enactment, rule of law or rule of the scheme as would otherwise require, or might otherwise be taken to require, the implementation of any procedure or the obtaining of any consent, with a view to the making of the modification<sup>20</sup>.

1 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 The persons competent to make such an application are (1) the trustees of the scheme, in the case of the purposes referred to in the Pensions Act 1995 s 69(3)(a), (b) (see note 7 infra); and (2) the trustees or managers of the scheme, the employer or any person other than the trustees or managers who has power to alter the rules of the scheme, in the case of the purposes referred to in s 69(3)(c): s 69(4).

3 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by ibid s 176). See also PARA 598 note 7 ante.

4 For the meaning of 'public service pension scheme' see PARA 874 post (definition applied by *ibid* s 124(1)).

5 For the meaning of 'modification' see PARA 664 note 10 ante (definition applied by *ibid* s 124(5)).

6 *Ibid* s 69(1)(a). The purposes are those referred to in s 69(3): see note 7 *infra*. An order under s 69(1)(a) must be framed: (1) if made with a view to achieving either of the purposes referred to in s 69(3)(a) or s 69(3)(b), so as to confer the power of modification on the trustees; and (2) if made with a view to achieving the purposes referred to in s 69(3)(c), so as to confer the power of modification on such persons (who may include persons who were not parties to the application made to the authority) as the authority thinks appropriate: s 69(5).

7 *Ibid* s 69(1)(b). The purposes referred to in s 69(1) are: (1) in the case of a scheme to which the Income and Corporation Taxes Act 1988 s 603, Sch 22 (as amended) (reduction of pension fund surpluses in certain exempt approved schemes: see PARA 766 ante) applies, to reduce or eliminate on any particular occasion any excess in accordance with any proposal submitted under Sch 22 para 3(1), where any requirements mentioned in the Pensions Act 1995 s 37(4) (see PARA 860 post), and any other prescribed requirements, will be satisfied in relation to the reduction or elimination; (2) in the case of an exempt approved scheme (within the meaning given by the Income and Corporation Taxes Act 1988 s 592(1): see PARA 754 ante) which is being wound up, to enable assets remaining after the liabilities of the scheme have been fully discharged to be distributed to the employer, where prescribed requirements in relation to the distribution are satisfied; or (3) to enable the scheme to be so treated during a prescribed period that an employment to which the scheme applies may be contracted-out employment by reference to it: Pensions Act 1995 s 69(3). For the purposes of head (3) *supra*, the prescribed period is the period of two years beginning with 6 April 1997: Occupational Pension Schemes (Modification of Schemes) Regulations 1996, SI 1996/2517, reg 2A (added by SI 1997/786). For the meaning of 'contracted-out employment' see the Pension Schemes Act 1993 s 8(1) (as amended); and PARA 878 post (definition applied by the Pensions Act 1995 s 124(5)).

A further requirement prescribed for the purposes of head (1) *supra* is that the second notice referred to in the Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 4 (notice of proposed payment from surplus: see PARA 860 post) also advises the member of the requirement for an order under the Pensions Act 1995 s 69; and the prescribed requirements referred to in head (2) *supra* are (a) any requirements under s 76(3) or s 76(4) (see PARA 851 post) or the Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 7 (see PARA 851 post) which must be satisfied before a power to distribute assets to the employer on a winding up can be exercised; (b) a requirement that the trustees are satisfied that any proposal to distribute excess assets to the employer is in the interests of the members; and (c) a requirement that the second notice referred to in reg 7 also advises the member of the requirement for an order under the Pensions Act 1995 s 69(3)(b), and both the first and second notice referred to in the Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 7 also advise the member of the requirement referred to in head (b) *supra*: reg 11.

8 For the meaning of 'regulations' see PARA 600 note 2 ante.

9 Pensions Act 1995 s 69(2).

10 For the meaning of 'prescribed' see PARA 555 note 1 ante.

11 Pensions Act 1995 s 69(6).

12 *Ibid* s 70(1).

13 *Ibid* s 70(2).

14 *Ie* the purpose referred to in *ibid* s 69(3)(c): see note 7 head (3) *supra*.

15 *Ibid* s 70(3).

16 'Retrospectively' means with effect from a date before that on which the power is exercised or, as the case may be, the order is made: *ibid* s 71(4).

17 *Ibid* s 71(1).

18 *Ibid* s 71(2).

19 For the meaning of 'enactment' see PARA 612 note 16 ante.

20 Pensions Act 1995 s 71(3).

## UPDATE

## **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **833-835 Restriction on powers to alter schemes ... Grounds for applying modifications**

SI 1996/2517 revoked: SI 2006/759 (amended by SI 2007/60).

### **835 Grounds for applying modifications**

TEXT AND NOTES--As to the power of the Authority to modify a scheme to ensure that it is properly wound up, see the Pensions Act 1995 s 71A (added by the Child Support, Pensions and Social Security Act 2000 s 48; and amended by Pensions Act 2004 Sch 12 para 58, Sch 13 Pt 1).

TEXT AND NOTES 1-11--1995 Act s 69 amended: Pensions Act 2004 Sch 12 para 57, Sch 13 Pt 1.

NOTE 7--The reference to an exempt approved scheme is now to a registered pension scheme under the Finance Act 2004 s 153 (see PARA 873B.1): 1995 Act s 69(3)(b) (amended by the Taxation of Pension Schemes (Consequential Amendments) Order 2006, SI 2006/745). SI 1996/2156 replaced: Occupational Pension Schemes (Payments to Employer) Regulations, SI 2006/802.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(8) MODIFICATION AND AMENDMENT/836. Modification of public service pension schemes.

### **836. Modification of public service pension schemes.**

The appropriate authority<sup>1</sup> may make such provision for the modification<sup>2</sup> of a public service pension scheme<sup>3</sup> as could be made in respect of a scheme other than a public service pension scheme by an order of the Occupational Pensions Regulatory Authority<sup>4</sup> modifying the scheme<sup>5</sup>.

The powers of the appropriate authority are exercisable by means of an order directly modifying the scheme (without regard, in the case of a scheme contained in or made under powers conferred by an enactment<sup>6</sup>, to the terms of the enactment or any of its restrictions), or modifying an enactment under which the scheme was made or by virtue of which it has effect<sup>7</sup>. Any such order may adapt, amend or repeal any such enactment as is referred to above as that authority thinks appropriate<sup>8</sup>.

1 'The appropriate authority', in relation to a scheme, means such Minister of the Crown or government department as may be designated by the Treasury as having responsibility for the particular scheme: Pensions Act 1995 s 72(2).

2 For the meaning of 'modification' see PARA 664 note 10 ante (definition applied by ibid s 124(5)).

3 For the meaning of 'public service pension scheme' see PARA 874 post (definition applied by ibid s 124(1)).

4 Ie an order of the authority under ibid s 69(1)(b): see PARA 835 ante. As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

5 Pensions Act 1995 s 72(1).

6 For the meaning of 'enactment' see PARA 612 note 16 ante.

7 Pensions Act 1995 s 72(3).

8 Ibid s 72(4).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(8) MODIFICATION AND AMENDMENT/837. Amendment to secure Inland Revenue approval.

### **837. Amendment to secure Inland Revenue approval.**

A provision, however expressed, designed to preclude any amendment of a retirement benefits scheme<sup>1</sup> which would have prejudiced its approval under previous legislation<sup>2</sup> does not prevent any amendment of a scheme proposed in connection with an application for the Board's approval<sup>3</sup> which is needed in order to ensure that approval is given, or designed to enhance the benefits under the scheme up to the limits suitable in a scheme for which approval is sought<sup>4</sup>. In the case of a scheme which contains no powers of amendment, the administrator<sup>5</sup> of the scheme may, with the consent of all the members of the scheme, and of the employer (or of each of the employers), make any such needed or designed amendment<sup>6</sup>.

1 For the meaning of 'retirement benefits scheme' see PARA 741 ante.

2 Ie under the Income and Corporation Taxes Act 1970 ss 208 or 222 (both repealed).

3 Ie under the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended); see PARA 747 et seq ante. For the meaning of 'the Board' see PARA 678 note 2 ante.

4 See ibid s 610(1), (2); and PARA 747 ante.

5 For the meaning of 'administrator' see PARA 747 note 3 ante.

6 See the Income and Corporation Taxes Act 1988 s 610(3); and PARA 747 ante.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(8) MODIFICATION AND AMENDMENT/838. Modification to fix time for settling priority of liabilities on winding up.

### **838. Modification to fix time for settling priority of liabilities on winding up.**

The trustees of a trust scheme<sup>1</sup> may by resolution modify the scheme with a view to fixing or providing for the fixing of the time when the priority of the liability in respect of any person is to be determined, in the event of a determination that the scheme is not for the time being to be wound up, despite rules otherwise requiring it to be so<sup>2</sup>. That time must be on or after the date of the resolution and of any such determination to defer winding up and before the date on which the scheme begins to be wound up<sup>3</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 See the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 5(1); and PARA 845 post.

3 See *ibid* reg 5(2); and PARA 845 post.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (9) DISPUTE RESOLUTION/839. Resolution of disputes.

## **(9) DISPUTE RESOLUTION**

### **839. Resolution of disputes.**

The trustees or managers<sup>1</sup> of an occupational pension scheme<sup>2</sup> must secure that such arrangements as are required by or under these provisions for the resolution of disagreements between prescribed<sup>3</sup> persons about matters in relation to the scheme are made and implemented<sup>4</sup>. Such arrangements must, in the case of existing schemes, have effect as from 6 April 1997<sup>5</sup>. The arrangements must provide for a person, on the application of a complainant of a prescribed description<sup>6</sup>, to give a decision on such a disagreement; and require the trustees or managers, on the application of such a complainant following such a decision, to reconsider the matter in question and confirm the decision or give a new decision in its place<sup>7</sup>. Such applications and decisions must be in writing<sup>8</sup>.

Regulations<sup>9</sup> may make provision about applications for decisions under such arrangements, and the procedure for reaching and giving such decisions, including the times by which applications are to be made and decisions given<sup>10</sup>. If, in the case of any occupational pension scheme, such arrangements as are required by these provisions to be made have not been made, or are not being implemented, the provisions relating to civil penalties<sup>11</sup> apply to any of the trustees or managers who have failed to take all such steps as are reasonable to secure that such arrangements are made or implemented<sup>12</sup>.

Where these requirements apply, the jurisdiction of the Pensions Ombudsman is subject to certain restrictions<sup>13</sup>.

1 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

2 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

3 For the meaning of 'prescribed' see PARA 555 note 1 ante. The prescribed persons are, on the one hand, the trustees or managers of the scheme; and, on the other hand (1) the active, deferred and pensioner members of the scheme; (2) a widow, widower or surviving dependant of a deceased member of the scheme; (3) prospective members of the scheme; (4) persons who ceased to be within any of the categories of persons referred to in heads (1)-(3) supra within the six months immediately preceding the date of an application under the Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996, SI 1996/1270, reg 4 (see PARA 840 post); and (5) where there is a disagreement which relates to a question whether a person who claims to be such a person as is mentioned in heads (1)-(4) supra is such a person, the person so claiming: reg 2(1). 'Scheme' means an occupational pension scheme within the meaning of the Pension Schemes Act 1993 s 1 (see PARA 741 ante); and 'prospective member' means any person who, under the terms of his contract of service or the scheme rules (a) is able, at his own option, to become a member of the scheme; (b) will become so able if he continues in the same employment for a sufficiently long period; (c) will be admitted to it automatically unless he makes an election not to become a member; or (d) may be admitted to it subject to the consent of his employer: Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996, SI 1996/1270, reg 1(2).

4 Pensions Act 1995 s 50(1). Section 50 does not apply to a scheme of a prescribed description and s 50(1) does not apply to prescribed matters in relation to the scheme: s 50(7). The requirements of s 50 do not apply to schemes in which all the members are trustees and schemes with no more than one member; nor do they apply to a disagreement if, in respect of that disagreement, (1) proceedings have been begun in any court or tribunal; (2) the Pensions Ombudsman has commenced an investigation into a complaint made or dispute referred to him; or (3) a notice of appeal has been issued by the complainant under the Firemen's Pension Scheme Order 1992, SI 1992/129, reg H2 or the Police Pensions Regulations 1987, SI 1987/257, reg H2: Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996, SI 1996/1270, regs 8, 9.

5 Pensions Act 1995 s 50(5), which refers to the commencement of s 50. Section 50 was brought into force on 6 April 1996 for the purpose only of authorising the making of regulations (see the Pensions Act 1995 (Commencement No 3) Order 1996, SI 1996/778); and on 6 April 1997 for all other purposes (see the Pensions Act 1995 (Commencement No 10) Order 1997, SI 1997/664). The latter date is the relevant date for these purposes.

6 For these purposes, a complainant of a prescribed description is a person referred to in the Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996, SI 1996/1270, reg 2(1)(a)-(e) (see note 3 heads (1)-(5) supra): reg 2(2).

7 Pensions Act 1995 s 50(2).

8 Ibid s 50(4).

9 For the meaning of 'regulations' see PARA 600 note 2 ante.

10 Pensions Act 1995 s 50(3).

11 Ie the provisions of ibid s 10: see PARA 611 ante.

12 Ibid s 50(6). For these purposes, the maximum amount of the penalty which may be imposed by the Occupational Pensions Regulatory Authority under s 10(2)(b) is £1,000 in the case of an individual, and £10,000 in any other case: Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996, SI 1996/1270, reg 10. As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

13 See PARA 665 ante.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **839 Resolution of disputes**

TEXT AND NOTES--Replaced.

The trustees or managers of an occupational pension scheme must secure that dispute resolution arrangements complying with the requirements of these provisions are made and implemented<sup>1</sup>. Dispute resolution arrangements are arrangements for the resolution of pension disputes<sup>2</sup>. The dispute resolution arrangements must provide a procedure (1) for any of the parties to the dispute<sup>3</sup> to make an application for a decision to be taken on the matters in dispute ('an application for the resolution of a pension dispute'), and (2) for the trustees or managers to take that decision<sup>4</sup>. Where an application for the resolution of a pension dispute is made in accordance with the dispute resolution arrangements, the trustees or managers must (a) take the decision required on the matters in dispute within a reasonable period of the receipt of the application by them, and (b) notify the applicant of the decision within a reasonable

period of it having been taken<sup>5</sup>. The above provisions do not apply in relation to an occupational pension scheme if (i) every member of the scheme is a trustee of the scheme, (ii) the scheme has no more than one member, or (iii) the scheme is of a prescribed description<sup>6</sup>. If, in the case of an occupational pension scheme, the dispute resolution arrangements required by the above provisions to be made (A) have not been made, or (B) are not being implemented, the civil penalty provisions<sup>7</sup> apply to any of the trustees or managers who have failed to take all reasonable steps to secure that such arrangements are made or implemented<sup>8</sup>.

1 Pensions Act 1995 s 50(1) (ss 50, 50A, 50B substituted by the Pensions Act 2004 s 273; 1995 Act s 50 amended by the Pensions Act 2007 s 16(1)-(6)). Dispute resolution arrangements under the 1995 Act s 50(1) must, in the case of existing schemes, have effect on and after the date of commencement of s 50 (ie 6 April 2008: see SI 2008/627) in relation to applications made on or after that date: 1995 Act s 50(7).

2 Ibid s 50(2). For this purpose a pension dispute is a dispute which (1) is between (a) the trustees or managers of a scheme, and (b) one or more persons with an interest in the scheme (see s 50A (amended by the Civil Partnership (Pensions and Benefit Payments) (Consequential, etc Provisions) Order 2005, SI 2005/2053)), (2) is about matters relating to the scheme, and (3) is not an exempted dispute (see 1995 Act s 50(9)): s 50(3). For the purposes of s 50 a dispute is an exempted dispute if (i) proceedings in respect of it have been commenced in any court or tribunal, (ii) the Pensions Ombudsman has commenced an investigation in respect of it as a result of a complaint made or a dispute referred to him, or (iii) it is of a prescribed description: s 50(9). As to the disputes so prescribed, see the Occupational Pension Schemes (Internal Dispute Resolution Procedures Consequential and Miscellaneous Amendments) Regulations 2008, SI 2008/649, reg 4 (exempted disputes).

3 Ie mentioned in the 1995 Act s 50(3)(a)(ii): see NOTE 2 head (b).

4 Ibid s 50(4). The procedure provided for by the dispute resolution arrangements in pursuance of s 50(4) must include the provision required by s 50B (amended by the 2007 Act s 16(7)-(10)): 1995 Act s 50(6).

The dispute resolution arrangements may make provision for securing that an application for the resolution of a pension dispute may not be made to the trustees or managers unless (1) the matters in dispute have been previously referred to a person of a description specified in the arrangements ('the specified person') in order for him to consider those matters, and (2) the specified person has given his decision on those matters, and for enabling the specified person's decision to be confirmed or replaced by the decision taken by the trustees or managers on the application, after reconsidering those matters: s 50(4A) (s 50(4A) added by the 2007 Act s 16(4)).

5 1995 Act s 50(5). In a case where a reference is made to the specified person in accordance with provision made under s 50(4A) (see NOTE 4), s 50(5) applies in relation to the specified person as it applies in relation to the trustees or managers in a case where an application for the resolution of a pension dispute is made to them: s 50(5A) (s 50(5A) added by the 2007 Act s 16(5)).

6 1995 Act s 50(8). Head (iii) Ie a scheme in relation to which the sole trustee of the scheme is a company and all members of the scheme are directors of that company: SI 2008/649 reg 3.

7 Ie the provisions of the 1995 Act s 10: see PARA 611.

8 Ibid s 50(10).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (9) DISPUTE RESOLUTION/840. Application for, and notice of, a decision.

#### **840. Application for, and notice of, a decision.**

An application for a decision under arrangements required for the resolution of disputes<sup>1</sup> must set out particulars of the disagreement in respect of which a decision is sought<sup>2</sup> and must be signed by or on behalf of the complainant<sup>3</sup>. Such an application may be made or continued on behalf of a complainant by a representative nominated by him<sup>4</sup>.

Where a complainant dies or is a minor or is otherwise incapable of acting for himself, an application may be made or continued on his behalf in the case of his death, by his personal representative, and in any other case, by a member of his family or some other person suitable to represent him<sup>5</sup>.

A decision on the matters raised by such an application must be issued to the complainant and, where applicable, his representative by notice in writing within two months from the date on which the prescribed particulars were received<sup>6</sup>. The notice must include:

- 2022 (1) a statement of the decision;
- 2023 (2) a reference to any legislation relied upon;
- 2024 (3) a reference to such parts of any scheme rules relied upon and, where a discretion has been exercised, a reference to such parts of the scheme rules by which such discretion is conferred; and
- 2025 (4) a reference to the complainant's right to refer the disagreement for reconsideration by the trustees or managers of the scheme within the prescribed time limit<sup>7</sup>.

If, in any case, written notice of a decision is not issued within two months from the date on which particulars of the disagreement were received, an interim reply must immediately be sent to the complainant and, where applicable, his representative, setting out the reasons for the delay and an expected date for issuing the decision<sup>8</sup>.

1    Ie arrangements required by the Pensions Act 1995 s 50(2)(a): see PARA 839 ante.

2    Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996, SI 1996/1270, reg 4(1). The particulars must include: (1) where the complainant is a person described in either reg 2(1)(a), (c) or (d) (see PARA 839 note 3 heads (1), (3)-(4) ante) or a person claiming to be such under reg 2(1)(e) (see PARA 839 note 3 head (5) ante), the full name, address, date of birth and the national insurance number of the complainant; (2) where the complainant is a person described in reg 2(1)(b) (see PARA 839 note 3 head (2) ante), or a person claiming to be such under reg 2(1)(e), the full name, address and date of birth of the complainant, his relationship to the scheme member and the full name, address, date of birth and national insurance number of the scheme member; (3) the full name and address of any representative acting on behalf of the complainant and whether such address is the address to be used for service on the complainant of any documents in connection with the disagreement; (4) a statement as to the nature of the disagreement with sufficient details to show why the complainant is aggrieved: reg 4(2).

3    Ibid reg 4(3).

4    Ibid reg 3(1).

5    Ibid reg 3(2).

6    Ibid reg 5(1).

- 7 Ibid reg 5(2). The time limit referred to is that described in reg 6(1): see PARA 841 post.
- 8 Ibid reg 5(3).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **840 Application for, and notice of, a decision**

TEXT AND NOTES--SI 1996/1270 revoked: SI 2008/649.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (9) DISPUTE RESOLUTION/841. Referral of disagreement to the trustees or managers.

#### **841. Referral of disagreement to the trustees or managers.**

An application to the trustees or managers<sup>1</sup> of a scheme<sup>2</sup> to reconsider a disagreement in respect of which a decision<sup>3</sup> has been made may be made within six months from the date of the notice of the decision and must set out particulars of the grounds on which the application is made<sup>4</sup>. The application must be signed by or on behalf of the complainant<sup>5</sup>.

The trustees or managers of a scheme must issue to the complainant and, where applicable, his representative a notice in writing of their decision on the matters so raised within two months from the date on which the prescribed particulars were received by them<sup>6</sup>. The notice must include:

- 2026 (1) a statement of the decision and an explanation as to whether and, if so, to what extent that decision either confirms or replaces the decision originally made<sup>7</sup>;
- 2027 (2) a reference to any legislation relied upon;
- 2028 (3) a reference to such parts of any scheme rules relied upon and, where a discretion has been exercised, a reference to such parts of the scheme rules by which such discretion is conferred;
- 2029 (4) a statement that the Pensions Advisory Service ('OPAS') is available to assist members and beneficiaries of the scheme in connection with difficulties which they have failed to resolve with the trustees or managers of the scheme and the address at which it may be contacted; and
- 2030 (5) a statement that the Pensions Ombudsman<sup>8</sup> may investigate and determine any complaint or dispute of fact or law in relation to a scheme<sup>9</sup> and the address at which he may be contacted<sup>10</sup>.

If, in any case, written notice of a decision<sup>11</sup> is not issued within two months from the date on which particulars of the disagreement were received, an interim reply must immediately be sent to the complainant and, where applicable, his representative, setting out the reasons for the delay and an expected date for issuing the decision<sup>12</sup>.

1 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

2 For the meaning of 'scheme' see PARA 839 note 3 ante.

3 I.e. a decision referred to in the Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996, SI 1996/1270, reg 5: see PARA 840 ante.

4 Ibid reg 6(1). The particulars must include: (1) the matters referred to in reg 4(2)(a)-(c) (see PARA 840 ante); (2) a copy of the notice of the decision made under the Pensions Act 1995 s 50(2)(a) (see PARA 839 ante); (3) a statement of the reasons why the complainant is dissatisfied with that decision; and (4) a statement that the complainant wishes the disagreement to be reconsidered by the trustees or managers of the scheme: Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996, SI 1996/1270, reg 6(2).

5 Ibid reg 6(3).

6 Ibid reg 7(1).

7 I.e. the decision made under the Pensions Act 1995 s 50(2)(a): see PARA 839 ante.

- 8 As to the Pensions Ombudsman see PARA 663 ante.
- 9 Ie a scheme made or referred in accordance with the Pension Schemes Act 1993: see PARA 663 et seq ante.
- 10 Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996, SI 1996/1270, reg 7(2).
- 11 Ie a decision under the Pensions Act 1995 s 50(2)(b): see PARA 839 ante.
- 12 Occupational Pension Schemes (Internal Dispute Resolution Procedures) Regulations 1996, SI 1996/1270, reg 7(3).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **841 Referral of disagreement to the trustees or managers**

TEXT AND NOTES--SI 1996/1270 revoked: SI 2008/649.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (9) DISPUTE RESOLUTION/841A. .

**841A. .**

**UPDATE**

**741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

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The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (10) WINDING UP/842. General application of the law of trusts.

## **(10) WINDING UP**

### **842. General application of the law of trusts.**

Apart from certain statutory modifications<sup>1</sup>, the winding up of an occupational pension scheme is subject to the general law of trusts<sup>2</sup>.

<sup>1</sup> See the Pensions Act 1995 ss 73-77; and PARA 845 et seq post.

<sup>2</sup> See *Re Drexel Burnham Lambert UK Pension Plan* [1995] 1 WLR 32; *Providence Capitol Trustees Ltd v Ayres* [1996] 4 All ER 760.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **842-852 Winding Up**

Provision has been made for the supervision of the winding up: see the Pensions Act 1995 ss 72A-72C (added by the Child Support, Pensions and Social Security Act 2000 ss 49, 51; and amended by the Pensions Act 2004 Sch 12 paras 59, 60, Sch 13 Pt 1).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (10) WINDING UP/843. Power of trustees to defer winding up.

### **843. Power of trustees to defer winding up.**

If, apart from these provisions, the rules of a trust scheme<sup>1</sup> would require the scheme to be wound up, the trustees may determine that the scheme is not for the time being to be wound up but that no new members<sup>2</sup> are to be admitted to the scheme<sup>3</sup>. Where the trustees make such a determination, they may also determine:

- 2031 (1) that no further contributions are to be paid towards the scheme<sup>4</sup>; or
- 2032 (2) that no new benefits are to accrue to, or in respect of, members of the scheme<sup>5</sup>,

but this does not authorise the trustees to determine, where there are accrued rights<sup>6</sup> to any benefit, that the benefit is not to be increased<sup>7</sup>. The above provisions do not apply to a money purchase scheme<sup>8</sup>, or a scheme falling within a prescribed<sup>9</sup> class or description<sup>10</sup>, and thus do not apply to:

- 2033 (a) any scheme in relation to which no relevant employer debt event<sup>11</sup> has occurred;
- 2034 (b) a scheme in respect of which any Minister of the Crown has given a guarantee or made any other arrangements for the purpose of securing that the assets of the scheme are sufficient to meet its liabilities;
- 2035 (c) a scheme which provides relevant benefits<sup>12</sup>, but is neither an approved scheme<sup>13</sup> nor a relevant statutory scheme<sup>14</sup>;
- 2036 (d) a scheme with a specified type of superannuation fund<sup>15</sup>;
- 2037 (e) a scheme with less than two members;
- 2038 (f) a small self-administered scheme<sup>16</sup> which is an approved scheme;
- 2039 (g) a scheme the only benefits provided by which (other than money purchase benefits) are death benefits; or
- 2040 (h) a relevant lump sum retirement benefits scheme<sup>17</sup>.

Where any determination to defer winding up is made, before the expiry of the period of one month beginning with the date on which it is made, the person who has made it must inform in writing the members of the scheme, and any other persons whose entitlement to payment of a pension or any other benefit under the scheme has arisen, that it has been made<sup>18</sup>. If any person fails to comply with this requirement, the Occupational Pensions Regulatory Authority<sup>19</sup> may require him by notice in writing to pay a penalty:

- 2041 (i) in the case of a contravention by an individual, not exceeding £1,000; and
- 2042 (ii) otherwise, not exceeding £10,000,

before the expiry of the period of 28 days beginning with the date on which the notice is given<sup>20</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 For the meaning of 'member' see PARA 612 note 5 ante.

3 Pensions Act 1995 s 38(1). The trustees of any trust scheme or any other persons with power in respect of any such scheme to make a determination to defer winding up the scheme must keep a written record of any such determination made by them: Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 11(1)(a).

4 Pensions Act 1995 s 38(2)(a).

5 Ibid s 38(2)(b).

6 For the purposes of ibid Pt I (ss 1-125) (see PARA 598 et seq ante, 845 et seq post): (1) the accrued rights of a member of an occupational pension scheme at any time are the rights which have accrued to or in respect of him at that time to future benefits under the scheme; and (2) at any time when the pensionable service of a member of an occupational pension scheme is continuing, his accrued rights are to be determined as if he had opted, immediately before that time, to terminate that service, and references to accrued pension or accrued benefits are to be interpreted accordingly: s 124(2). For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by s 176). See also PARA 598 note 7 ante. For the meaning of 'pensionable service' see PARA 782 note 5 ante.

7 Ibid s 38(2).

8 Ibid s 38(3)(a). For the meaning of 'money purchase scheme' see PARA 811 note 2 ante (definition applied by s 124(5)).

9 For the meaning of 'prescribed' see PARA 555 note 1 ante.

10 Pensions Act 1995 s 38(3)(b).

11 For the purposes of head (a) in the text, a relevant employer debt event has only occurred in relation to a scheme if (apart from ibid s 38 or any other power to defer winding up the scheme) the rules of the scheme require the scheme to be wound up as a result of a relevant insolvency event having occurred in relation to any person who immediately before the event occurred was an employer in relation to the scheme; and for these purposes s 75(4) (definition of relevant insolvency events: see PARA 850 post) applies as it applies for the purposes of s 75 (disregarding any modifications of that section); and, in the case of a scheme which has no active members, the reference to an employer is to the person who was the employer immediately before the occurrence of the event after which the scheme ceased to have any active members: Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 10(2).

12 'Relevant benefits' has the meaning given in the Income and Corporation Taxes Act 1988 s 612(1) (see PARA 741 note 6 ante): Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 10(3).

13 'Approved scheme' means a scheme which is approved or was formerly approved under the Income and Corporation Taxes Act 1988 s 590 or s 591 (as amended) (see PARAS 747-751 ante) or in respect of which an application for such approval has been duly made which has not been determined: Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 10(3).

14 'Relevant statutory scheme' has the meaning given in the Income and Corporation Taxes Act 1988 s 611A (as added) (see PARA 756 note 2 ante): Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 10(3).

15 'Le such a superannuation fund as is mentioned in the Income and Corporation Taxes Act 1988 s 615(6) (certain overseas pensions): Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 10(3).

16 'Small self-administered scheme' has the meaning given in the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Small Self-administered Schemes) Regulations 1991, SI 1991/1614, reg 2(1) (see PARA 751 note 17 ante): Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 10(3).

17 Ibid reg 10(1). 'Relevant lump sum retirement benefits scheme' means an approved scheme (1) which has been categorised by the Commissioners of Inland Revenue for the purposes of its approval as a centralised scheme for non-associated employers; (2) which is not contracted-out; and (3) under the provisions of which the only benefits which may be provided on or after retirement (other than money purchase benefits derived from the payment of additional contributions by any person) are lump sum benefits which are not calculated by reference to any member's salary; and 'lump sum benefits' do not include benefits paid by way of commuted retirement pension: reg 10(3).

18 Ibid reg 11(2).

19 As to the Occupational Pensions Regulatory Authority see PARA 598 et seq ante.

20 Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 11(3).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **842-852 Winding Up**

Provision has been made for the supervision of the winding up: see the Pensions Act 1995 ss 72A-72C (added by the Child Support, Pensions and Social Security Act 2000 ss 49, 51; and amended by the Pensions Act 2004 Sch 12 paras 59, 60, Sch 13 Pt 1).

### **843 Power of trustees to defer winding up**

TEXT AND NOTES 1-10--See also Pensions Act 1995 s 38(4) (added by Pensions Act 2004 Sch 12 para 50(3)).

TEXT AND NOTES 1-3--For 'that the scheme ... admitted to the scheme' read '(1) that the scheme is not for the time being to be wound up but that no new members are to be admitted to it; or (2) that the scheme is not for the time being to be wound up but that no new members, except pension credit members, are to be admitted to it': 1995 Act s 38(1)(a), (b) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 43, 50(1), (2). 'Pension credit member', in relation to an occupational pension scheme, means a person who has rights under the scheme which are attributable (directly or indirectly) to a pension credit; 'pension credit' means a credit under the 1999 Act s 29(1)(b) (see PARA 961A.3) or under corresponding Northern Ireland legislation: 1995 Act s 124(1) (amended by the 1999 Act Sch 12 paras 43, 61(1), (3)).

TEXT AND NOTES 4-7--The 1995 Act s 38(2) does not authorise the trustees to determine (1) where there are accrued rights or pension credit rights to any benefit, that the benefit is not to be increased; or (2) where the power conferred by that provision is exercisable by virtue of a determination under s 38(1)(b), that members of the scheme may not acquire pension credit rights under it: s 38(2A) (added by the 1999 Act Sch 12 para 50(4)). 'Pension credit rights', in relation to an occupational pension scheme, means rights to future benefits under the scheme which are attributable (directly or indirectly) to a pension credit: 1995 Act s 124(1) (amended by the 1999 Act Sch 12 para 61(3)).

TEXT AND NOTES 4, 5--1995 Act s 38(2)(a), (b) amended: Pensions Act 2004 Sch 12 para 50(2), Sch 13 Pt 1.

TEXT AND NOTES 6, 7--Words 'but this ... increased' omitted: 1995 Act s 38(2) (amended by the 1999 Act Sch 12 paras 43, 50(1), (3), Sch 13 Pt III).

NOTE 6--In the 1995 Act s 124(2), head (1), the reference to rights which have accrued to or in respect of the member does not include any rights which are pension credit rights: s 124(2A) (added by the 1999 Act Sch 12 para 61(4)).

NOTE 11--SI 1996/3126 reg 10(2) amended: SI 2005/678.

NOTE 15--The trustees or managers of such a fund must not be authorised under the Pensions Act 2004 s 288 (see PARA 969A.2), or approved under s 289 (see PARA 969A.3) in relation to a European employer: SI 1996/3126 reg 10(1) (amended by SI 2006/467).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (10) WINDING UP/844. Time at which winding up commences.

#### **844. Time at which winding up commences.**

The time when a scheme<sup>1</sup> begins to be wound up is determined<sup>2</sup> as follows<sup>3</sup>. Where the rules of the scheme require or permit the scheme to be wound up and the scheme is wound up under those rules, the scheme begins to be wound up (1) either at such time as the rules provide that it does so, or if the rules make no provision as to that time, at such time as the trustees determine that the scheme must begin to be wound up; or (2) as soon as there are no members who are in pensionable service<sup>4</sup> under the scheme, whichever is the later<sup>5</sup>. Where the rules of the scheme require or permit the scheme to be wound up, but the trustees determine<sup>6</sup> that the scheme is not for the time being to be wound up, then for these purposes, in so far as any provision made by the rules of the scheme as to the time when it begins to be wound up is inconsistent with the trustees' determination, that provision must be disregarded<sup>7</sup>.

Where a scheme is wound up in pursuance of an order<sup>8</sup> of the Occupational Pensions Regulatory Authority<sup>9</sup> or of an order of a court, and the order makes provision as to the time at which the scheme is to begin to be wound up, the scheme begins to be wound up at the time specified in the order or, if none is so specified, the date on which the order takes effect<sup>10</sup>.

1 As to the schemes to which these provisions apply see PARA 843 ante.

2 I.e. for the purposes of the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126 (as amended): see PARAS 843 ante, 845 et seq post.

3 Ibid reg 2(1).

4 For the meaning of 'pensionable service' see PARA 782 note 5 ante.

5 Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 2(2).

6 I.e. whether in pursuance of the Pensions Act 1995 s 38 (see PARA 843 ante) or otherwise: Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 2(3).

7 Ibid reg 2(3). Where under the rules of the scheme any person other than the trustees may determine that the scheme is to be wound up, or is not to be wound up for the time being, then the references in reg 2(2)(a)(ii) (see head (1) in the text), reg 2(3) to the trustees' determination must be taken, in a case where the winding up begins or is deferred by virtue of that other person's determination, as a reference to his determination; and this provision applies where such a power is vested in the trustees jointly with another person, or in some but not all of the trustees, as it applies where such a power is vested only in a person other than the trustees: reg 2(4).

8 I.e. under the Pensions Act 1995 s 11: see PARA 612 ante.

9 As to the Occupational Pensions Regulatory Authority see PARA 598 et seq ante.

10 Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 2(5).

#### **UPDATE**

#### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **842-852 Winding Up**

Provision has been made for the supervision of the winding up: see the Pensions Act 1995 ss 72A-72C (added by the Child Support, Pensions and Social Security Act 2000 ss 49, 51; and amended by the Pensions Act 2004 Sch 12 paras 59, 60, Sch 13 Pt 1).

### **844 Time at which winding up commences**

TEXT AND NOTE 3--SI 1996/3126 reg 2(1) substituted: SI 2005/706.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (10) WINDING UP/845. Preferential liabilities on winding up.

#### **845. Preferential liabilities on winding up.**

The following provisions apply, where a salary-related occupational pension scheme to which the minimum funding requirement applies<sup>1</sup> is being wound up, to determine the order in which the assets of the scheme are to be applied towards satisfying the liabilities in respect of pensions and other benefits (including increases in pensions)<sup>2</sup>. The assets of the scheme must be applied first towards satisfying the amounts of the liabilities mentioned in heads (a) to (e) below and, if the assets are insufficient to satisfy those amounts in full, then:

- 2043 (1) the assets must be applied towards satisfying the amounts of the liabilities in the order listed in heads (a) to (e) below; and
- 2044 (2) where the amounts of the liabilities mentioned in one head cannot be satisfied in full, those amounts must be satisfied in the same proportions<sup>3</sup>.

The liabilities so referred to are:

- 2045 (a) any liability for pensions or other benefits which, in the opinion of the trustees, are derived from the payment by any member<sup>4</sup> of the scheme of voluntary contributions<sup>5</sup>;
- 2046 (b) where the trustees or managers<sup>6</sup> of the scheme are entitled to benefits under a contract of insurance which was entered into before 6 April 1997 with a view to securing the whole or part of the scheme's liability for any pension or other benefit payable in respect of one particular person whose entitlement to payment of a pension or other benefit has arisen and for any benefit which will be payable in respect of that person on his death, and either that contract may not be surrendered or the amount payable on surrender does not exceed the liability secured by the contract (but excluding liability for increases to pensions), the liability so secured<sup>7</sup>;
- 2047 (c) in a case not falling within head (b) above, where a person's entitlement to payment of pension or other benefit has arisen, liability for that pension or benefit and for any pension or other benefit which will be payable in respect of that person on his death (but excluding increases to pensions)<sup>8</sup>;
- 2048 (d) any liability for pensions or other benefits which have accrued to or in respect of any members of the scheme (but excluding increases to pensions) or, in respect of members with less than two years pensionable service, the return of contributions<sup>9</sup>;
- 2049 (e) any liability for increases to pensions referred to in heads (c) and (d) above<sup>10</sup>,

and, for these purposes, the amounts of the liabilities mentioned in heads (b) to (d) above are to be taken to be the amounts calculated and verified in the prescribed<sup>11</sup> manner<sup>12</sup>.

To the extent that any liabilities, as calculated in accordance with the rules of the scheme, have not been so satisfied, any remaining assets of the scheme must then be applied towards satisfying those liabilities (as so calculated) in the order provided for in the rules of the scheme<sup>13</sup>. If the scheme confers power on any person other than the trustees or managers to apply the assets of the scheme in respect of pensions or other benefits (including increases in

pensions), it cannot be exercised by that person but may be exercised instead by the trustees or managers<sup>14</sup>.

If these requirements are not complied with, the provisions relating to prohibition orders<sup>15</sup> apply to any trustee who has failed to take all such steps as are reasonable to secure compliance, and the provisions relating to civil penalties<sup>16</sup> apply to any trustee or manager who has failed to take all such steps<sup>17</sup>.

These provisions do not apply to an occupational pension scheme falling within a prescribed class or description<sup>18</sup> and have effect with prescribed modifications<sup>19</sup> in cases where part of a salary-related occupational pension scheme to which the minimum funding requirement applies is being wound up<sup>20</sup>.

1     The one to which the Pensions Act 1995 s 56 applies: see PARA 811 ante. For the meaning of 'salary-related occupational pension scheme' see PARA 643 note 8 ante (definition applied by s 124(5)); and for the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by s 176). See also PARA 598 note 7 ante.

2     Ibid s 73(1).

3     Ibid s 73(2).

4     For the meaning of 'member' see PARA 612 note 5 ante.

5     Pensions Act 1995 s 73(3)(a).

6     For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

7     Pensions Act 1995 s 73(3)(aa) (added in relation to all cases by the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 3(1), (3)). As to the power to make regulations modifying the Pensions Act 1995 s 73(3) (as amended) see s 73(7). For the meaning of 'regulations' see PARA 600 note 2 ante.

8     Ibid s 73(3)(b) (modified in relation to all cases by the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 3(1), (4)).

9     Pensions Act 1995 s 73(3)(c). For the meaning of 'pensionable service' see PARA 782 note 5 ante. Section 73(3)(c) is substituted in the case of a scheme which begins to be wound up before the expiry of the transitional period: see the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 3(1)(b), (5). For these purposes, the transitional period is either the period of ten years beginning with 6 April 1997 or, in the case of a scheme to which the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 16(2) applies (see PARA 817 ante) and the schedule period in relation to which has been extended under reg 25 (as amended) or reg 27 (see PARA 817 ante), that extended schedule period: Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, regs 1(4), 3(2). 'The schedule period' has the same meaning as in the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536 (as amended) (see PARA 817 note 10 ante): Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 3(2).

10    Pensions Act 1995 s 73(3)(d). Section 73(3)(d) is substituted, and s 73(3)(e), (f), (g) added, in the case of a scheme which begins to be wound up before the expiry of the transitional period: see the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 3(1)(b), (5).

11    For the meaning of 'prescribed' see PARA 555 note 1 ante.

12    Pensions Act 1995 s 73(3) (further modified, in the case of a scheme which begins to be wound up before the expiry of the transitional period, by the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 3(6); and, in the case of a scheme which begins to be wound up after that period, by reg 3(7)). Regulations may provide for the values of the assets and the amounts of the liabilities to be calculated and verified in accordance with guidance prepared and from time to time revised by a prescribed body, and approved by the Secretary of State: Pensions Act 1995 s 119. As to the Secretary of State see PARA 1 ante. For the prescribed manner of calculating and verifying the liabilities see the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 4.

The trustees of a trust scheme may by resolution modify the scheme with a view to fixing or providing for the fixing of the time when the paragraph of the Pensions Act 1995 s 73(3) (see heads (a)-(e) in the text) into which the liability in respect of any person falls is to be determined for the purposes of s 73(2) or s 73(3) or of any priority rule of the scheme, in the event of a determination (whether in pursuance of s 38 (see PARA 843 ante) or otherwise that the scheme is not for the time being to be wound up, despite rules otherwise requiring it to be

so: Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 5(1); and see PARA 838 ante. That time must be on or after the date of the resolution and of any such determination to defer winding up and before the date on which the scheme begins to be wound up: reg 5(2). In reg 5(1), 'priority rule' means a rule of the scheme requiring the trustees to apply the assets of the scheme on a winding up in satisfying the amounts of certain liabilities to or in respect of members before other such liabilities: reg 5(3).

The trustees of any trust scheme or any other persons with power in respect of any such scheme to make a determination as to the time when the paragraph of the Pensions Act 1995 s 73(3) (see heads (a)-(e) in the text) into which the liability in respect of any person falls is fixed must keep a written record of any such determination made by them: Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 11(1) (b). As to information requirements and penalties with respect to such a determination see reg 11(2), (3); and PARA 843 ante.

13 Pensions Act 1995 s 73(4). The trustees of any trust scheme or any other persons with power in respect of any such scheme to make a determination as to the time when the amounts or descriptions of liabilities of the scheme are to be determined for the purposes of any rule of the scheme requiring the assets of the scheme to be applied on winding up in satisfying the amounts of certain liabilities to or in respect of members before other such liabilities, must keep a written record of any such determination made by them; Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 11(1)(c). As to information requirements and penalties with respect to such a determination see reg 11(2), (3); and PARA 843 ante.

14 Pensions Act 1995 s 73(5).

15 Ie the provisions of *ibid* s 3: see PARA 604 ante.

16 Ie the provisions of *ibid* s 10: see PARA 611 ante.

17 *Ibid* s 73(6).

18 *Ibid* s 73(8).

19 For the meaning of 'modifications' see PARA 664 note 10 ante (definition applied by *ibid* s 124(5)).

20 *Ibid* s 73(9). See the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 12 (as substituted); and PARA 847 post.

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 842-852 Winding Up

Provision has been made for the supervision of the winding up: see the Pensions Act 1995 ss 72A-72C (added by the Child Support, Pensions and Social Security Act 2000 ss 49, 51; and amended by the Pensions Act 2004 Sch 12 paras 59, 60, Sch 13 Pt 1).

### 845 Preferential liabilities on winding up

TEXT AND NOTES--Pensions Act 1995 s 73 now ss 73-73B: see PARA 845A.

NOTES--In the case of an occupational pension scheme which is not a scheme to which the Welfare Reform and Pensions Act 1999 s 38 applies, rights attributable (directly or indirectly) to a pension credit are to be accorded in a winding up the same treatment (1) if they have come into payment, as the rights of a pensioner member; and (2) if they have not come into payment, as the rights of a deferred member: s 38(2) (s 38(2)-(4) (s 38(2) amended by Pensions Act 2004 Sch 12 para 75), 46(1). The 1999 Act s 38 applies to an occupational pension scheme other than (a) a money purchase scheme, or (b) a prescribed scheme or a scheme of a prescribed description: s 38(2A) (added by Pensions Act 2004 Sch 12 para 75). The 1999 Act s 38(2) overrides the provisions of a scheme to the extent that it conflicts with them, and the scheme has effect with such modifications as may be required in consequence: s 38(3). 'Deferred member' and 'pensioner member' have the same meanings as in the 1995 Act Pt I (ss 1-125) (see PARA 612): 1999 Act s 38(4)(a). 'Pension credit' means a credit under s 29(1)(b) (see PARA 961A.3) and includes a credit under the corresponding Northern Ireland provision: ss 38(4)(b), 46(1). References to rights attributable to a pension credit having come into payment are to the person to whom the rights belong having become entitled by virtue of the rights to the present payment of pension or other benefits: s 38(4)(c).

As to multi-employer schemes (see PARA 809), see the Occupational Pension Scheme (Winding Up) (Modification for Multi-employer Schemes and Miscellaneous Amendments) Regulations 2005, SI 2005/2159 (amended by SI 2007/814).

NOTE 4--Where the employer makes a contribution equal to the members voluntary contribution, both benefits are 'derived from' the payment of voluntary contributions by the member: *Bridge Trustees Ltd v Houldsworth* [2010] EWCA Civ 179, [2010] All ER (D) 67 (Mar).

NOTES 7-12--SI 1996/3126 reg 3 is amended in relation to occupational pension schemes which begin to be wound up on or after 10 May 2004 and before the end of the transitional period by SI 2004/1140.

SI 1997/3126 reg 3 further amended: SI 2005/706.

NOTE 12--SI 1996/3126 reg 3(7) substituted: SI 1999/3198. SI 1996/3126 reg 4 substituted: SI 2005/706. SI 1996/3126 reg 4A (calculation of liabilities where employer not insolvent and where winding up commences before 11 June 2003) added by SI 2002/380 and amended by SI 2004/403. SI 1996/3126 reg 4B (calculation of liabilities where employer not insolvent and where winding up commences on or after 11 June 2003) added: SI 2004/403. SI 1996/3126 reg 11(1)(b) amended: SI 2005/706.

1995 Act s 119 amended: Pensions Act 2004 Sch 12 para 68, Sch 13 Pt 1; Pensions Act 2007 Sch 5 para 8.

TEXT AND NOTE 17--1995 Act s 73(6) amended: Pensions Act 2004 Sch 12 para 61, Sch 13 Pt 1 (not yet in force).

NOTE 20--SI 1996/3126 reg 12 amended: SI 2005/3377.

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## **845A. Preferential liabilities.**

### **1. Preferential liabilities on winding up**

The following provisions<sup>1</sup> apply where an occupational pension scheme to which these provisions apply is being wound up to determine the order in which the assets<sup>2</sup> of the scheme are to be applied towards satisfying the liabilities<sup>3</sup> of the scheme in respect of pensions and other benefits<sup>4</sup>. The following provisions apply to an occupational pension scheme other than a scheme which is (1) a money purchase scheme, or (2) a prescribed scheme or a scheme of a prescribed description<sup>5</sup>. The assets of the scheme must be applied first towards satisfying the amounts of the liabilities mentioned below<sup>6</sup> and, if the assets are insufficient to satisfy those amounts in full, then (a) the assets must be applied first towards satisfying the amounts of the liabilities mentioned in earlier heads of the provision below before the amounts of the liabilities mentioned in later heads, and (b) where the amounts of the liabilities mentioned in one of those heads cannot be satisfied in full, those amounts must be satisfied in the same proportions<sup>7</sup>. The liabilities referred to above<sup>8</sup> are (i) where (A) the trustees or managers of the scheme are entitled to benefits under a relevant pre-1997 contract of insurance<sup>9</sup> entered into in relation to the scheme, and (B) either that contract may not be surrendered or the amount payable on surrender does not exceed the liability secured by the contract, the liability so secured; (ii) any liability for pensions or other benefits to the extent that the amount of the liability does not exceed the corresponding PPF liability<sup>10</sup>, other than a liability within head (i) above; (iii) any liability for pensions or other benefits which, in the opinion of the trustees or managers, are derived from the payment by any member of voluntary contributions, other than a liability within head (i) or (ii) above; (iv) any other liability in respect of pensions or other benefits<sup>11</sup>. Where, on the commencement of the winding up period<sup>12</sup>, a member becomes a person to whom Chapter 5 of Part 4 of the Pension Schemes Act 1993 (early leavers: cash transfer sums and contribution refunds)<sup>13</sup> applies, that Chapter applies in relation to him with such modifications as may be prescribed<sup>14</sup>.

Supplementary provision is made<sup>15</sup>.

1    Ie the Pensions Act 1995 s 73.

2    For the purposes of *ibid* s 73 'assets' of a scheme to which s 73 applies do not include any assets representing the value of any rights in respect of money purchase benefits under the scheme rules: s 73(10) (ss 73, 73A, 73B substituted by the Pensions Act 2004 s 270(1)). 'Scheme rules' has the same meaning as in the Pensions Act 2004 (see s 318; and PARA 636A.19): 1995 Act s 73(10).

3    For the purposes of *ibid* s 73 'liabilities' of such a scheme do not include any liabilities in respect of money purchase benefits under the scheme rules: s 73(10).

4    *Ibid* s 73(1). As to the schemes to which s 73 does not apply see the Occupational Pension Schemes (Winding up etc) Regulations 2005, SI 2005/706, reg 3 (amended by SI 2006/467, SI 2007/814).

5    1995 Act s 73(2).

6    Ie mentioned in *ibid* s 73(4).

7    *Ibid* s 73(3). See *Cripps v Trustee Solutions Ltd* [2007] EWCA Civ 771, [2007] All ER (D) 416 (Jul); applied in *Alexander Forbes Trustee Services Ltd v Clarke* [2008] EWHC 153 (Ch), [2008] All ER (D) 41 (Feb).

8    Ie in the 1995 Act s 73(3).

9 For these purposes 'relevant pre-1997 contract of insurance' means a contract of insurance which was entered into before 6 April 1997 with a view to securing the whole or part of the scheme's liability for (1) any pension or other benefit payable to or in respect of one particular person whose entitlement to payment of a pension or other benefit has arisen, and (2) any benefit which will be payable in respect of that person on his death: *ibid* s 73(5).

10 For these purposes 'corresponding PPF liability' in relation to any liability for pensions or other benefits means (1) where the liability is to a member of the scheme, the cost of securing benefits for or in respect of the member corresponding to the compensation which would be payable to or in respect of the member in accordance with the pension compensation provisions if the Board of the Pension Protection Fund assumed responsibility for the scheme in accordance with the 2004 Act Pt 2 Ch 3 (ss 126-181) (see *PARA 659C*), and (2) where the liability is to another person in respect of a member of the scheme, the cost of securing benefits for that person corresponding to the compensation which would be payable to that person in respect of the member in accordance with the pension compensation provisions if the Board assumed responsibility for the scheme in accordance with Pt 2 Ch 3: 1995 Act s 73(5). 'The pension compensation provisions' has the same meaning as in the 2004 Act Pt 2 (ss 107-220) (see s 162; and *PARA 659C.26*): 1995 Act s 73(10). For the purposes of s 73, when determining the corresponding PPF liability in relation to any liability of a scheme to, or in respect of, a member for pensions or other benefits, the pension compensation provisions apply with such modifications as may be prescribed: s 73(6).

11 *Ibid* s 73(4). Regulations may modify s 73(4): s 73(7). For the purposes of s 73(4) (1) regulations may prescribe how it is to be determined whether a liability for pensions or other benefits which, in the opinion of the trustees or managers of the scheme, are derived from the payment by any member of voluntary contributions falls within head (i) or (ii) in the text; (2) no pension or other benefit which is attributable (directly or indirectly) to a pension credit is to be regarded for the purposes of head (iii) in the text as derived from the payment of voluntary contributions: s 73(8).

12 For the purposes of *ibid* s 73 'winding up period', in relation to an occupational pension scheme to which s 73 applies, means the period which (1) begins with the day on which the time immediately after the beginning of the winding up of the scheme falls, and (2) ends when the winding up of the scheme is completed: s 73(10).

13 See *PARA 960A*.

14 1995 Act s 73(9).

15 See *ibid* s 73B.

## 2. Operation of scheme during winding up period

The following provisions<sup>1</sup> apply where an occupational pension scheme<sup>2</sup> is being wound up<sup>3</sup>. During the winding up period, the trustees or managers of the scheme (1) must secure that any pensions or other benefits (other than money purchase benefits) paid to or in respect of a member are reduced, so far as necessary, to reflect the liabilities<sup>4</sup> of the scheme to or in respect of the member, and (2) may, for the purposes of head (1) above, take such steps as they consider appropriate (including steps adjusting future payments) to recover any overpayment or pay any shortfall<sup>5</sup>. During the winding up period (a) no benefits may accrue under the scheme rules to, or in respect of, members of the scheme, and (b) no new members of any class may be admitted to the scheme<sup>6</sup>. Regulations may require the trustees or managers of the scheme, in prescribed circumstances (i) to adjust the entitlement of a person to a pension or other benefit under the scheme rules where the entitlement arises as a result of a discretionary award<sup>7</sup> which takes effect during the winding up period; (ii) to adjust the entitlement of a person ('the survivor') to a pension or other benefit under the scheme rules where (A) a member of the scheme, or a person who was (or might have become) entitled to a pension or other benefit in respect of a member, dies during the winding up period, and (B) the survivor's entitlement is to a pension or other benefit in respect of the member (whether arising on the date of that death or subsequently)<sup>8</sup>. If the scheme confers power on any person other than the trustees or managers of the scheme to apply the assets of the scheme in respect of pensions or other benefits (including increases in pensions or benefits), it cannot be exercised by that person but may<sup>9</sup> be exercised instead by the trustees or managers<sup>10</sup>.

Supplementary provision is made<sup>11</sup>.

- 1 le the Pensions Act 1995 s 73A.
  - 2 le to which *ibid* s 73 (see *PARA 845A.1*) applies.
  - 3 1995 Act s 73A(1) (ss 73, 73A, 73B substituted by the Pensions Act 2004 s 270(1)).
  - 4 These will be satisfied in accordance with the 1995 Act s 73.
  - 5 *Ibid* s 73A(2).
  - 6 *Ibid* s 73A(3). Section 73A(3) does not prevent any increase, in a benefit, which would otherwise accrue in accordance with the scheme or any enactment: s 73A(4). Section 73A(3) does not prevent the accrual of money purchase benefits to the extent that they are derived from income or capital gains arising from the investment of payments which are made by, or in respect of, a member of the scheme: s 73A(5). Where a person is entitled to a pension credit derived from another person's shareable rights under the scheme, s 73A(3) does not prevent the trustees or managers of the scheme discharging their liability in respect of the credit under the Welfare Reform and Pensions Act 1999 Pt 4 Ch 1 (sharing of rights under pension arrangements) by conferring appropriate rights under the scheme on that person: Pensions Act 1995 s 73A(6). For the purposes of s 73A 'shareable rights' has the same meaning as in the Welfare Reform and Pensions Act 1999 Pt 4 Ch 1; and 'appropriate rights' has the same meaning as in the Welfare Reform and Pensions Act 1999 Sch 5 para 5 (pension credits: mode of discharge): Pensions Act 1995 s 73A(10).
  - 7 For the purposes of *ibid* s 73A 'discretionary award' means an award of a prescribed description: s 73A(10).
  - 8 *Ibid* s 73A(7). Regulations under s 73A(7) may, in particular (1) prescribe how the required adjustments to entitlement are to be determined and the manner in which they are to be made; (2) in a case where the commencement of the winding up of the scheme is backdated (whether in accordance with the Pensions Act 2004 s 154 (requirement to wind up schemes with sufficient assets to meet protected liabilities: see *PARA 659C.23*) or otherwise), require any adjustment to a person's entitlement to be made with effect from the time the award takes effect; (3) without prejudice to the Pensions Act 1995 ss 10(3)-(9), 73B(2) and 116, make provision about the consequences of breaching the requirements of the regulations: s 73A(8).
  - 9 Subject to the provisions made by or by virtue of *ibid* s 73A and ss 73 and 73B.
  - 10 *Ibid* s 73A(9).
- The Pensions Act 1995 s 73(10) (see *PARA 845A.1*) applies as it applies for the purposes of s 73: s 73A(10).
- 11 See *ibid* s 73B.

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and *PARA 873A*.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and *PARA 873B*.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see *para 873D*.

### 842-852 Winding Up

Provision has been made for the supervision of the winding up: see the Pensions Act 1995 ss 72A-72C (added by the Child Support, Pensions and Social Security Act 2000 ss 49, 51; and amended by the Pensions Act 2004 Sch 12 paras 59, 60, Sch 13 Pt 1).

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#### **846. Preferential liabilities on winding up of hybrid schemes.**

In relation to any scheme<sup>1</sup> which is not a money purchase scheme<sup>2</sup>, but where some of the benefits that may be provided are relevant money purchase benefits<sup>3</sup>, the statutory provisions relating to priority of liabilities in a winding up<sup>4</sup> apply as if the liabilities of the scheme did not include liabilities in respect of those benefits, and the assets of the scheme did not include the assets by reference to which the rate or amount of those benefits is calculated<sup>5</sup>.

1 As to the schemes to which these provisions apply see PARA 843 ante.

2 For the meaning of 'money purchase scheme' see PARA 811 note 2 ante.

3 For these purposes, 'relevant money purchase benefits' means money purchase benefits other than benefits derived from the payment by any member of voluntary contributions, or underpin benefits: Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 13(2). 'Underpin benefits' means money purchase benefits which under the provisions of the scheme will only be provided in respect of a member if their value exceeds the value of other benefits in respect of him under the scheme which are not money purchase benefits: reg 13(3). Where a scheme which is not a money purchase scheme may provide underpin benefits, the amount of the liability for those benefits must be calculated in accordance with reg 4 (but omitting reg 4(1)(c), (3)-(5)): reg 13(4).

4 In the Pensions Act 1995 s 73 (as modified): see PARA 845 ante.

5 Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 13(1). As to the valuation of assets see further reg 13(5)-(7).

#### **UPDATE**

#### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

#### **842-852 Winding Up**

Provision has been made for the supervision of the winding up: see the Pensions Act 1995 ss 72A-72C (added by the Child Support, Pensions and Social Security Act 2000 ss 49, 51; and amended by the Pensions Act 2004 Sch 12 paras 59, 60, Sch 13 Pt 1).

#### **846 Preferential liabilities on winding up of hybrid schemes**

NOTE 3--SI 1996/3126 reg 13(4) amended: SI 2002/380.

NOTE 5--SI 1996/3126 reg 13(6), (7) revoked: SI 2005/3377.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (10) WINDING UP/847. Discharge of liabilities by insurance etc; in general.

#### **847. Discharge of liabilities by insurance etc; in general.**

The following provisions apply where a salary-related occupational pension scheme to which the minimum funding requirement applies<sup>1</sup>, other than a scheme falling within a prescribed<sup>2</sup> class or description, is being wound up<sup>3</sup>. A liability to or in respect of a member<sup>4</sup> of the scheme in respect of pensions or other benefits (including increases in pensions) is to be treated as discharged (to the extent that it would not be so treated apart from these provisions) if the trustees or managers<sup>5</sup> of the scheme have, in accordance with prescribed arrangements, provided for the discharge of the liability in one or more of the ways mentioned in heads (1) to (4) below<sup>6</sup>.

The ways so referred to are:

- 2050 (1) by acquiring transfer credits<sup>7</sup> allowed under the rules of another occupational pension scheme which satisfies prescribed requirements and the trustees or managers of which are able and willing to accept payment in respect of the member<sup>8</sup>;
- 2051 (2) by acquiring rights allowed under the rules of a personal pension scheme which satisfies prescribed requirements and the trustees or managers of which are able and willing to accept payment in respect of the member's accrued rights<sup>9</sup>;
- 2052 (3) by purchasing one or more annuities which satisfy prescribed requirements<sup>10</sup> from one or more insurance companies willing to accept payment in respect of the member from the trustees or managers<sup>11</sup>;
- 2053 (4) by subscribing to other pension arrangements which satisfy prescribed requirements<sup>12</sup>.

Regulations<sup>13</sup> may provide for these provisions to have effect in relation to so much of any liability as may be determined in accordance with the regulations, or to have effect with prescribed modifications<sup>14</sup> in relation to schemes falling within a prescribed class or description<sup>15</sup>.

1 The one to which the Pensions Act 1995 s 56 applies: see s 73(1); and PARA 845 ante. For the meaning of 'salary-related occupational pension scheme' see PARA 643 note 8 ante (definition applied by s 124(5)); and for the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by s 176). See also PARA 598 note 7 ante.

2 For the meaning of 'prescribed' see PARA 555 note 1 ante.

3 Pensions Act 1995 s 74(1).

4 For the meaning of 'member' see PARA 612 note 5 ante.

5 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

6 Pensions Act 1995 s 74(2). If the assets of the scheme are insufficient to satisfy in full the liabilities, as calculated in accordance with the rules of the scheme, in respect of pensions and other benefits (including increases in pensions), the reference to providing for the discharge of any liability in one or more of the ways mentioned in heads (1)-(4) in the text is to applying any amount available in accordance with s 73 (as modified) (see PARA 845 ante) in one or more of those ways: s 74(4).

The arrangements with which the trustees or managers of a scheme must comply in providing for the discharge of a liability are as follows: (1) where the trustees or managers of a scheme propose to discharge a liability of

the scheme to or in respect of a member (a) they must give him, or, if he has died, each beneficiary who is entitled to benefits in respect of him, notice in writing of that fact; and (b) if they propose to discharge the liability wholly or partly in the way mentioned in s 74(3)(a) or s 74(3)(b) (as modified) or in the way mentioned in the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 8(5) in a case where reg 8(5)(a) applies (payment to Secretary of State of amount required for restoring the member's state scheme rights), then, subject to reg 6(4), they must obtain the written consent of the member or, as the case may be, the beneficiary to discharging the liability in that way; and (c) in the case of discharge in the way mentioned in reg 8(5), any other requirements which apply to the making of a payment so mentioned must have been met; (2) a notice under head (1)(a) supra (a 'discharge notice') must comply with the requirements of reg 7; (3) in a case where the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 12 (as amended) (transfer of member's accrued rights without consent: see PARA 934 post) applies, no consent need be obtained to a discharge of liability in the way mentioned in the Pensions Act 1995 s 74(3)(a) (see head (1) in the text); and (4) where the trustees or managers have complied with heads (1)-(2) supra and an election has been made under the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 7(3)(a), they may discharge the liability in pursuance of the election without complying with those heads again: reg 6(1)-(5).

7 For the meaning of 'transfer credits' see PARA 612 note 5 ante.

8 Pensions Act 1995 s 74(3)(a). For the requirements to be satisfied see the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 8(1).

9 Pensions Act 1995 s 74(3)(b). For the requirements to be satisfied see the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 8(2). For the meaning of 'accrued rights' see PARA 843 note 6 ante.

10 For the meaning of 'insurance company' see the Insurance Companies Act 1982 s 96(1); and COMPANIES vol 15 (2009) PARA 701 (definition applied by the Pension Schemes Act 1993 s 181(1); and by the Pensions Act 1995 s 125(4)).

11 Ibid s 74(3)(c). For the requirements to be satisfied see the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 8(3).

12 Pensions Act 1995 s 74(3)(d). For the requirements to be satisfied see the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 8(4), (5). In any case where the liability to or in respect of the member is a liability in respect of protected rights, nothing in regs 6-8 affects any requirements imposed by or under the Pension Schemes Act 1993 s 32A (as added) (discharge of protected rights on winding up: insurance policies: see PARA 849 post) or any rules of the scheme reflecting those requirements: Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 9.

13 For the meaning of 'regulations' see PARA 600 note 2 ante.

14 For the meaning of 'modifications' see PARA 664 note 10 ante (definition applied by the Pensions Act 1995 s 124(5)).

15 Ibid s 74(5). Where s 56 applies to a scheme as if different parts of the scheme were separate schemes and a part of such a scheme is being wound up (whether or not any other parts are being wound up), s 73 (as modified) and s 74 also so apply, taking references therein to the assets of the scheme as references only to those assets treated for the purposes of s 56 as assets of that part and taking references therein to the liabilities of the scheme or any particular description of liabilities as references only to such liabilities of the scheme or, as the case may be, of that description as are treated for the purposes of s 56 as liabilities of that part: Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 12 (substituted by SI 1997/786).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

## **842-852 Winding Up**

Provision has been made for the supervision of the winding up: see the Pensions Act 1995 ss 72A-72C (added by the Child Support, Pensions and Social Security Act 2000 ss 49, 51; and amended by the Pensions Act 2004 Sch 12 paras 59, 60, Sch 13 Pt 1).

## **847 Discharge of liabilities by insurance etc; in general**

TEXT AND NOTES--For the purposes of the Pensions Act 1995 s 74 (1) references to assets of the scheme do not include any assets representing the value of any rights in respect of money purchase benefits under the scheme rules, and (2) references to liabilities of the scheme do not include any liabilities in respect of money purchase benefits under the scheme rules; and 'scheme rules' has the same meaning as in the Pensions Act 2004 (see s 318 and PARA 636A.19): 1995 Act s 74(6) (added by Pensions Act 2004 s 270(2)(f)).

NOTES--SI 1996/3126 reg 8 further amended: SI 2005/706, SI 2007/1930, SI 2009/615, SI 2009/2930.

TEXT AND NOTE 3--The 1995 Act s 74 applies where an occupational pension scheme to which s 73 applies is being wound up: s 74(1) (substituted by Pensions Act 2004 s 270(2)(a)).

TEXT AND NOTE 6--In 1995 Act s 74(2) words '(including increases in pensions)' omitted: Pensions Act 2004 s 270(2)(b).

NOTE 6--In 1995 Act s 74(4) (1) for 'rules of the scheme' substitute 'scheme rules', and (2) omit ' (including increases in pensions)': Pensions Act 2004 s 270(2)(d).

TEXT AND NOTES 8-12--Also, '(5) by the payment of a cash sum in circumstances where prescribed requirements are met.': 1995 Act s 74(3)(e) (added by Pensions Act 2004 s 270(2)(c)).

NOTES 8-11--SI 1996/3126 reg 8(1)-(3) substituted: SI 2000/2691.

TEXT AND NOTE 9--Now refers to accrued rights or pension credit rights: 1995 Act s 74(3) (b) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 43, 56). For the meaning of 'pension credit rights' see PARA 843.

NOTE 10--Insurance Companies Act 1982 and definition of 'insurance company' in Pension Schemes Act 1993 s 181(1) repealed: SI 2001/3649.

TEXT AND NOTE 11--For 'insurance companies' read 'insurers': 1995 Act s 74(3)(c) (amended by SI 2001/3649).

TEXT AND NOTE 15--1995 Act s 74(5) amended: Pensions Act 2004 s 270(2)(e), Sch 13 Pt 1.

NOTE 15--See also SI 1996/3126 regs 12A, 12B (added by SI 2005/706). SI 1996/3126 reg 12 amended: SI 2005/3377.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (10) WINDING UP/848. Notice of discharge.

#### **848. Notice of discharge.**

Where the trustees or managers<sup>1</sup> of a scheme propose to discharge a liability of the scheme to or in respect of a member they must give him, or, if he has died, each beneficiary who is entitled to benefits in respect of him, notice in writing of that fact<sup>2</sup>. A discharge notice must specify the sum which is available to be used to discharge the liability of the scheme to the member or, as the case may be, the beneficiary in respect of his rights under the scheme and, if the full amount of that liability<sup>3</sup> is greater than that sum, that amount and the reason for the difference<sup>4</sup>. A discharge notice must also:

- 2054 (1) specify the way or ways in which it is proposed to discharge the liability;
- 2055 (2) if the proposed way or any of the proposed ways requires the consent of the member or, as the case may be, the beneficiary, state that his consent is so required, the period within which his consent must be given<sup>5</sup> and the way or ways in which it is proposed to discharge the liability if he does not give his consent; and
- 2056 (3) if the proposed way is by a payment to the Secretary of State<sup>6</sup>, state any further requirements which must be met before discharge may be made in that way<sup>7</sup>.

If there are any options available to the member or beneficiary, the discharge notice must specify them and state:

- 2057 (a) that if he wishes to elect that, instead of the liability being discharged in the proposed way, it should be discharged in one or more of the other ways<sup>8</sup> which are available in his case (or partly in the proposed way and partly in another such way), then he must give notice to that effect in writing to the trustees or managers, specifying the way or ways in which he wishes the liability to be discharged, and the name of the relevant provider<sup>9</sup>;
- 2058 (b) that such a notice must be given by him before the expiry of the period of three months beginning with the date on which the discharge notice is given to him; and
- 2059 (c) that it would be advisable for him to obtain independent financial advice before deciding whether to make such an election<sup>10</sup>.

Discharge notices are not required to be given to a person if the trustees or managers know no address for him or if correspondence sent to the address at which he was last known by them to be living has been returned<sup>11</sup>.

1 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

2 See the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 6(2)(a).

3 ie as calculated in accordance with *ibid* reg 4.

4 *Ibid* reg 7(1).

5 The period must be at least three months beginning with the date on which the notice is given: *ibid* reg 7(2)(ii).

6 le the way mentioned in *ibid* reg 8(5) (amount required for restoring the member's state scheme rights where the Pension Schemes Act 1993 s 39, Sch 2 para 5(3B) (as added) applies).

7 Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 7(2).

8 le the ways mentioned in the Pensions Act 1995 s 74(3): see PARA 847 ante.

9 'The relevant provider' means (1) in the case of the acquisition of transfer credits under another occupational pension scheme, the trustees or managers of the scheme; (2) in the case of the acquisition of rights under a personal pension scheme, the person who is responsible for the provision of pensions and other benefits under the scheme; and (3) in the case of the purchase or transfer of the benefit of an annuity, the insurance company or companies from which the annuity is to be or, as the case may be, has been purchased: Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 7(8).

10 *Ibid* reg 7(3). The statement mentioned in head (c) in the text must also be included in any case where the consent of the member or the beneficiary is required: reg 7(4). Where it is proposed to discharge the liability (1) in the way mentioned in the Pensions Act 1995 s 74(3)(a) (see PARA 847 head (1) ante), the discharge notice must specify the name of the relevant provider and the scheme address; (2) in the way mentioned in s 74(3)(b) (see PARA 847 head (2) ante), the discharge notice must specify the name of the relevant provider and (if different) of the person who is the scheme administrator and the scheme address; (3) in the way mentioned in s 74(3)(c) (see PARA 847 head (3) ante) or in the Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 8(4), the discharge notice must specify (a) the name and address of the relevant provider; (b) if different, the name and address of the person from whom information about the terms of the contract for the provision of the annuity which is to be purchased or, as the case may be, the benefit of which is to be transferred can be obtained; and (c) in a case where the contract for the provision of the annuity has not been made at the time the notice is given, whether information about its terms will be given on the assumption that they will coincide with the terms of a quotation: reg 7(5)-(7). For these purposes, 'the scheme address', in relation to a scheme, means the place in the United Kingdom where the management of the scheme is conducted or, if there is more than one such place, the principal place; and 'scheme administrator' has the meaning given in the Income and Corporation Taxes Act 1988 s 630(1) (see PARA 714 note 5 ante): Occupational Pensions (Winding Up) Regulations 1996, SI 1996/3126, reg 7(8). A discharge notice and any notice under reg 7(3) is treated as having been given to a person if it has been sent to him by post at the address at which he was last known by the trustees or managers of the scheme to be living: reg 7(9).

11 *Ibid* reg 7(10).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **842-852 Winding Up**

Provision has been made for the supervision of the winding up: see the Pensions Act 1995 ss 72A-72C (added by the Child Support, Pensions and Social Security Act 2000 ss 49, 51; and amended by the Pensions Act 2004 Sch 12 paras 59, 60, Sch 13 Pt 1).

### **848 Notice of discharge**

NOTES 6, 10--SI 1996/3126 reg 8 amended: SI 2005/706, SI 2007/848, SI 2009/615, SI 2009/2930.

NOTE 6--1993 Act Sch 2 para 5(3B) amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 62.

NOTE 10--Definition of 'scheme administrator' in SI 1996/3126 reg 7(8) amended: SI 2005/706.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (10) WINDING UP/849. Discharge of protected rights on winding up by insurance etc.

#### **849. Discharge of protected rights on winding up by insurance etc.**

Where an occupational pension scheme<sup>1</sup> is being wound up and such conditions as may be prescribed<sup>2</sup> are satisfied, effect may be given to the protected rights<sup>3</sup> of a member<sup>4</sup> of the scheme<sup>5</sup> by:

- 2060 (1) taking out an appropriate policy of insurance<sup>6</sup>, or a number of such policies, under which the member is the beneficiary<sup>7</sup>; or
- 2061 (2) assuring the benefits of a policy of insurance, or a number of such policies, to the member, where the policy assured is an appropriate policy<sup>8</sup>.

The prescribed conditions are that the trustees or managers<sup>9</sup> give written notice<sup>10</sup> to the member of the proposal to give effect to his protected rights by means of an appropriate policy of insurance and either (a) the member agrees in writing within three months from the date of the written notice; or (b) where this condition is not satisfied, either no application for a cash equivalent<sup>11</sup> is received by the trustees or managers within three months from the date of the written notice or an application for a cash equivalent is so received and any of the following conditions are satisfied<sup>12</sup>:

- 2062 (i) the member withdraws his application for a cash equivalent<sup>13</sup>;
- 2063 (ii) the member loses his right to the cash equivalent under the provisions relating to variation and loss of rights<sup>14</sup>; or
- 2064 (iii) it is not possible for the trustees or managers within the specified period<sup>15</sup> to do what is needed to carry out what the member requires<sup>16</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 741 ante.

2 For the meaning of 'prescribed' see PARA 555 note 1 ante.

3 For the meaning of 'protected rights' see the Pension Schemes Act 1993 s 10 (as amended); and PARA 883 post.

4 As to the power to prescribe persons who are to be regarded as members or prospective members of a pension scheme see PARA 557 note 9 ante.

5 In spite of the Pension Schemes Act 1993 s 28 (as amended): see PARA 899 post.

6 A policy of insurance is appropriate for the purposes of *ibid* s 32A (added by the Pensions Act 1995 s 146(1)) if (1) the insurance company with which it is or was taken out or entered into is, or was at the time when the policy was taken out or (as the case may be) the benefit of it was assured, carrying on ordinary long-term insurance business (within the meaning of the Insurance Companies Act 1982 s 96: see *INSURANCE* vol 25 (2003 Reissue) PARA 21) in the United Kingdom or any other member state, and satisfies, or at that time satisfied, prescribed requirements; and (2) it may not be assigned or surrendered except on conditions which satisfy such requirements as may be prescribed; and (3) it contains or is indorsed with terms whose effect is that the amount secured by it may not be commuted except on conditions which satisfy such requirements as may be prescribed; and (4) it satisfies such other requirements as may be prescribed: Pension Schemes Act 1993 s 32A(2) (as so added).

For the prescribed requirements in relation to head (1) *supra* see the Occupational Pension Schemes (Discharge of Protected Rights on Winding Up) Regulations 1996, SI 1996/775, reg 3; for the prescribed conditions in relation to head (2) *supra* see reg 4; for the prescribed conditions in relation to head (3) *supra* see reg 5; and for the prescribed conditions in relation to head (4) *supra* see reg 6.

7 Pension Schemes Act 1993 s 32A(1)(a) (as added: see note 6 supra).

8 Ibid s 32A(1)(b) (as added: see note 6 supra). As to the relationship between these provisions and those of the Pensions Act 1995 s 74 see PARA 847 note 12 ante.

9 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

10 The written notice must be sent by post to the member's last known address and must include the following information: (1) details of the proposal to wind up the scheme and to give effect to protected rights by means of an appropriate policy of insurance on or after three months from the date of the written notice; (2) an explanation of the effect of winding up a scheme; (3) details of the cash equivalent of the member's protected rights at a date not earlier than three months prior to the date of the written notice; (4) a statement that if the member does not wish his protected rights to be secured by an appropriate policy of insurance, notification of where those protected rights are to be transferred to must be given to the trustees or managers within three months from the date of the written notice; (5) the options available to the member in respect of his protected rights; (6) the name and address of the insurance company providing the appropriate policy of insurance and where appropriate a statement confirming that the insurance company is the same company which manages the scheme and issues the insurance policy or policies securing the benefits under that scheme; (7) where appropriate, details of any administrative charges or other costs or charges which will be incurred and on whom they fall in respect of the proposed appropriate policy of insurance; (8) the rights and options available under the appropriate policy of insurance in respect of assignment, surrender and commutation; and (9) the availability of independent financial advice: Occupational Pension Schemes (Discharge of Protected Rights on Winding Up) Regulations 1996, SI 1996/775, reg 2(3), Schedule.

11 Ie under the Pension Schemes Act 1993 s 95 (as amended): see PARA 954 post.

12 Occupational Pension Schemes (Discharge of Protected Rights on Winding Up) Regulations 1996, SI 1996/775, reg 2(1).

13 Ie in accordance with the Pension Schemes Act 1993 s 100: see PARA 954 post.

14 Ie under ibid s 98(7): see PARA 957 post.

15 Ie the period specified in ibid s 99(2) (as amended): see PARA 958 post.

16 Occupational Pension Schemes (Discharge of Protected Rights on Winding Up) Regulations 1996, SI 1996/775, reg 2(2).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **842-852 Winding Up**

Provision has been made for the supervision of the winding up: see the Pensions Act 1995 ss 72A-72C (added by the Child Support, Pensions and Social Security Act 2000 ss 49, 51; and amended by the Pensions Act 2004 Sch 12 paras 59, 60, Sch 13 Pt 1).

**849 Discharge of protected rights on winding up by insurance etc**

TEXT AND NOTES 1-8--The following provisions come into force on the abolition date: see Pensions Act 2007 s 15; and PARA 880. For savings see Sch 4 Pt 3. Where an occupational pension scheme is being wound up, effect may not be given to the protected rights of a member of the scheme by taking out a policy of insurance (or a number of such policies) under which the member is the beneficiary unless the policy (or each such policy) satisfies the requirement in the 1993 Act s 32A(2): s 32A(1) (s 32A substituted by the Pensions Act 2007 Sch 4 para 12). The requirement is that the policy of insurance makes such provision in relation to giving effect to the protected rights of the beneficiary as a scheme to which the 1993 Act s 25A (see PARA 898A) applies is required to make under or by virtue of s 27A (see PARA 899A) in relation to giving effect to the protected rights of a member of the scheme: s 32A(2).

NOTE 6--Pension Schemes Act 1993 s 32A(2) amended, SI 1996/775 reg 3 substituted: SI 2001/3649. SI 1996/775 reg 5 substituted by SI 2006/744 and amended by SI 2007/849, SI 2009/2930. SI 1996/775 reg 6 amended: SI 2006/744.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/ (10) WINDING UP/850. Deficiencies in the assets.

### **850. Deficiencies in the assets.**

If, in the case of an occupational pension scheme<sup>1</sup> which is not a money purchase scheme<sup>2</sup>, the value at the applicable time<sup>3</sup> of the assets of the scheme is less than the amount at that time of the liabilities of the scheme, an amount equal to the difference must be treated as a debt<sup>4</sup> due from the employer to the trustees or managers<sup>5</sup> of the scheme<sup>6</sup>. For these purposes, the liabilities and assets to be taken into account, and their amount or value, must be determined, calculated and verified by a prescribed person and in the prescribed manner<sup>7</sup>. In calculating the value of any liabilities, a provision of the scheme which limits the amount of its liabilities by reference to the amount of its assets is to be disregarded<sup>8</sup>.

If, in the case of an occupational pension scheme which is not a money purchase scheme, a relevant insolvency event occurs in relation to the employer, and a debt so due from the employer has not been discharged at the time that event occurs, the debt in question must be taken, for the purposes of the law relating to winding up, bankruptcy or sequestration as it applies in relation to the employer, to arise immediately before that time<sup>9</sup>.

These provisions do not prejudice any other right or remedy which the trustees or managers may have in respect of a deficiency in the scheme's assets<sup>10</sup> and they do not apply to an occupational pension scheme falling within a prescribed class or description<sup>11</sup> and thus do not apply to:

- 2065 (1) a public service pension scheme<sup>12</sup> under the provisions of which there is no requirement for assets related to the intended rate or amount of benefit under the scheme to be set aside in advance (disregarding requirements relating to additional voluntary contributions) or which is made under the statutory provisions relating to the superannuation of persons employed in local government service<sup>13</sup> or to parliamentary pensions<sup>14</sup>;
- 2066 (2) any occupational pension scheme in respect of which any Minister of the Crown has given a guarantee or made any other arrangements for the purpose of securing that the assets of the scheme are sufficient to meet its liabilities;
- 2067 (3) an occupational pension scheme which provides relevant benefits<sup>15</sup> but is neither an approved scheme<sup>16</sup> nor a relevant statutory scheme<sup>17</sup>;
- 2068 (4) a scheme with a specified type of superannuation fund<sup>18</sup>;
- 2069 (5) a scheme with less than two members;
- 2070 (6) a scheme the only benefits provided by which are death benefits and under the provisions of which no member has accrued rights;
- 2071 (7) a relevant lump sum retirement benefits scheme<sup>19</sup>; or
- 2072 (8) the scheme established by the Salvation Army Act 1963<sup>20</sup>.

In addition, regulations may modify<sup>21</sup> these provisions as they apply in prescribed circumstances<sup>22</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

2 For the meaning of 'money purchase scheme' see PARA 811 note 2 ante (definition applied by ibid s 176).

3 'The applicable time' means (1) if the scheme is being wound up before a relevant insolvency event occurs in relation to the employer, any time when it is being wound up before such an event occurs; and (2) otherwise,

immediately before the relevant insolvency event occurs: *ibid* s 75(3). A relevant insolvency event occurs in relation to the employer (in England and Wales) where the employer is a company, when it goes into liquidation, within the meaning of the Insolvency Act 1986 s 247(2) (see *COMPANY AND PARTNERSHIP INSOLVENCY* vol 7(3) (2004 Reissue) PARA 9), or where the employer is an individual, at the commencement of his bankruptcy, within the meaning of s 278 (see *BANKRUPTCY AND INDIVIDUAL INSOLVENCY* vol 3(2) (2002 Reissue) PARA 213): Pensions Act 1995 s 75(4).

In the application of s 75 and the Occupational Pension Schemes (Deficiency on Winding Up etc) Regulations 1996, SI 1996/3128 (as amended) to a scheme which has no active members, 'the employer' includes every person who employed persons in the description or category of employment to which the scheme relates immediately before the occurrence of the event after which the scheme ceased to have any active members: reg 5(1). In the application of those provisions to a scheme, 'the employer' includes any person who has ceased on or after 6 April 1997 and before the applicable time to be a person employing persons in the description or category of employment to which the scheme relates, unless when he so ceased the scheme was not being wound up and continued to have active members, and one of the prescribed conditions is met, ie that (a) no debt was treated as becoming due from him under the Pensions Act 1995 s 75(1) by virtue of his so ceasing; (b) such a debt was treated as becoming due from him and has been paid before the applicable time; (c) such a debt was treated as becoming due from him but at the applicable time it is excluded from the value of the assets of the scheme by virtue of the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536, reg 6(1)(b) (exclusion of debts unlikely to be recovered: see PARA 813 ante); Occupational Pension Schemes (Deficiency on Winding Up etc) Regulations 1996, SI 1996/3128, reg 5(2), (3). For the meaning of 'employer' generally see PARA 598 note 4 ante. For transitional provisions where a person who was an employer ceased to participate see reg 6. Regulations 5, 6 do not apply to a money purchase scheme, but in the application of the Pensions Act 1995 s 75 and the Occupational Pension Schemes (Deficiency on Winding Up etc) Regulations 1996, SI 1996/3128 (as amended) to such a scheme which has no active members at the applicable time, 'the employer' includes every person who employed persons in the description or category of employment to which the scheme relates immediately before the occurrence of the event after which the scheme ceased to have any active members: reg 9.

4 A debt so due must not be regarded as a preferential debt for the purposes of the Insolvency Act 1986 (see *BANKRUPTCY AND INDIVIDUAL INSOLVENCY*; *COMPANY AND PARTNERSHIP INSOLVENCY*), or as a preferred debt for the purposes of the Bankruptcy (Scotland) Act 1985: Pensions Act 1995 s 75(8).

5 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

6 Pensions Act 1995 s 75(1). Regulations made by virtue of s 75 may provide for the values of the assets and the amounts of the liabilities to be calculated and verified in accordance with guidance prepared and from time to time revised by a prescribed body, and approved by the Secretary of State: s 119. As to the Secretary of State see PARA 1 ante. As to calculation of the value of scheme liabilities and assets see the Occupational Pension Schemes (Deficiency on Winding Up etc) Regulations 1996, SI 1996/3218, reg 3. For the prescribed form of actuary's certificate see reg 3(2), Sch 1. For the meaning of 'prescribed' see PARA 555 note 1 ante.

7 Pensions Act 1995 s 75(5).

8 *Ibid* s 75(6).

9 *Ibid* s 75(2).

10 *Ibid* s 75(7).

11 *Ibid* s 75(9).

12 For the meaning of 'public service pension scheme' see PARA 874 post.

13 *Ie* under the Superannuation Act 1972 s 7: see PARA 875 post.

14 *Ie* under the Parliamentary and other Pensions Act 1987 s 2 (as amended): see *PARLIAMENT* vol 78 (2010) PARA 926.

15 For the meaning of 'relevant benefits' see the Income and Corporation Taxes Act 1988 s 612(1); and PARA 741 note 6 ante.

16 'Approved scheme' means a scheme which is approved or was formerly approved under *ibid* s 590 or s 591 (as amended) (see PARAS 748-751 ante) or in respect of which an application for such approval has been duly made which has not been determined: Occupational Pension Schemes (Deficiency on Winding Up etc) Regulations 1996, SI 1996/3128, reg 10(2).

17 For the meaning of 'relevant statutory scheme' see the Income and Corporation Taxes Act 1988 s 611A (as added); and PARA 756 note 2 ante.

18 le such a superannuation fund as is specified in *ibid* s 615(6) (certain overseas pensions).

19 'Relevant lump sum retirement benefits scheme' means an approved scheme which has been categorised by the Commissioners of Inland Revenue for the purposes of its approval as a centralised scheme for non-associated employers, which is not contracted-out and under the provisions of which the only benefits which may be provided on or after retirement (other than money purchase benefits derived from the payment of additional contributions by any person) are lump sum benefits which are not calculated by reference to any member's salary; and 'lump sum benefits' does not include benefits paid by way of commuted retirement pension: Occupational Pension Schemes (Deficiency on Winding Up etc) Regulations 1996, SI 1996/3128, reg 10(2).

20 See *ibid* reg 10(1).

21 For the meaning of 'modifications' see PARA 664 note 10 *ante* (definition applied by the Pensions Act 1995 s 124(5)).

22 *Ibid* s 75(10). Section 75 is modified in relation to (1) multi-employer schemes (see the Occupational Pension Schemes (Deficiency on Winding Up etc) Regulations 1996, SI 1996/3128, reg 4 (amended by SI 1997/786), which adds the Pensions Act 1995 s 75(1A)-(1E) for those purposes only); (2) money purchase schemes and multi-employer money purchase schemes (see the Occupational Pension Schemes (Deficiency on Winding Up etc) Regulations 1996, SI 1996/3128, regs 7, 8); (3) schemes covering United Kingdom and foreign employment (see reg 11, Sch 2 paras 1, 2); and (4) schemes with partial government guarantee (see Sch 2 para 3).

In the case of money purchase schemes, the Pensions Act 1995 s 75 is further modified (by the Occupational and Personal Pension Schemes (Levy) Regulations 1997, SI 1997/666, reg 11) as follows:

198 (a) the Pensions Act 1995 s 75(2), (4), (6), (9), (10) are omitted;

199 (b) s 75(1) is substituted as follows: 'If, in the case of a scheme which is a money purchase scheme, the value at the applicable time of the unallocated assets of the scheme is less than an amount payable by way of levy under the Pension Schemes Act 1993 s 175 [(as substituted) (see PARA 974 *post*)], then an amount equal to the difference is to be treated as a debt due from the employer to the trustees or managers of the scheme';

200 (c) the definitions in the Pensions Act 1995 s 75(3) are substituted as follows: 'applicable time', in relation to an amount payable by way of levy, means the time when the levy first becomes payable to the Secretary of State or, as the case may be, the Pensions Compensation Board (see PARA 637 *ante*) or such later time as the trustees or managers may agree with the employer; 'employer' means, in relation to an occupational pension scheme in which there are members in pensionable service, the employer of persons in the description or category of employment to which the scheme relates, and, in relation to an occupational pension scheme which is a frozen scheme, the person who was the employer of persons in the description or category of employment to which the scheme related immediately before the occurrence of the event after which the scheme became a frozen scheme; 'frozen scheme' means a registrable scheme under which benefits continue to be payable to existing members and to which no new members may be admitted, no further contributions are payable by or in respect of existing members and no further benefits accrue to existing members although benefits which have already accrued to them may be increased; 'registrable scheme' means an occupational or a personal pension scheme (i) which is established in the United Kingdom or has a place at which its management is conducted in the United Kingdom and has a representative appointed to carry out the functions of a trustee in the United Kingdom; and (ii) which is a scheme in respect of which a person has applied for, or received, the approval of the Board of Inland Revenue for the purposes of the Income and Corporation Taxes Act 1988 s 590 or s 591 (as amended) (other than s 591(2)(g) (as amended)) (conditions for approval of retirement benefit schemes and discretionary approval: see PARAS 747-752 *ante*), or for the purposes of Pt XIV Ch IV (ss 630-655) (as amended) (personal pension schemes: see PARA 711 *et seq ante*), or is a scheme which is a public service pension scheme (as to which see PARA 874 *ante*); and (iii) which has more than one member and provides benefits which are not solely payable on the death of a member, and, for this purpose, an occupational pension scheme which is a retirement benefits scheme approved under s 591(2)(h) (discretionary approval: see PARA 752 *ante*) is to be treated as a personal pension scheme; and 'unallocated assets', in the case of a money purchase scheme, means any assets of the scheme which have not been specifically allocated for the provision of benefits to or in respect of members (whether generally or individually); and

201 (d) the Pensions Act 1995 s 75(5) is substituted as follows: 'The value at the applicable time of the unallocated assets is to be taken to be the value as certified in a statement by the scheme auditor'.

**UPDATE****741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

**842-852 Winding Up**

Provision has been made for the supervision of the winding up: see the Pensions Act 1995 ss 72A-72C (added by the Child Support, Pensions and Social Security Act 2000 ss 49, 51; and amended by the Pensions Act 2004 Sch 12 paras 59, 60, Sch 13 Pt 1).

**850 Deficiencies in the assets**

TEXT AND NOTES--Pensions Act 1995 s 75 amended so as to ensure that in certain circumstances a debt can be placed on the sponsoring employer of an occupational pension scheme, if the value of the scheme's assets is less than its liabilities: see Pensions Act 2004 s 271, Sch 13 Pt 1. See also Occupational Pension Schemes (Employer Debt) Regulations 2005, SI 2005/678 (amended by SI 2005/993, SI 2005/2224, SI 2005/3377, SI 2006/558, SI 2006/467, SI 2007/60, SI 2008/731, SI 2008/1068), which replace SI 1996/3128 where debts arise under the 1995 Act s 75 in respect of occupational pension schemes. See further 1995 Act s 75A (added by 2004 Act s 272) which enables the 1995 Act s 75 to be modified as it applies in relation to multi-employer schemes.

The 2004 Act Pt 6 (s 286) provides for financial assistance to be given to members of certain pension schemes. See PARA 850A

NOTE 3--SI 1996/3128 further amended: SI 1997/3038, SI 2007/60, SI 2008/2301.

NOTE 4--See *Bradstock Group Pension Scheme Trustees Ltd v Bradstock Group plc* [2002] EWHC 651 (Ch), [2002] ICR 1427 (trustee's power to negotiate compromise).

NOTES 6, 22--See *Re Federal-Mogul Aftermarket UK Ltd* [2008] EWHC 1099 (Ch), [2008] BPIR 846, sub nom *Gleave v The Board of the Pension Protection Fund* [2008] All ER (D) 287 (May) (supervisors of company voluntary arrangement required to accept scheme actuary's quantification of debt).

NOTE 6--In SI 1996/3128, 'the actuary' means the actuary appointed for the scheme in pursuance of the 1995 Act s 47(1)(b) (see PARA 787 NOTE 2) or, in the case of a scheme to which s 47(1)(b) does not apply by virtue of regulations made under s 47(5) (see PARA 825), an actuary otherwise authorised by the trustees or managers to provide

such valuations or certifications as may be required under SI 1996/3128: reg 2(2); SI 1997/3038.

SI 1996/3128 reg 3 amended: SI 2002/380, SI 2004/403, SI 2005/872. SI 1996/3128 reg 3A (valuation of liabilities where employer not insolvent and where winding up commences before 11 June 2003) added by SI 2002/380 and amended by SI 2004/403. SI 1996/3128 reg 3B (valuation of liabilities where employer not insolvent and where winding up commences on or after 11 June 2003) added: SI 2004/403. SI 1996/3128 reg 3C (valuation of liabilities where winding up commences, and date of calculation falls, on or after 15 February 2005) and reg 3D (valuation of liabilities where there is more than one employer) added: SI 2005/72.

See *Capital Cranfield Trustees Ltd v Pinsent Curtis* [2005] EWCA Civ 860, [2005] ICR 1767 (trustees' power to determine what contribution was 'appropriate').

1995 Act s 119 amended: 2004 Act Sch 12 para 68, Sch 13 Pt 1.

NOTE 22--SI 1997/666 replaced: Occupational and Personal Pension Schemes (General Levy) Regulations 2005, SI 2005/626 (see PARA 974).

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## **850A. Financial assistance for members of certain pension schemes.**

### **1. General**

The Secretary of State must make provision, by regulations, for a scheme for making payments to, or in respect of, qualifying members<sup>1</sup> of qualifying pension schemes ('the financial assistance scheme')<sup>2</sup>. Such regulations may, in particular, make provision (1) for the financial assistance scheme to be managed by the Secretary of State, a body established by or for the purposes of the regulations or such other person as may be prescribed; (2) for the person who manages the financial assistance scheme ('the scheme manager') to hold (whether on trust or otherwise), manage and apply a fund in accordance with the regulations or, where the fund is held on trust, the deed of trust; (3) for the property, rights and liabilities of qualifying pension schemes to be transferred to the scheme manager in prescribed circumstances and for the trustees or managers<sup>3</sup> of a qualifying pension scheme in respect of which such a transfer has occurred to be discharged from prescribed liabilities; (4) prescribing the circumstances in which payments are to be made by the scheme manager to, or in respect of, qualifying members of qualifying pension schemes and the manner in which the amount of any payment is to be determined, and, where the fund is held by the fund manager on trust, the circumstances and manner may be prescribed by reference to the deed of trust; (5) authorising the Secretary of State (a) where he is not the scheme manager, to pay grants to the scheme manager; (b) where he is the scheme manager, to pay amounts into the fund held by him in accordance with the regulations; (c) to pay grants to other prescribed persons in connection with the financial assistance scheme; (6) prescribing the circumstances in which amounts are to be paid into or out of the fund held by the scheme manager; (7) for or in connection with (i) the review of, or appeals against, any determination, or failure to make a determination, in connection with the financial assistance scheme<sup>4</sup>, or (ii) the investigation of complaints relating to the financial assistance scheme, and for the establishment of a body or the appointment of a person or persons to hear such appeals or conduct such investigations; (8) conferring functions in relation to the financial assistance scheme on the Pensions Regulator or the Board of the Pension Protection Fund; (9) providing for a person to exercise a discretion in dealing with any matter in relation to the financial assistance scheme; (10) applying any provision of Part 1 or 2 of the Pensions Act 2004<sup>5</sup> with such modifications<sup>6</sup> as may be prescribed; and such regulations may make different provision for different cases or descriptions of case and include such incidental, supplementary, consequential or transitional provision as appears to the Secretary of State to be expedient<sup>7</sup>. The regulations may not make provision for the imposition of a levy or charge on any person for the purpose of funding, directly or indirectly, the financial assistance scheme<sup>8</sup>. The regulations may not require any income or capital of a qualifying member of a qualifying pension scheme (other than income or capital which derives, directly or indirectly, from that scheme) to be taken into account when determining whether the member is entitled to a payment under the financial assistance scheme or the amount of any payment to which the member is entitled<sup>9</sup>.

The restriction on purchasing annuities<sup>10</sup> is extended and a sanction is introduced that allows the scheme manager to make void any annuity contract entered into contrary to the restriction<sup>11</sup>.

The Treasury may by regulation make provision for and in connection with (a) the application of the relevant taxes<sup>12</sup> in relation to the financial assistance scheme<sup>13</sup>, and (b) the application of the relevant taxes in relation to any person in connection with the financial assistance

scheme<sup>14</sup>. The provision that may be so made includes provision imposing any of the relevant taxes as well as provision for exemptions and reliefs<sup>15</sup>. Such regulations may, in particular, include provision for and in connection with the taxation of payments made by virtue of regulations under the provisions above<sup>16</sup>. The exemptions and reliefs that may be given by regulations under these provisions include, in particular, exemption from charges to income tax, corporation tax or capital gains tax in respect of (i) income arising from any assets held or managed by, or receipts of, the scheme manager and any chargeable gains arising from the disposal of any such assets; and (ii) the receipt of fraud compensation payments<sup>17</sup>. Such regulations may also include provision having effect in relation to any time before they are made if the provision does not increase any person's liability to tax<sup>18</sup>. They may be framed as provision applying with appropriate modifications provisions having effect in relation to registered pension schemes<sup>19</sup>. Such regulations may include provision extending any enactment or instrument, and consequential, supplementary and transitional provision<sup>20</sup>.

The Treasury may also by regulations make provision for an in connection with the application of the relevant taxes in relation to circumstances in which there is a relevant intervention<sup>21</sup> under the Financial Services Compensation Scheme<sup>22</sup>. The provision that may be made by such regulations includes provision imposing any of the relevant taxes (as well as provision for exemptions or reliefs; as well a provision having effect in relation to any time before they are made (if that provision does not increase any person's liability to tax<sup>23</sup>. Provision so made may be framed as provision modifying, or applying with appropriate modifications, provisions having effect in relation to registered pension schemes<sup>24</sup>. Such regulations may include provision extending any enactment or instrument, and consequential, supplementary and transitional provision<sup>25</sup>.

1 For the purposes of the Pensions Act 2004 s 286 'qualifying member', in relation to a qualifying pension scheme, means a person who, at such time as may be prescribed, is a member of the scheme or has ceased to be a member of the scheme: s 286(2) (amended by Pensions Act 2008 s 124(2)). See Financial Assistance Scheme Regulations 2005, SI 2005/1986 (amended by SI 2005/3256, SI 2006/3370, SI 2007/3581, SI 2008/1432, SI 2008/1903, SI 2008/3069, SI 2009/792, SI 2009/1851, SI 2010/1145). For the meaning of 'member' see PARA 636A.3. 'Qualifying pension scheme' means an occupational pension scheme (including such a scheme which has been fully wound up) (a) which, at such time as may be prescribed, is not (i) a money purchase scheme, or (ii) a scheme of a prescribed description, (b) the winding up of which began, subject to any prescribed exception, during the prescribed period ending immediately before the day appointed under Pensions Act 2004 s 126(2) (see PARA 659C.1), (c) the employer in relation to which satisfies such conditions as may be prescribed at such time as may be prescribed, and (d) prescribed details of which have been notified to such person as may be prescribed by a person of a prescribed description (A) in the prescribed form and manner, and (B) before the prescribed date: s 286(2) (amended by Pensions Act 2008 s 124(3)). As from a day to be appointed definition of 'qualifying pension scheme' is further amended: Pensions Act 2008 s 124(4), (5). See SI 2005/1986. For the meaning of 'occupational pension scheme' and 'prescribed' see PARA 636A.3. As to the service of notifications and electronic working under the Pensions Act 2004 see ss 303-305. A time or period prescribed under the Pensions Act 2004 s 286(2) may fall (or, in the case of a period, wholly or partly fall) at a time before the passing of the Pensions Act 2004 (ie 18 November 2004): s 286(8).

2 Ibid s 286(1). See SI 2005/1986. As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

The Secretary of State must, in particular, make provision for securing that (subject to any relevant restriction) the aggregate amount of (1) any annual payment payable to a qualifying member of such a scheme, and (2) the member's actual pension (if any), is not less than 80 per cent of the member's expected pension, irrespective of the date of his attaining normal retirement age (or the date when he would have attained that age if he dies before attaining it): Pensions Act 2004 s 286(1A) (added by Pensions Act 2007 s 18(2)). A 'relevant restriction' means any provision of the regulations which (a) operates to restrict the amount of an annual payment by means of a cap on the product of the calculation of a specified fraction of the member's expected pension, or (b) provides for an annual payment not to be payable where the member's actual pension exceeds any specified amount: 2004 Act s 286(1B) (as added). 'Annual payment' has the meaning given by regulations under s 286(1); and 'actual pension' and 'expected pension', in relation to a qualifying member of a qualifying pension scheme, mean the amounts which, in accordance with regulations under s 286(1), are to be taken into account as the member's actual pension and expected pension, respectively, in determining the amount of any annual payment payable to the member: s 286(2) (amended by 2007 Act s 18(3)).

3 For the meaning of 'managers' see PARA 636A.11. The Financial Assistance Scheme (Internal Review) Regulations 2005, SI 2005/1994 (amended by SI 2005/3256, SI 2006/349, SI 2006/3370, SI 2008/1903, SI 2009/792, SI 2009/1851), have been made under the Pensions Act 2004 s 286(1).

4 As to provision for the investigation and determination of appeals against review decisions made by the scheme manager of the financial assistance scheme, see the Financial Assistance Scheme (Appeals) Regulations 2005, SI 2005/3273 (amended by SI 2006/3370, SI 2008/1903, SI 2008/2683, SI 2009/792, SI 2009/1851).

5 See PARAS 636A, 659A-659G. As to the application of certain provisions of the Pensions Act 2004 Pt 2 to regulations governing appeals in relation to the financial assistance scheme, see the Financial Assistance Scheme (Modifications and Miscellaneous Amendments) Regulations 2005, SI 2005/3256.

6 For the meaning of 'modifications' see PARA 636A.16.

7 Pensions Act 2004 s 286(3). See SI 2005/1986. Any amount which, by virtue of head (5) in the text, the Secretary of State pays under regulations under the Pensions Act 2004 s 286(1) is to be paid out of money provided by Parliament: s 286(4).

8 Ibid s 286(5).

9 Ibid s 286(6). For the purposes of s 286(6), regulations may prescribe the circumstances in which a qualifying member of a qualifying pension scheme is to be regarded as having income or capital which derives, directly or indirectly, from that scheme: s 286(7). See SI 2005/1986.

Nothing in the Pensions Act 2004 s 286 prejudices the operation of s 315 (subordinate legislation (general provisions)): s 286(9).

10 See PARA 850A.3.

11 See Pensions Act 2004 s 286A (added by Pensions Act 2008 s 125(1)). The amendment made by s 125(1) must be taken to have had effect from 26 June 2008: s 125(2).

12 I.e. income tax, capital gains tax, corporation tax, inheritance tax, value added tax, stamp duty land tax, stamp duty and stamp duty reserve tax: Finance Act 2009 s 73(4).

13 I.e. the scheme provided for by regulations under the Pensions Act 2004 s 286. Finance Act 2009 s 73(2).

14 Finance Act 2009 s 73(1).

15 Finance Act 2009 s 73(3).

16 Finance Act 2009 s 73(5), referring to the Pensions Act 2008 s 286.

17 Finance Act 2009 s 73(6). The reference is to fraud compensation payments within the meaning of the Pensions Act 2004 Pt 2 (ss 107-220) (see s 182(1); and PARA 659D.1): Finance Act 2009 s 73(6)(b).

18 Finance Act 2009 s 73(7).

19 Finance Act 2009 s 73(8). For this purpose 'registered pension scheme' means a pension scheme within the meaning of the Finance Act 2004 Pt 4 (ss 149-284) which is registered under Pt 4 Ch 2 (ss 153-159) (see PARA 873B.1).

20 Finance Act 2009 s 73(9). The regulations must be made by statutory instrument and are subject to annulment in pursuance of a resolution of the House of Commons: Finance Act 2009 s 73(10), (11).

21 I.e. (1) anything done under, or while seeking to make, arrangements for securing continuity of insurance in connection with registered pension schemes; (2) anything done as part of measures or safeguarding policy holders in connection with registered pension schemes; or (3) the payment of compensation in connection with such schemes: Finance Act 2009 s 74(1), (2), (11).

22 Finance Act 2009 s 74(3). The 'Financial Services Coimbursement Scheme' is that established under the Financial Services and Markets Act 2000 Pt 15 (ss 212-224A): Finance Act 2009 s 74(3).

23 Finance Act 2009 s 74(4), (6)

24 Finance Act 2009 s 74(7).

25 Finance Act 2009 s 74(8). The regulations must be made by statutory instrument and are subject to annulment in pursuance of a resolution of the House of Commons: s 74(9), (10).

## 2. Increased levels of payments

The following provisions<sup>1</sup> apply where the scheme manager<sup>2</sup> has determined that an initial payment<sup>3</sup> may be made under the FAS regulations to or in respect of a qualifying member<sup>4</sup> of a qualifying pension scheme<sup>5</sup>, and they so apply whether the determination (1) has been made, or (2) relates to a period beginning, before or after the passing of the Pensions Act 2007<sup>6</sup>. Subject to any relevant restriction<sup>7</sup>, the amount of any such initial payment payable to the member is to be (a) the amount of the member's expected pension multiplied by 0.9, less (b) the amount of the member's interim pension (if any), irrespective of the date of the member attaining normal retirement age (or the date when he would have attained that age if he dies before attaining it)<sup>8</sup>. The amount of any such initial payment payable to the survivor<sup>9</sup> of the member is to be (i) whichever is the smaller of (A) one-half of the product of the calculation in head (a) above, or (B) one-half of the product of that calculation as reduced by virtue of any relevant restriction, less (ii) the amount of the interim pension<sup>10</sup> payable to the survivor (if any), irrespective of the date of the member attaining normal retirement age (or the date when he would have attained that age if he dies before attaining it)<sup>11</sup>. Any provision of the FAS regulations which is inconsistent with the above provisions<sup>12</sup> is of no effect to the extent of the inconsistency<sup>13</sup>.

1 le the Pensions Act 2007 s 18(5) and (6).

2 'Scheme manager' has the same meaning as in the Pensions Act 2004 s 286 (see PARA 850A.1): Pensions Act 2007 s 18(11).

3 'Initial payment' has the meaning given by the FAS regulations: *ibid* s 18(11). 'The FAS regulations' means regulations under the Pensions Act 2004 s 286(1) (see PARA 850A.1): 2007 Act s 18(11).

4 'Qualifying member' has the same meaning as in the Pensions Act 2004 s 286 (see PARA 850A.1): 2007 Act s 18(11).

5 'Qualifying pension scheme' has the same meaning as in the Pensions Act 2004 s 286 (see PARA 850A.1): 2007 Act s 18(11).

6 *Ibid* s 18(4). The Pensions Act 2007 received the royal assent on 26 July 2007.

7 In *ibid* s 18(5) and (6) 'relevant restriction' means any provision of the FAS regulations which (1) operates to restrict the amount of an initial payment by means of a cap on the product of the calculation of a specified fraction of the member's expected pension, or (2) provides for an initial payment not to be payable where the member's interim pension exceeds any specified amount; but for the purposes of s 18(5) and (6) any such specified fraction is to be taken to be 0.9: s 18(7) (amended by SI 2008/1432). See further NOTE 8. 'Expected pension' and 'interim pension', in relation to a qualifying member of a qualifying pension scheme, mean the amounts which, in accordance with the FAS regulations, are to be taken into account as the member's expected pension and interim pension, respectively, in determining the amount of any initial payment payable to, or in respect of, the member: s 18(11).

8 *Ibid* s 18(5) (amended by SI 2008/1432). The Secretary of State may by regulations (1) amend the 2007 Act s 18(5) so as to substitute for the fraction for the time being specified there such fraction as is specified in the regulations, and (2) make a corresponding amendment in s 18(7): s 18(9). No regulations may be made under s 18(9) unless a draft of the regulations has been laid before and approved by a resolution of each House of Parliament: s 18(10). For further provision as to regulations under s 18 see s 25.

9 'Survivor' has the meaning given by the FAS regulations (see PARA 850A.1): 2007 Act s 18(11).

10 'Interim pension', in relation to the survivor of a qualifying member of a qualifying pension scheme, means the amount which, in accordance with the FAS regulations, is to be taken into account as the interim pension payable to the survivor in determining the amount of any initial payment payable to the survivor: *ibid* s 18(11).

11 *Ibid* s 18(6).

12 le inconsistent with *ibid* s 18(5) or (6).

13 *Ibid* s 18(8).

As to the review of the operation of the Pensions Act 2007 see s 24.

### **3. Temporary restriction on purchase of annuities**

The Secretary of State must by regulations make provision for securing that, during the period of nine months beginning with the date on which the regulations come into force, the trustees of relevant pension schemes<sup>1</sup> are prohibited from purchasing, or agreeing to purchase, annuities on behalf of qualifying members<sup>2</sup>, unless (1) before that date they have entered into a binding commitment to purchase the annuities, or (2) the purchase of the annuities is approved in pursuance of the provision below<sup>3</sup>. The regulations must make provision (a) for enabling the trustees of a relevant pension scheme to apply to the scheme manager<sup>4</sup> for approval of the purchase of annuities on behalf of qualifying members; (b) for authorising the scheme manager to approve the purchase of any such annuities if the scheme manager thinks it appropriate to do so<sup>5</sup>. Regulations under these provisions (i) must be made as soon as is reasonably practicable after the passing of the Pensions Act 2007<sup>6</sup>; (ii) may make such consequential, incidental, supplemental or transitional provision as the Secretary of State considers appropriate<sup>7</sup>. A statutory instrument containing regulations under these provisions is subject to annulment in pursuance of a resolution of either House of Parliament<sup>8</sup>.

The restriction on purchasing annuities is extended and a sanction is introduced which allows the scheme manager to make void any annuity contract entered into contrary to the restriction<sup>9</sup>.

1 For the purposes of the Pensions Act 2007 s 19 an occupational pension scheme is a 'relevant pension scheme' at any time during the period mentioned in s 19(1) if at that time the scheme is a qualifying pension scheme which has not been fully wound up: s 19(3). In s 19 'occupational pension scheme' and 'qualifying pension scheme' have the same meanings as in the Pensions Act 2004 s 286 (see *PARA* 850A.1): 2007 Act s 19(6).

2 In *ibid* s 19 'qualifying member' has the same meaning as in the Pensions Act 2004 s 286 (see *PARA* 850A.1): 2007 Act s 19(6).

3 le in pursuance of *ibid* s 19(2): s 19(1). As to regulations made under the Pensions Act 2007 s 19, see the Financial Assistance Scheme (Halting Annuitisation) Regulations 2007, SI 2007/2533. As to regulations under the Pensions Act 2007 generally see s 25.

4 In *ibid* s 19 'scheme manager' has the same meaning as in the Pensions Act 2004 s 286 (see *PARA* 850A.1): 2007 Act s 19(6).

5 *Ibid* s 19(2).

6 The Pensions Act 2007 received the royal assent on 26 July 2007.

7 *Ibid* s 19(4).

8 *Ibid* s 19(5).

As to the review of the operation of the Pensions Act 2007 see s 24.

9 See Pensions Act 2004 s 286A (added by Pensions Act 2008 s 125(1)); and *PARA* 850A.1.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **842-852 Winding Up**

Provision has been made for the supervision of the winding up: see the Pensions Act 1995 ss 72A-72C (added by the Child Support, Pensions and Social Security Act 2000 ss 49, 51; and amended by the Pensions Act 2004 Sch 12 paras 59, 60, Sch 13 Pt 1).

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### **851. Excess assets on winding up.**

The following provisions apply to a trust scheme<sup>1</sup> in any circumstances if:

- 2073 (1) it is an exempt approved scheme<sup>2</sup>;
- 2074 (2) the scheme is being wound up; and
- 2075 (3) in those circumstances power is conferred on the employer<sup>3</sup> or the trustees to distribute assets to the employer on a winding up<sup>4</sup>.

That power to distribute cannot be exercised unless the following requirements, and any requirements that may be prescribed, are satisfied<sup>5</sup>. The specified requirements are that:

- 2076 (a) the liabilities of the scheme have been fully discharged<sup>6</sup>;
- 2077 (b) where there is any power under the scheme, after the discharge of those liabilities, to distribute assets to any person other than the employer, the power has been exercised or a decision has been made not to exercise it<sup>7</sup>;
- 2078 (c) the annual rates<sup>8</sup> of the pensions<sup>9</sup> under the scheme which commence or have commenced are increased by the appropriate percentage<sup>10</sup>;
- 2079 (d) notice has been given in accordance with prescribed requirements to the members of the scheme of the proposal to exercise the power<sup>11</sup>; and
- 2080 (e) in prescribed circumstances, the Occupational Pensions Regulatory Authority<sup>12</sup> is of the opinion that the requirements of heads (a) to (d) above, and any prescribed requirements, are satisfied<sup>13</sup>.

If, where these provisions apply to any trust scheme, the trustees purport to exercise the power to distribute referred to in head (3) above without complying with these requirements, the provisions relating to prohibition orders<sup>14</sup> and civil penalties<sup>15</sup> apply to any of them who have failed to take all such steps as are reasonable to secure compliance<sup>16</sup>; and if, where these provisions apply to any trust scheme, any person other than the trustees purports to exercise that power to distribute without complying with these requirements, the provisions relating to civil penalties also apply to him<sup>17</sup>.

Regulations<sup>18</sup> may provide that, in prescribed circumstances, these provisions do not apply to schemes falling within a prescribed class or description, or apply to them with prescribed modifications<sup>19</sup>, and thus they do not apply to a scheme where:

- 2081 (i) any Minister of the Crown has given a guarantee or made any other arrangements for the purpose of securing that the assets of the scheme are sufficient to meet its liabilities; or
- 2082 (ii) arrangements for the payment of any surplus or for the distribution of any excess assets on the winding up of the scheme are subject to the approval of any Minister of the Crown<sup>20</sup>.

<sup>1</sup> For the meaning of 'trust scheme' see PARA 604 note 2 ante.

<sup>2</sup> Ie within the meaning of the Income and Corporation Taxes Act 1988 s 592(1): see PARA 754 ante.

<sup>3</sup> For the meaning of 'employer' see PARA 598 note 4 ante.

4 Pensions Act 1995 s 76(1).

5 Ibid s 76(2). For the meaning of 'prescribed' see PARA 555 note 1 ante.

6 Ibid s 76(3)(a).

7 Ibid s 76(3)(b).

8 For these purposes, 'annual rate' has the same meaning as in ibid s 54 (see PARA 861 note 9 post): s 76(5)(a).

9 'Pension' does not include any guaranteed minimum pension (as defined in the Pension Schemes Act 1993 s 8(2) (as amended) (see PARA 878 post)) or any increase in such a pension under s 109 (as amended) (see PARA 926 post), or any money purchase benefit (as defined in s 181(1): see PARA 811 note 2 ante): Pensions Act 1995 s 76(5)(b).

10 Ibid s 76(3)(c). For these purposes, 'appropriate percentage' has the same meaning as in s 54 (see PARA 861 note 10 post): s 76(5)(a).

11 Ibid s 76(3)(d). The prescribed requirements as to notice are set out in the Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 7: reg 7(1). Where the trustees or the employer propose to exercise a power to distribute assets to the employer on a winding up, the trustees or, as the case may be, the employer must take all reasonable steps to ensure that each member is given two written notices of the proposal in accordance with the following provisions: reg 7(2). A notice must be treated as having been given to a member if it has been sent to him by post either at the address at which he was last known to be living or, in the case of an active member, at an address at which he is known to be currently employed; and notices are not required to be given where a member has no known address or where correspondence sent to a member's last known address has been returned: reg 7(5). The first notice must (1) inform the member as to the trustees' estimate of the value of the assets remaining after the liabilities of the scheme have been fully discharged and the persons or class of person to whom, and in what proportions, it is proposed that they should be distributed and whether the requirements of the Pensions Act 1995 s 76(3) are satisfied; (2) invite the member, if he wishes, to make written representations in relation to the proposal to the trustees or, as the case may be, to the employer, before a specified date (which is not earlier than two months from the date on which the first notice is given); (3) advise the member that a second notice will be given to him if the trustees or the employer, as the case may be, intend to proceed with the proposal, and that no excess assets may be distributed to the employer in accordance with the proposal until at least three months after the date on which the second notice is given: reg 7(3). The second notice must be given after the date specified in accordance with head (2) supra and at least three months before the power is exercised; and it must contain the information referred to in head (1) supra, including any modifications to the proposal, and advise the member that he may make written representations to the Occupational Pensions Regulatory Authority (see note 12 infra) before a specified date (which is not earlier than three months from the date on which the second notice is given) if he considers that any of the requirements of the Pensions Act 1995 s 76(3) are not satisfied: Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 7(4).

12 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

13 Pensions Act 1995 s 76(2), (4). For these purposes, the prescribed circumstances are (1) that, subject to the Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 8(2), the authority receives in relation to any proposal to which the Pensions Act 1995 s 75 applies (a) written representations from a member to the effect that any of the requirements of s 76(3) are not satisfied; or (b) information from any source sufficient to raise a doubt as to whether all those requirements are satisfied; and (2) the authority notifies the trustees or, as the case may be, the employer in writing that the power should not be exercised until the authority has confirmed in writing that it is satisfied that those requirements are satisfied: Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 8(1). Where notice has been given to a member in accordance with reg 7 (see note 11 supra), head (1)(a) supra will only apply in the case of representations received by the authority from the member before the date specified in accordance with reg 7(4)(b) (expiry date of the second notice): reg 8(2). The additional requirement that the trustees or, as the case may be, the employer obtain written confirmation from the authority that it has not received any representations or information referred to in head (1) supra and that accordingly the Pensions Act 1995 s 76(4) does not apply is imposed where the date specified in accordance with the Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 7(4)(b) (expiry date of the second notice: see note 11 supra) has passed and where the trustees or, as the case may be, the employer have or has not received notification from the authority in accordance with head (2) supra: see reg 9.

14 Ie the provisions of the Pensions Act 1995 s 3: see PARA 604 ante.

15 Ie the provisions of ibid s 10: see PARA 611 ante.

16 Ibid s 76(6).

17 Ibid s 76(7).

18 For the meaning of 'regulations' see PARA 600 note 2 ante.

19 Pensions Act 1995 s 76(8). For the meaning of 'modifications' see PARA 664 note 10 ante (definition applied by s 124(5)). Section 76 is modified in relation to schemes with more than one employer: see the Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 12 (amended by SI 1997/786).

20 Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 14 (amended, with effect from 24 November 1997, by SI 1997/2559).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **842-852 Winding Up**

Provision has been made for the supervision of the winding up: see the Pensions Act 1995 ss 72A-72C (added by the Child Support, Pensions and Social Security Act 2000 ss 49, 51; and amended by the Pensions Act 2004 Sch 12 paras 59, 60, Sch 13 Pt 1).

### **851 Excess assets on winding up**

TEXT AND NOTE 2--For 'exempt approved scheme' read 'registered pension scheme under the Finance Act 2004 s 153 (see PARA 873B.1): Pensions Act 1995 s 76(1) (amended by SI 2006/745).

TEXT AND NOTES 8-10--1995 Act s 76(5) repealed: Pensions Act 2004 Sch 12 para 62(b), Sch 13 Pt 1.

TEXT AND NOTE 10--1995 Act s 76(3)(c) repealed: Pensions Act 2004 Sch 12 para 62(a), Sch 13 Pt 1.

NOTE 11--SI 1996/2156 reg 7 replaced: Occupational Pension Schemes (Payments to Employer) Regulations 2006, SI 2006/802. See now reg 15.

NOTE 13--SI 1996/2156 regs 8, 9 replaced: SI 2006/802. See now regs 16, 17.

TEXT AND NOTE 16--1995 Act s 76(6) amended: Pensions Act 2004 Sch 12 para 62(c).

NOTE 19--SI 1996/2156 reg 12 replaced: SI 2006/802. See now reg 18.

TEXT AND NOTE 20--SI 1996/2156 reg 14 replaced: SI 2006/802. See now reg 12.



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## **852. Power to distribute excess assets after winding up.**

The annual rates<sup>1</sup> of the pensions<sup>2</sup> under a trust scheme<sup>3</sup> which commence or have commenced must be increased by the appropriate percentage<sup>4</sup>, so far as the value of the undistributed assets allows<sup>5</sup>, in any circumstances if:

- 2083 (1) the scheme is an exempt approved scheme<sup>6</sup>;
- 2084 (2) the scheme is being wound up;
- 2085 (3) the liabilities of the scheme have been fully discharged;
- 2086 (4) where there is any power under the scheme, after the discharge of those liabilities, to distribute assets to any person other than the employer<sup>7</sup>, the power has been exercised or a decision has been made not to exercise it;
- 2087 (5) any assets remain undistributed; and
- 2088 (6) the scheme prohibits the distribution of assets to the employer in those circumstances<sup>8</sup>.

Where any assets remain undistributed after the discharge of this duty, the trustees must use those assets for the purpose of providing additional benefits or increasing the value of any benefits, but subject to prescribed<sup>9</sup> limits, and the trustees may then distribute those assets (so far as undistributed) to the employer<sup>10</sup>. If, where these provisions apply to a trust scheme, the requirements are not complied with, the provisions relating to prohibition orders<sup>11</sup> apply to any trustee who has failed to take all such steps as are reasonable to secure compliance<sup>12</sup>.

Regulations<sup>13</sup> may modify<sup>14</sup> the above provisions as they apply in prescribed circumstances<sup>15</sup>.

1 For the meaning of 'annual rate' see, by virtue of the Pensions Act 1995 s 76(5)(a), s 54; and PARA 861 note 9 post.

2 'Pension' does not include any guaranteed minimum pension (as defined in the Pension Schemes Act 1993 s 8(2) (as amended) (see PARA 878 post)) or any increase in such a pension under s 109 (as amended) (see PARA 926 post), or any money purchase benefit (as defined in s 181(1): see PARA 811 note 2 ante): Pensions Act 1995 s 76(5)(b).

3 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

4 For the meaning of 'appropriate percentage' see, by virtue of the Pensions Act 1995 s 76(5)(a), s 54; and PARA 861 note 10 post.

5 Ibid s 77(2).

6 le within the meaning of the Income and Corporation Taxes Act 1988 s 592(1) (as amended): see PARA 754 ante.

7 For the meaning of 'employer' see PARA 598 note 4 ante.

8 Pensions Act 1995 s 77(1).

9 For the meaning of 'prescribed' see PARA 555 note 1 ante.

10 Pensions Act 1995 s 77(4). The prescribed limits for these purposes are the maximum benefits that may be provided by the scheme as an exempt approved scheme within the meaning of the Income and Corporation Taxes Act 1988 s 592(1) (as amended): Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 10(1). For the purposes of calculating those maximum benefits, final remuneration

may, if the trustees so determine, be taken to be any one of the following amounts: (1) the amount of annual remuneration on which the scheme benefits are calculated; (2) the highest amount of annual remuneration on which, under the rules of the scheme, benefits could be calculated; or (3) the amount referred to in the Retirement Benefits Schemes (Restriction on Discretion to Approve) (Additional Voluntary Contributions) Regulations 1993, SI 1993/3016, reg 5(4)(f)(iii), which is an amount based on the average of the total emoluments paid to an employee during the last three years of assessment: Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 10(2). For the meaning of 'employee' see PARA 598 note 5 ante.

11    Ie the provisions of the Pensions Act 1995 s 3: see PARA 604 ante.

12    Ibid s 77(5).

13    For the meaning of 'regulations' see PARA 600 note 2 ante.

14    For the meaning of 'modify' see PARA 664 note 10 ante (definition applied by the Pensions Act 1995 s 124(5)).

15    Ibid s 77(6). Section 77 is modified in relation to schemes with more than one employer: see the Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 12 (amended by SI 1977/786).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **842-852 Winding Up**

Provision has been made for the supervision of the winding up: see the Pensions Act 1995 ss 72A-72C (added by the Child Support, Pensions and Social Security Act 2000 ss 49, 51; and amended by the Pensions Act 2004 Sch 12 paras 59, 60, Sch 13 Pt 1).

### **852 Power to distribute excess assets after winding up**

NOTES 1-4--Pensions Act 1995 s 76(5) repealed: Pensions Act 2004 Sch 12 para 62(b), Sch 13 Pt 1.

TEXT AND NOTES 5, 10, 12--1995 Act s 77(2) omitted, s 77(4), (5) amended: 2004 Act Sch 12 para 63, Sch 13 Pt 1 (partly in force: SI 2005/3331).

NOTES 10, 15--SI 1996/2156 replaced: Occupational Pension Schemes (Payments to Employer) Regulations, SI 2006/802.

TEXT AND NOTES 11, 12--The provisions relating to civil penalties (ie under the 1995 Act s 10) (see PARA 611) also apply in such circumstances: s 77(5) (amended by the Welfare

Reform and Pensions Act 1999 Sch 2 para 15) (amendment prospectively repealed:  
Pensions Act 2004 Sch 13 Pt 1).

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## **(11) INSOLVENCY OF EMPLOYER**

### **853. Duty of Secretary of State to pay unpaid contributions to schemes.**

If, on an application made to him in writing by the persons competent to act in respect of an occupational pension scheme<sup>1</sup> or a personal pension scheme<sup>2</sup>, the Secretary of State<sup>3</sup> is satisfied:

- 2089 (1) that an employer<sup>4</sup> has become insolvent<sup>5</sup>; and
- 2090 (2) that at the time he did so there remained unpaid relevant contributions<sup>6</sup> falling to be paid by him to the scheme,

then, subject to the following provisions, the Secretary of State must pay into the resources<sup>7</sup> of the scheme the sum which in his opinion is payable in respect of the unpaid relevant contributions<sup>8</sup>.

The sum payable in respect of unpaid contributions of an employer on his own account to an occupational pension scheme or a personal pension scheme must be the least of the following amounts:

- 2091 (a) the balance of relevant contributions remaining unpaid on the date when he became insolvent and payable by the employer on his own account to the scheme in respect of the 12 months immediately preceding that date<sup>9</sup>;
- 2092 (b) the amount certified by an actuary to be necessary for the purpose of meeting the liability of the scheme on dissolution to pay the benefits provided by the scheme to or in respect of the employees of the employer<sup>10</sup>;
- 2093 (c) an amount equal to 10 per cent of the total amount of remuneration<sup>11</sup> paid or payable to those employees in respect of the 12 months immediately preceding the date on which the employer became insolvent<sup>12</sup>.

Any sum so payable in respect of unpaid contributions on behalf of an employee must not exceed the amount deducted from the pay of the employee in respect of the employee's contributions to the scheme during the 12 months immediately preceding the date on which the employer became insolvent<sup>13</sup>.

1 For these purposes, 'occupational pension scheme' means any scheme or arrangement which provides or is capable of providing, in relation to employees in any description of employment, benefits (in the form of pensions or otherwise) payable to or in respect of any such employees on the termination of their employment or on their death or retirement; and 'contract of employment', 'employee', 'employer' and 'employment', and other expressions which are defined in the Employment Rights Act 1996, have the same meanings as in the 1996 Act: Pension Schemes Act 1993 s 123(3) (amended by the Employment Rights Act 1996 s 240, Sch 1 para 16(12), (2)). For the meaning of 'occupational pension scheme' generally see PARA 741 ante.

2 For the meaning of 'personal pension scheme' see the Pension Schemes Act 1993 s 1; and PARA 710 ante. For the purposes of Pt VII Ch II (ss 123-127) (as amended) (see PARA 854 et seq post), the definition of personal pension scheme in s 1 has effect with the substitution for the words 'employed earners' of the word 'employees': s 123(4). For the meaning of 'employed earner' see PARA 32 ante (definition applied by s 181(1)).

3 As to the Secretary of State see PARA 1 ante.

4 For the meaning of 'employer' generally see PARA 660 note 18 ante; but see note 1 supra.

5 An employer is taken to be insolvent if, but only if, in England and Wales: (1) he has been adjudged bankrupt or has made a composition or arrangement with his creditors; (2) he has died and his estate falls to be administered in accordance with an order under the Insolvency Act 1986 s 421 (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 823); or (3) where the employer is a company (a) a winding-up order or an administration order is made or a resolution for voluntary winding up is passed with respect to it; (b) a receiver or manager of its undertaking is duly appointed; (c) possession is taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge; or (d) a voluntary arrangement proposed for the purpose of the Insolvency Act 1986 Pt I (ss 1-27) (see COMPANY AND PARTNERSHIP INSOLVENCY) is approved under that Part: Pension Schemes Act 1993 s 123(1).

6 'Relevant contributions' means contributions falling to be paid by an employer to an occupational pension scheme or a personal pension scheme, either on his own account or on behalf of an employee; and for the purposes of ibid s 124 a contribution must not be treated as falling to be paid on behalf of an employee unless a sum equal to that amount has been deducted from the pay of the employee by way of a contribution from him: s 124(2).

7 Any reference in ibid Pt VII Ch II (see PARA 854 et seq post) to the resources of a scheme is a reference to the funds out of which the benefits provided by the scheme are from time to time payable: s 123(5). For the meaning of 'resources' generally see PARA 609 note 2 ante.

8 Ibid s 124(1).

9 Ibid s 124(3)(a) (amended by the Pensions Act 1995 s 90).

10 Pension Schemes Act 1993 s 124(3)(b) (as amended: see note 9 supra).

11 For the purposes of ibid s 124(3)(c) (as amended: see note 9 supra), 'remuneration' includes holiday pay, statutory sick pay, statutory maternity pay under the Social Security Act 1986 Pt V (ss 46-50) (repealed) or the Social Security Contributions and Benefits Act 1992 Pt XII (ss 164-171) (see EMPLOYMENT vol 39 (2009) PARA 365 et seq), and any such payment as is referred to in the Employment Rights Act 1996 s 184(2): Pension Schemes Act 1993 s 124(4) (amended by the Employment Rights Act 1996 s 240, Sch 1 para 61(1), (3)). 'Holiday pay' means: (1) pay in respect of holiday actually taken; or (2) any accrued holiday pay which under the employee's contract of employment would in the ordinary course have become payable to him in respect of the period of a holiday if his employment with the employer had continued until he became entitled to a holiday: Pension Schemes Act 1993 s 123(3) (amended by the Employment Rights Act 1996 Sch 1 para 16(1), (2)). For the meaning of 'contract of employment' and 'employment' see the Employment Rights Act 1996 s 230 (definition applied by the Pension Schemes Act 1993 s 123(3) (as so amended)).

12 Ibid s 124(3)(c) (as amended: see note 9 supra).

13 Ibid s 124(5).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 853 Duty of Secretary of State to pay unpaid contributions to schemes

NOTE 1--Definition of 'occupational pension scheme' in Pension Schemes Act 1993 s 123(3) omitted: Pensions Act 2004 Sch 12 para 19(a).

NOTE 2--1993 Act s 123(4) omitted: 2004 Act Sch 12 para 19(b).

NOTE 5--Now, head (3)(a) a winding-up order is made or a resolution for voluntary winding up is passed with respect to it or the company enters administration: 1993 Act s 123(1) (amended by the Enterprise Act 2002 (Insolvency) Order 2003, SI 2003/2096).

NOTE 6--In the 1993 Act s 124 'on his own account', in relation to an employer, means on his own account but to fund benefits for, or in respect of, one or more employees: s 124(6) (added by the 2004 Act Sch 12 para 20).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(11) INSOLVENCY OF EMPLOYER/854. Certification of amounts payable by insolvency officers.

#### **854. Certification of amounts payable by insolvency officers.**

The following provisions apply where one of the officers mentioned in heads (1) to (5) below ('the relevant officer') has been or is required to be appointed in connection with an employer's insolvency<sup>1</sup>. The officers so referred to are:

- 2094 (1) a trustee in bankruptcy<sup>2</sup>;
- 2095 (2) a liquidator<sup>3</sup>;
- 2096 (3) an administrator<sup>4</sup>;
- 2097 (4) a receiver or manager<sup>5</sup>; or
- 2098 (5) a trustee<sup>6</sup> under a composition or arrangement between the employer and his creditors or under a trust deed for his creditors executed by the employer<sup>7</sup>.

Where these provisions apply<sup>8</sup>, the Secretary of State<sup>9</sup> must not make any such payment in respect of unpaid relevant contributions<sup>10</sup> until he has received a statement from the relevant officer of the amount of relevant contributions which appear to have been unpaid on the date on which the employer became insolvent<sup>11</sup> and to remain unpaid; and the relevant officer must on request by the Secretary of State provide him as soon as reasonably practicable with such a statement<sup>12</sup>.

Where an application<sup>13</sup> is made to the Secretary of State in respect of contributions to an occupational pension scheme or personal pension scheme<sup>14</sup> falling to be made, by an employer, the Secretary of State may require:

- 2099 (a) the employer to provide him with such information as the Secretary of State may reasonably require for the purpose of determining whether the application is well founded<sup>15</sup>; and
- 2100 (b) any person having the custody or control of any relevant records or other documents to produce for examination on behalf of the Secretary of State any such document in that person's custody or under his control which is of such a description as the Secretary of State may require<sup>16</sup>.

Any such requirement must be made in writing and given to the person on whom the requirement is imposed and may be varied or revoked by a subsequent notice so given<sup>17</sup>. If a person refuses or wilfully neglects to furnish any information or produce any document which he has been required to furnish or produce by such a notice he is liable on summary conviction to a fine not exceeding level 3 on the standard scale<sup>18</sup>. If a person, in purporting to comply with a requirement of such a notice, knowingly or recklessly makes any false statement, he is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>19</sup>.

1 Pension Schemes Act 1993 s 125(1). For the meaning of 'employer' see PARA 853 note 1 ante.

2 Ibid s 125(2)(a).

3 Ibid s 125(2)(b). If a company is a trustee of a pension scheme, the liquidator of the company may exercise a company's power as a trustee of the scheme: see *Re William Makin & Son Ltd* [1992] PLR 177, [1993] BCC 453.

- 4 Pension Schemes Act 1993 s 125(2)(c).
- 5 Ibid s 125(2)(d).
- 6 'Trustee', in relation to a composition or arrangement, includes the supervisor of a voluntary arrangement proposed for the purposes of and approved under the Insolvency Act 1986 Pt I (ss 1-7) or Pt VIII (ss 252-263) (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY): Pension Schemes Act 1993 s 125(2).
- 7 Ibid s 125(2)(e).
- 8 Ie subject to certain exceptions: see ibid s 125(5); and note 12 infra.
- 9 As to the Secretary of State see PARA 1 ante.
- 10 For the meaning of 'relevant contributions' see PARA 853 note 6 ante.
- 11 As to when an employer is insolvent see PARA 853 note 5 ante. In certain circumstances involving insolvency an independent trustee is required to be appointed to the scheme: see PARA 795 ante.
- 12 Pension Schemes Act 1993 s 125(3). Subject to s 125(5), an amount is taken to be payable, paid or deducted as mentioned in s 124(3)(a) or s 124(3)(c) (as amended) (see PARA 853 ante) or s 124(5) only if it is so certified by the relevant officer: s 125(4). If the Secretary of State is satisfied: (1) that he does not require a statement under s 125(3) in order to determine the amount of relevant contributions that was unpaid on the date on which the employer became insolvent and remains unpaid; or (2) that he does not require a certificate under s 125(4) in order to determine the amounts payable, paid or deducted as mentioned in s 124(3)(a) or s 124(3)(c) (as amended) (see PARA 853 ante) or s 124(5), he may make a payment under s 124 (as amended) (see PARA 853 ante) in respect of the contributions in question without having received such a statement or, as the case may be, such a certificate: s 125(5).
- 13 Ie under ibid s 124 (as amended): see PARA 853 ante.
- 14 For the meaning of 'occupational pension scheme' for these purposes see PARA 853 note 1 ante. For the meaning of 'personal pension scheme' see PARA 710 ante; but cf para 853 note 2 ante.
- 15 Pension Schemes Act 1993 s 157(1)(a).
- 16 Ibid s 157(1)(b).
- 17 Ibid s 157(2).
- 18 Ibid s 157(3). As to the standard scale see PARA 172 note 3 ante.
- 19 Ibid s 157(4). Section 157 must be construed as if it were in Pt VII Ch II (ss 123-127) (as amended): s 157(5).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.



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### **855. Complaint to an industrial tribunal.**

Any persons who are competent to act in respect of an occupational pension scheme<sup>1</sup> or a personal pension scheme<sup>2</sup> and who have applied for a payment of unpaid contributions<sup>3</sup> to be made into the resources of the scheme may present a complaint to an industrial tribunal<sup>4</sup> that:

- 2101 (1) the Secretary of State<sup>5</sup> has failed to make any such payment<sup>6</sup>; or
- 2102 (2) any such payment made by him is less than the amount which should have been paid<sup>7</sup>.

Such a complaint must be presented within the period of three months beginning with the date on which the decision of the Secretary of State on that application was communicated to the persons presenting it or, if that is not reasonably practicable, within such further period as is reasonable<sup>8</sup>. Where an industrial tribunal finds that the Secretary of State ought to make such a payment, it must make a declaration to that effect and must also declare the amount of any such payment which it finds that the Secretary of State ought to make<sup>9</sup>.

- 1 For the meaning of 'occupational pension scheme' see PARA 853 note 1 ante.
- 2 For the meaning of 'personal pension scheme' see PARA 710 ante; but cf para 853 note 2 ante.
- 3 ie under the Pension Schemes Act 1993 s 124 (as amended); see PARA 853 ante.
- 4 For the meaning of 'industrial tribunal' see PARA 557 note 14 ante.
- 5 As to the Secretary of State see PARA 1 ante.
- 6 Pension Schemes Act 1993 s 126(1)(a).
- 7 Ibid s 126(1)(b).
- 8 Ibid s 126(2).
- 9 Ibid s 126(3).

### **UPDATE**

#### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

**855 Complaint to an [employment] tribunal**

TEXT AND NOTES--Industrial tribunals now called employment tribunals: Employment Rights (Dispute Resolution) Act 1998 s 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(11) INSOLVENCY OF EMPLOYER/856. Transfer to the Secretary of State of rights and remedies.

### **856. Transfer to the Secretary of State of rights and remedies.**

Where the Secretary of State<sup>1</sup> makes any payment of unpaid contributions<sup>2</sup> into the resources<sup>3</sup> of an occupational pension scheme<sup>4</sup> or a personal pension scheme<sup>5</sup> in respect of any contributions to the scheme, any rights and remedies in respect of those contributions belonging to the persons competent to act in respect of the scheme must, on the making of the payment, become rights and remedies of the Secretary of State<sup>6</sup>. Where the Secretary of State makes any such payment and the sum (or any part of the sum) falling to be paid by the employer<sup>7</sup> on account of the contributions in respect of which the payment is made constitutes a preferential debt within the meaning of the Insolvency Act 1986<sup>8</sup> for the purposes of any provision of that Act (including any such provision as applied by an order made under that Act) or any provision of the Companies Act 1985, then, without prejudice to the generality of the above provision, there must be included among the rights and remedies which become rights and remedies of the Secretary of State any right arising under any such provision by reason of the status of that sum (or that part of it) as a preferential or preferred debt<sup>9</sup>. In computing for the purposes of any such provision the aggregate amount payable in priority to other creditors of the employer in respect of:

- 2103 (1) any claim of the Secretary of State to be so paid; and
- 2104 (2) any claim by the persons competent to act in respect of the scheme,

any claim falling within head (1) above must be treated as if it were a claim of those persons; but the Secretary of State is entitled, as against those persons, to be so paid in respect of any such claim of his (up to the full amount of the claim) before any payment is made to them in respect of any claim falling within head (2) above<sup>10</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 I.e. in pursuance of the Pension Schemes Act 1993 s 124 (as amended): see PARA 853 ante.

3 For the meaning of 'resources' for these purposes see PARA 853 note 7 ante.

4 For the meaning of 'occupational pension scheme' for these purposes see PARA 853 note 1 ante.

5 For the meaning of 'personal pension scheme' see PARA 710 ante; but cf para 853 note 2 ante.

6 Pension Schemes Act 1993 s 127(1).

7 For the meaning of 'employer' for these purposes see PARA 853 note 1 ante.

8 As to preferential debts see the Insolvency Act 1986 s 386 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY.

9 Pension Schemes Act 1993 s 127(2).

10 Ibid s 127(3).

### **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

## **856 Transfer to the Secretary of State of rights and remedies**

TEXT AND NOTES 7-9--Pension Schemes Act 1993 s 127(2) amended: SI 2009/1941.

TEXT AND NOTE 9--Now any provision of the Companies Act 2006: 1993 Act s 127(2) (amended by SI 2008/948).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(11) INSOLVENCY OF EMPLOYER/857. Insolvency provisions cannot be excluded.

### **857. Insolvency provisions cannot be excluded.**

Any provision in an agreement, whether a contract of employment or not, is void in so far as it purports (1) to exclude or limit the operation of any of the specified insolvency provisions<sup>1</sup>; or (2) to preclude any person from presenting a complaint to, or bringing any proceedings before, an industrial tribunal<sup>2</sup> under those provisions<sup>3</sup>.

<sup>1</sup> I.e. any provision of the Pension Schemes Act 1993 Pt VII Ch II (ss 123-127) (as amended): see PARA 853 et seq ante.

<sup>2</sup> For the meaning of 'industrial tribunal' see PARA 557 note 14 ante.

<sup>3</sup> Pension Schemes Act 1993 s 161.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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### **858. Employments with foreign element excluded.**

The specified insolvency provisions<sup>1</sup> and the Secretary of State's information powers in relation to applications under them<sup>2</sup> do not apply:

2105 (1) to employment<sup>3</sup> where under his contract of employment the employee ordinarily works outside the territory of the member states<sup>4</sup>; or

2106 (2) to employment as master or as a member of the crew of a fishing vessel where the employee is remunerated only by a share in the profits or gross earnings of the vessel<sup>5</sup>.

1 le any provision of the Pension Schemes Act 1993 Pt VII Ch II (ss 123-127) (as amended); see PARA 853 et seq ante:

2 le ibid s 157; see PARA 854 ante.

3 For the meaning of 'employment' see PARA 560 note 5 ante; but see also PARA 853 note 1 ante.

4 Pension Schemes Act 1993 s 165(7)(a). As to the meaning of 'employee' for these purposes see PARA 853 note 1 ante. For the meaning of 'employee' generally see PARA 598 note 5 ante. As to the member states see EUROPEAN COMMUNITIES.

5 Ibid s 165(7)(b). Additionally, ss 124, 125 (as amended) (see PARAS 853-854 ante) do not apply to a merchant seaman within the meaning of the Employment Rights Act 1996; but the Employment Rights Act 1996 s 210 applies to the Pension Schemes Act 1993 Pt VII Ch II (as amended) and s 157 as it applies to the provisions of the 1996 Act: Pension Schemes Act 1993 s 165(7), (8) (amended by the Employment Rights Act 1996 s 240, Sch 1 para 61(1), (4)).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

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### **859. Priority in bankruptcy etc.**

Certain sums owed on account of (1) an earner's contributions to an occupational pension scheme<sup>1</sup>; (2) employer's contributions to a contracted-out scheme<sup>2</sup>; and (3) state scheme premium or contributions equivalent premium<sup>3</sup>, are preferential debts<sup>4</sup> in cases of insolvency<sup>5</sup>.

1 See the Pension Schemes Act 1993 s 128, Sch 4 para 1. For the meaning of 'occupational pension scheme' see PARA 741 ante.

2 See *ibid* Sch 4 para 2 (Sch 4 paras 2, 3 amended by the Pensions Act 1995 s 137(6), (7), Sch 5 paras 18, 85). For the meaning of 'contracted-out scheme' see PARA 880 post.

3 See the Pension Schemes Act 1993 Sch 4 para 3 (as amended: see note 2 *supra*). As to state scheme premium and the contributions equivalent premium replacing it see PARA 922 post.

4 *Ie* for the purposes of the Insolvency Act 1986 s 386 (as amended), Sch 6 para 8: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY.

5 See the Pensions Act 1995 s 128.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **859 Priority in bankruptcy etc.**

NOTE 2--Pension Schemes Act 1993 Sch 4 para 2 further amended: Welfare Reform and Pensions Act 1999 Sch 2 para 8; National Insurance Contributions Act 2008 Sch 1 para 13, Sch 2.

NOTE 3--Pension Schemes Act 1993 Sch 4 para 3 further amended: SI 2008/948.

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## **(12) PAYMENT OF SURPLUS TO EMPLOYER**

### **860. In general.**

The following provisions apply to a trust scheme<sup>1</sup> if:

- 2107 (1) apart from these provisions, power is conferred on any person (including the employer<sup>2</sup>) to make payments to the employer out of funds which are held for the purposes of the scheme;
- 2108 (2) the scheme is one to which the provisions of the Income and Corporation Taxes Act 1988 relating to the reduction of pension fund surpluses in certain exempt approved schemes apply<sup>3</sup>; and
- 2109 (3) the scheme is not being wound up<sup>4</sup>.

Where the power referred to in head (1) above is conferred by the scheme on a person other than the trustees, it cannot be exercised by that person but may be exercised instead by the trustees; and any restriction imposed by the scheme on the exercise of the power must, so far as capable of doing so, apply to its exercise by the trustees<sup>5</sup>. The power referred to in head (1) above cannot be exercised unless the following requirements<sup>6</sup>, and any prescribed requirements<sup>7</sup>, are satisfied<sup>8</sup>. The requirements are that:

- 2110 (a) the power is exercised in pursuance of proposals approved under the relevant provisions of the Income and Corporation Taxes Act 1988<sup>9</sup>;
- 2111 (b) the trustees are satisfied that it is in the interests of the members<sup>10</sup> that the power be exercised in the manner so proposed;
- 2112 (c) where the power is conferred by the scheme on the employer, the employer has asked for the power to be exercised, or consented to it being exercised, in the manner so proposed;
- 2113 (d) the annual rates<sup>11</sup> of the pensions<sup>12</sup> under the scheme which commence or have commenced are increased by the appropriate percentage<sup>13</sup>; and
- 2114 (e) notice has been given in accordance with prescribed requirements to the members of the scheme of the proposal to exercise the power<sup>14</sup>.

The Occupational Pensions Regulatory Authority<sup>15</sup> must be of the opinion that any prescribed requirements, and the requirements of heads (a) to (e) above, are satisfied<sup>16</sup>.

If, where these provisions apply to any trust scheme, the trustees purport to exercise the power referred to in head (1) above by making such a payment without complying with the above requirements, the provisions relating to prohibition orders<sup>17</sup> and civil penalties<sup>18</sup> apply to any trustee who has failed to take all such steps as are reasonable to secure compliance<sup>19</sup>; and if in such circumstances any person other than the trustees purports to exercise the power referred to in head (1) above by making such a payment, the provisions relating to civil penalties apply to him<sup>20</sup>.

Regulations may provide that, in prescribed circumstances, these provisions do not apply to schemes falling within a prescribed class or description, or apply to them with prescribed modifications<sup>21</sup>. Thus they do not apply to a scheme where any Minister of the Crown has given a guarantee or made any other arrangements for the purpose of securing that the assets of the scheme are sufficient to meet its liabilities, or where arrangements for the payment of any

surplus or for the distribution of any excess assets on the winding up of the scheme are subject to the approval of any Minister of the Crown<sup>22</sup>.

1 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

2 For the meaning of 'employer' see PARA 598 note 4 ante.

3 In the Income and Corporation Taxes Act 1988 s 603, Sch 22 (as amended): see PARA 766 ante.

4 Pensions Act 1995 s 37(1). Section 37 does not apply to any payment to which, by virtue of the Income and Corporation Taxes Act 1988 s 601(3), s 601(2) does not apply (see PARA 764 ante): Pensions Act 1995 s 37(7).

5 Ibid s 37(2).

6 In the requirements of ibid s 37(4) (see the text and note 14 infra) and, in prescribed circumstances, s 37(5): see s 37(3). For the meaning of 'prescribed' see PARA 555 note 1 ante.

7 The prescribed circumstances are: (1) that, subject as follows, the Occupational Pensions Regulatory Authority (see note 15 infra) receives in relation to any proposals to which ibid s 37 applies (a) written representations from a member to the effect that any of the requirements of s 37(4) are not satisfied; or (b) information from any source sufficient to raise a doubt as to whether all those requirements are satisfied; and (2) the authority notifies the trustees in writing that no payment should be made to the employer in accordance with the proposals until the authority has confirmed in writing that it is satisfied that those requirements are satisfied: Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 5(1). Where the trustees have given notice to a member in accordance with reg 4 (see note 14 infra), head (1)(a) supra will only apply in the case of representations received by the authority from the member before the date specified in accordance with reg 4(4)(b) (expiry date of the second notice): reg 5(2). Where the date specified in accordance with reg 4(4)(b) has passed and the trustees have not received notification from the authority in accordance with reg 5(1)(b) (see head (2) supra), they must obtain written confirmation from the authority that it has not received any representations or information referred to in head (1) supra and accordingly the Pensions Act 1995 s 37(5) does not apply: Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 6(1), (2).

8 Pensions Act 1995 s 37(3).

9 In the Income and Corporation Taxes Act 1988 Sch 22 para 6(1): see PARA 766 ante.

10 For the meaning of 'member' see PARA 612 note 5 ante.

11 'Annual rate', in relation to a pension, means the annual rate of the pension, as previously increased under the rules of the scheme or under the Pensions Act 1995 s 51 (see PARA 861 post): s 54(3) (definition applied by s 37(4): see s 37(6)(a)).

12 For these purposes, 'pension' does not include: (1) any guaranteed minimum pension (as defined in the Pension Schemes Act 1993 s 8(2) (as amended) (see PARA 878 post)) or any increase in such a pension under s 109 (as amended) (see PARA 926 post); or (2) any money purchase benefit (as defined in s 181(1): see PARA 811 note 2 ante): Pensions Act 1995 s 37(6)(b).

13 'Appropriate percentage', in relation to an increase in the whole or part of the annual rate of a pension, means the revaluation percentage for the revaluation period the reference period for which ends with the last preceding 30 September before the increase is made (expressions used in this definition having the same meaning as in the Pension Schemes Act 1993 s 84 (as amended), Sch 3 para 2 (methods of revaluing accrued pension benefits) (see PARA 942 post): Pensions Act 1995 s 54(3) (definition applied by s 37(4): see s 37(6)(a)).

14 Ibid s 37(4). The trustees must take all reasonable steps to ensure that each member is given two written notices in accordance with the following provisions: see the Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 4(1), (2). The first notice must be given after proposals to reduce or eliminate a surplus have been approved under the Income and Corporation Taxes Act 1988 Sch 22 para 6(1) (see PARA 766 ante), and must (1) inform the member as to how it is proposed that the surplus must be reduced or eliminated, by reference to the ways permitted under Sch 22 para 3(3), and whether the requirements of the Pensions Act 1995 s 37(4) are satisfied; (2) invite the member, if he wishes, to make written representations in relation to the proposals to the trustees before a specified date (which is not earlier than two months from the date on which the first notice is given); (3) advise the member that a second notice will be given to him if the trustees intend to proceed with the proposals and that no payment may be made to the employer in accordance with the proposals until at least three months after the date on which the second notice is given: Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg

4(3). The second notice must be given after the date specified in accordance with head (2) supra and at least three months before the power is exercised and it must contain the information referred to in head (1) supra, including any modifications to the proposals, and advise the member that he may make written representations to the authority before a specified date (which is not earlier than three months from the date on which the second notice is given) if he considers that any of the requirements of the Pensions Act 1995 s 37(4) are not satisfied: Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 4(4). For these purposes, a notice is treated as having been given to a member if it has been sent to him by post either at the address at which he was last known to be living or, in the case of an active member, at an address at which he is known to be currently employed; and notices are not required to be given where a member has no known address or where correspondence sent to a member's last known address has been returned: reg 4(5).

In the application of the Pensions Act 1995 s 37(4) to a scheme in relation to which there is more than one employer, head (c) in the text has effect with the substitution for the word 'employer', where it appears for the second time, of the words 'person whom the employers nominate to act as their representative for the purposes of this paragraph or, if no such nomination is made, all the employers': Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 13 (amended by SI 1997/786).

15 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

16 Pensions Act 1995 s 37(5).

17 Ie the provisions of *ibid* s 3: see PARA 604 ante.

18 Ie the provisions of *ibid* s 10: see PARA 611 ante.

19 *Ibid* s 37(8).

20 *Ibid* s 37(9). Unless a decision dealing with a pension scheme surplus is shown to be unlawful, neither the court nor the Pensions Ombudsman has power to overrule it, whether it is made by the employer and the scheme's trustees jointly or by the employer after consultation with the trustees: see *Jefferies v Mayes, National Grid Company plc v Mayes, National Power plc v Feldon* (1997) Times, 30 June. As to the Pensions Ombudsman see PARA 663 et seq ante.

21 Pensions Act 1995 s 37(10). For the meaning of 'modifications' see PARA 664 note 10 ante (definition applied by s 124(5)). Section 37 is modified in its application to schemes with more than one employer: see the Occupational Pension Schemes (Payments to Employers) Regulations 1996, SI 1996/2156, reg 12 (as amended); and PARA 851 note 19 ante; reg 13 (as amended); and note 14 supra.

22 See *ibid* reg 14 (amended, with effect from 24 November 1997, by SI 1997/2559).

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 860 In general

TEXT AND NOTES--See *International Power plc (formerly National Power plc) v Healy; National Grid Co plc v Mayes* [2001] UKHL 20, [2001] 2 All ER 417 (where there was an

actuarial surplus in a pension scheme, the release of an accrued debt owed by the employer did not amount to a payment to the employer out of the moneys of the scheme).

Pensions Act 1995 s 37 substituted; see *infra*.

Section 37 applies to a trust scheme if (1) apart from s 37 power is conferred on the employer or any other person to make payments to the employer out of funds held for the purposes of the scheme, and (2) the scheme is not being wound up: s 37(1) (substituted by Pensions Act 2004 s 250). But the Pensions Act 1995 s 37 does not apply in the case of any of the payments listed in the Finance Act 2004 s 175 paras (c)-(f) (authorised employer payments other than public service scheme payments or authorised surplus payments): Pensions Act 1995 s 37(1A) (added by Pensions Act 2008 s 130). Where the power referred to in head (1) is conferred by the scheme on a person other than the trustees (a) it cannot be exercised by that person but may instead be exercised by the trustees, and (b) any restriction imposed by the scheme on the exercise of the power must, so far as capable of doing so, apply to its exercise by the trustees: 1995 Act s 37(2) (as substituted). The power referred to in head (1) may only be exercised if (i) the trustees have obtained a written valuation of the scheme's assets and liabilities prepared and signed by a prescribed person; (ii) there is a certificate in force stating that in the opinion of that person the prescribed requirements are met as at the date by reference to which the assets are valued and the liabilities are calculated, and specifying what in the opinion of that person is the maximum amount of payment that may be made to the employer; (iii) the payment does not exceed the maximum amount specified in the certificate; (iv) the trustees are satisfied that it is in the interests of the members that the power is exercised in the manner proposed; (v) where the power is conferred by the scheme on the employer, the employer has asked for the power to be exercised, or consented to its being exercised, in the manner proposed; (vi) there is no freezing order in force in relation to the scheme under the Pensions Act 2004 s 23 (see PARA 636A.19); and (vii) notice of the proposal to exercise the power has been given, in accordance with prescribed requirements, to the members of the scheme: 1995 Act s 37(3) (as so substituted). Provision may be made by regulations as to (A) the requirements (which may be alternative requirements) that must be met, in relation to any proposed payment to the employer out of funds held for the purposes of a scheme, with respect to the value of the scheme's assets and the amount of its liabilities; (B) the assets and liabilities to be taken into account for that purpose and the manner in which their value or amount is to be determined, calculated and verified; (C) the maximum amount of the payment that may be made to the employer, having regard to the value of the scheme's assets and the amount of its liabilities; (D) the giving of a certificate as to the matters mentioned in heads (A) and (C); and (E) the period for which such a certificate is to be in force: s 37(4) (as so substituted). The trustees must also comply with any other prescribed requirements in connection with the making of a payment under s 37: s 37(5) (as so substituted). If the trustees purport to exercise the power referred to in head (1) without complying with the requirements of s 37, or fail to comply with any requirement of regulations under s 37(5), s 10 (see PARA 611) applies to any of them who has failed to take all reasonable steps to secure compliance: s 37(6) (as so substituted). If a person other than the trustees purports to exercise the power referred to in head (1), s 10 applies to him: s 37(7) (as so substituted). Regulations may provide that in prescribed circumstances s 37 does not apply, or applies with prescribed modifications, to schemes of a prescribed description: s 37(8) (as so substituted).

See further Pensions Act 2004 s 251 (payment of surplus to employer: transitional power to amend scheme).

NOTES--SI 1996/2156 replaced: Occupational Pension Schemes (Payments to Employer) Regulations 2006, SI 2006/802.

NOTE 13--Definition of 'appropriate percentage' in 1995 Act s 54(3) repealed: Pensions Act 2004 Sch 13 Pt 1.

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## **(13) MISCELLANEOUS PROVISIONS**

### **(i) Indexation**

#### **861. Annual increase in rate of pension.**

Except in the case of any pension<sup>1</sup> or part of a pension which, in the opinion of the trustees or managers<sup>2</sup>, is derived from the payment by any member<sup>3</sup> of the scheme of voluntary contributions<sup>4</sup>, the following provisions apply to a pension under an occupational pension scheme<sup>5</sup> if:

- 2115 (1) the scheme is an approved scheme<sup>6</sup>, or is a scheme for which Inland Revenue approval has been applied for<sup>7</sup> and not refused, and is not a public service pension scheme<sup>8</sup>; and
- 2116 (2) apart from these provisions, the annual rate<sup>9</sup> of the pension would not be increased each year by at least the appropriate percentage<sup>10</sup> of that rate<sup>11</sup>.

Subject to the restrictions on increase where a member is under 55<sup>12</sup>, where such a pension, or any part of it, is attributable to pensionable service<sup>13</sup> on or after the appointed day<sup>14</sup> or, in the case of money purchase benefits<sup>15</sup>, to payments in respect of employment<sup>16</sup> carried on on or after the appointed day:

- 2117 (a) the annual rate of the pension; or
- 2118 (b) if only part of the pension is attributable to pensionable service or, as the case may be, to payments in respect of employment carried on on or after the appointed day, so much of the annual rate as is attributable to that part,

must be increased annually by at least the appropriate percentage<sup>17</sup>. This requirement does not, however, apply to a pension under an occupational pension scheme if the rules of the scheme require the annual rate of the pension<sup>18</sup> to be increased at intervals of not more than 12 months by at least the relevant percentage<sup>19</sup> and the scheme complies with any prescribed requirements<sup>20</sup>.

Regulations<sup>21</sup> may provide that these provisions apply in relation to a pension as if so much of it as would not otherwise be attributable to pensionable service or to payments in respect of employment were attributable to pensionable service or, as the case may be, payments in respect of employment before the appointed day, on or after that day, or partly before and partly on or after that day<sup>22</sup>.

The first increase required by these provisions in the rate of a pension must take effect not later than the first anniversary of the date on which the pension is first paid; and subsequent increases must take effect at intervals of not more than 12 months<sup>23</sup>. Where the first such increase is to take effect on a date when the pension has been in payment for a period of less than 12 months, the increase must be of an amount at least equal to one twelfth of the amount of the increase otherwise so required for each complete month in that period<sup>24</sup>.

Special provision is made by the Pensions (Increase) Act 1971 and the Social Security Pensions Act 1975 for increases in the annual rate of certain official pensions<sup>25</sup>.

- 1 For these purposes, 'pension', in relation to a scheme, means any pension in payment under the scheme and includes an annuity: Pensions Act 1995 s 54(3).
- 2 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.
- 3 For the meaning of 'member' see PARA 612 note 5 ante.
- 4 See the Pensions Act 1995 s 51(6).
- 5 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.
- 6 Ie within the meaning of the Income and Corporation Taxes Act 1988 Pt XIV Ch I (ss 590-612) (as amended): see PARA 747 et seq ante.
- 7 Ie under ibid Pt XIV Ch I (as amended): see PARA 747 et seq ante.
- 8 For the meaning of 'public service pension scheme' see PARA 874 post (definition applied by the Pensions Act 1995 s 124(1)).
- 9 'Annual rate', in relation to a pension, means the annual rate of the pension, as previously increased under the rules of the scheme or under ibid s 51: s 54(3).
- 10 'Appropriate percentage', in relation to an increase in the whole or part of the annual rate of a pension, means the revaluation percentage for the revaluation period the reference period for which ends with the last preceding 30 September before the increase is made, expressions used in this definition having the same meanings as in the Pension Schemes Act 1993 s 84(4), Sch 3 para 2 (see PARA 942 post): Pensions Act 1995 s 54(3).
- 11 Ibid s 51(1).
- 12 Ie subject to the provisions of ibid s 52: see PARA 862 post.
- 13 For the meaning of 'pensionable service' see PARA 782 note 5 ante.
- 14 'The appointed day' means the day appointed under the Pensions Act 1995 s 180 for the commencement of s 51 (ie 6 April 1997): s 54(3).
- 15 For the meaning of 'money purchase benefits' see PARA 811 note 2 ante (definition applied by ibid s 124(5)).
- 16 For the meaning of 'employment' see PARA 560 note 5 ante (definition applied by ibid s 124(5)).
- 17 Ibid s 51(2); and see note 22 infra.
- 18 Or, if only part of the pension is attributable to pensionable service or, as the case may be, to payments in respect of employment carried on on or after the appointed day, so much of the annual rate as is attributable to that part: see ibid s 51(3).
- 19 For these purposes, the relevant percentage is: (1) the percentage increase in the retail prices index for the reference period, being a period determined, in relation to each periodic increase, under the rules; or (2) the percentage for that period which corresponds to 5% per annum, whichever is the lesser: ibid s 51(4).
- 20 Ibid s 51(3); and see note 22 infra.
- 21 For the meaning of 'regulations' see PARA 600 note 2 ante.
- 22 Pensions Act 1995 s 51(5). Where a person's accrued rights to a pension payable under an occupational pension scheme to which s 51 applies, or any part of them, derive from the allowance by the scheme of a transfer credit in respect of rights which were subject to the indexation requirement, or to the requirements of s 162 (annual increase in rate of personal pensions: see PARA 737 ante), in any pension scheme of which that person has previously been a member, s 51(2), (3) applies to such part of that pension as is attributable to those rights as if they were attributable to pensionable service or to payments in respect of employment on or after the appointed day: Occupational Pension Schemes (Indexation) Regulations 1996, SI 1996/1679, reg 2(1). Regulation 2(1) does not, however, apply in any case where a person's accrued rights to a pension payable by an occupational pension scheme referred to therein, or any part of them, derive from rights which have, at any

time prior to the allowance by such a scheme of a transfer credit in respect of them, been held in a personal pension scheme and which were not subject to the requirements of the Pensions Act 1995 s 162 in that scheme: Occupational Pension Schemes (Indexation) Regulations 1996, SI 1996/1679, reg 2(2). Where a person's accrued rights to a pension payable under an occupational pension scheme to which the Pensions Act 1995 s 51 applies, or any part of them, derive from the acceptance by the scheme of a payment from a policy of insurance or annuity contract in respect of rights which were subject to the indexation requirement, or to the requirements of s 162, in any pension scheme of which that person has previously been a member, s 51(2), (3) applies to such part of that pension as is attributable to those rights as if they were attributable to pensionable service or to payments in respect of employment on or after the appointed day: Occupational Pension Schemes (Indexation) Regulations 1996, SI 1996/1679, reg 3.

23 Pensions Act 1995 s 54(1).

24 Ibid s 54(2).

25 See the Pensions (Increase) Act 1971 s 1 (as substituted); the Social Security Pensions Act 1959 s 59 (as amended); and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARAS 615-616. For an example of an order making such an annual increase see the Pensions Increase (Review) Order 1997, SI 1997/634. Where the amount by reference to which an increase in an official pension is to be calculated would otherwise be reduced under the Social Security Pensions Act 1975 s 59(5) (as amended) (amount by reference to which any increase authorised is calculated in the case of a person entitled to a guaranteed minimum pension (within the meaning of the Pension Schemes Act 1993: see PARA 878 post) to be reduced by an amount equal to the rate of a guaranteed minimum pension), the Treasury may direct that in such cases or classes of cases as may be specified in the direction, no such reduction is to be made or the reduction is to be of an amount less than that rate, and in any such cases the increase must be calculated in accordance with the direction: see the Social Security Pensions Act 1959 s 59A (added by the Social Security Act 1979 s 11(4); amended by the Social Security Act 1986 s 9(9); and by the Pension Schemes Act 1993 s 190, Sch 8 para 9(2)).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

#### **861 Annual increase in rate of pension**

TEXT AND NOTES--No increase under the Pensions Act 1995 s 51 is required to be made, at any time on or after the relevant date, of so much of any pension under a money purchase scheme as (1) is payable by way of an annuity the amount of which for any year after the first year of payment is determined (whether under the terms of the scheme or under the terms of the annuity contract in pursuance of which it is payable) by reference to fluctuations in the value of, or the return from, particular investments; (2) does not represent benefits payable in respect of the protected rights of any

member of the scheme; and (3) satisfies such other conditions, if any, as may be prescribed: s 51A(1) (s 51A added by Child Support, Pensions and Social Security Act 2000 s 51(2)). For the purposes of the 1995 Act s 51A it is immaterial whether the annuity in question is payable out of the funds of the scheme in question or under an annuity contract entered into for the purposes of the scheme: s 51A(2). 'The relevant date' means the date appointed for the coming into force of the Child Support, Pensions and Social Security Act 2000 s 51 (ie 1 December 2000): Pensions Act 1995 s 51A(3).

See also Personal and Occupational Pension Schemes (Indexation and Disclosure of Information) (Miscellaneous Amendments) Regulations 2005, SI 2005/704 (modification of Pensions Act 1995 s 51).

TEXT AND NOTES 1-4--Refers also to part of a pension which is attributable (directly or indirectly) to a pension credit (see PARA 951): 1995 Act s 51(6) (amended by Welfare Reform and Pensions Act 1999 Sch 12 paras 43, 51).

TEXT AND NOTES 6-8--Now, head (1) the scheme is a registered pension scheme under the Finance Act 2004 s 153 (see PARA 873B.2), and is not a public service pension scheme, and, in the case where the pension becomes a pension in payment on or after the commencement day (ie the day appointed for the coming into force of the Pensions Act 2004 s 278 (ie 6 April 2004: see SI 2005/275)), is not a money purchase scheme: 1995 Act ss 51(1), 54(3) (amended by Pensions Act 2004 s 278(2)(a), (b), (8); and SI 2006/745).

TEXT AND NOTE 6--Reference to an approved pension is now to a registered pension scheme under the Finance Act 2004 s 153 (see PARA 873B.1): 1995 Act s 51(1) (amended by SI 2006/745).

NOTE 10--Definition of 'appropriate percentage' in 1995 Act s 54(3) repealed: Pensions Act 2004 Sch 13 Pt 1.

Now, head (2) the whole, or any part of, the pension is attributable (a) to pensionable service on or after the appointed day, or (b) in the case of money purchase benefits where the pension is in payment before the commencement day, to payments in respect of employment carried on or after the appointed day; also head (3) apart from the 1995 Act s 51 (a) the annual rate of the pension, or (b) if only part of the pension is attributable as described in head (2), so much of the annual rate as is attributable to that part, would not be increased each year by at least the appropriate percentage of that rate: s 51(1)(b), (c) (substituted by Pensions Act 2004 s 278(2)(c). For the meaning of 'the appropriate percentage' see 1995 Act s 51ZA (added by Pensions Act 2004 s 278(7); amended by Pensions Act 2008 Sch 2 para 8).

TEXT AND NOTES 12-17--1995 Act s 51(2) is also now subject to s 51A (see TEXT AND NOTES): s 51(2) (amended by Child Support, Pensions and Social Security Act 2000 s 51(1)).

TEXT AND NOTE 15--In the case of money purchase benefits, where the pension is in payment before the commencement day: 1995 Act s 51(2) (amended by Pensions Act 2004 s 278(3)).

NOTE 19--In head (2) for '5 per cent per annum' read '(a) in the case of a category X pension, 5 per cent per annum, and (b) in the case of a category Y pension, 2.5 per cent per annum': 1995 Act s 51(4) (amended by Pensions Act 2004 s 278(4)).

For the purposes of the 1995 Act s 51, a pension is a category X pension if it is (i) a pension which became a pension in payment before the commencement day, or (ii) a pension (A) which becomes a pension in payment on or after the commencement day, and (B) the whole of which is attributable to pensionable service before that day: s

51(4A) (s 51(4A)-(4C) added by Pensions Act 2004 s 278(5)). For the purposes of the 1995 Act s 51, a pension is a category Y pension if it is a pension (aa) which becomes a pension in payment on or after the commencement day, and (bb) the whole of which is attributable to pensionable service on or after the commencement day: s 51(4B). For the purposes of applying s 51 in the case of a pension (1) which becomes a pension in payment on or after the commencement day, (2) part of which is attributable to pensionable service before the commencement day, and (3) part of which is attributable to pensionable service on or after that day, each of those parts of the pension is to be treated as if it were a separate pension: s 51(4C).

TEXT AND NOTE 22--1995 Act s 51(5) amended: Pensions Act 2004 s 278(6).

NOTE 22--SI 1996/1679 amended: SI 2005/704, SI 2009/615.

As to the calculation of a reduction under the National Health Service (Superannuation) Regulations 1980, SI 1980/362, to the annual amount of an occupational pension, see *Department of Health v Pensions Ombudsman* (1998) Independent, 6 October, CA.

NOTE 25--For current order making such an annual increase see the Pensions Increase (Review) Order 2009, SI 2009/692.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(13) MISCELLANEOUS PROVISIONS/(i) Indexation/862. Restriction on increase where member is under 55.

## **862. Restriction on increase where member is under 55.**

Subject to certain exceptions<sup>1</sup>, no annual increase in the rate of pension<sup>2</sup> is required to be paid to or for a member<sup>3</sup> of a scheme whose pension<sup>4</sup> is in payment but who has not attained the age of 55 at the time when the increase takes effect<sup>5</sup>. This restriction does not apply if the member is permanently incapacitated by mental or physical infirmity from engaging in regular full-time employment<sup>6</sup>, or has retired on account of mental or physical infirmity from the employment in respect of which, or on retirement from which, the pension is payable<sup>7</sup>.

The rules of a scheme may provide that if, in a case where a pension has been paid to or for a member under the age of 55 at an increased rate in consequence of some infirmity of his, the member ceases to suffer from the infirmity in question before he attains the age of 55, but continues to be entitled to the pension, any increases subsequently taking effect<sup>8</sup> in the annual rate of the pension are not to be paid or not to be paid in full<sup>9</sup>.

1    Ie the exceptions contained in the Pensions Act 1995 s 52(2): see the text and note 7 infra.

2    Ie no increase under *ibid* s 51: see PARA 861 ante.

3    For the meaning of 'member' see PARA 612 note 5 ante.

4    For the meaning of 'pension' for these purposes see PARA 861 note 1 ante.

5    Pensions Act 1995 s 52(1). In any case where: (1) by virtue only of s 52(1) or (3) (see the text and note 9 infra), increases are not paid to or for a member or are not paid in full; but (2) the member attains the age of 55 or, in a case falling within s 52(3), again satisfies the condition set out in s 52(2)(a) (see the text and note 6 infra), his pension must then become payable at the annual rate at which it would have been payable apart from s 52(1) or (3): s 52(4). For the meaning of 'annual rate' see PARA 861 note 9 ante.

6    Ibid s 52(2)(a). For the meaning of 'employment' see PARA 560 note 5 ante (definition applied by s 124(5)).

7    Ibid s 52(2)(b).

8    Ie under *ibid* s 51: see PARA 861 ante.

9    Ibid s 52(3); and see note 5 supra.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

**861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(13) MISCELLANEOUS PROVISIONS/(i) Indexation/863. Effect of increases above the statutory requirement.

### **863. Effect of increases above the statutory requirement.**

Where in any tax year<sup>1</sup> the trustees or managers<sup>2</sup> of an occupational pension scheme<sup>3</sup> make an increase in a person's pension<sup>4</sup>, not being an increase required by statute<sup>5</sup>, they may deduct the amount of the increase from any increase which they would otherwise be required to make<sup>6</sup> in the next tax year<sup>7</sup>. Where in any tax year the trustees or managers of such a scheme make an increase in a person's pension and part of the increase is not required by statute<sup>8</sup>, they may deduct that part of the increase from any increase which they would otherwise be required to make<sup>9</sup> in the next tax year<sup>10</sup>.

Where by virtue of the above provisions any pensions are not required to be increased in pursuance of the statutory provisions<sup>11</sup>, or not by the full amount that they otherwise would be, their amount must be calculated for any purpose as if they had been increased in pursuance of the statutory provision in question or, as the case may be, by that full amount<sup>12</sup>.

1 'Tax year' means the 12 months beginning with 6 April in any year: Pension Schemes Act 1993 s 181(1) (definition applied by the Pensions Act 1995 s 124(5)).

2 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

3 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

4 For the meaning of 'pension' for these purposes see PARA 861 note 1 ante.

5 Ie an increase required by the Pension Schemes Act 1993 s 109 (as amended) (see PARA 926 post) or the Pensions Act 1995 s 51 (see PARA 861 ante): see s 53(1).

6 Ie under either the Pension Schemes Act 1993 s 109 (as amended) or the Pensions Act 1995 s 51: see s 53(1).

7 Ibid s 53(1).

8 Ie not required by the Pension Schemes Act 1993 s 109 (as amended) or the Pensions Act 1995 s 51: see s 53(2).

9 See note 6 supra.

10 Pensions Act 1995 s 53(2).

11 See note 8 supra.

12 Pensions Act 1995 s 53(3).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent

legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

### **863 Effect of increases above the statutory requirement**

NOTE 4--In the Pensions Act 1995 s 53(1), (2), the references to a person's pension do not include any pension which is attributable (directly or indirectly) to a pension credit (see PARA 951): s 53(3A) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 43, 52).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(13) MISCELLANEOUS PROVISIONS/(ii) Money Purchase Schemes/864. Schedules of payments to money purchase schemes.

## **(ii) Money Purchase Schemes**

### **864. Schedules of payments to money purchase schemes.**

The following provisions apply to an occupational pension scheme<sup>1</sup> which is a money purchase scheme<sup>2</sup>, other than one falling within a prescribed<sup>3</sup> class or description<sup>4</sup>. The trustees or managers<sup>5</sup> of every occupational pension scheme to which these provisions apply must secure that there is prepared, maintained and from time to time revised a schedule (a 'payment schedule') showing:

- 2119 (1) the rates of contributions payable towards the scheme by or on behalf of the employer<sup>6</sup> and the active members<sup>7</sup> of the scheme<sup>8</sup>;
- 2120 (2) such other amounts payable towards the scheme as may be prescribed<sup>9</sup>; and
- 2121 (3) the dates on or before which payments of such contributions or other amounts are to be made ('due dates')<sup>10</sup>.

The payment schedule for a scheme must satisfy prescribed requirements<sup>11</sup>. The matters shown in the payment schedule for a scheme must, to the extent that the scheme makes provision for their determination, be so determined<sup>12</sup>, and otherwise:

- 2122 (a) must be matters previously agreed between the employer and the trustees or managers of the scheme<sup>13</sup>; or
- 2123 (b) if no such agreement has been made as to all matters shown in the schedule (other than those for whose determination the scheme makes provision), must be matters determined by the trustees or managers of the scheme<sup>14</sup>.

Where in the case of a scheme these provisions are not complied with, the provisions relating to prohibition orders<sup>15</sup> apply to any trustee who has failed to take all such steps as are reasonable to secure compliance, and those relating to civil penalties<sup>16</sup> apply to any trustee or manager who has failed to take all such steps<sup>17</sup>.

Except in prescribed circumstances<sup>18</sup>, the trustees or managers of an occupational pension scheme to which the above provisions apply must, where any amounts payable in accordance with the payment schedule have not been paid on or before the due date, give notice of that fact, within the prescribed period<sup>19</sup>, to the Occupational Pensions Regulatory Authority and to the members<sup>20</sup> of the scheme<sup>21</sup>. Any such amounts which for the time being remain unpaid after that date (whether payable by the employer or not) must, if not a debt due from the employer to the trustees or managers apart from this provision, be treated as such a debt<sup>22</sup>. Where any amounts payable in accordance with the payment schedule by or on behalf of the employer have not been paid on or before the due date, the provisions relating to civil penalties apply to the employer<sup>23</sup>.

<sup>1</sup> For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176).

2 For the meaning of 'money purchase scheme' see PARA 811 note 2 ante (definition applied by *ibid* s 124(5)).

3 For the meaning of 'prescribed' see PARA 555 note 1 ante. The prescribed class or description for these purposes is a money purchase scheme which falls within the description referred to in the Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 3(1)(c), (d), (f)-(i) (see PARA 826 ante): reg 17 (amended by SI 1997/786).

4 Pensions Act 1995 s 87(1). In the case of money purchase schemes falling within a prescribed class or description, regulations may: (1) provide for any of the provisions of ss 56-60 (see PARAS 811-821 ante) to apply, or apply with prescribed modifications (in spite of anything in those sections); and (2) provide for any of the provisions relating to money purchase schemes to apply with prescribed modifications or not to apply, to such extent as may be prescribed: s 89(1). For the meaning of 'regulations' see PARA 600 note 2 ante. For the meaning of 'modifications' see PARA 664 note 10 ante (definition applied by s 124(5)).

Regulations may also provide for any of the provisions of s 75 (see PARA 850 ante) to apply, or apply with prescribed modifications, to money purchase schemes to such extent as may be prescribed (in spite of anything in that section), and the power so conferred includes power to apply s 75 in circumstances other than those in which the scheme is being wound up or a relevant insolvency event occurs: s 89(2). For the meaning of 'relevant insolvency event' see PARA 850 note 3 ante. See the Occupational Pension Schemes (Deficiency on Winding Up etc) Regulations 1996, SI 1996/3128, reg 9; and PARA 847 note 12 ante.

5 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

6 For the meaning of 'employer' see PARA 598 note 4 ante.

7 For the meaning of 'active member' see PARA 612 note 5 ante.

8 Pensions Act 1995 s 87(2)(a).

9 *Ibid* s 87(2)(b). The prescribed amounts are amounts payable towards the scheme by the employer in respect of expenses likely to be incurred in the scheme year: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 18.

10 Pensions Act 1994 s 87(2)(c).

11 *Ibid* s 87(3). The prescribed requirements are that (1) the payment schedule shows amounts payable in the scheme year; (2) subject to the Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 19(2), the payment schedule contains separate entries for the rates and due dates of contributions (other than voluntary contributions) payable towards the scheme by or on behalf of (a) the employer, and in the case of a scheme in relation to which there is more than one employer, each employer; (b) the active members of the scheme: reg 19(1). In the case where an insurance premium is payable, however, the payment schedule need not contain separate entries for identifying the contributions payable by or on behalf of the employer and the active members of the scheme in respect of that premium: reg 19(2).

12 Pensions Act 1995 s 87(4)(a).

13 *Ibid* s 87(4)(b)(i).

14 *Ibid* s 87(4)(b)(ii).

15 *Ie* the provisions of *ibid* s 3: see PARA 604 ante.

16 *Ie* the provisions of *ibid* s 10: see PARA 611 ante.

17 *Ibid* s 87(5).

18 The prescribed circumstances are as follows: (1) where an amount, payable in accordance with the payment schedule, has been paid no later than 60 days after the due date, notice of non-payment in respect of that amount on or before the due date need not be given to the members of the scheme; and (2) in the case of a scheme in relation to which there is more than one employer, notice of non-payment in respect of an amount payable in accordance with the payment schedule need not be given to members where their pensionable service is not with the employer who has not paid any amount in accordance with that payment schedule: Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715, reg 21.

19 For these purposes, the prescribed period is, in the case where notice is to be given to the Occupational Pensions Regulatory Authority, 30 days from the due date, and in the case where notice is to be given to a member, 90 days from the due date: *ibid* reg 20. As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

20 For the meaning of 'member' see PARA 612 note 5 ante.

21 Pensions Act 1995 s 88(1). If, in the case of an occupational pension scheme to which s 87 applies, s 88(1) is not complied with, s 3 (see PARA 604 ante) applies to any trustee who has failed to take all such steps as are reasonable to secure compliance, and s 10 (see PARA 611 ante) applies to any trustee or manager who has failed to take all such steps: s 88(4).

22 Ibid s 88(2).

23 Ibid s 88(3).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

### **864 Schedules of payments to money purchase schemes**

NOTE 4--Pensions Act 1995 s 89(1), (2) amended: Pensions Act 2004 Sch 12 para 66, Sch 13 Pt 1.

TEXT AND NOTE 17--1995 Act s 87(5) amended: 2004 Sch 12 para 64, Sch 13 Pt 1.

NOTE 18--Notice need also not be given if payment has been made no later than ten days after the due date, and the default is only the first or second such default in the period of 12 months ending on and including the due date: SI 1996/1715 reg 21(3) (added by SI 1999/3198). Where, under the 1995 Act s 49(9) (see PARA 798), there is a requirement on the trustees or managers to give notice of a failure to pay within a prescribed time an amount corresponding to any contribution payable on behalf of an active member which has been deducted from the member's earnings, the trustees or managers are not required to give notice of a failure to pay such amount by the due date for the purposes of s 88(1), in a case to which that subsection would otherwise apply: SI 1996/1715 reg 21(4) (added by SI 2000/679).

TEXT AND NOTE 21--Where, in the case of an occupational pension scheme to which the 1995 Act s 87 applies (1) there is a failure to pay on or before the due date any amounts payable in accordance with the payment schedule, and (2) the trustees or managers have reasonable cause to believe that the failure is likely to be of material significance in the exercise by the Authority of any of their functions, they must,

except in prescribed circumstances, give notice of the failure to the Authority and to the members of the scheme within a reasonable period after the due date: s 88(1) (substituted by the 2004 Act s 269(2)).

NOTE 21--1995 Act s 88(4) amended: 2004 Act Sch 12 para 65, Sch 13 Pt 1.

TEXT AND NOTE 23--Now by or on behalf of the employer on the employer's own account: 1995 Act s 88(3); Welfare Reform and Pensions Act 1999 s 10(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(13) MISCELLANEOUS PROVISIONS/(iii) Assignment, Forfeiture etc/865. Inalienability of occupational pension.

### **(iii) Assignment, Forfeiture etc**

#### **865. Inalienability of occupational pension.**

Subject to the following exceptions, where a person is entitled, or has an accrued right<sup>1</sup>, to a pension<sup>2</sup> under an occupational pension scheme<sup>3</sup>:

- 2124 (1) the entitlement or right cannot be assigned, commuted or surrendered<sup>4</sup>;
- 2125 (2) the entitlement or right cannot be charged or a lien exercised in respect of it<sup>5</sup>; and
- 2126 (3) no set-off can be exercised in respect of it<sup>6</sup>,

and an agreement to effect any of those things is unenforceable<sup>7</sup>.

Where by virtue of these provisions a person's entitlement, or accrued right, to a pension under an occupational pension scheme cannot, apart from such exceptions, be assigned, no order can be made by any court the effect of which would be that he would be restrained from receiving that pension<sup>8</sup>.

In the case of a person ('the person in question') who is entitled, or has an accrued right, to a pension under an occupational pension scheme, the above provisions do not apply to any of the following, or any agreement to effect any of the following:

- 2127 (a) an assignment in favour of the person in question's widow, widower or dependant<sup>9</sup>;
- 2128 (b) a surrender, at the option of the person in question, for the purpose of:  
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  - 248. (i) providing benefits for that person's widow, widower or dependant; or
  - 249. (ii) acquiring for the person in question entitlement to further benefits under the scheme<sup>10</sup>;
- 184 2129 (c) a commutation:  
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  - 250. (i) of the person in question's benefit on or after retirement or in exceptional circumstances of serious ill health;
  - 251. (ii) in prescribed circumstances<sup>11</sup>, of any benefit for that person's widow, widower or dependant; or
  - 252. (iii) in other prescribed circumstances<sup>12</sup>;
- 186 2130 (d) a charge or lien on, or set-off against, the person in question's entitlement, or accrued right, to pension (except to the extent that it includes transfer credits<sup>13</sup> other than prescribed transfer credits<sup>14</sup>) for the purpose of enabling the employer to obtain the discharge by him of some monetary obligation due to the employer and arising out of a criminal, negligent or fraudulent act or omission by him<sup>15</sup>;
- 2131 (e) Except in prescribed circumstances<sup>16</sup>, a charge or lien on, or set-off against, the person in question's entitlement, or accrued right, to pension, for the purpose of discharging some monetary obligation due from the person in question to the scheme and:

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253. (i) arising out of a criminal, negligent or fraudulent act or omission by him; or  
 254. (ii) in the case of a trust scheme<sup>17</sup> of which the person in question is a trustee,  
 arising out of a breach of trust by him<sup>18</sup>.

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1 For the meaning of 'accrued rights' see PARA 843 note 6 ante.

2 For these purposes, 'pension', in relation to an occupational pension scheme, includes any benefit under the scheme and any part of a pension and any payment by way of pension: Pensions Act 1995 s 94(2).

3 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by *ibid* s 176). See also PARA 598 note 7 ante.

4 *Ibid* s 91(1)(a).

5 *Ibid* s 91(1)(b).

6 *Ibid* s 91(1)(c).

7 *Ibid* s 91(1). Section 91 is subject to the Pension Schemes Act 1993 s 159 (as amended) (inalienability of guaranteed minimum pension and protected rights payments: see PARA 928 post): Pensions Act 1995 s 91(7).

8 *Ibid* s 91(2). Section 91(2) does not prevent the making of an attachment of earnings order under the Attachment of Earnings Act 1971, or an income payments order under the Insolvency Act 1986: Pensions Act 1995 s 91(4). Where a bankruptcy order is made against a person, any entitlement or right of his which by virtue of s 91 cannot, apart from s 91(5) (see heads (a)-(e) in the text), be assigned is excluded from his estate for the purposes of the Insolvency Act 1986 Pts VIII-XI (ss 252-385) (as amended) or the Bankruptcy (Scotland) Act 1985: Pensions Act 1995 s 91(3).

9 *Ibid* s 91(5)(a).

10 *Ibid* s 91(5)(b).

11 The prescribed circumstances are where: (1) either (a) the pension has become payable; or (b) the occupational pension scheme is being wound up; and (2) the aggregate amount of the benefit payable to the member or, as the case may be, his widow or her widower or dependant under all the schemes relating to employment with the same employer as the employment in respect of which the benefit is payable does not exceed £260 per annum: Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997, SI 1997/785, reg 2(1). Where a member's pension is commuted under head (2) *supra*, any prospective widow's or widower's benefit payable under the scheme may also be commuted (provided that the aggregate amount of such benefit prospectively payable under all schemes relating to employment with the same employer as the employment in respect of which the benefit is payable does not exceed £260 per annum) and the value of any such widow's or widower's benefit is not to be taken into account for the purposes of the limit of £260 per annum mentioned in that head: reg 2(2). For the purposes of head (1)(b) *supra*, an occupational pension scheme is treated as being wound up when any of the circumstances referred to in the Occupational Pension Schemes (Winding Up) Regulations 1996, SI 1996/3126, reg 2 apply (see PARA 844 ante): Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997, SI 1997/785, reg 2(3). For the meaning of 'prescribed' see PARA 555 note 1 ante.

12 Pensions Act 1995 s 91(5)(c); and see note 11 *supra*.

13 For the meaning of 'transfer credits' see PARA 612 note 5 ante.

14 The prescribed transfer credits are those transfer credits attributable to employment with the same employer or an associated employer and the benefits of which could have been charged or a lien or set-off exercised in respect of such benefits under the occupational pension scheme from which the transfer was made: Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997, SI 1997/785, reg 3. For the meaning of 'employer' see PARA 598 note 4 ante.

15 Pensions Act 1995 s 91(5)(d). Where a charge, lien or set-off is exercisable by virtue of s 91(5)(d) or (e) (see heads (d)-(e) in the text), (1) its amount must not exceed the amount of the monetary obligation in question, or (if less) the value (determined in the prescribed manner) of the person in question's entitlement or accrued right; and (2) the person in question must be given a certificate showing the amount of the charge, lien or set-off and its effect on his benefits under the scheme; and where there is a dispute as to its amount, the charge, lien or set-off must not be exercised unless the obligation in question has become enforceable under an

order of a competent court or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff: s 91(6).

16 The prescribed circumstance is where a monetary obligation arises out of a breach of trust by the person in question and the court has relieved him wholly or partly from personal liability under the Trustee Act 1925 s 61 (see TRUSTS vol 48 (2007 Reissue) PARA 1123) or the Trusts (Scotland) Act 1921 s 32: Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997, SI 1997/785, reg 4.

17 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

18 Pensions Act 1995 s 91(5)(e). Section 91(5)(e) is subject to s 91(6): see note 15 supra. Regulations may modify s 91 in its application to public service pension schemes or to other schemes falling within a prescribed class or description, or provide that s 91 does not apply in relation to schemes falling within a prescribed class or description: s 94(1). For the meaning of 'regulations' see PARA 600 note 2 ante; for the meaning of 'modify' see PARA 664 note 10 ante (definition applied by s 124(5)); and for the meaning of 'public service pension scheme' see PARA 874 post (definition applied by s 176).

The power to modify s 91 has been exercised as follows: (1) s 91(5)(d) (see head (d) in the text) has effect in its application to public service pension schemes and the Armed Forces Pension Scheme with the omission of the words 'and arising out of a criminal, negligent or fraudulent act or omission by him' (Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997, SI 1997/785, reg 7); (2) if a scheme is one the trustees of which have made or wish to make a loan in respect of which the conditions of the Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, reg 6(8) are met (investments to which the restrictions do not apply: see PARA 807 ante), the Pensions Act 1995 s 91(1)(b) does not apply to the extent that it would prevent the directors' interest under the policy referred to being used as security for that loan (Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997, SI 1997/785, reg 8(1)); (3) the Pensions Act 1995 s 91(1)(a) does not apply to that part of an occupational pension scheme under which there is an entitlement or an accrued right to a lump sum retirement benefit and the Inland Revenue has granted a concession, in accordance with a statement issued on 11 October 1996, to a member in respect of that lump sum retirement benefit (Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997, SI 1997/785, reg 8(2)); and (4) the Pensions Act 1995 s 91(2) does not apply in relation to schemes which are not approved schemes (as to which see PARA 747 et seq ante), but this exemption does not apply to public service pension schemes and the Armed Forces Pension Scheme (Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997, SI 1997/785, reg 8(3), (4)).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

### **865 Inalienability of occupational pension**

TEXT AND NOTES--The restrictions in the Pensions Act 1995 s 91 are disapplied when pension sharing rights are activated under certain types of order: see further PARA 961A.2.

TEXT AND NOTES 1-7--For 'or has an accrued right ... occupational pension scheme' read 'to a pension under an occupational pension scheme or has a right to a future pension under such a scheme': 1995 Act s 91(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 43, 57(1), (2)).

NOTE 7--There is nothing in the 1995 Act to invalidate an order consenting to the discharge from any further liability to pay a pension provided the order is limited to future rights: *Fisher v Harrison* [2003] EWCA Civ 1047, [2003] All ER (D) 484 (Jul).

TEXT AND NOTE 8--For 'or accrued right ... scheme' read 'to a pension under an occupational pension scheme, or right to a future pension under such a scheme,': 1995 Act s 91(2) (amended by the 1999 Act Sch 12 paras 43, 57(1), (3)). 1995 Act s 91(3) repealed: 1999 Act Sch 13 Pt I.

TEXT AND NOTES 9-18--Also head (f) subject to the 1995 Act s 91(6), a charge or lien on, or set-off against, the person in question's entitlement, or right, for the purpose of discharging some monetary obligation due from the person in question to the scheme arising out of a payment made in error in respect of the pension: s 91(5)(f) (added by the Pensions Act 2004 s 266(2)).

TEXT AND NOTES 9, 10, 12--1995 Act s 91(5)(a), (b), (c) amended to include surviving civil partners: SI 2005/2053.

TEXT AND NOTE 9--For 'or has ... occupational pension scheme' read 'to a pension under an occupational pension scheme, or has a right to a future pension under such a scheme': 1995 Act s 91(5) (amended by the 1999 Act Sch 12 paras 43, 57(1), (4)(a)).

NOTE 11--SI 1997/785 amended: SI 1999/1849, SI 2005/706, SI 2005/2877, SI 2006/778, SI 2009/2930.

Now, heads (1) where any amount payable as a lump sum to (a) the earner is permitted by the lump sum rule in the Finance Act 2004 s 166 (see PARA 873B.7) and qualifies as a trivial commutation lump sum for the purposes of Sch 29 para 7 (see PARA 873B.5); (b) the earner's widow, widower or surviving civil partner is permitted by the lump sum death benefit rule in s 168 (see PARA 873B.8) and qualifies as a trivial commutation lump sum death benefit for the purposes of Sch 29 para 20 (see PARA 873B.8); or (c) the earner or the earner's widow, widower or surviving civil partner is a payment by a registered pension scheme within the meaning of s 150(2) and is described in the Registered Pension Schemes (Authorised Payments) Regulations 2009, SI 2009/1171, Pt 2 (regs 6-12); or (2) the scheme is being wound up and (a) the aggregate amount of all benefits payable as a lump sum to the earner is permitted by the lump sum rule in the Finance Act 2004 s 166 and qualifies as a winding-up lump sum for the purposes of Sch 29 para 10 (see PARA 873B.7); or (b) the aggregate amount of all benefits payable as a lump sum to the earner's surviving widow, widower or surviving civil partner is permitted by the lump sum death benefit rule in s 168 and qualifies as a trivial commutation lump sum death benefit for the purposes of Sch 29 para 20: SI 1997/785 reg 2(1) (substituted by SI 2006/744). Reg 2(2) revoked, reg 2(3) amended: SI 2006/744.

NOTE 12--The other prescribed circumstances include (1) where the payment of a lump sum to a person is permitted in accordance with any of the lump sum death benefit rule in the Finance Act 2004 s 168(1)(a)-(e); and (2) the circumstances where a person has reached normal minimum pension age but has not retired from the employment of the employer in relation to the scheme, the payment of a lump sum to the person is permitted in accordance with s 168(1)(a) or (g) of that rule: SI 1997/785 reg 2(1A)

(added by SI 2006/744). See also the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.

TEXT AND NOTES 13-18--In heads (d), (e), for 'accrued right, to pension' read 'right': 1995 Act s 91(5)(d), (e) (amended by the 1999 Act Sch 12 paras 43, 57(1), (4)(b), (c)).

NOTE 15--1995 Act s 91(6) amended: Pensions Act 2004 s 266(3).

NOTE 18--For 'approved' read 'registered': SI 1887/785 reg 8(3) (amended by SI 2006/744). The 1995 Act s 91(1)(a) does not apply to a scheme to the extent that it would prevent the making of any arrangement to effect a surrender of excess rights, at the option of the person in question, for the purposes of the Finance Act 2004 Sch 36 para 12: SI 1997/785 reg 8(6) (added by SI 2006/744). See also the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403; and PARA 873A.

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### **866. Forfeiture, etc.**

An entitlement, or accrued right<sup>1</sup>, to a pension<sup>2</sup> under an occupational pension scheme<sup>3</sup> cannot generally be forfeited<sup>4</sup>; but this general rule does not prevent forfeiture by reference to:

- 2132 (1) a transaction or purported transaction which under the provisions relating to the inalienability of occupational pensions<sup>5</sup> is of no effect<sup>6</sup>; or
- 2133 (2) the bankruptcy of the person entitled to the pension or whose right to it has accrued<sup>7</sup>,

whether or not that event occurred before or after the pension became payable<sup>8</sup>. Where such forfeiture occurs, any pension which was, or would but for the forfeiture have become, payable may, if the trustees or managers<sup>9</sup> of the scheme so determine, be paid to all or any of the following:

- 2134 (a) the member<sup>10</sup> of the scheme to or in respect of whom the pension was, or would have become, payable<sup>11</sup>;
- 2135 (b) the spouse, widow or widower of the member<sup>12</sup>;
- 2136 (c) any dependant of the member<sup>13</sup>; and
- 2137 (d) any other person falling within a prescribed<sup>14</sup> class<sup>15</sup>.

Nor does the general rule prevent forfeiture by reference to:

- 2138 (i) the person entitled to the pension, or whose right to it has accrued, having been convicted of one or more offences which are committed before the pension becomes payable<sup>16</sup> and which are offences of treason, offences under the Official Secrets Acts 1911 to 1989<sup>17</sup> for which the person has been sentenced on the same occasion to a term of imprisonment of, or to two or more consecutive terms amounting in the aggregate to, at least ten years, or prescribed offences<sup>18</sup>;
- 2139 (ii) a failure by any person to make a claim for pension where the forfeiture is in reliance on any enactment<sup>19</sup> relating to the limitation of actions, or where the claim is not made within six years of the date on which the pension becomes due<sup>20</sup>,

or forfeiture in prescribed circumstances<sup>21</sup>.

1 For the meaning of 'accrued rights' see PARA 843 note 6 ante.

2 For the meaning of 'pension' for these purposes see PARA 865 note 1 ante.

3 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

4 See the Pensions Act 1995 s 92(1). References to forfeiture for these purposes and for the purposes of s 93 (see PARA 867 post) include any manner of deprivation or suspension: s 92(7).

5 Ie under the provisions of *ibid* s 91: see PARA 865 ante.

6 *Ibid* s 92(2)(a).

- 7 Ibid s 92(2)(b).
- 8 Ibid s 92(2).
- 9 For the meaning of 'trustees or managers' see PARA 612 note 10 ante.
- 10 For the meaning of 'member' see PARA 612 note 5 ante.
- 11 Pensions Act 1995 s 92(3)(a).
- 12 Ibid s 92(3)(b).
- 13 Ibid s 92(3)(c).
- 14 For the meaning of 'prescribed' see PARA 555 note 1 ante.
- 15 Pensions Act 1995 s 92(3)(d). The prescribed class is any person, other than a person mentioned in s 92(3)(a)-(c), to whom, under the rules of the scheme, the pension was or could have been paid: Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997, SI 1997/785, reg 5.
- 16 Pensions Act 1995 s 92(4)(a). Section 92(4)(a) does not apply in relation to public service pension schemes: Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997, SI 1997/785, reg 8(5).
- 17 See CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARAS 501-502.
- 18 Pensions Act 1995 s 92(4)(b). As to prescribed offences see note 21 infra.
- 19 For the meaning of 'enactment' see PARA 612 note 16 ante.
- 20 Pensions Act 1995 s 92(5). Regulations may modify s 92 in its application to public service pension schemes or to other schemes falling within a prescribed class or description, or provide that that section does not apply in relation to schemes falling within a prescribed class or description: s 94(1). For the meaning of 'regulations' see PARA 600 note 2 ante. For the meaning of 'modify' see PARA 664 note 10 ante (definition applied by s 124(5)); and for the meaning of 'public service pension scheme' see PARA 874 post (definition applied by s 176).
- 21 Ibid s 92(6). The prescribed circumstances are where: (1) a pension is payable to a member's widow or widower, dependant or any other person who is nominated under the scheme rules by the member and that person is convicted of the offence of murder or manslaughter of that member or any other offence of which unlawful killing of that member is an element; (2) a person in respect of whom a pension is or would have been payable has caused a monetary loss to the scheme as a result of (a) a criminal, negligent or fraudulent act or omission by him; or (b) in the case of a trust scheme of which the person is a trustee, a breach of trust by him; (3) in the case of a public service pension scheme: (a) the member is convicted of an offence committed in connection with his service as a public servant; and (b) a Minister of the Crown certifies that the commission of that offence has been gravely injurious to the interests of the State or is liable to lead to serious loss of confidence in the public service; (4) in the case of the Armed Forces Pension Scheme: (a) the member is convicted of an offence committed in connection with his service as a member of the armed forces; and (b) the Secretary of State considers that offence to have been gravely injurious to the defence, security or other interests of the State: Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997, SI 1997/785, reg 6(1). For the purposes of head (1) supra, unlawful killing includes the case of a person who has unlawfully aided, abetted, counselled or procured the death of a person: reg 6(2). A person's entitlement or accrued right to a pension may be forfeited under head (2) supra to the extent only that it does not exceed the amount of the monetary loss to the scheme, or (if less) the value of the person's entitlement or accrued right under the scheme: reg 6(3). As to forfeiture generally see PARA 81 ante.

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent

legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

### **866 Forfeiture, etc**

TEXT AND NOTES 1-4--For 'or accrued right ... scheme' read 'to a pension under an occupational pension scheme or a right to a future pension under such a scheme': Pensions Act 1995 s 92(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 43, 58(1), (2)).

TEXT AND NOTE 7--1995 Act s 92(2)(b) repealed: 1999 Act s 14(3), Sch 13 Pt I.

NOTES 11-21--See Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.

TEXT AND NOTE 12--1995 Act s 92(3)(b) substituted: SI 2005/2053.

TEXT AND NOTE 16--For 'person entitled ... accrued' read 'pensioner, or prospective pensioner': 1995 Act s 92(4) (amended by the 1999 Act Sch 12 paras 43, 58(1), (3)).

NOTE 21--SI 1997/785 reg 6 amended: SI 2005/2877.

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### **867. Forfeiture by reference to obligation to employer.**

The general rule against forfeiture<sup>1</sup> does not prevent forfeiture of a person's entitlement, or accrued right<sup>2</sup>, to a pension<sup>3</sup> under an occupational pension scheme<sup>4</sup> by reference to the person having incurred some monetary obligation due to the employer<sup>5</sup> and arising out of a criminal, negligent or fraudulent act or omission by the person<sup>6</sup>. Such forfeiture must not take effect where there is a dispute as to the amount of the monetary obligation in question, unless the obligation has become enforceable under an order of a competent court or in consequence of an award of an arbitrator or, in Scotland, an arbiter to be appointed (failing agreement between the parties) by the sheriff<sup>7</sup>. Where a person's entitlement or accrued right to a pension is so forfeited, the person must be given a certificate showing the amount forfeited and the effect of the forfeiture on his benefits under the scheme<sup>8</sup>. Where such forfeiture occurs, an amount not exceeding the amount forfeited may, if the trustees or managers<sup>9</sup> of the scheme so determine, be paid to the employer<sup>10</sup>.

1     I.e. the Pensions Act 1995 s 92(1): see PARA 866 ante. For the meaning of 'forfeiture' see PARA 866 note 4 ante.

2     For the meaning of 'accrued rights' see PARA 843 note 6 ante.

3     For the meaning of 'pension' for these purposes see PARA 865 note 1 ante.

4     For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

5     For the meaning of 'employer' see PARA 598 note 4 ante.

6     Pensions Act 1995 s 93(1). A person's entitlement or accrued right to a pension may be forfeited by reason of s 93(1) to the extent only that it does not exceed the amount of the monetary obligation in question, or (if less) the value (determined in the prescribed manner) of the person's entitlement or accrued right to a pension under the scheme: s 93(2). For the meaning of 'prescribed' see PARA 555 note 1 ante.

7     Ibid s 93(3).

8     Ibid s 93(4).

9     For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

10    Pensions Act 1995 s 93(5). Regulations may modify s 93 in its application to public service pension schemes or to other schemes falling within a prescribed class or description, or provide that s 93 does not apply in relation to schemes falling within a prescribed class or description: s 94(1). For the meaning of 'regulations' see PARA 600 note 2 ante; for the meaning of 'modify' see PARA 664 note 10 ante (definition applied by s 124(5)); and for the meaning of 'public service pension scheme' see PARA 874 post (definition applied by s 176).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent

legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

### **867 Forfeiture by reference to obligation to employer**

TEXT AND NOTES 1-6--For 'or accrued right ... scheme' read ' to a pension under a occupational pension scheme or right to a future pension under such a scheme': Pensions Act 1995 s 93(1) (amended by Welfare Reform and Pensions Act 1999 Sch 12 para 59(2)).

NOTE 6--For 'accrued right to a pension' and 'accrued right to a pension under the scheme' read 'right': 1995 Act s 93(2) (amended by 1999 Act Sch 12 para 59(3)).

TEXT AND NOTE 8--For 'accrued right to a pension' read 'right': 1995 Act s 93(4) (amended by 1999 Act Sch 12 para 59(4)).

NOTE 10--See Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.

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**868. Recovery of excessive pension contributions where individual adjudged bankrupt.**

Where an individual is adjudged bankrupt<sup>1</sup> and:

- 2140 (1) he has during the relevant period made contributions<sup>2</sup> as a member<sup>3</sup> of an occupational pension scheme; or
- 2141 (2) contributions have during the relevant period been made to such a scheme on his behalf,

the trustee of the bankrupt's estate may apply to the court<sup>4</sup> for an order under these provisions, and if, on an application for such an order, the court is satisfied that the making of any of the contributions ('the excessive contributions') has unfairly prejudiced the individual's creditors<sup>5</sup>, the court may make such order as it thinks fit for restoring the position to what it would have been if the excessive contributions had not been made<sup>6</sup>. The court must, in determining whether it is so satisfied, consider in particular:

- 2142 (a) whether any of the contributions were made by or on behalf of the individual for the purpose of putting assets beyond the reach of his creditors or any of them;
- 2143 (b) whether the total amount of contributions made by or on behalf of the individual (including contributions made to any other occupational pension scheme) during the relevant period was excessive in view of the individual's circumstances at the time when they were made; and
- 2144 (c) whether the level of benefits under the scheme, together with benefits under any other occupational pension scheme, to which the individual is entitled, or is likely to become entitled, is excessive in all the circumstances of the case<sup>7</sup>.

Such an order may include provision:

- 2145 (i) requiring the trustees or managers<sup>8</sup> of the scheme to pay an amount to the individual's trustee in bankruptcy;
- 2146 (ii) reducing the amount of any benefit to which the individual (or his spouse, widow, widower or dependant) is entitled, or to which he has an accrued right, under the scheme;
- 2147 (iii) reducing the amount of any benefit to which, by virtue of any assignment, commutation or surrender of the individual's entitlement (or that of his spouse, widow, widower or dependant) or accrued right under the scheme, another person is entitled or has an accrued right;
- 2148 (iv) otherwise adjusting the liabilities of the scheme in respect of any such person as is mentioned in head (ii) or head (iii) above<sup>9</sup>,

but the maximum amount by which such an order may require the assets of an occupational pension scheme to be reduced is the lesser of the amount of the excessive contributions and the value of the assets of the scheme which represent contributions made by or on behalf of

the individual<sup>10</sup>. Such an order must reduce the amount of the liabilities of the scheme by an amount equal to the amount of the reduction made in the value of the assets of the scheme<sup>11</sup> unless the individual's entitlement or accrued right to benefits under the scheme which he acquired by virtue of the excessive contributions (his 'excessive entitlement') has been forfeited<sup>12</sup>; and where part of the individual's excessive entitlement has been forfeited, the amount of the reduction in the liabilities of the scheme so required is the value of the remaining part of his excessive entitlement<sup>13</sup>.

Such an order in respect of an occupational pension scheme is binding on the trustees or managers of the scheme<sup>14</sup> and where any sum is required by such an order to be paid to the trustee in bankruptcy, that sum is comprised in the bankrupt's estate<sup>15</sup>.

1 As to when an individual is adjudged bankrupt see BANKRUPTCY AND INDIVIDUAL INSOLVENCY.

2 Where contributions have been made during the relevant period to any occupational pension scheme and the entitlement or accrued right to benefits acquired thereby has been transferred to a second or subsequent occupational pension scheme ('the transferee scheme'), the Insolvency Act 1986 ss 342A-342C (added by the Pensions Act 1995 s 95) apply as though the contributions had been made to the transferee scheme: Insolvency Act 1986 s 342C(3) (as so added). For these purposes: (1) contributions are made during the relevant period if (a) they are made by or on behalf of the individual at any time during the period of five years ending with the day of presentation of the bankruptcy petition on which the individual is adjudged bankrupt; or (b) they are made on behalf of the individual at any time during the period between the presentation of the petition and the commencement of the bankruptcy; and (2) the accrued rights of an individual under an occupational pension scheme at any time are the rights which have accrued to or in respect of him at that time to future benefits under the scheme: s 342C(4) (as so added). For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by s 342C(5) (as so added)).

3 'Member' is not defined for these purposes: but see PARA 612 note 5 ante.

4 Ie the court within the meaning of the Insolvency Act 1986: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 764.

5 As to creditors see BANKRUPTCY AND INDIVIDUAL INSOLVENCY.

6 Insolvency Act 1986 s 342A(1), (2) (as added: see note 2 supra).

7 Ibid s 342A(3) (as added: see note 2 supra).

8 'Trustees or managers', in relation to an occupational pension scheme, means, in the case of a scheme established under a trust, the trustees of the scheme, and in any other case, the managers of the scheme: ibid s 342C(5) (as added: see note 2 supra).

9 Ibid s 342B(1) (as added: see note 2 supra). These powers are without prejudice to the generality of heads (a)-(c) in the text: see s 342B(1) (as so added).

10 Ibid s 342B(2) (as added: see note 2 supra).

11 Ibid s 342B(3) (as added: see note 2 supra).

12 Ibid s 342B(4) (as added: see note 2 supra).

13 Ibid s 342B(5) (as added: see note 2 supra).

14 Ibid s 342B(6) (as added: see note 2 supra).

15 Ibid s 342C(2) (as added: see note 2 supra). Nothing in (1) any provision of the Pension Schemes Act 1993 s 159 (as amended) or the Pensions Act 1995 s 91 (which prevent assignment, or orders being made restraining a person from receiving anything which he is prevented from assigning, and make provision in relation to a person's pension on bankruptcy: see PARAS 865 ante, 928 post); (2) any provision of any enactment (whether passed or made before or after the passing of the Pensions Act 1995) corresponding to any of the provisions mentioned in head (1) supra; or (3) any provision of the scheme in question corresponding to any of those provisions, applies to a court exercising its powers under the Insolvency Act 1986 342A (as so added): s 342C(1) (as so added).

## UPDATE

## **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

## **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

## **868 Recovery of excessive pension contributions where individual adjudged bankrupt**

TEXT AND NOTES--Replaced.

Where an individual who is adjudged bankrupt has rights under an approved pension arrangement<sup>1</sup> or has excluded rights under an unapproved pension arrangement<sup>2</sup>, the trustee of the bankrupt's estate may apply to the court for an order for the recovery of excessive pension contributions<sup>3</sup>. If the court is satisfied (1) that the rights under the arrangement are to any extent, and whether directly or indirectly, the fruits of relevant contributions<sup>4</sup>; and (2) that the making of any of the relevant contributions ('the excessive contributions') has unfairly prejudiced the individual's creditors, the court may make such order as it thinks fit for restoring the position to what it would have been had the excessive contributions not been made<sup>5</sup>. Where the court is satisfied that the value of the rights under the arrangement is, as a result of rights of the individual under the arrangement or any other pension arrangement having at any time become subject to a pension debit<sup>6</sup>, less than it would otherwise have been, (a) any relevant contributions which were represented by the rights which became subject to the debit will<sup>7</sup> be taken to be contributions of which the rights under the arrangement are the fruits; and (b) where the relevant contributions represented by the rights under the arrangement (including those so represented by virtue of head (a) above) are not all excessive contributions, relevant contributions which are represented by the rights under the arrangement otherwise than by virtue of head (a) above will be treated as excessive contributions before any which are so represented by virtue of that head<sup>8</sup>.

Without prejudice to the generality of the court's powers<sup>9</sup>, an order for the recovery of excessive pension contributions may include provision (i) requiring the person responsible for the arrangement<sup>10</sup> to pay an amount to the individual's trustee in bankruptcy; (ii) adjusting the liabilities of the arrangement in respect of the individual<sup>11</sup>; (iii) adjusting any liabilities of the arrangement<sup>12</sup> in respect of any other person that derive, directly or indirectly, from rights of the individual under the arrangement; (iv) for the recovery by the person responsible for the arrangement (whether by deduction from any amount which that person is ordered to pay or

otherwise) of costs incurred by that person in complying in the bankrupt's case with any requirement relating to the provision of information<sup>13</sup> or in giving effect to the order<sup>14</sup>. The maximum amount which the person responsible for an arrangement may be required to pay by an order for the recovery of excessive pension contributions is the lesser of (A) the amount of the excessive contributions; and (B) the value of the individual's rights under the arrangement (if the arrangement is an approved pension arrangement) or of his excluded rights under the arrangement (if the arrangement is an unapproved pension arrangement)<sup>15</sup>. An order for the recovery of excessive pension contributions which requires the person responsible for an arrangement to pay an amount ('the restoration amount') to the individual's trustee in bankruptcy must provide for the liabilities of the arrangement to be correspondingly reduced<sup>16</sup>. For these purposes, liabilities are correspondingly reduced if the difference between (aa) the amount of the liabilities immediately before the reduction; and (bb) the amount of the liabilities immediately after the reduction, is equal to the restoration amount<sup>17</sup>. An order for the recovery of excessive pension contributions in respect of an arrangement is binding on the person responsible for the arrangement, and overrides provisions of the arrangement to the extent that they conflict with the provisions of the order<sup>18</sup>.

The person responsible for (I) an approved pension arrangement under which a bankrupt has rights; (II) an unapproved pension arrangement under which a bankrupt has excluded rights; or (III) a pension arrangement under which a bankrupt has at any time had rights, must, on the bankrupt's trustee in bankruptcy making a written request, provide the trustee with such information about the arrangement and rights as the trustee may reasonably require for, or in connection with, the making of applications for orders for the recovery of excessive pension contributions<sup>19</sup>. The application of certain statutory provisions to the exercise by a court of its powers under the above provisions is excluded<sup>20</sup>. Where any sum is required by an order for the recovery of excessive pension contributions to be paid to the trustee in bankruptcy, that sum is comprised in the bankrupt's estate<sup>21</sup>.

1 'Approved pension arrangement' has the same meaning as in the Welfare Reform and Pensions Act 1999 s 11 (see PARA 754A): Insolvency Act 1986 s 342A(8) (ss 342A-342C substituted by the 1999 Act s 15).

2 'Unapproved pension arrangement' has the same meaning as in *ibid* s 12 (see PARA 754B): 1986 Act s 342A(8). For the purposes of ss 342A-342C, rights of an individual under an unapproved pension arrangement are excluded rights if they are rights which are excluded from his estate by virtue of regulations under the 1999 Act s 12: 1986 Act s 342A(7).

3 *Ie* an order under *ibid* s 342A.

4 'Relevant contributions' means contributions to the arrangement or any other pension arrangement (1) which the individual has at any time made on his own behalf; or (2) which have at any time been made on his behalf: *ibid* s 342A(5).

5 *Ibid* s 342A(1), (2). The court must, in determining whether it is satisfied under head (2) of the text, consider in particular (1) whether any of the contributions were made for the purpose of putting assets beyond the reach of the individual's creditors or any of them; and (2) whether the total amount of any contributions (a) made by or on behalf of the individual to pension arrangements; and (b) represented (whether directly or indirectly) by rights under approved pension arrangements or excluded rights under unapproved pension arrangements, is an amount which is excessive in view of the individual's circumstances when those contributions were made: s 342A(6).

6 *Ie* under the 1999 Act s 29(1)(a): see PARA 961A.3.

7 *Ie* for the purposes of the 1986 Act s 342A(2).

8 *Ibid* s 342A(3), (4).

9 *Ie* without prejudice to the generality of *ibid* s 342A(2).

10 References to the person responsible for a pension arrangement are to (1) the trustees, managers or provider of the arrangement; or (2) the person having functions in relation to the arrangement corresponding to those of a trustee, manager or provider: *ibid* s 342C(6).

11 The reference to adjusting the liabilities of the arrangement in respect of a person include, in particular, reducing the amount of any benefit or future benefit to which that person is entitled under the arrangement: *ibid* s 342B(2).

12 The reference to liabilities of the arrangement in head (iii) of the text does not include liabilities in respect of a person which result from giving effect to an order or provision falling within the 1999 Act s 28(1) (see PARA 961A.1): 1986 Act s 342B(3).

13 Is any requirement under *ibid* s 342C(1): see TEXT AND NOTE 19.

14 *Ibid* s 342B(1).

15 *Ibid* s 342B(4). Regulations may make provision about the calculation and verification of any such value as is mentioned in head (b) of the text: s 342C(4). The power conferred by s 342C(4) includes power to provide for calculation or verification (1) in such manner as may, in the particular case, be approved by a prescribed person; or (2) in accordance with guidance from time to time prepared by a prescribed person: s 342C(5) (s 342C(5) amended by Pensions Act 2007 Sch 5 para 3). 'Prescribed' means prescribed by regulations; and 'regulations' means regulations made by the Secretary of State: 1986 Act s 342C(7). Such regulations may (a) make different provision for different cases; (b) contain such incidental, supplemental and transitional provisions as appear to the Secretary of State necessary or expedient, and they must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 342C(8), (9).

16 *Ibid* s 342B(5).

17 *Ibid* s 342B(6). Regulations may make provision about the calculation and verification of any such amounts as are mentioned in heads (aa) and (bb) of the text: s 342C(4)(b) (342C as substituted: see NOTE 1). See also NOTE 15.

18 *Ibid* s 342B(7).

19 *Ibid* s 342C(1).

20 Nothing in (1) any provision of the Pension Schemes Act 1993 s 159 (see PARA 928) or the Pensions Act 1995 s 91 (see PARA 865); (2) any provision of any enactment (whether passed or made before or after the passing of the 1999 Act) corresponding to any of the provisions mentioned in head (1); or (3) any provision of the arrangement in question corresponding to any of those provisions, applies to a court exercising its powers under the 1986 Act s 342A: s 342C(2).

21 *Ibid* s 342C(3).

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#### **(iv) Offences**

##### **869. Offences by bodies corporate and partnerships.**

Where an offence under Part I of the Pensions Act 1995<sup>1</sup> committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly<sup>2</sup>. Where the affairs of a body corporate are managed by its members, the above provision applies in relation to the acts and defaults of a member in connection with his functions of management as to a director of a body corporate<sup>3</sup>.

Where an offence under Part I of the Pensions Act 1995 committed by a Scottish partnership<sup>4</sup> is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, he as well as the partnership is guilty of the offence and liable to be proceeded against and punished accordingly<sup>5</sup>.

1    le the Pensions Act 1995 Pt I (ss 1-125): see PARA 598 et seq ante, 870 et seq post.

2    Ibid s 115(1).

3    Ibid s 115(2).

4    For the meaning of 'Scottish partnership' see PARA 604 note 9 ante.

5    Pensions Act 1995 s 115(3).

#### **UPDATE**

##### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

##### **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

### **869 Offences by bodies corporate and partnerships**

NOTE 2--See *R v Dixon* [2000] 2 Cr App Rep (S) 7, CA (in circumstances where there was no fraudulent evasion or payment, a financial penalty rather than a custodial sentence was more appropriate for a company secretary guilty of offences under the 1995 Act ss 49(8), 115(1)).

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### **870. Breach of regulations.**

Regulations<sup>1</sup> made by virtue of any provision of Part I of the Pensions Act 1995<sup>2</sup> may provide for the contravention<sup>3</sup> of any provision contained in any such regulations to be an offence under that Part and for the recovery on summary conviction for any such offence of a fine not exceeding level 5 on the standard scale<sup>4</sup>. An offence under any provision of the regulations may be charged by reference to any day or longer period of time; and a person may be convicted of a second or subsequent offence under such a provision by reference to any period of time following the preceding conviction of the offence<sup>5</sup>.

Where by reason of the contravention of any provision contained in regulations so made:

- 2149 (1) a person is convicted of such an offence<sup>6</sup>; or
- 2150 (2) a person pays a civil penalty<sup>7</sup>,

then, in respect of that contravention, he is not, if convicted as mentioned in head (1) above, liable to pay such a penalty and is not, if he pays a penalty as mentioned in head (2) above, to be convicted of such an offence<sup>8</sup>.

1 For the meaning of 'regulations' see PARA 600 note 2 ante.

2 Ie the Pensions Act 1995 Pt I (ss 1-125): see PARA 598 et seq ante, 871 et seq post.

3 For the meaning of 'contravention' see PARA 611 note 10 ante.

4 Pensions Act 1995 s 116(1). As to the standard scale see PARA 172 note 3 ante.

5 Ibid s 116(2).

6 Ibid s 116(3)(a).

7 Ibid s 116(3)(b). As to civil penalties see s 10; and PARA 611 ante.

8 See ibid s 116(3).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

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## **(v) Overriding Requirements and Special Cases**

### **871. Overriding requirements.**

Where any provision mentioned below conflicts with the provisions of an occupational pension scheme<sup>1</sup>:

- 2151 (1) the provision mentioned below, to the extent that it conflicts, overrides the provisions of the scheme<sup>2</sup>; and
- 2152 (2) the scheme has effect with such modifications<sup>3</sup> as may be required in consequence of head (1) above<sup>4</sup>.

The provisions so referred to are those of:

- 2153 (a) Part I of the Pensions Act 1995<sup>5</sup>;
- 2154 (b) any subordinate legislation<sup>6</sup> made or having effect as if made under that Part; or
- 2155 (c) any specified arrangements<sup>7</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

2 Ibid s 117(1)(a).

3 For the meaning of 'modifications' see PARA 664 note 10 ante (definition applied by ibid s 124(5)). Regulations may provide for ss 22-26 (see PARA 795 ante), and s 117 (so far as it applies to those sections), not to apply in relation to a trust scheme falling within a prescribed class or description: s 118(2). For the meaning of 'trust scheme' see PARA 604 note 2 ante. For the meaning of 'prescribed' see PARA 555 note 1 ante.

4 Ibid s 117(1)(b).

5 Ie the Pensions Act 1995 Pt I (ss 1-125): see PARA 598 et seq ante, 872 et seq post.

6 For the meaning of 'subordinate legislation' see STATUTES vol 44(1) (Reissue) PARAS 1232, 1499.

7 Pensions Act 1995 s 117(2). The arrangements so specified are those under s 16(1) or 17(2): see PARA 791 ante.

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004

Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

### **871 Overriding requirements**

NOTE 2--See *British Vita Unlimited v British Pension Fund Trustees Ltd* [2007] EWHC 953 (Ch), [2008] 1 All ER 37.

NOTE 3--Pensions Act 1995 s 118(2) amended: Pensions Act 2004 Sch 12 para 67.

TEXT AND NOTE 7--1995 Act s 117(2) amended: 2004 Act Sch 13 Pt 1.

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## **872. Powers to modify and consultations about regulations.**

Regulations<sup>1</sup> may modify<sup>2</sup> any provisions of Part I of the Pensions Act 1995<sup>3</sup>, in their application:

- 2156 (1) to a trust scheme<sup>4</sup> which applies to earners<sup>5</sup> in employments<sup>6</sup> under different employers<sup>7</sup>;
- 2157 (2) to a trust scheme of which there are no members<sup>8</sup> who are in pensionable service<sup>9</sup> under the scheme<sup>10</sup>; or
- 2158 (3) to any case where a partnership is the employer, or one of the employers, in relation to a trust scheme<sup>11</sup>.

Before the Secretary of State<sup>12</sup> makes any regulations by virtue of that Part, he must consult such persons as he considers appropriate<sup>13</sup>; but this does not apply:

- 2159 (a) to regulations made for the purpose only of consolidating other regulations revoked by them<sup>14</sup>;
  - 2160 (b) to regulations in the case of which the Secretary of State considers consultation inexpedient because of urgency<sup>15</sup>;
  - 2161 (c) to regulations made before the end of the period of six months beginning with the coming into force of the provision by virtue of which the regulations are made<sup>16</sup>; or
  - 2162 (d) to regulations which:
- 189 255. (i) state that they are consequential upon a specified enactment<sup>17</sup>; and
  - 256. (ii) are made before the end of the period of six months beginning with the coming into force of that enactment<sup>18</sup>.

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1 For the meaning of 'regulations' see PARA 600 note 2 ante.

2 For the meaning of 'modify' see PARA 664 note 10 ante (definition applied by the Pensions Act 1995 s 124(5)).

3 *Ibid* Pt I (ss 1-125): see PARA 598 et seq ante, 873 post.

4 For the meaning of 'trust scheme' see PARA 604 note 2 ante.

5 For the meaning of 'earner' see PARA 32 ante (definition applied by the Pension Schemes Act 1993 s 181(1); and by the Pensions Act 1995 s 124(5)).

6 For the meaning of 'employment' see PARA 560 note 5 ante (definition applied by the Pensions Act 1995 s 124(5)).

7 *Ibid* s 118(1)(a). For the meaning of 'employer' see PARA 598 note 4 ante.

8 For the meaning of 'member' see PARA 612 note 5 ante.

9 For the meaning of 'pensionable service' see PARA 782 note 5 ante.

10 Pensions Act 1995 s 118(1)(b).

11 Ibid s 118(1)(c). Modifications have been made to Pt I by, inter alia, the Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 1996, SI 1996/1216 (as amended); the Occupational Pension Schemes (Minimum Funding Requirement and Actuarial Valuations) Regulations 1996, SI 1996/1536 (as amended); the Occupational Pension Schemes (Winding Up) Regulations 1996, SI 1996/3126 (as amended); the Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127 (as amended); and the Occupational Pension Schemes (Deficiency on Winding Up etc) Regulations 1996, SI 1996/3128 (as amended). Such modifications are noted in this title in the appropriate context where the substantive provisions which they modify are discussed.

12 As to the Secretary of State see PARA 1 ante.

13 Pensions Act 1995 s 120(1).

14 Ibid s 120(2)(a).

15 Ibid s 120(2)(b).

16 Ibid s 120(2)(c).

17 For the meaning of 'enactment' see PARA 612 note 16 ante.

18 Pensions Act 1995 s 120(2)(d).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

### **872 Powers to modify and consultations about regulations**

NOTE 11--SI 1996/1216 replaced: Occupational Pension Schemes (Member-nominated Trustees and Directors) Regulations 2006, SI 2006/714 (see PARA 794A). SI 1996/1536 revoked: SI 2006/3377. SI 1996/3128 further amended: SI 1997/3038, SI 2005/72, SI 2007/60.

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### **873. Crown application.**

Part I of the Pensions Act 1995<sup>1</sup> applies to an occupational pension scheme<sup>2</sup> managed by or on behalf of the Crown as it applies to other occupational pension schemes; and, accordingly, references in that Part to a person in his capacity as a trustee or manager<sup>3</sup> of an occupational pension scheme include the Crown, or a person acting on behalf of the Crown, in that capacity<sup>4</sup>; and references in that Part to a person in his capacity as employer<sup>5</sup> in relation to an occupational pension scheme include the Crown, or a person acting on behalf of the Crown, in that capacity<sup>6</sup>. This does not, however, apply to any provision made by or under that Part under which a person may be prosecuted for an offence; but such a provision applies to persons in the public service of the Crown as it applies to other persons<sup>7</sup>.

Nothing in Part I of the Pensions Act 1995 applies to Her Majesty in Her private capacity (within the meaning of the Crown Proceedings Act 1947)<sup>8</sup>.

1    Ie the Pensions Act 1995 Pt I (ss 1-125); see PARA 598 et seq ante.

2    For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by s 176). See also PARA 598 note 7 ante.

3    For the meaning of 'trustees or managers' see PARA 612 note 10 ante.

4    Pensions Act 1995 s 121(1). Section 121 does not apply to ss 42-46 (repealed; replaced by provisions of the Employment Rights Act 1996 ss 46, 48, 58-60, 103, 105, 108, 109, 203 (see PARA 797 ante; and EMPLOYMENT)); Pensions Act 1995 s 121(4). As to the application of those provisions of the 1996 Act to Crown employment see the Employment Rights Act 1996 s 191.

5    For the meaning of 'employer' see PARA 598 note 4 ante.

6    Pensions Act 1995 s 121(2).

7    Ibid s 121(3).

8    Ibid s 121(5).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

## **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

### **873 Crown application**

NOTE 4--1996 Act s 191 amended: Employment Relations Act 2004 Sch 1 para 34, Sch 2.

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### **873A. Stakeholder Pension Schemes.**

The Welfare Reform and Pensions Act 1999 Pt I (ss 1-8) makes provision with regard to the establishment of a new type of pension scheme, known as the stakeholder pension scheme.

#### **1. Meaning of 'stakeholder pension scheme'**

A pension scheme<sup>1</sup> is a stakeholder pension scheme for the purposes of the provisions relating to such schemes<sup>2</sup> if it is registered as such a scheme<sup>3</sup> and each of the following conditions is fulfilled, together with such other conditions as may be prescribed<sup>4</sup>. The conditions are that (1) the scheme is established under a trust or in such other way as may be prescribed<sup>5</sup>; (2) the provisions made by the instruments establishing the scheme comply with such requirements as may be prescribed<sup>6</sup>; (3) subject to such exceptions as may be prescribed, the benefits provided by the scheme are money purchase benefits<sup>7</sup>; (4) the scheme complies with such requirements as may be prescribed as regards the extent to which, and the circumstances in which (a) any payment made to the scheme by, or on behalf or in respect of a member of the scheme; (b) any income or capital gain arising from the investment of such a payment; or (c) the value of rights under the scheme, may be used to defray the administrative expenses of the scheme, to pay commission or in any other way which does not result in the provision of benefits for or in respect of members<sup>8</sup>; (5) the scheme complies with such of the requirements of regulations relating to disclosure of information about schemes to members<sup>9</sup> as are applicable to it<sup>10</sup>; (6) subject to such minimum contribution levels and other restrictions as may be prescribed, members of the scheme may make such contributions to the scheme as they think appropriate<sup>11</sup>; (7) except in so far as is necessary to ensure that the scheme has tax-exemption or tax-approval<sup>12</sup>, the scheme accepts transfer payments in respect of members' rights under (a) other pension schemes; (b) contracts and schemes approved under provisions relating to retirement annuity contracts<sup>13</sup>; (c) annuities and insurance policies purchased or transferred for the purpose of giving effect to rights under pension schemes; and (d) annuities purchased or entered into for the purpose of discharging liability in respect of pension credits<sup>14</sup>; (8) the scheme has such exemption or approval as is mentioned in head (7) above<sup>15</sup>; and (9) if the scheme is an occupational pension scheme, it is specified in a contracting-out certificate in relation to all categories of employment to which the scheme relates, and if the scheme is a personal pension scheme, it is an appropriate scheme<sup>16</sup>.

1 'Pension scheme' means a personal pension scheme (see PARA 710) or an occupational pension scheme within the meaning of the Pension Schemes Act 1993 s 1 (see PARA 741): Welfare Reform and Pensions Act 1999 s 8(1).

2 Ie the provisions of *ibid* Pt I (ss 1-8).

3 Ie under *ibid* s 2: see PARA 873A.2.

4 *Ibid* s 1(1) (amended by Pensions Act 2004 s 285(2)). As from the abolition date (see PARA 880) 1999 Act s 1(1) further amended: Pensions Act 2007 Sch 4 para 37(a). For savings see 2007 Act Sch 4 Pt 3. 'Prescribed' means prescribed by regulations made by the Secretary of State: 1999 Act s 8(1); see the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403 (amended by SI 2001/104, SI 2001/934, SI 2001/3649, SI 2002/1383, SI 2002/1555, SI 2002/2098, SI 2005/577, SI 2005/2877, SI 2005/3377, SI 2006/714, SI 2006/744, SI 2007/60, SI 2007/814, SI 2008/649, SI 2009/615).

5 1999 Act s 1(2). See SI 2000/1403, NOTE 4.

6 1999 Act s 1(3). See SI 2000/1403, NOTE 4.

7 le within the meaning given by the 1993 Act s 181 (see PARA 811): 1999 Act s 1(4). See SI 2000/1403, NOTE 4.

8 1999 Act s 1(5) (amended by Pensions Act 2004 s 285(3)). See SI 2000/1403, NOTE 4.

9 le regulations made under the 1993 Act s 113: see PARA 557.

10 1999 Act s 1(6) (prospectively amended by 2004 Act Sch 12 para 72).

11 1999 Act s 1(7). See SI 2000/1403, NOTE 4.

12 le within the meaning of the 1993 Act.

13 le the Income and Corporation Taxes Act 1988 Pt XIV Ch III (ss 618-629) (see PARA 677 et seq).

14 le under the 1999 Act s 29(1)(b) (see PARA 961A.3) or under corresponding Northern Ireland legislation: s 1(8).

15 Ibid s 1(9).

16 Ibid s 1(10) (added by 2004 Act s 285(4)), referring to an appropriate scheme within the meaning of the 1993 Act s 7(4). As from the abolition date (see PARA 880) 1999 Act s 1(10) repealed: Pensions Act 2007 Sch 4 para 37(b), Sch 7 Pt 6. For savings see 2007 Act Sch 4 Pt 3.

## 2. Registration of stakeholder schemes

The Authority must keep a register of stakeholder pension schemes<sup>1</sup>. The Authority must register a pension scheme if the trustees of the scheme, or any person or persons prescribed<sup>2</sup> in relation to the scheme (1) make an application for the purpose and pay such fee as the Authority may determine; and (2) declare that each of the applicable conditions<sup>3</sup> is fulfilled in relation to the scheme<sup>4</sup>. However, where the Authority is satisfied on reasonable grounds that any of those conditions is not fulfilled in relation to a pension scheme, the Authority may by direction refuse to register the scheme or, where the scheme is registered<sup>5</sup>, remove it from the register<sup>6</sup>. Provision relating to civil penalties<sup>7</sup> applies to any trustee of a pension scheme which is or has been registered, and to any person prescribed in relation to such a scheme, if (a) he fails to take all such steps as are reasonable to secure that each of those conditions is fulfilled in relation to the scheme or (as the case may be) while the scheme was so registered he failed to take all such steps as were reasonable to secure that each of those conditions was so fulfilled; or (b) where the scheme was registered on his application, any of those conditions was not fulfilled in relation to the scheme at the time of the application<sup>8</sup>. The Secretary of State may by regulations make provision (i) for the register, or extracts from the register, or for copies of the register or of extracts from the register, to be open to inspection by; and (ii) for copies of the register, or of extracts from it, to be supplied to, such persons, in such manner, at such times, on payment of such fees, and subject to such other terms and conditions, as may be prescribed<sup>9</sup>.

1 Welfare Reform and Pensions Act 1999 s 2(1) (amended by Pensions Act 2004 Sch 12 para 73(a)). As to the meaning of 'stakeholder pension scheme' see PARA 873A.1.

2 For the meaning of 'prescribed' see PARA 873A.1 NOTE 4.

3 le the conditions set out in the 1999 Act s 1(2)-(10) and such other conditions as may be prescribed under s 1(1): see PARA 873A.1.

4 Ibid s 2(2) (amended by 2004 Act s 285(5)). As from the abolition date (see PARA 880) 1999 Act s 2(2) further amended and 2004 Act s 285(5) repealed: Pensions Act 2007 Sch 1 para 38, Sch 7 Pt 6. For savings see 2007 Act Sch 4 Pt 3. See the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403; and PARA 873A.1.

- 5 le under the 1999 Act s 2.
- 6 Ibid s 2(3) (amended by 2004 Act Sch 12 para 73(b)).
- 7 le the Pensions Act 1995 s 10: see PARA 611.
- 8 1999 Act s 2(4) (amended by 2004 Act Sch 12 para 73(c)). See SI 2000/1403, NOTE 4.
- 9 1999 Act s 2(7). See SI 2000/1403, NOTE 4.

### 3. Duty of employers to facilitate access to stakeholder schemes

Except in so far as regulations otherwise provide, it is the duty of an employer<sup>1</sup> of relevant employees<sup>2</sup> to comply with the following requirements<sup>3</sup>. The first requirement is that the employer must ensure that at all times there is at least one scheme designated by him<sup>4</sup> which is registered<sup>5</sup> and offers membership to all his relevant employees (whether or not any other scheme registered which does not offer membership to all those employees is for the time being designated by him), and before designating a scheme the employer must consult with his relevant employees and any organisations representing them<sup>6</sup>. The second requirement is that the employer must supply his relevant employees with (1) the name and address of the designated scheme or, as the case may be, of each of the designated schemes; and (2) such other information as may be prescribed<sup>7</sup>. The third requirement is that the employer must allow representatives of the designated scheme or schemes reasonable access to his relevant employees for the purpose of supplying them with information about the scheme or schemes<sup>8</sup>. The fourth requirement is that, subject to such exceptions and qualifications as may be prescribed, the employer must, if he is requested to do so by a relevant employee of his who is a member of a qualifying scheme<sup>9</sup> deduct the employee's contributions to the scheme from his remuneration, and pay them to the trustees or managers of the scheme or, if regulations so provide, to a prescribed person<sup>10</sup>. The fifth requirement is that the employer must, if any scheme designated by him ceases to be registered, withdraw his designation of the scheme (but this requirement is not to be taken as implying that he cannot withdraw his designation of a scheme in other circumstances)<sup>11</sup>. Provision relating to civil penalties<sup>12</sup> applies to an employer who fails to comply with any of the above requirements<sup>13</sup>. An employer is not, whether before designating a scheme or at any time while a scheme is designated by him, under any duty (a) to make any enquiries, or act on any information, about the scheme for any purpose not connected with (i) ascertaining whether the scheme is for the time being registered; (ii) ascertaining the persons to whom it offers membership; or (iii) enabling him to comply with the second requirement; or (b) in particular, to investigate or monitor, or make any judgment as to, the past, present or future performance of the scheme<sup>14</sup>.

1 'Employer' means any employer, whether or not resident or incorporated in any part of the United Kingdom: Welfare Reform and Pensions Act 1999 s 3(9).

2 'Relevant employees', in relation to an employer, means all employees of his employed in Great Britain and also, in the case of an employer resident or incorporated in any part of Great Britain, all employees of his employed outside the United Kingdom, but with the exception, in the case of any employer, of any employees of his (1) whose employment qualifies them for membership of an occupational pension scheme of the employer; (2) whose earnings fall below the lower earnings limit as defined in the Pension Schemes Act 1993 s 181 (which provides that 'lower earnings limit' is to be construed in accordance with the Social Security Contributions and Benefits Act 1992 s 5: see PARA 34); or (3) who are of such other description as may be prescribed: 1999 Act s 3(9). For the meaning of 'prescribed' see PARA 873A.1 NOTE 4.

3 Ibid s 3(1). See the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403; and PARA 873A.1.

4 le for the purposes of the 1999 Act s 3(2).

5 le under ibid s 2: see PARA 873A.2.

6 Ibid s 3(2).

7 Ibid s 3(3). See SI 2000/1403, NOTE 3.

8 1999 Act s 3(4).

9 'Qualifying scheme', in relation to an employer, means (1) the designated scheme or one of the designated schemes; or (2) if regulations so provide, any other stakeholder pension scheme: ibid s 3(9). See SI 2000/1403, NOTE 3.

10 1999 Act s 3(5). See SI 2000/1403, NOTE 3.

11 1999 Act s 3(6).

12 Ie the Pensions Act 1995 s 10: see PARA 611.

13 1999 Act s 3(7).

14 Ibid s 3(8).

#### **4. Application of enactments; reduced rates of national insurance contributions**

Provisions relating to the right not to suffer detriment<sup>1</sup> and protection from unfair dismissal<sup>2</sup> apply in relation to an employee who is (or is a director of a company which is) a trustee of a scheme designated by his employer<sup>3</sup> as they apply in relation to an employee who is (or is a director of a company which is) a trustee of a relevant occupational pension scheme<sup>4</sup> which relates to his employment<sup>5</sup>. Provision relating to time off for occupational pension scheme trustees<sup>6</sup> applies to the employer in relation to a designated scheme as it applies to the employer in relation to a relevant occupational pension scheme<sup>7</sup>.

Certain provisions relating to other types of pension schemes also apply to stakeholder pension schemes with various modifications<sup>8</sup>.

Provision is made with regard to the determination of different reduced rates of national insurance contributions payable by members of contracted-out money purchase occupational pension schemes depending on whether or not such schemes are registered as stakeholder pension schemes<sup>9</sup>. Corresponding provision is made in respect of appropriate personal pension schemes<sup>10</sup>.

Certain enactments apply to a pension scheme established under a trust which is not an occupational pension scheme but which is or has been registered as a stakeholder pension scheme<sup>11</sup> as if it were an occupational pension scheme<sup>12</sup>.

1 Ie the Employment Rights Act 1996 s 46: see EMPLOYMENT vol 39 (2009) PARA 551.

2 Ie ibid s 102: see EMPLOYMENT vol 40 (2009) PARA 751.

3 Ie under the Welfare Reform and Pensions Act 1999 s 3(2): see PARA 873A.3.

4 'Relevant occupational pension scheme' has the meaning given by the 1996 Act s 46: 1999 Act s 6(4).

5 Ibid s 6(1).

6 Ie the 1996 Act s 58: see PARA 797.

7 1999 Act s 6(2).

8 See further ibid s 6(3), Sch 1 (Sch 1 amended by Pensions Act 2004 Sch 12 para 76, Sch 13 Pt 1 (partly in force: SI 2005/275, SI 2005/695, SI 2005/1720, SI 2005/2447, SI 2005/3331, SI 2006/560)). The provisions specified in the 1999 Act Sch 1 are, subject to exceptions, the Pensions Act 1995 ss 3-11, 15, 27-30, 32-36, 39, 41, 47, 49, 50, 68, 91, 92, 94, 117, 124, 125, the Pensions Act 2004 s 67, Pt 2 Chs 4 and 5, ss 247-249, s 318.

9 See the 1999 Act s 7; and PARA 912.

10 See *ibid* s 7; and PARA 915.

11 *Ie* under *ibid* s 2: see PARA 873A.2.

12 Stakeholder Pension Schemes Regulations 2000, SI 2000/1403 (see PARA 873A.1), reg 32. The provisions, listed in Sch 2 (amended by SI 2001/934, SI 2008/649), are the Occupational Pension Schemes (Assignment, Forfeiture, Bankruptcy etc) Regulations 1997, SI 1997/785 (amended by SI 1999/1849, SI 2005/2877, SI 2009/2930), except regs 3, 8(1), (1A); the Occupational Pension Schemes (Disclosure of Information) Regulations 1996, SI 1996/1655 (see PARA 800), regs 1, 2, 6, 7, Sch 3 (except Sch 3 para 16); the Occupational Pension Schemes (Investment) Regulations 1996, SI 1996/3127, regs 1, 10; the Occupational and Personal Pension Schemes (Levy) Regulations 1997, SI 1997/666 (amended by SI 1998/600, 1999/682, SI 2000/542), regs 1 (in part), 5-8 (SI 1997/666 now replaced by Occupational and Personal Pension Schemes (General Levy) Regulations 2005, SI 2005/626 (see PARA 974)); the Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, except reg 8; the Occupational Pension Schemes (Prohibition of Trustees) Regulations 1997, SI 1997/663; the Occupational Pension Schemes (Requirement to obtain Audited Accounts and a Statement from the Auditor) Regulations 1996, SI 1996/1975 (amended by SI 1997/786, SI 1997/3038, SI 2000/833, SI 2005/2426, SI 2006/467, SI 2006/778), except SI 1996/1975 regs 2(1)(b), 4, Schedule para 5; the Occupational Pension Schemes (Scheme Administration) Regulations 1996, SI 1996/1715 (amended by SI 1997/819, SI 1998/1494, SI 1998/3038, SI 2001/3649), regs 1, 3(2)(a), (3), (5)-(7), 4(1), (2)(a), (b), 5(1)-(10), 6(3), 7-11, 12(1) (in part), 13(1), 14; and the Occupational Pension Schemes (Internal Dispute Resolution Procedures Consequential and Miscellaneous Amendments) Regulations 2008, SI 2008/649.

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### 861-873 Miscellaneous Provisions

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(13) MISCELLANEOUS PROVISIONS/(v) Overriding Requirements and Special Cases/873B. Registered Pension Schemes.

## **873B. Registered Pension Schemes.**

### **1. Introduction**

The Finance Act 2004 introduces the concept of registered pension schemes, to which particular tax provisions apply<sup>1</sup>. Separate provision is made for unregistered schemes<sup>2</sup>.

'Pension scheme' is defined as a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to, or in respect of, persons on retirement, on death, on having reached a particular age, on the onset of serious ill-health or incapacity, or in similar circumstances<sup>3</sup>. A scheme is a registered pension scheme at any time when it is registered<sup>4</sup>.

The Board of Inland Revenue may make regulations for and in connection with treating registered pension schemes which are prescribed (or of a description prescribed) by the regulations as if they were a number of separate registered pension schemes for such of the purposes of these provisions<sup>5</sup> and of provision made under them as are so prescribed<sup>6</sup>.

1 See the Finance Act 2004 ss 149-242, 250-280, Schs 28-34; and PARA 873B.2 et seq.

2 Ibid ss 243-249. The new provisions have effect from 6 April 2006, except for any power to make orders or regulations under any of those provisions, which was exercisable at any time after 22 July 2004 (the date on which the Finance Act 2004 received the royal assent): s 284. For extensive transitional provisions and savings see s 283, Sch 36 (amended by the Finance Act 2006 Sch 23 paras 24, 25, 35-46). The Treasury may by order make any other transitional provision which may appear appropriate in consequence of, or otherwise in connection with, the enactment of the new provisions or any repeal or revocation thereof; and such an order may, in particular, include savings from the effect of any amendment made by those provisions or any such repeal or enactment or any repeal made by the Finance Act 2004 in consequence thereof and may include provision having effect before it is made (provided that it does not increase any person's liability to tax): s 283(2), (3), (3A), (3B) (s (3A), (3B) added by 2006 Act Sch 23 para 35). See the Registered Pension Schemes (Modification of the Rules of Existing Schemes) Regulations 2006, SI 2006/364.

Nothing in the 2004 Act Sch 36 limits the power to make such an order, and nothing in Sch 36 or in any provision made by virtue of such an order prejudices the operation of the Interpretation Act 1985 ss 16, 17: 2004 Act s 283(4), (5) (amended by 2006 Act Sch 23 para 35). Any power of the Treasury or the Board of Inland Revenue (see PARA 873B.2 NOTE 1) to make any order or regulations under the Finance Act 2004 ss 149-284 is exercisable by statutory instrument, which is subject to annulment in pursuance of a resolution of the House of Commons: s 282. As to regulations so far made see Registered Pension Schemes (Prescribed Schemes and Occupations) Regulations 2005, SI 2005/3451; Registered Pension Schemes (Provision of Information) Regulations 2006, SI 2006/567 (amended by SI 2006/1961, SI 2008/720, SI 2008/2990); Taxation of Pension Schemes (Transitional Provisions) Order 2006, SI 2006/572 (amended by SI 2008/2990, SI 2009/1172, SI 2009/1989). No order may be made under the 2004 Act s 208(6) (see PARA 873B.21) s 209(7) (see PARA 873B.21), s 315(2A) (see PARA 873B.15), s 227(5A) (see PARA 824A.7), s 240(3A) (see PARA 873B.19) or s 242(5) (see PARA 873B.2) unless a draft of the statutory instrument containing it has been laid before, and approved by a resolution of, the House of Commons: s 282(1A) (added by Finance Act 2009 Sch 2 para 18).

3 2004 Act s 150(1).

4 Ibid s 150(2). As to registration see PARA 873B.2. An annuity contract made with an insurance company by means of which benefits under a registered pension scheme have been secured, but which does not provide for the immediate payment of benefits, is treated as having become a registered pension scheme on the day on which it is made: s 153(8) (amended by the Finance Act 2005 Sch 10 para 2). Where an order has been made under the Pensions Act 2004 s 19(4) or s 21(2)(a), or the Pensions (Northern Ireland) Order 2005 art 15(4) or 17(2)(a) that property or money be transferred, or a sum be paid, towards an annuity contract made with an insurance company, the annuity contract is treated as having become a registered pension scheme on the day on which it is made: Finance Act 2004 s 153(8A) (added by the 2005 Act Sch 10 para 3).

5 le the Finance Act 2004 Pt 4 (ss 149-284): see PARA 873B.2 et seq.

6 Ibid s 274A(1), (2) (s 274A added by the 2005 Act Sch 10 para 50). The provision that may be made by such regulations may, in particular, include (1) provision as to who is to be treated as the scheme administrator in relation to each of the separate pension schemes; and (2) any other modifications of the provision made by and under Pt 4 (see NOTE 5) as appears appropriate in consequence of, or otherwise in connection with, provision made under s 274A(1) (including provision so made by virtue of head (1)): s 274A(3). Such regulations may make different provision for different cases: s 274A(4). See the Registered Pension Schemes (Splitting of Schemes) Regulations 2006, SI 2006/569 (amended by SI 2007/793).

## 2. Registration

An application may be made to the Inland Revenue<sup>1</sup> for a pension scheme<sup>2</sup> to be registered<sup>3</sup>. Such an application must contain any information which is reasonably required, in a form specified by the Board of Inland Revenue, and must be accompanied by a declaration that it is made by the scheme administrator<sup>4</sup> and any other declarations by the scheme administrator which are reasonably required by the Inland Revenue<sup>5</sup>. On receipt of the application, the Inland Revenue must register the scheme unless it appears that any information contained in the application is incorrect, or any declaration accompanying it is false, and it must notify the scheme administrator of its decision, stating the day on and after which the scheme is to be registered<sup>6</sup>.

A scheme cannot be registered unless it is an occupational pension scheme<sup>7</sup> or a scheme established by a permitted person<sup>8</sup>.

1 The 'Inland Revenue' means any officer of the Board of Inland Revenue; and the 'Board of Inland Revenue' means the Commissioners of Inland Revenue: Finance Act 2004 s 279(1). As to the Commissioners of Inland Revenue see INCOME TAXATION vol 23(1) (Reissue) PARA 31 et seq.

2 For the meaning of 'pension scheme' see PARA 873B.1.

3 2004 Act s 153(1).

4 The scheme administrator, in relation to a pension scheme, is the person who is, or persons who are, appointed in accordance with the rules of the scheme to be responsible for the discharge of the functions conferred or imposed on the scheme administrator by and under these provisions: *ibid* s 270(1). A person cannot be a scheme administrator (or one of the persons who together are such an administrator) unless he is resident in the United Kingdom or another state which is a member state or a non-member EEA state, and has made the required declaration to the Inland Revenue: s 270(2). The 'required declaration' is a declaration that the person concerned understands that he will be responsible for discharging the functions conferred or imposed on the scheme administrator by and under these provisions, and that he intends to discharge those functions at all times, whether resident in the United Kingdom or another such state: s 270(3). 'Non-member EEA state' means a state which is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2 May 1992 (as adjusted by the Protocol signed at Brussels on 17 March 1993), but which is not a member state: 2004 Act s 270(4).

5 *Ibid* s 153(2). The declarations which the Inland Revenue may require to accompany an application for the registration of a pension scheme include, in particular, a declaration that the instruments or agreements by which it is constituted do not entitle any person to unauthorised payments: s 153(3). As to unauthorised payments see PARA 873B.9 et seq.

6 *Ibid* s 153(4)-(7). If it does not so appear, the Inland Revenue has a discretion whether to register the scheme: s 153(4). A negative decision must also be notified to the scheme administrator: s 153(6)). The scheme administrator may appeal against the decision within the period of 30 days beginning with the day on which he was notified of the negative decision: s 156(1),(2), (5). If the tribunal, on an appeal notified to it, considers that the scheme ought not to be registered, it must dismiss the appeal: s 156(6), (7) (s 156(6)-(8) amended by SI 2009/56). If it decides that the scheme ought to have been registered, the scheme is treated as having been registered on such date as the tribunal may determine (subject to any further appeal): 2004 Act s 156(6), (8).

7 le a pension scheme established by an employer or employers and having or capable of having effect so as to provide benefits to or in respect of any or all of the employees of that employer or those employers, or of any other employer (whether or not it also has or is capable of having effect so as to provide benefits to or in

respect of other persons): *ibid* s 150(5). 'Employer' and 'employee' have the same meanings as in the Income Tax (Earnings and Pensions) Act 2003 ss 4, 5 but include (respectively) a former employee and a former employer; and 'employment' is to be read accordingly: 2004 Act s 279(1).

8 *Ibid* s 154(1) (substituted by Finance Act 2007 Sch 20 para 2(2)). A permitted person is a person with permission under the Financial Services and Markets Act 2000 to establish in the United Kingdom a personal pension scheme or a stakeholder pension scheme: 2004 Act s 154(1). This provision is to be construed in accordance with the Financial Services and Markets Act 2000 s 22, Sch 2 (see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARAS 84, 85) and any relevant order under s 22: 2004 Act s 154(2A) (added by Finance Act 2007 Sch 20 para 2(3)).

The 2004 Act s 154(1) does not apply to a public service pension scheme: s 154(2). A 'public service pension scheme' is a pension scheme established by or under any enactment, approved by a relevant governmental or Parliamentary person or body, or specified in an order made by the Treasury: s 150(3). A 'relevant governmental or Parliamentary person or body' means (1) a minister of the Crown or a government department; (2) the Scottish Parliament, the Scottish Parliamentary Corporate Body or a member of the Scottish Executive; (3) the National Assembly for Wales, the National Assembly for Wales Commission or the Welsh Ministers; or (4) the Northern Ireland Assembly, the Northern Ireland Assembly Commission, a Northern Ireland Minister, the head of a Northern Ireland department, or a Northern Ireland department: s 150(4) (amended by SI 2007/1388). As to public service pension schemes generally see PARA 874 *et seq*.

The Treasury may by order amend the 2004 Act s 154: s 154(4) (amended by the 2007 Act Sch 20 para 2(5)). As to the making of such orders see PARA 873B.1 NOTE 2.

### 3. De-registration

The Inland Revenue<sup>1</sup> may withdraw the registration of a pension scheme<sup>2</sup> if (and only if) it appears to them that:

- 2163 (1) the amount of the scheme chargeable payments<sup>3</sup> made by the pension scheme during any period of 12 months exceeds the de-registration threshold<sup>4</sup>;
- 2164 (2) the scheme administrator<sup>5</sup> fails to pay a substantial amount of tax (or interest on tax) due from him<sup>6</sup>;
- 2165 (3) the scheme administrator fails to provide information required<sup>7</sup> to be provided to the Inland Revenue, and the failure is significant<sup>8</sup>;
- 2166 (4) any information contained in the application to register the pension scheme or otherwise provided to the Inland Revenue is incorrect in a material particular;
- 2167 (5) any declaration accompanying the application to register or the provision of other information to the Inland Revenue is false in a material particular; or
- 2168 (6) there is no scheme administrator<sup>9</sup>.

Any decision to withdraw registration must be notified to the scheme administrator or, if there is no such person, to any person or persons who has or have responsibility for the discharge of any obligation relating to the pension scheme<sup>10</sup> and whom it is reasonably practicable for the Inland Revenue to identify<sup>11</sup>. The notification must state the date on and after which the scheme will not be a registered pension scheme<sup>12</sup>.

1 For the meaning of 'Inland Revenue' see PARA 873B.2 NOTE 1.

2 For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2.

3 As to scheme chargeable payments see PARA 873B.19.

4 The amount of the scheme chargeable payments made by a pension scheme during any period of 12 months exceeds the de-registration threshold if the scheme chargeable payments percentage is 25 per cent or more: Finance Act 2004 s 158(2). The 'scheme chargeable payments percentage' is (1) if only one scheme chargeable payment is made during the period concerned, the percentage of the pension fund used up on the occasion of that payment; and (2) if two or more such payments are made during the period concerned, the aggregate of the percentages of the pension fund used up on the occasion of each such payment: s 158(3). The percentage of the pension fund used up on the occasion of a scheme chargeable payment is:

$$\frac{SCP}{AA} \times 100$$

where SCP is the amount of the scheme chargeable payment, and AA is an amount equal to the aggregate of the amount of the sums and the market value of the assets held for the purposes of the pension scheme at the time when the scheme chargeable payment is made: s 158(4). The 'market value' of an asset held for the purposes of a pension scheme is determined in accordance with the Taxation of Chargeable Gains Act 1992 s 272 (see CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 44): 2004 Act s 278(1). However, where such an asset is a right or interest in respect of any money lent (directly or indirectly) to any relevant associated person, the value of that asset is treated as being the amount owing (including any unpaid interest) on the money lent: s 278(2). 'Relevant associated persons' are (a) any employer who has at any time (whether or not before the making of the loan) made contributions under the pension scheme; (b) any company connected (at the time of the making of the loan or subsequently) with any such employer; (c) any person who has at any time (whether or not before the making of the loan) been a member of the scheme; and (d) any person connected (at the time of the making of the loan or subsequently) with any such person: s 278(3). 'Connected' has the meaning given by the Income and Corporation Taxes Act 1988 s 839 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1258): 2004 Act s 278(4). For the meaning of 'employer' see PARA 873B.2 NOTE 7; for the meaning of 'contribution' see PARA 873B.12; for the meaning of 'member' see PARA 873B.4; and for the meaning of 'loan' see PARA 873B.4.

The market value of taxable property (see PARA 873B.30) or of an interest therein is also to be determined in accordance with the Taxation of Chargeable Gains Act 1992, but subject to any provision made by regulations made under the 2004 Act Sch 29A para 36(2) (see PARA 873B.32): s 278(3A), (3B) (added by the Finance Act 2006 Sch 21 para 11).

5 For the meaning of 'scheme administrator' see PARA 873B.2 NOTE 4.

6 Ie by virtue of the 2004 Act Pt 4 (ss 149-284): see PARAS 873B.1, 873B.2, PARA 873B.4 et seq.

7 Ie by the provisions referred to in NOTE 6.

8 Such failure is 'significant' if the amount of information which the scheme administrator fails to provide is substantial, or that failure is likely to result in serious prejudice to the assessment or collection of tax: 2004 Act s 158(5).

9 Ibid ss 157(1), 158(1).

10 Ie an obligation under ibid s 271(4) (see PARA 873B.27), s 272 (see PARA 873B.27) or s 273 (see PARA 873B.27).

11 Ibid s 157(2), (3). In such a case, the scheme administrator or the recipient of the notice may appeal within the period of 30 days beginning with the day on which he was notified of the decision to de-register: s 159(1),(2), (5). If the tribunal (on an appeal that is notified to it) considers that the scheme ought to be de-registered, it must dismiss the appeal. If the tribunal decides that it ought not to have been de-registered, registration is treated as continuing without interruption(subject to any further appeal ): s 159(6)-(8) (amended by SI 2009/56).

12 2004 Act s 157(4). As to the tax charge which may arise on the deregistration of a scheme see PARA 873B.20.

#### **4. Authorised member payments by registered pension schemes: in general**

The only payments<sup>1</sup> that a registered pension scheme<sup>2</sup> is authorised to make to or in respect of a person who is or has been a member<sup>3</sup> are (1) pensions<sup>4</sup> permitted by the pension rules or the pension death benefit rules<sup>5</sup>; (2) lump sums permitted by the lump sum rule or the lump sum death benefit rules<sup>6</sup>; (3) recognised transfers; (4) scheme administration member payments; (5) payments pursuant to a pension sharing order or provision; and (6) payments of a description prescribed by regulations made by the Board<sup>7</sup>.

A 'recognised transfer' is a transfer of sums or assets held for the purposes of, or representing accrued rights under, a registered pension scheme so as to become held for the purposes of, or to represent rights under, another registered pension scheme or a qualifying recognised overseas pension scheme<sup>8</sup>, in connection with a member of the scheme<sup>9</sup>.

A 'scheme administration member payment' is a payment by a registered pension scheme to or in respect of a person who is or has been a member of the scheme which is made for the purposes of the administration or management of the scheme, and include, in particular, the payment of wages, salaries or fees to persons engaged in administering the scheme, and payments made for the purchase of assets to be held for the purposes of the pension scheme<sup>10</sup>.

The only payments which a registered pension scheme which is an occupational pension scheme is authorised to make to or in respect of a person who is or has been a sponsoring employer are:

- (a) public service scheme payments<sup>11</sup>;
- (b) authorised surplus payments<sup>12</sup>;
- (c) compensation payments<sup>13</sup>;
- (d) authorised employer loans<sup>14</sup>;
- (e) scheme administration employer payments<sup>15</sup>;
- (f) payments of a description prescribed by regulations made by the Board<sup>16</sup>.

1 'Payment' includes a transfer of assets and any other transfer of money's worth: Finance Act 2004 s 161(1), (2).

2 For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2.

3 'Member', in relation to a pension scheme, means any active member, pensioner member, deferred member or pension credit member of the scheme: Finance Act 2004 s 151(1). A person is an active member if there are currently arrangements made under the scheme for the accrual of benefits to or in respect of him; a person is a pensioner member if he is entitled to the present payment of benefits under the scheme and is not an active member; a person is a deferred member if he has accrued rights under the scheme and is neither an active member nor a pensioner member; and a person is a pension credit member if he has rights under the scheme which are attributable (directly or indirectly) to pension credits, and if a person dies having become entitled to pension credits, but without having rights attributable to them, the person is treated as having acquired, immediately before death, the rights by virtue of which the liability in respect of the pension credits is subsequently discharged: s 151(2)-(5) (s 151(5) amended by the Finance Act 2006 Sch 23 para 2). 'Pension credit' has the same meaning as in the Welfare Reform and Pensions Act 1999 s 46(1) or corresponding Northern Ireland legislation: 2004 Act ss 279(1), 280(1).

4 'Pension', in relation to a registered pension scheme, include an annuity and income withdrawal: *ibid* s 165(2). 'Income withdrawal' means (1) if the member has not reached the age of 75, an amount (other than a payment of an annuity) which the member is entitled to be paid from his unsecured pension fund in respect of an arrangement; and (2) if the member has reached the age of 75, an amount which he is entitled to be paid from his alternatively secured pension fund in respect of an arrangement: Sch 28 para 7. For the meaning of 'unsecured pension fund' see PARA 873B.5 NOTE 5; for the meaning of 'alternatively secured pension fund' see PARA 873B.5 NOTE 13; and for the meaning of 'arrangement' see PARA 873B.5 NOTE 5.

5 As to the pension rules see PARA 873B.5; and as to the pension death benefit rules see PARA 873B.6.

6 As to the lump sum rules see PARA 873B.7; and as to the lump sum death benefit rules see PARA 873B.8.

7 2004 Act ss 160(1), 164 (s 160 amended by Finance Act 2006 Sch 23 para 3(2); 2004 Act s 164 amended by 2006 Act Sch 23 para 6; Finance Act 2008 Sch 29 para 1(2); and Finance Act 2009 s 75(32)). Such regulations may (1) provide that for the purposes of the Income Tax (Earnings and Pensions) Act 2003 all or part of a prescribed payment is to be treated as pension under a registered pension scheme, or as a lump sum of a prescribed description; (2) provide that all or part of a prescribed payment is subject to the short service refund lump sum charge or the special lump sum death benefits charge; (3) provide that a prescribed event in relation to a prescribed payment is to be treated for the purposes of the lifetime allowance charge as a benefit crystallisation event, and make provision as to the amount crystallised by that event; (4) include provision having effect in relation to time before the regulations are made if that provision does not increase any person's liability to tax; and 'prescribed' means prescribed in such regulations: s 164(2) (added by Finance Act 2008 Sch 29 para 1(2)). See the Registered Pension Schemes (Authorised Payments) (Transfers to the Pension Protection Fund) Regulations 2006, SI 2006/134; the Registered Pension Schemes (Authorised Member Payments) Regulations 2006, SI 2006/137; the Registered Pension Schemes (Authorised Payments) Regulations 2006, SI 2006/209; the Registered Pension Schemes (Authorised Member Payments) (No 2) Regulations 2006, SI

2006/571; the Registered Pension Schemes (Authorised Payments--Arrears of Pension) Regulations 2006, SI 2006/614; the Registered Pension Schemes (Authorised Member Payments) Regulations 2007, SI 2007/3532; the Registered Pension Schemes (Authorised Payments) Regulations 2009, SI 2009/1171. 'Pension sharing order or provision' means any order or provision mentioned in the 1999 Act s 28(1) or the Welfare Reform and Pensions (Northern Ireland) Order 1999 art 25(1): 2004 Act ss 279(1), 280. As to the Board see PARA 873B.2 NOTE 1.

8 A recognised overseas pension scheme is an overseas pension scheme which is established in a country or territory prescribed, or of a description prescribed, by regulations made by the Board, or satisfies any requirements so prescribed; and 'overseas pension scheme' means a pension scheme (other than a registered pension scheme) which is established in a country or territory outside the United Kingdom, and satisfies any requirements prescribed by such regulations: *ibid* s 150(7), (8). See the Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006, SI 2006/206 (amended by SI 2007/1600). A recognised overseas pension scheme is a qualifying recognised overseas pension scheme if (1) the scheme manager has given to the Inland Revenue notification that it is a recognised overseas pension scheme and has provided any such evidence to that effect as the Inland Revenue may require; (2) the scheme manager has undertaken to inform the Inland Revenue if it ceases to be a recognised overseas pension scheme; (3) the scheme manager has undertaken to comply with any prescribed information requirements imposed on the scheme manager; and (4) the scheme is not prevented from qualifying because the Inland Revenue has decided that (a) there has been a failure to comply with any prescribed information requirements imposed on the scheme manager and the failure is significant, and (b) by reason of the failure it is not appropriate that transfers of sums or assets held for the purposes of, or representing, accrued rights under, registered pension schemes so as to become held for the purposes of, or to represent rights under, the recognised overseas pension scheme should be recognised transfers, and have notified the person or persons appearing to be the scheme manager accordingly: 2004 Act s 169(2), (4). 'Prescribed information requirements' means requirements imposed by or under regulations made by the Board to provide to the Inland Revenue any information of a description prescribed by regulations so made, and requirements specified by regulations so made to provide information to an authority so specified in circumstances so specified; and a failure to comply with such requirements is significant if the amount of information which has not been provided is substantial, or the failure to provide the information is likely to result in serious prejudice to the assessment or collection of tax: s 169(4), (6). 'Scheme manager', in relation to a pension scheme, means the person or persons administering, or responsible for the management of, the scheme: s 169(3). At any time after a recognised overseas pension scheme is excluded from qualification by virtue of head (4), the Inland Revenue may decide that it should cease to be so excluded, and must notify the scheme manager accordingly: s 169(7). As to the making of regulations under these provisions see PARA 873B.1 NOTE 2. See the Pension Schemes (Information Requirements -Qualifying Overseas Pension Schemes, Qualifying Recognised Overseas Pensions Schemes and Corresponding Relief) Regulations 2006, SI 2006/208.

If a scheme is so excluded, the scheme manager may appeal against the decision within the period of 30 days beginning with the day on which notification of the decision to exclude was given: 2004 Act s 170(1), (2). If the tribunal (on an appeal notified to it) considers that the scheme ought to be excluded, the tribunal must dismiss the appeal. If the tribunal decides that the scheme ought not to have been excluded, it is treated as having remained a qualifying recognised overseas pension scheme (subject to any further appeal): s 170(6)-(8) (amended by SI 2009/56). For the meaning of 'Inland Revenue' see PARA 873B.2 NOTE 1.

9 2004 Act s 169(1). A transfer of sums or assets held for the purposes of, or representing accrued rights under, a registered pension scheme to an insurance company is treated as a recognised transfer if the sums or assets had been applied by the pension scheme towards the provision of a scheme pension or a dependants' scheme pension: s 169(1A) (s 169(1A)-(1E) added by Finance Act 2005 Sch 10 para 36). The Board of Inland Revenue may by regulations provide (1) that, where any of the sums or assets transferred represent rights in respect of a scheme pension to which a member of a registered pension scheme has become entitled ('the original scheme pension') (a) the transfer is not a recognised transfer unless those sums and assets are, after the transfer, applied towards the provision of a scheme pension (a 'new scheme pension') and (b) if they are so applied, the new scheme pension is to be treated, to such extent as is prescribed by the regulations and for such of the purposes of the 2004 Act Pt 4 (ss 140-284) (see PARA 873B.1 et seq, PARA 873B.5 et seq) as are so prescribed, as if it were the original scheme pension; (2) that, where any of the sums or assets transferred represent rights in respect of a dependants' scheme pension to which a dependant of a member of a registered pension scheme has become entitled in respect of a member ('the original dependants' scheme pension') (a) the transfer is not a recognised transfer unless those sums and assets are, after the transfer, applied towards the provision of a dependants' scheme pension (a 'new dependants' scheme pension'), and (b) if they are so applied, the new dependants' scheme pension is to be treated, to such extent as is prescribed by the regulations and for such of the purposes of Pt 4 as are so prescribed, as if it were the original dependants' scheme pension; and (3) that where any of the sums or assets transferred represent (a) a person's unsecured pension fund or dependant's unsecured pension fund, or (b) a person's alternatively secured pension fund or dependant's alternatively secured pension fund, under an arrangement ('the old arrangement'), the transfer is not a recognised transfer unless all those sums and assets become held under an arrangement under which no other sums or assets are held ('the new arrangement'): s 169(1B)-(1D). If regulations so provide, they may make in relation to cases in which the sums or assets become so held provision for the treatment for the purposes of any provision of Pt 4 of (a) the sums and assets transferred, and (b) the new arrangement,

including provision for treating the sums and assets so transferred as remaining to such extent as is prescribed by the regulations and for such of the purposes of Pt 4 as are so prescribed, sums and assets held under the old arrangement: s 169(1E). For the meaning of 'insurance company' see PARA 873B.2 NOTE 8; for the meaning of 'scheme pension', see PARA 873B.5 NOTE 6; and for the meaning of 'dependants' scheme pension', see PARA 873B.6 NOTE 4. See the Registered Pension Schemes (Transfer of Sums and Assets) Regulations 2006, SI 2006/499 (amended by SI 2008/1946, SI 2008/1946).

10 2004 Act s 171(1), (3) (s 171(1) amended by the 2006 Act Sch 23 para 7). However, if a payment exceeds the amount which might be expected to be paid to a person who was at arm's length, the excess is not a scheme administration member payment: 2004 Act s 171(2). A loan to, or in respect of, a person who is or has been a member of the scheme is not a scheme administration member payment: s 171(4) (amended by the 2006 Act Sch 23 para 7). Regulations made by the Board may provide that payments of a description specified in the regulations are, or are not, scheme administration member payments: 2004 Act s 171(5). As to the making of such regulations see PARA 873B.1 NOTE 2.

'Loan' does not include the purchase of, or subscription to, debentures, debenture stock, loan stock, bonds, certificates of deposit or other instruments creating or acknowledging indebtedness which are listed or dealt in on a recognised stock exchange or offered to the public: s 162(1), (2). A guarantee of a loan made to or in respect of a person who is or has been a member or sponsoring employer of a registered pension scheme (or to or in respect of a person who is connected with such a member or sponsoring employer but is not himself such a member or sponsoring employer) is treated as a loan to or in respect of such a person of an amount equal to the amount guaranteed: s 162(3) (amended by the 2005 Act Sch 10 para 6; and the 2006 Act Sch 23 para 5). If a person who is a member or sponsoring employer of a registered pension scheme (or a person who is connected with such a member or sponsoring employer but is not himself such a member or sponsoring employer) is liable to pay a debt the right to payment of which constitutes an asset held for the purposes of the pension scheme, but is not required to pay it by the date ('the relevant date') by which a person at arm's length from the scheme might be expected to be required to pay the debt, that debt is treated as a loan made by the scheme to such a person on that date: 2004 Act s 162(4), (5) (s 162(4) amended by the 2005 Act Sch 10 para 6; and the 2006 Act Sch 23 para 5). If the amount of a loan to or in respect of a person who is or has been a sponsoring employer is increased, the amount of the increase is treated as a loan made on the date of the increase: 2004 Act s 179(5) (amended by the 2006 Act Sch 23 para 11). 'Recognised stock exchange' has the meaning given by the Income and Corporation Taxes Act 1988 s 841 (see INCOME TAXATION vol 23(1) (Reissue) PARA 512): 2004 Act s 162(2)(a). 'Connected person' has the meaning given by the Income and Corporation Taxes Act 1988 s 839 (see INCOME TAXATION vol 23(1) (Reissue) PARA 1258) (definition applied by the 2004 Act s 162(5) (added by the 2005 Act Sch 10 para 6)).

A payment by a registered pension scheme to or in respect of a person who is connected with a person who is or has been a member or sponsoring employer (or who was connected with such a person at the date of that person's death) and is not a himself a person who has been a member or a sponsoring employer, is treated as made in respect of the member or sponsoring employer; and any asset held by a person so connected is treated as held for the benefit of the member or sponsoring employer: 2004 Act s 161(5), (6) (s 161(5) amended by the 2005 Act Sch 10 para 5; 2004 Act s 161(5), (6) amended by the 2006 Act Sch 23 para 4(2), (3)). Any increase in the value of an asset held by, or reduction in the liability of, a person so connected is treated as an increase or reduction for the benefit of the person concerned: 2004 Act s 161(7) (amended by the 2006 Act Sch 23 para 4(3)). 'Connected person' has the meaning given by the 1988 s 839: 2004 Act s 161(8).

'Sponsoring employer', in relation to an occupational pension scheme, is the employer, or any of the employers, to or in respect of any or all of whose employees the pension scheme has, or is capable of having, effect so as to provided benefits: s 150(6). For the meaning of 'occupational pension scheme', 'employer' and 'employee' see PARA 873B.2 NOTE 7.

11 A payment is a public service scheme payment if it is made by a public service pension scheme and is not of a description prescribed by regulations made by the Board: *ibid* s 176. For the meaning of 'public service pension scheme' see PARA 873B.2 NOTE 8. As to the making of such regulations see PARA 873B.1 NOTE 2.

12 It is a payment of a description prescribed by regulations made by the Board: *ibid* s 177. As to the making of such regulations see PARA 873B.1 NOTE 2. See the Registered Pension Schemes (Authorised Surplus Payments) Regulations 2006 SI 2006/574.

13 It is a payment made in respect of a member's liability to a sponsoring employer in respect of a criminal, fraudulent or negligent act or omission by the member: 2004 Act s 178.

14 A loan made to or in respect of a person who is or has been a sponsoring employer is an authorised employer loan if (1) the amount loaned does not exceed an amount equal to 50 per cent of the aggregate of the amount of the sums, and the market value of the assets, held for the purposes of the pension scheme immediately before the loan is made; (2) the loan is secured by a charge which is of adequate value; and (3) the repayment terms are such that (a) the rate of interest payable on the loan is not less than the rate prescribed by regulations made by the Board of Inland Revenue, (b) the loan repayment date is before the end of the period of five years beginning with the date on which the loan is made, and (c) the amount payable in

each period beginning with the date on which the loan is made, and ending with the last day of a loan year, is not less than the required amount: *ibid* s 179(1), (2) (s 179(1) amended by 2006 Act Sch 23 para 11). However, if on a standard loan repayment date any amount (including interest) is owing, the loan repayment date may be postponed (once only) to a date before the end of the period of five years beginning with the standard loan repayment date: 2004 Act s 179(3), (4). See the Registered Pension Schemes (Prescribed Interest Rates for Authorised Employer Loans) Regulations 2005, SI 2005/3449.

'Charge' includes a right in security or an agreement to create a right in security, and any reference to assets subject to a charge or assets charged includes a reference to the property over which such a right is granted: 2004 Act s 179(7). A charge is of 'adequate value' if (a) at the time the charge is given, the market value of the assets subject thereto (i) in the case of the first charge to secure the loan, is at least equal to the amount owing (including interest), and (ii) in any other case, is at least equal to the lower of that amount and the market value of the assets subject to the previous charge; (b) if, at any time after the charge is given, the market value of the assets charged is less than would be required under head (a) if the charge were given at that time, the reduction in value is not attributable to any step taken by the pension scheme, the sponsoring employer, or a person connected with the sponsoring employer; and (c) the charge takes priority over any other charge over the assets: s 179(6), Sch 30 para 1 (s 179(6) amended by the 2006 Act Sch 23 para 11). For the meaning of 'market value' see PARA 873B.3 NOTE 4; and for the meaning of 'loan' see NOTE 10.

'Loan repayment date' means the date by which the total amount owing (including interest) must be paid, and a 'standard loan repayment date' is a loan repayment date before the end of the period of five years beginning with the date on which the loan is made: 2004 Act Sch 30 para 2. 'Loan year' means the period of 12 months beginning with the date on which the loan is made, and each succeeding period of 12 months, but in the period of 12 months in which the loan repayment date falls, the loan year ends on that date (and that loan year is the last loan year): Sch 30 para 3. The 'required amount', in relation to a period beginning with the date on which the loan is made and ending with the last day of a loan year is:

$$\frac{L + TIP}{TLY} \times NLY$$

where L is the amount of the loan, TIP is the interest payable on the loan, TLY is the total number of loan years, and NLY is the number of loan years in the period: Sch 30 para 4. As to the unauthorised payment which arises when an employer loan does not meet the conditions set out above see PARA 873B.10.

15 A 'scheme administration employer payment' is a payment made (1) by a registered pension scheme that is an occupational pension scheme, and (2) to or in respect of a person who is or has been a sponsoring employer, for the purposes of the administration or management of the scheme; including, in particular, the payment of wages, salaries or fees to persons engaged in administering the scheme and payments made for the purchase of assets to be held for the purposes of the scheme: *ibid* s 180(1), (4) (amended by the 2006 Act Sch 23 para 12). However, if such a payment exceeds the amount which might be expected to be paid to a person who was at arm's length, the excess is not a scheme administration employer payment: 2004 Act s 180(2). A loan to or in respect of a person who is or has been a sponsoring employer is not a scheme administration employer payment; and payments made to acquire shares in a sponsoring employer are not scheme administration employer payments if, when the payment is made: (a) the market value of shares in the sponsoring employer held for the purposes of the scheme is equal to or greater than 5 per cent of the aggregate of the amount of the sums, and the market value of the assets, held for the purposes of the scheme, or (b) the total market value of shares in sponsoring employers held for the purposes of the pension scheme is equal to or greater than 20 per cent of that aggregate: s 180(4), (5) (s 180(4) amended by the 2006 Act Sch 23 para 12). Regulations made by the Board may provide that payments of a description therein specified are, or are not, scheme administration employer payments: 2004 Act s 180(6). As to the making of such regulations see PARA 873B.1 NOTE 2.

16 *Ibid* s 175 (amended by the 2006 Act Sch 23 para 10).

## 5. Authorised member payments by registered pension schemes: the pension rules

The pension rules are that:

- 2169 (1) no payment of pension<sup>1</sup> may be made before the day on which the member<sup>2</sup> reaches normal minimum pension age<sup>3</sup>, unless the ill-health condition<sup>4</sup> was met immediately before he became entitled to a pension under the scheme<sup>5</sup>;
- 2170 (2) if the member dies before the end of the period of ten years beginning with the day on which he became entitled to a scheme pension<sup>6</sup> or an annuity, payment of that pension or annuity may be made (to any person) until the end of that

period, but no other payment of the member's pension may be made after his death<sup>7</sup>;

2171 (3) no payment of pension other than a scheme pension may be made in respect of a defined benefits arrangement<sup>8</sup>;

2172 (4) if the member has not reached the age of 75, no payment of pension other than a scheme pension, a lifetime annuity or unsecured pension, may be made in respect of a money purchase arrangement, but a scheme pension may only be paid if the member had an opportunity to select a lifetime annuity instead<sup>9</sup>;

2173 (5) the total amount of unsecured pension paid in each unsecured pension year<sup>10</sup> in respect of a money pension arrangement must not exceed 120 per cent of the basis amount<sup>11</sup> for the unsecured pension year<sup>12</sup>;

2174 (6) if the member has reached the age of 75, no payment of pension other than a scheme pension, a lifetime annuity or alternatively secured pension, may be made in respect of a money purchase arrangement, and a scheme pension may only be paid if the member had an opportunity to select a lifetime annuity instead<sup>13</sup>;

2175 (7) the total amount of alternatively secured pension paid in each alternatively secured pension year<sup>14</sup> in respect of a money purchase arrangement must not exceed 90 per cent of the basis amount<sup>15</sup> for the alternatively secured pension year<sup>16</sup>.

1 For the meaning of 'pension' see PARA 873B.4 NOTE 4.

2 For the meaning of 'member' see PARA 873B.4 NOTE 3.

3 'Normal minimum pension age' means (1) before 6 April 2010, 50; and (2) on and after that date, 55: Finance Act 2004 s 279(1).

4 The ill-health condition is met if (1) the scheme administrator has received evidence from a registered medical practitioner that the member is (and will continue to be) incapable of carrying on the member's occupation because of physical or mental impairment; and (2) the member has in fact so ceased: *ibid* s 165(4), Sch 28 para 1. For the meaning of 'scheme administrator' see PARA 2 NOTE 4.

5 *Ibid* s 165(1). A person becomes entitled to a pension under a registered pension scheme (1) in the case of income withdrawal under the scheme, whenever sums or assets held for the purposes of an arrangement under the scheme are designated as available for the payment of unsecured pension; and (2) in any other case, when the person first acquires an actual (rather than a prospective) right to receive the pension; and for this purpose, the abatement of a scheme pension under a public service pension scheme (see PARA 873B.2 NOTE 8) is not taken to affect the right to receive it: s 165(3) (amended by the Finance Act 2005 Sch 10 para 7). For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2. For the meaning of 'income withdrawal' see PARA 873B.4 NOTE 4; and for the meaning of 'abatement', see PARA 873B.16 NOTE 7. 'Arrangement', in relation to a member of a pension scheme, means an arrangement relating to the member under the scheme: 2004 Act s 152(1). See also NOTE 7. 'Unsecured pension' means a short-term annuity or income withdrawal; and an annuity purchased by a member is a 'short-term annuity' if (a) it is purchased by the application of sums or assets representing the whole or any part of the member's unsecured pension fund in respect of an arrangement; (b) it is payable by an insurance company; (c) the member had an opportunity to select the insurance company; (d) it is payable for a term which does not exceed five years and ends before the member reaches the age of 75; and (e) its amount either cannot decrease or falls to be determined in any manner prescribed by regulations made by the Board of Inland Revenue: Sch 28 paras 4, 6 (Sch 28 para 6 amended by the 2005 Act Sch 10 para 14). See the Registered Pension Schemes (Transfer of Sums and Assets) Regulations 2006, SI 2006/499 (see PARA 873B.4); and the Registered Pension Schemes (Prescribed Manner of Determining Amount of Annuities) Regulations 2006, SI 2006/568.

An annuity does not fail to satisfy head (e) by reason of the operation of a pension sharing order or provisions: 2004 Act Sch 28 para 6(1A) (added by the 2005 Act Sch 10 para 14). For the meaning of 'insurance company' see PARA 873B.2 NOTE 8. The member's unsecured pension fund in respect of an arrangement consists of such of the sums or assets held for the purposes of the arrangement as are member-designated funds, as have at any time been designated under the arrangements as available for the payment of unsecured pension, and have not been applied for purchasing a scheme pension, a lifetime annuity or a short-term annuity or paid as income withdrawal: 2004 Act Sch 28 para 8(1) (amended by the 2005 Act Sch 10 para 18). 'Member-designated funds' are sums or assets held for the purposes of an arrangement which have been designated at any time under the arrangement as available for the payment of unsecured pension; or which arise, or (directly or indirectly) are derived, from sums or assets which have been so designated or which so arise or are so derived, and (in each

case) have not been applied towards the provision of a scheme pension: 2004 Act Sch 28 para 8(1A) (added by the 2005 Act Sch 10 para 18).

When the member reaches the age of 75, any relevant uncrystallised funds are treated as having been designated under the arrangement as available for the payment of unsecured pension immediately before the member reached that age: 2004 Act Sch 28 para 8(2). 'Relevant uncrystallised funds' means (i) if the arrangement is a cash balance arrangement, a sum equal to what would, on the valuation assumption in s 277(a) (see PARA 873B.11), be available for the provision of benefits to or in respect of the member if he became entitled to them on reaching the age of 75, and (ii) if it is not, such of the sums and assets held for the purposes of the arrangement as are not member-designated funds and have not been applied towards the provision of a scheme pension or a dependants' scheme pension: Sch 28 para 8(3) (amended by the 2005 Act Sch 10 para 18). For the meaning of 'scheme pension' see NOTE 6; and for the meaning of 'dependants' scheme pension' see PARA 873B.6 NOTE 4. As to cash balance arrangements, see NOTE 7.

If any sums or assets representing the member's unsecured pension fund in respect of an arrangement under the pension scheme would (apart from this provision) come to be taken to represent another unsecured pension fund of his under the pension scheme, or a dependant's unsecured pension fund of his under that scheme, they are treated as not doing so: 2004 Act Sch 28 para 8(4) (added by 2005 Act Sch 10 para 18).

The sums and assets held for the purposes of an arrangement under a pension scheme are so much of the sums and assets held for the purposes of the scheme under which the arrangement is made as are properly attributable, in accordance with the provisions of the pension scheme and any just and reasonable apportionment, to the arrangement: 2004 Act s 279(3).

Regulations may be made in relation to short-term annuities under powers similar to those conferred in relation to lifetime annuities (see NOTE 7): Sch 28 para 6(1B)-(1D) (added by the 2005 Act Sch 10 para 14). See SI 2006/499 above.

6 A pension payable to a member is a scheme pension if it is payable by the scheme administrator or by an insurance company selected by the scheme administrator, and (1) the pension is payable (at least annually) until the member's death or until the later of his death and the end of a term certain not exceeding ten years, and (2) the rate of pension payable at any time during any relevant 12-month period is not less than the rate payable at the relevant time: 2004 Act Sch 28 para 2(2), (3) (amended by the 2005 Act Sch 10 para 11). The 'relevant time' is, in the case of the first relevant 12-month period, the day on which the member becomes entitled to the pension, and in the case of any other relevant 12-month period, immediately before the beginning of that period: 2004 Act Sch 28 para 2(3A) (added by the 2005 Act Sch 10 para 11). None of the following prevents heads (1) and (2) from being satisfied: (a) the reduction of the pension if the member became entitled to it by reason of the ill-health condition being met; (b) a reduction in the rate of the pension which applies to all the scheme pensions being paid to or in respect of members of the scheme; (c) a reduction in the rate of the pension, taking effect at a time not earlier than when the member reaches the age of 60 and not later than when he reaches the age of 65, which does not exceed the relevant state retirement pension rate at that time (or the pension ceasing to be payable at such a time if at that time that rate is greater than the rate of the pension); (d) the reduction of the pension in consequence of a pension sharing order or provision; (e) forfeiture of entitlement to the pension in circumstances prescribed by regulations made by the Board of Inland Revenue; (f) the reduction of the pension in consequence of an order of a court; (g) if the pension is under a public service pension scheme, its reduction by abatement; or (h) the reduction of the pension in any other circumstances prescribed by regulations made by the Board of Inland Revenue: 2004 Act Sch 28 para 2(4) (amended by the 2005 Act Sch 10 para 11; and the Finance Act 2006 Sch 23 para 20(3)). A pension is reduced for this purpose if it ceases to be payable (whether temporarily or permanently): 2004 Act Sch 28 para 2(4A) (added by the 2005 Act Sch 10 para 11). For the meaning of 'pension sharing order or provision', see PARA 873B.4 NOTE 7; and for the meaning of 'public service pension scheme', see PARA 873B.2 NOTE 8. Regulations under heads (e) and (h) or Sch 28 para 2(5) may include provision having effect in relation to times before they are made: 2004 Act Sch 28 para 2(8) (added by the 2005 Act Sch 10 para 11; the Finance Act 2006 Sch 23 para 20(3); and the Finance Act 2007 Sch 20 para 7). As to the making of such regulations, see INCOME TAXATION. See the Pension Schemes (Reduction in Pension Rates) Regulations 2006, SI 2006/138 (amended by SI 2009/1311); the Registered Pension Schemes (Authorised Reductions) Regulations 2006, SI 2006/1465; and the Registered Pension Schemes (Bridging Pensions) Regulations 2007, SI 2007/826.

A pension is payable until the end of a term certain even if it may, after the death of the member during the term, end on the pensioner marrying, entering into a civil partnership, reaching the age of 18, or ceasing to be in full-time education; and a 'relevant 12-month period' is any 12-month period which begins on or after the first anniversary of the day on which the member becomes entitled to the pension, and ends before the day on which the pension ceases to be payable: 2004 Act Sch 28 para 2(6), (7) (amended by SI 2007/493). The 'relevant state retirement pension rate' at any time (i) where no employment of the member to which the pension scheme relates is or has been other than contracted-out employment by reference to the scheme, is 125% of the rate of the basic pension at that; (ii) where no such employment of the member is or has been contracted-out employment by reference to the pension scheme, is 250% of the rate of the basic pension at that time; and (iii) otherwise, is such percentage of the rate of the basic pension at that time falling between the percentages for the time being specified under or by virtue of head (i) or (ii) as the Treasury may by regulations prescribe: 2004 Act Sch 28 para 2(5) (Sch 28 para 2(5), (5A) substituted by 2006 Act Sch 23 para

20(3)). 'Contracted-out employment' has the meaning given by the Pension Schemes Act 1993 s 8(1); and 'basic pension' means the basic pension specified in the Social Security Contributions and Benefits Act 1992 s 44: 2004 Act Sch 28 para 2(5A). The Treasury may by regulations increase the percentage referred to in head (i) or (ii): Sch 28 para 2(5). For the meaning of 'scheme administrator' see PARA 873B.2 NOTE 4. For the meaning of 'pension scheme' see PARA 873B.1.

The Board of Inland Revenue may by regulations provide that if a scheme pension payable by an insurance company selected by the scheme administrator of a registered pension scheme ('the original scheme pension') ceases to be payable, and in consequence of the transfer of sums or assets (or both) from the insurance company to another insurance company in connection with the original scheme pension ceasing to be payable, another scheme pension becomes payable by the other insurance company ('the new scheme pension'), the new scheme pension is treated, to such extent as is prescribed by the regulations and for such of the purposes of Pt 4 (ss 149-284) (see PARA 873B.1 et seq, PARA 873B.6 et seq) as are so prescribed, as if it were the original scheme pension: Sch 28 para 2(6A) (added by 2005 Act Sch 10 para, 11). See the Registered Pension Schemes (Transfer of Sums and Assets) Regulations 2006 SI 2006/499.

If a pension falls outside head (1), or outside head (2) because a substantial reduction occurs in the rate of the pension, or if it is a pension which is reduced in accordance with the 2004 Act Sch 28 para 2(4)(a) or the rate of which is reduced in accordance with Sch 28 para 2(4)(b) and the reduction is part of avoidance arrangements, the pension scheme is treated as making an unauthorised payment to the member of the appropriate amount: Sch 28 para 2A(1), (2) (Sch 28 para 2A added by 2005 Act Sch 10 para 12; and amended by 2007 Act Sch 20 para 7). For this purpose, a substantial reduction occurs in the rate of a pension if the rate at which the pension is payable at any time during any relevant 12-month period is less than 80 per cent of the rate payable when the member became entitled to the pension; and 'avoidance arrangements' includes schemes, arrangements and understandings of any kind (whether or not legally enforceable) the main purpose, or one of the main purposes, of which is to increase the member's entitlement to a lump sum on which there is no liability to income tax: 2004 Act Sch 28 para 2A(3), (4). The 'appropriate amount', in relation to the pension, is the amount of any lump sum on which there is no liability to tax to which the member became entitled in connection with the pension: Sch 28 para 2A(5). Once Sch 28 para 2A has applied in relation to the pension, it does not apply in relation to it again; but such application does not prevent any payments of the pension themselves being unauthorised member payments: Sch 28 para 2A(6), (7). As to unauthorised payments, see PARA 873B.9.

7 Ibid s 165(1) (amended by Finance Act 2007 Sch 19 para 2).

8 2004 Act s 165(1). For the meaning of 'defined benefits arrangement' see NOTE 7.

9 Ibid s 165(1). See also NOTE 6.

10 'Unsecured pension year' means the period of 12 months beginning with the day on which the member first becomes entitled to unsecured pension in respect of the arrangement, and each succeeding period of 12 months; but when the member reaches the age of 75, or dies before reaching that age, the current unsecured pension year is the last unsecured pension year and ends immediately before the member's death or seventy-fifth birthday: ibid Sch 28 para 9.

11 The period of five unsecured pension years beginning with the first such year, and each succeeding period of five unsecured pension years, is a 'reference period'. However, if at any time during a reference period (the 'current reference period') the member notifies the scheme administrator that the member wishes a new reference period to begin on the next day that is an anniversary of the reference date in relation to the current reference period, the scheme administrator may determine that the current reference period is to end immediately before that day and that (subject to any further operation of this provision) the period of five unsecured pension years beginning with that day, and each succeeding period of five unsecured pension years, is to be a reference period. In each case, and the first day of each reference period is, in relation to that period, 'the reference date': ibid Sch 28 para 10(1), (1A)-(1C) (Sch 28 para 10(1) amended, Sch 28 para 10(1A)-(1C) added, by 2007 Act Sch 20 para 8(2)). For the first unsecured pension year falling within a reference period, the basis amount is the annual amount of the relevant annuity which could have been purchased by the application of the sums and assets representing the member's unsecured fund on the nominated date: 2004 Act Sch 28 para 10(2). In relation to the first reference period, the nominated date is the reference date, and in relation to any subsequent reference period, it is such day, within the period of 60 days ending with the reference date as is nominated by the scheme administrator (or, if no day is so nominated, the reference date): Sch 28 para 10(3). For each other unsecured pension year falling within a reference period, the basis amount is the annual amount of the relevant annuity which could have been purchased by the application of the sums and assets representing the member's unsecured pension fund (1) if there has been no recent annuity purchase, recent additional fund designation or recent pension sharing event, on the nominated date, and (2) otherwise immediately after the last annuity purchase, additional fund designation or pension sharing event: Sch 28 para 10(4) (amended by 2005 Act Sch 10 para 19). On the occasion of each additional fund designation during an unsecured pension year, the basis amount for that year is the annual amount of the relevant annuity which could have been purchased by the application of the sums and assets representing the member's unsecured pension fund immediately after the additional fund designation: 2004 Act Sch 28 para 10(5), (6). 'Annuity purchase' means the purchase of a scheme pension or a lifetime annuity by the application of sums or assets

representing the whole or part of the member's unsecured pension fund; 'the additional fund designation' is the designation under the arrangement of further sums or assets held for the purposes of the arrangement as available for the payment of an unsecured pension; and 'pension fund sharing event' means the coming into operation of a pension sharing order or provision relating to the sums and assets representing the member's unsecured pension fund: Sch 28 paras 10(7), (8), (8A), 24(8A) (Sch 28 paras 10(8A), 24(8A) added by 2005 Act Sch 10 para 19). In each case, it is 'recent' if it took place within the period beginning with the reference date and ending with the last day of the immediately preceding unsecured pension year: 2004 Act Sch 28 paras 10(9), 24(9) (amended by 2005 Act Sch 10 para 19).

A 'relevant annuity' is an annuity of a description prescribed by regulations made by the Board of Inland Revenue; and the annual amount of such an annuity is to be ascertained in accordance with such regulations: 2004 Act Sch 28 para 14(1), (2). Such regulations may in particular provide for the annual amount to be ascertained by reference to comparative annuity tables published by the Financial Services Authority, or to material published by any other person: Sch 28 para 14(3). As to the Board of Inland Revenue see PARA 873B.2 NOTE 1. As to the making of such regulations see PARA 873B.1 NOTE 2. See the Registered Pension Schemes (Relevant Annuities) Regulations 2006, SI 2006/129.

12 2004 Act s 165(1).

13 Ibid s 165(1). 'Alternatively secured pension' means income withdrawal; and a member's alternatively secured pension fund in respect of an arrangement consists of such of the sums and assets held for the purposes of the arrangement as (1)(a)(i) were part of his unsecured pension fund in respect of the arrangement when the member reached the age of 75, or (ii) arise, or are directly or indirectly derived from sums or assets within head (i) or which so arise or are so derived; (b)(i) became held for the purposes of the arrangement after the member had attained the age of 75 or arise, or are directly or indirectly derived, from sums or assets which became so held or which so arise or are so derived, or (ii) if the arrangement is a relevant arrangement, have at any time since the member reached that age been designated as available for the payment of alternatively secured pension to him or arise or are directly or indirectly derived from sums or assets which have been so designated or which so arise or are so derived; and (2) have not been subsequently applied towards the provision of a scheme pension: *ibid* Sch 28 paras 5, 11(1)-(3) (amended by 2005 Act Sch 10 para 20). A 'relevant arrangement' is an arrangement which became a money purchase arrangement after the member reached the age of 75 (having previously been a hybrid arrangement under which, in certain circumstances, defined benefits were payable): 2004 Act Sch 28 para 11(4). If any sums or assets representing the member's alternatively secured pension fund in respect of an arrangement under the pension scheme would (apart from this provision) come to be taken to represent another alternatively secured pension fund of his under the pension scheme, or a dependant's alternatively secured pension fund of his under the pension scheme, they are treated as not doing so: Sch 28 para 11(5) (added by 2005 Act Sch 10 para 20).

An arrangement is a 'money purchase arrangement' at any time if, at that time, all the benefits that may be provided to or in respect of the member under the arrangement are cash balance benefits or other money purchase benefits; it is a 'cash balance arrangement' at any time if, at that time, all the benefits that may be so provided are cash benefits; it is a 'defined benefits arrangement' at any time if, at that time, all the benefits that may be so provided are defined benefits; and it is a hybrid arrangement at any time if, at that time, all of the benefits that may be so provided are (depending on the circumstances) to be of one of any two or three of the following varieties: (a) cash balance benefits, (b) other money purchase benefits, and (c) defined benefits: s 152(2), (3), (6), (8). Where not all of the benefits that may be so provided are of the same one of those varieties of benefit, the arrangement is treated as being two or three separate arrangements, one of which relates to each of the two or three varieties of benefit that may be so provided: s 152(9). 'Money purchase benefits' means benefits the rate or amount of which is calculated by reference to an amount available for the provision of benefits to or in respect of the member (whether the amount so available is calculated by reference to payments made under the scheme by the member or any other person in respect of the member, or any other factor): s 152(4). 'Cash balance benefits' means benefits the rate or amount of which is calculated by reference to an amount available for the provision of benefits to or in respect of the member calculated otherwise than wholly by reference to payments made under the arrangement by the member or by any other person in respect of the member (or transfers or other credits): s 152(5). 'Defined benefits' means benefits which are not money purchase benefits, but which are calculated by reference to earnings or service of the member or any other factor other than an amount available for their provision: s 152(7). An annuity payable to the member is a lifetime annuity if (i) it is payable by an insurance company; (ii) the member had an opportunity to select the insurance company; (iii) it is payable until the member's death or until the later of the member's death and the end of a term certain not exceeding ten years; and (iv) its amount either cannot decrease or falls to be determined in any manner prescribed by regulations made by the Board of Inland Revenue: Sch 28 para 3(1) (amended by the 2005 Act Sch 10 para 13). An annuity is payable until the end of a term certain even if it may, after the death of the member during the term, end on the annuitant's marrying, entering into a civil partnership, reaching the age of 18 or ceasing to be in full-time education: 2004 Act Sch 28 para 3(2) (amended by SI 2007/493). See also NOTE 5. References to payments made, or benefits provided, by a pension scheme are to payments made or benefits provided from sums or assets held for the purposes of the scheme: s 279(2). For the meaning of 'payment' see PARA 873B.4 NOTE 1. An annuity does not fall outside head (iv) by reason of the operation of a pension sharing order or provision: Sch 28 para 3(2A) (added by 2005 Act Sch 10 para 13).

If at the time when the member reaches the age of 75, the scheme administrator has been unable to ascertain the member's whereabouts after having taken all reasonable steps to do so, and the 2004 Act Sch 28 para 8(2) applies in relation to the member and the arrangements, and none of the sums or assets held for the purposes of the arrangement are member-designated funds immediately before it applies, then the references in Sch 28 para 11(2), (3) to the time when the member reached the age of 75 are to be read as referring to the end of the period of six months beginning with any later date on which the member's whereabouts are subsequently ascertained by the scheme administrator: Sch 18 para 11(6), (7) (added by Finance Act 2007 Sch 19 para 11).

The Board of Inland Revenue may by regulations make provision in relation to cases in which a lifetime annuity payable by an insurance company ('the original lifetime annuity') ceases to be payable and in consequence of that (A) sums or assets (or both) are transferred from the insurance company to another insurance company and are applied towards the provision of either another lifetime annuity (a 'new lifetime annuity') or a scheme pension, short-term annuity dependants' scheme pension, dependants' annuity or dependants' short-term annuity by the other insurance company; or (B) sums or assets are transferred to the relevant registered pension scheme: 2004 Act Sch 28 para 3(2B) (Sch 28 para 2(2B)-(2D) added by 2005 Act Sch 10 para 13). Such regulations may provide that in a case where a new lifetime annuity becomes payable, that annuity is to be treated, to such extent as is prescribed by the regulations and for such of the purposes of the 2004 Act Pt 4 (ss 149-284) (see PARA 873B.1 et seq; PARA 873B.6 et seq) as are so prescribed, as if it were the original lifetime annuity; and in any other case, the relevant registered pension scheme is to be treated as making an unauthorised payment to the member of an amount equal to the aggregate of the amount of the sums, and the market value of the assets transferred: Sch 28 para 3(2C). A registered pension scheme is the relevant registered pension scheme for this purpose if the original lifetime annuity was acquired using sums or assets held for the purposes of that scheme: 2004 Act Sch 28 para 3(2D). For the meaning of 'market value' see PARA 873B.3 NOTE 4. See SI 2006/499; SI 2006/568; and NOTE 5.

14 'Alternatively secured pension year' means the period of 12 months beginning with the day on which the member first becomes entitled to alternatively secured pension in respect of the arrangement, and each succeeding period of 12 months; but when the member dies, the current alternatively secured pension year is the last alternatively secured pension year and ends immediately before the member's death: 2004 Act Sch 28 para 12(1), (2).

15 For the first alternatively secured pension year, the basis amount is the annual amount of the relevant annuity which could have been purchased by the application of the sums and assets representing the member's alternatively secured pension fund on the date on which the member first became entitled to alternatively secured pension in respect of the arrangement: *ibid* Sch 28 para 13(1). For each other alternatively secured pension year, the basis amount is the annual amount of the relevant annuity which could have been purchased by the application of the sums and assets representing the member's alternatively secured pension fund on the nominated date, ie such day within the period of 60 days ending with the first day of the alternatively secured pension year as is nominated by the scheme administrator (or, if no date is so nominated, the first day of that year): Sch 28 para 13(2), (3).

16 *Ibid* s 165(1) (amended by 2007 Act Sch 19 para 2).

## **6. Authorised member payments by registered pension schemes: the pension death benefit rules**

The pension death benefit<sup>1</sup> rules are that:

- 2176 (1) no payment of pension death benefit may be made otherwise than to a dependant<sup>2</sup> of the member<sup>3</sup>;
- 2177 (2) no payment of pension death benefit other than a dependants' scheme pension<sup>4</sup> may be made in respect of a defined benefits arrangement<sup>5</sup>;
- 2178 (3) if a dependant has not reached the age of 75, no payment of pension death benefit to the dependant other than a dependants' scheme pension, a dependants' annuity<sup>6</sup>, or a dependants' unsecured pension<sup>7</sup> may be made to the dependant in respect of a money purchase arrangement, but a dependants' scheme pension may only be paid if the member of dependant had an opportunity to select a dependants' annuity instead<sup>8</sup>;
- 2179 (4) the total amount of a dependants' unsecured pension paid to a dependant in each unsecured pension year<sup>9</sup> in respect of a money purchase arrangement must not exceed 120 per cent of the basis amount<sup>10</sup> for the unsecured pension year<sup>11</sup>;
- 2180 (5) if a dependant has reached the age of 75, no payment of pension other than a dependants' scheme pension, a dependants' annuity or dependants'

alternatively secured pension<sup>12</sup> may be made to the dependant in respect of a money purchase arrangement, but a dependants' scheme pension may only be paid if the member or dependant had an opportunity to select a dependants' annuity instead<sup>13</sup>;

- 2181 (6) the total amount of dependants' alternatively secured pension paid to a dependant in each alternatively secured pension year<sup>14</sup> in respect of a money purchase arrangement must not exceed 90 per cent of the basis amount<sup>15</sup> for that year<sup>16</sup>.

Where

- 2182 (a) the member dies before 6 April 2006;  
 2183 (b) he has reached the age of 75; and  
 2184 (c) at the time of his death he is actually or prospectively entitled to one or more scheme pensions<sup>17</sup> under the pension scheme, then

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257. (i) where a pension is payable under the scheme to a dependant of the member in the period of 12 months beginning with the date of the member's death ('the-death year'), so much of the pension as exceeds the initial member pension limit<sup>18</sup> is not a dependants' scheme pension<sup>19</sup>;  
 258. (ii) where a pension is payable under the scheme to a dependant of the member, otherwise than in excepted circumstances<sup>20</sup>, in the period of 12 months beginning with the end of the-death year or in any succeeding period of 12 months ('the 12 months in question'), so much of the pension as exceeds the current member pension limit<sup>21</sup> is not a dependants' scheme pension<sup>22</sup>.

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1 'Pension death benefit' means a pension payable on the death of the member (other than a member's pension payable after his death under PARA 873B.5 head (2)): Finance Act 2004 s 167(2) (amended by the Finance Act 2007 Sch 20 para 22). For the meaning of 'pension' see PARA 873B.4 NOTE 4.

2 A 'dependant' of a member is (1) a person who was married to, or was a civil partner of, the member at the date of the member's death; (2) a child of the member who has not reached the age of 23, or an older child of the member who, in the opinion of the scheme administrator, was at the date of the member's death dependent on him because of physical or mental impairment; or (3) a person not falling within head (1) or (2) but who, at the date of the member's death, in the opinion of the scheme administrator (a) is financially dependent on the member, (b) has a financial relationship with the member which is one of mutual dependence, or (c) was dependent on the member because of physical or mental impairment: 2004 Act s 167(3), Sch 28 para 15 (amended by SI 2005/3229). If the rules of the scheme so provide, a person who was married to, or was a civil partner of, the member when he first became entitled to a pension under the scheme is a dependant of that member: 2004 Act Sch 28 para 15(1A) (added by the Finance Act 2005 Sch 10 para 26; and amended by SI 2005/3229). For the meaning of 'scheme administrator' see PARA 873B.2 NOTE 4.

3 2004 Act s 167(1). For the meaning of 'member' see PARA 873B.4 NOTE 3.

4 A pension payable to a dependant is a dependants' scheme pension if it is payable by the scheme administrator or an insurance company selected by the scheme administrator: *ibid* Sch 28 para 16(2) (amended by 2005 Act Sch 10 para 27). The Board of Inland Revenue may by regulations make provision in relation to cases in which a dependants' scheme pension payable to a dependant of a member of a registered pension scheme by an insurance company ('the original dependants' scheme pension') ceases to be payable and, in consequence, sums or assets (or both) are transferred from the insurance company to another insurance company and are applied towards the provision of either another dependants' scheme pension (a 'new dependants' scheme pension') or a scheme pension, lifetime annuity, short-term annuity, dependants' annuity or dependants' short-term annuity by the other insurance company; or sums or assets are transferred to the relevant registered pension scheme: 2004 Act Sch 28 para 16(2A) (Sch 28 para 16(2A)-(2C) added by 2005 Act Sch 10 para 27). Such regulations may provide that in a case where a new dependants' scheme pension becomes payable, that pension is to be treated, to such extent as is prescribed by the regulations and for such of the purposes of the 2004 Act Pt 4 (ss 149-284) (see PARA 873B.1 *et seq*, PARA 873B.7 *et seq*) as are so prescribed as it were the original dependants' scheme pension; and in any other case, the relevant registered pension scheme is to be treated as making an unauthorised payment in respect of the member of an amount

equal to the aggregate of the amount of the sums and the market value of the assets transferred: Sch 28 para 16(2B). A registered pension scheme is the relevant registered pension scheme for this purpose if the original dependants' scheme pension was acquired using sums or assets held for the purposes of that scheme: Sch 28 para 16(2C).

For the meaning of 'state retirement pension' see PARA 873B.5 NOTE 6; for the meaning of 'pension scheme' see PARA 873B.1; and for the meaning of 'insurance company' see PARA 873B.2 NOTE 8.

5 Ibid s 167(1). For the meaning of 'defined benefits arrangement' see PARA 873B.5 NOTE 13.

6 An annuity payable to a dependant is a dependants' annuity if (1) it is payable by an insurance company; (2) the member or dependant had an opportunity to select the insurance company; (3) its amount either cannot decrease or falls to be determined in any manner prescribed by regulations made by the Board of Inland Revenue; (4) where the dependant is not the member's child, it is payable until the earlier of the dependant's death or until the earlier of the dependant's marrying or dying; (5) where the dependant is the member's child, it is payable until the earlier of the dependant's ceasing to be a dependant or dying, or until the earliest of the dependant's marrying, entering into a civil partnership, ceasing to be a dependant, or dying; and (6) it is purchased either together with a lifetime annuity payable to the member or after the member's death: *ibid* Sch 28 para 17(1) (amended by 2005 Act Sch 10 para 15, 29; and SI 2007/493). A dependants' annuity is for the purpose purchased together with a lifetime annuity if the dependant's annuity is related to the lifetime annuity: 2004 Act Sch 28 para 17(1A) (added by the 2005 Act Sch 10 para 29). An annuity does not fail to satisfy head (3) by reason of the operation of a pension sharing order or provision: 2004 Act Sch 28 para 17(1A) (added by 2005 Act Sch 10 para 15). For the meaning of 'pension sharing order or provision' see PARA 873B.4 NOTE 7. The Board of Inland Revenue may by regulations make provision in relation to cases in which a dependants' annuity payable to a person ('the original dependants' annuity') ceases to be payable and in consequence of that (a) sums or assets (or both) are transferred from the insurance company to another insurance company and are applied towards the provision of either another dependants' annuity (a 'new dependants' annuity') or a scheme pension, lifetime annuity, short-term annuity, dependants' scheme pension, or dependants' short-term annuity by the other insurance company; or (b) sums or assets are transferred to the relevant registered pension scheme: 2004 Act Sch 28 para 17(3) (Sch 28 para 17(3)-(5) added by 2005 Act Sch 10 para 15). Such regulations may provide that (i) in a case where a new dependants' annuity becomes payable, that annuity is to be treated, to such extent as is prescribed by the regulations and for such of the purposes of the 2004 Act Pt 4 as are so prescribed, as if it were the original dependants' annuity; and (ii) in any other case, the relevant registered pension scheme is to be treated as making an unauthorised payment to the member of an amount equal to the aggregate of the amount of the sums, and the market value of the assets transferred: Sch 28 para 17(4). A registered pension scheme is the relevant registered pension scheme for this purpose if the original dependants' annuity was acquired using sums or assets held for the purposes of that scheme: 2004 Act Sch 28 para 17(5). For the meaning of 'market value', see PARA 873B.3 NOTE 4. See the Registered Pension Schemes (Transfer of Sums and Assets) Regulations 2006, SI 2006/499 (see PARA 873B.4); and the Registered Pension Schemes (Prescribed Manner of Determining Amount of Annuities) Regulations 2006, SI 2006/568 (see PARA 873B.5).

7 'Dependants' unsecured pension' means a dependants' short-term annuity or a dependants' income withdrawal: 2004 Act Sch 28 para 18. An annuity payable to a dependant is a dependants' short-term annuity if (1) it is purchased by the application of sums or assets representing the whole or any part of the dependant's unsecured pension fund in respect of an arrangement; (2) it is payable by an insurance company; (3) the dependant had an opportunity to select the insurance company; (4) it is payable for a term which does not exceed five years and ends before the dependant reaches the age of 75 or dies; and (5) its amount either cannot decrease or falls to be determined in any manner prescribed by regulations made by the Board of Inland Revenue: Sch 28 para 20(1) (amended by the 2005 Act Sch 10 para 16). An annuity does not fail to satisfy head (5) by reason of the operation of a pension sharing order or provision: 2004 Act Sch 28 para 20(1A) (added by 2005 Act Sch 10 para 16). Such regulations may be made in accordance with powers similar to those relating to dependants' annuities (see NOTE 6): Sch 28 para 20(1B)-(1D) (added by 2005 Act Sch 10 para 16). See SI 2006/499; and NOTE 6. 'Dependants' income withdrawal' means (a) if the dependant has not reached the age of 75, an amount (other than an annuity) which the dependant is entitled to be paid from the dependant's unsecured pension fund in respect of an arrangement; and (b) if the dependant has reached the age of 75, an amount which he is entitled to be paid from the dependant's alternatively secured pension fund (see NOTE 12) in respect of an arrangement: 2004 Act Sch 28 para 21. A dependant's unsecured pension fund in respect of an arrangement consists of such of the sums and assets held for the purposes of the arrangement (i) as are dependant-designated funds and (ii) have not been applied towards the provision of a dependants' scheme pension: Sch 28 para 22(1) (amended by 2005 Act Sch 10 para 21). For the meaning of 'arrangement' see PARA 873B.5 NOTE 5; and for the meaning of 'held for the purposes of an arrangement' see PARA 873B.5 NOTE 5. Sums or assets held for the purposes of an arrangement are dependant-designated funds if they have been designated at any time under the arrangement as available for the payment of dependant's unsecured pensions to the dependant; or arise or are directly or indirectly derived from sums or assets which have been so designated or which so arise or are so derived: 2004 Act Sch 28 para (2) (Sch 28 para 22(2), (3) added by 2005 Act Sch 10 para 21). If any sums or assets representing a dependant's unsecured pension fund in respect of an arrangement under the pension scheme would (apart from this provision) come to be taken to represent another dependant's unsecured pension fund of his under the scheme, or an unsecured pension fund of his

under the scheme, or are applied towards the provision of a scheme pension or a lifetime annuity, they are treated as not doing so: Sch 28 para 22(3).

8 Ibid s 167(1). For the meaning of 'money purchase arrangement' see PARA 873B.5 NOTE 13.

9 'Unsecured pension year' means the period of 12 months beginning with the day on which the dependant becomes entitled to dependants' unsecured pension in respect of the arrangement, and each succeeding period of 12 months: ibid Sch 28 para 23(1). However, when the dependant reaches the age of 75 or dies before reaching that age, the current unsecured pension year is the last unsecured pension year and ends immediately before the dependant's death or seventy-fifth birthday: Sch 28 para 23(2).

10 The period of five unsecured pension years beginning with the first such year, and each succeeding period of five unsecured pension years, is a 'reference period'. However, if at any time during a reference period (the 'current reference period'), the dependant notifies the scheme administrator that the dependant wishes a new reference period to begin on the next day that is an anniversary of the reference date in relation to the current reference period, the scheme administrator may determine that the current reference period is to end immediately before that date and that (subject to any further operation of this provision) the period of five unsecured pension years beginning with that day, and each succeeding period of five unsecured pension years, is to be a reference period. In each case, the first day of each reference period is, in relation to that period, 'the reference date': ibid Sch 28 para 24(1), (1A)-(1C) (Sch 28 para 24(1) amended, Sch 28 para 24(1A)-(1C) added, by 2007 Act Sch 20 para 8(3)). For the first unsecured pension year falling within a reference period, the basis amount is the annual amount of the relevant annuity which could have been purchased by the application of the sums and assets representing the dependant's unsecured fund on the nominated date: 2004 Act Sch 28 para 24(2). In relation to the first reference period, the nominated date is the reference date, and in relation to any subsequent reference period, it is such day, within the period of 60 days ending with the reference date as is nominated by the scheme administrator (or, if no day is so nominated, the reference date): Sch 28 para 24(3). For each other unsecured pension year falling within a reference period, the basis amount is the annual amount of the relevant annuity which could have been purchased by the application of the sums and assets representing the dependant's unsecured pension fund (1) if there has been no recent annuity purchase, recent additional fund designation or recent pension sharing event, on the nominated date, and (2) otherwise immediately after the last annuity purchase, additional fund designation or pension sharing event: Sch 28 para 24(4) (amended by the 2005 Act Sch 10 para 22). On the occasion of each additional fund designation during an unsecured pension year, the basis amount for that year is the annual amount of the relevant annuity which could have been purchased by the application of the sums and assets representing the dependant's unsecured pension fund immediately after the additional fund designation: 2004 Act Sch 28 para 24(5), (6). 'Annuity purchase' means the purchase of a dependants' scheme pension or a dependants' annuity by the application of sums or assets representing the whole or part of the dependant's unsecured pension fund; and 'additional fund designation' is the designation under the arrangement of further sums or assets held for the purposes of the arrangement as available for the payment of unsecured dependants' pension to the dependant: Sch 28 para 24(7), (8). For the meaning of 'recent', 'pension sharing event' and 'relevant annuity' see PARA 873B.5 NOTE 11.

11 Ibid s 167(1).

12 'Dependants' alternatively secured pension' means dependants' income withdrawal (see NOTE 7): ibid Sch 28 para 19. A dependant's alternatively secured pension fund in respect of an arrangement consists of such of the sums and assets held for the purposes of the arrangement as (1)(a)(i) were part of the dependant's unsecured pension fund in respect of the arrangement when the dependant reached the age of 75, or (ii) arise, or are directly or indirectly derived, from sums or assets within head (i) or which so arise or are so derived; (b) have at any time since the dependant reached that age been designated as available for the payment of alternatively secured dependants' pension to the dependant, or arise or are directly or indirectly derived from sums or assets which have been so designated or which so arise or are so derived; and (2) have not been subsequently applied for purchasing a dependants' scheme pension or a dependants' annuity or paid as dependants' income withdrawal: Sch 28 para 25(1)-(3) (amended by 2005 Sch 10 para 23). If any sums or assets representing a dependant's alternatively secured pension fund in respect of an arrangement under the pension scheme would (apart from this provision) come to be taken to represent another dependant's alternatively secured pension fund of his under the scheme, or an alternatively secured pension fund of his under the scheme, they are treated as not doing so: 2004 Act Sch 28 para 28(4) (added by the 2005 Act Sch 10 para 23).

13 2004 Act s 167(1).

14 'Alternatively secured pension year' means the period of 12 months beginning with the day on which the dependant first becomes entitled to alternatively secured pension in respect of the arrangement, and each succeeding period of 12 months; but when the dependant dies, the current alternatively secured pension year is the last alternatively secured pension year and ends immediately before the dependant's death: ibid Sch 28 para 26(1).

15 For the first alternatively secured pension year, the basis amount is the annual amount of the relevant annuity which could have been purchased by the application of the sums and assets representing the dependant's alternatively secured pension fund on the date on which the dependant first became entitled to dependants' alternatively secured pension in respect of the arrangement: *ibid* Sch 28 para 27(1). For each other alternatively secured pension year, the basis amount is the annual amount of the relevant annuity which could have been purchased by the application of the sums and assets representing the dependant's alternatively secured pension fund on the nominated date, ie such day within the period of 60 days ending with the first day of the alternatively secured pension year as is nominated by the scheme administrator (or, if no date is so nominated, the first day of that year): Sch 28 para 27(2), (3).

16 *Ibid* s 167(1) (amended by 2007 Act Sch 19 para, 3).

17 References in the 2004 Act Sch 28 paras 16A, 16B to a scheme pension include a pension payable before 6 April 2006 which would be a scheme pension if payable after that date: Sch 28 para 16A(2) (Sch 28 paras 16A-16C added by 2005 Act Sch 10 para 28).

18 The 'initial member pension limit' is the sum of (1) the aggregate of the amounts of the scheme pensions to which the member is actually entitled under the pension scheme immediately before his death payable to the member in the period of 12 months ending with the date of his death ('the pre-death year'); (2) the aggregate of the amounts of the scheme pensions to which the member is prospectively entitled under the pension scheme at that time which would have been so payable if he had been actually entitled to them throughout the pre-death year; and (3) 5 per cent of the aggregate of the amounts of the lump sums on which there is no liability to income tax to which the member has become entitled in connection with scheme pensions under the pension scheme before his death: 2004 Act Sch 28 para 16B(3). However, if the member became actually entitled to a scheme pension under the pension scheme during the pre-death year, head (1) has effect as if the amount of that pension which was payable to him under the scheme in that year were the amount which would have been so payable in the period of 12 months beginning with the date on which he became entitled to it had he not died: Sch 28 para 16B(4).

19 *Ibid* Sch 28 paras 16A(1), 16B(1). However, if more than one pension is so payable to one of the dependants of the member in the death year, or pensions are so payable to more than one dependant of the member in that year (or both), so much of any of the pensions as exceeds the appropriate proportion of the initial member pension limit is not a dependants' scheme pension: Sch 28 para 16B(2). The 'appropriate proportion' of the initial member pension limit, in relation to any pension payable under the scheme to a dependant of the member in the death year is:

$$\frac{P}{AP}$$

where P is the amount of that pension so payable and AP is the aggregate of the amounts of each of the pensions payable under the scheme to dependants of the member in that year: Sch 28 para 16B(5).

20 'Excepted circumstances' means that at the beginning of the period of 12 months in question there are at least 50 pensioner members of the pension scheme and (1) that the difference between CYP and PYP in the case of each relevant existing pension is the same amount; (2) the difference between CYP and PYP in the case of each relevant existing pension is the same percentage of PYP, or (3) in the case of each relevant existing pension the difference between CYP and PYP is the aggregate of a percentage of PYP and an amount which are both the same as those the aggregate of which make up that difference in the case of each other relevant existing pension: *ibid* Sch 28 para 16C(3), (4). 'Relevant existing pension' means a pension payable to any dependant of any member under the pension scheme throughout the 12 months in question and the immediately preceding period of 12 months; 'CYP' in relation to a relevant existing pension, is the current year pension, that is the amount of the pension payable in the 12 months in question; and 'PYP', in relation to a relevant existing pension, is the previous year pension, that is the amount of the pension payable in the immediately-preceding period of 12 months: Sch 28 para 16C(5). For the meaning of 'pensioner member', see PARA 873B.4 NOTE 1.

21 The 'current member pension limit', in relation to the 12-month period in question, is the initial member pension limit, increased by the aggregate of the permitted margin and the excepted circumstances amount: *ibid* Sch 28 para 16C(6).

The 'permitted margin' is the amount by which the initial member pension limit would be greater if it had been increased by whichever of calculation A and calculation B gives the greater amount: Sch 28 para 16C(7). Calculation A involves increasing the initial member pension limit by the relevant annual percentage rate for the whole of the period beginning with the first month beginning after the end of the death year ('the opening month') and ending with the first month of the 12 months in question ('the closing month'): Sch 28 para 16C(8). Calculation B involves increasing the initial member pension limit by the relevant indexation percentage: Sch 28 para 16C(10). The 'relevant annual percentage rate' is (1) if the relevant valuation factor in relation to the pension scheme is a number greater than 20, the annual rate agreed by the Inland Revenue and the scheme

administrator, and (2) otherwise, 5 per cent per annum: Sch 28 para 16C(9). For the meaning of 'relevant valuation factor', see PARA 873B.11. If the retail prices index for the closing month is higher than it was in the opening month, the relevant indexation percentage is the percentage increase in that index; and if it is not, the relevant indexation percentage is 0 per cent: Sch 28 para 16C(11), (12). For the meaning of 'retail prices index', see PARA 873B.16 NOTE 9.

The 'excepted circumstances amount' is the aggregate of the amounts of the relevant increases in pensions which were payable under the pension scheme to dependants of the member in excepted circumstances in any period or periods within head (b)(ii) of the text: Sch 28 para 16C(13). The relevant increase in the case of any pension payable in relation to any 12-month period under the pension scheme to a dependant of the member is the difference between CYP and PYP (see NOTE 20), but for this purpose reading the references to the 12 months in question as references to the 12-month period): Sch 28 para 16C(14).

22 Ibid Sch 28 paras 16A(1), 16C(1) However, if (1) more than one pension is so payable to one of the dependants in the 12 months in question, or (2) pensions are so payable to more than one dependant of the member in that period (or both), so much of any of the pensions as exceeds the appropriate portion of the current member pension limit is not a dependants' scheme pension: Sch 28 para 16C(2). The 'appropriate proportion' of the current member pension limit, in relation to any pension payable under the scheme to a dependant of the member in the 12 months in question is

$$\frac{P}{AP}$$

where P is the amount of that pension so payable and AP is the aggregate of the amounts of each of the pensions payable under the scheme to dependants of the member in the 12 months in question: Sch 28 para 16C(15).

## **7. Authorised member payments by registered pension schemes: the lump sum rule**

No lump sum may be paid other than (1) a pension commencement lump sum<sup>1</sup>; (2) a serious ill-health lump sum<sup>2</sup>; (3) a short service refund lump sum<sup>2</sup>; (4) a refund of excess contributions lump sum<sup>3</sup>; (5) a trivial commutation lump sum<sup>4</sup>; (6) a winding-up lump sum<sup>5</sup>; or (7) a lifetime allowance excess lump sum<sup>6</sup>. Each of these is referred to as an 'authorised lump sum'<sup>7</sup>.

A lump sum is a pension commencement lump sum if:

- 2185 (a) the member becomes entitled to it before reaching the age of 75;
- 2186 (b) the member becomes entitled to it in connection with his becoming entitled to a relevant pension<sup>8</sup> (or dies after becoming entitled to it but before becoming entitled to the relevant pension in connection with which it was expected that the member would become entitled to it);
- 2187 (c) it is paid when all or part of the member's lifetime allowance is available;
- 2188 (d) it is paid within the period beginning six months before and ending one year after the day on which the member becomes entitled<sup>9</sup> to it;
- 2189 (e) it is paid when the member has reached normal minimum pension age or the ill-health condition is satisfied<sup>10</sup>; and
- 2190 (f) it is not an excluded lump sum<sup>11</sup>.

Where all or part of a member's lifetime allowance is available immediately before a lump sum is paid and the amount of that lump sum exceeds his available lifetime allowance, but would otherwise be a pension commencement lump sum, a serious ill-health lump sum, a trivial commutation lump sum or a winding-up lump sum<sup>12</sup>, then the whole of the lump sum (and not only so much of it as does not as does not exceed the member's available lifetime allowance) is treated as paid when all or part of the member's lifetime allowance is available<sup>13</sup>.

If, because of the payment to a member of a pension commencement lump sum, the amount of the contributions paid by, or on behalf of, or in respect of, the member to the pension scheme or to any other registered pension scheme, is significantly greater than it otherwise would be,

and the member envisaged at the relevant time that that would be so, the pension scheme is treated as making to the member an unauthorised payment of the appropriate amount<sup>14</sup>.

1 A lump sum is a serious ill-health lump sum if (1) before it is paid the scheme administrator has received evidence from a registered medical practitioner that the member is expected to live for less than one year; (2) it is paid when all or part of the member's lifetime allowance is available; (3) it is paid in respect of an uncrystallised arrangement; (4) it extinguishes the member's entitlement to benefits under the arrangement; and (5) it is paid when the member has not reached the age of 75: Finance Act 2004 s 166, Sch 29 para 4(1). An 'uncrystallised arrangement' is an arrangement in respect of which there has been no previous benefit crystallisation event (see PARA 873B.16): Sch 29 para 4(2). For the meaning of 'member' see PARA 873B.4 NOTE 3; for the meaning of 'scheme administrator' see PARA 873B.2 NOTE 4; and for the meaning of 'arrangement' see PARA 873B.5 NOTE 5. As to the member's lifetime allowance see PARA 873B.15.

2 A lump sum is a short service refund lump sum if (1) the pension scheme is an occupational pension scheme; (2) the member's pensionable service was terminated before normal pension age but the member is not entitled to short service benefit by virtue of the Pension Schemes Act 1993 s 71; (3) there has been no previous benefit crystallisation event in relation to the member and the pension scheme; (4) it extinguishes the member's entitlement to benefits under the pension scheme (except to the extent that it is prohibited from being extinguished by the payment of a lump sum by reason of the operation of provisions made by or under any enactment); and (5) it is paid when the member has not reached the age of 75: 2004 Act Sch 29 para 5(1) (amended by Finance Act 2006 Sch 23 para 27). However, if a lump sum falling within head (1) exceeds an amount equal to the aggregate of the member's contributions under the pension scheme, the excess is not a short service refund lump sum: 2004 Act Sch 29 para 5(2). 'Pensionable service', 'normal pension age' and 'short service benefit' have the same meaning as in the 1993 Act s 181(1): 2004 Act Sch 29 para 5(3). For the meaning of 'occupational pension scheme' see PARA 873B.2 NOTE 7. As to the charge to tax in respect of short service refund lump sums see PARA 873B.21.

3 A lump sum is a refund of excess contributions lump sum if (1) it is paid in respect of a tax year in which the excess contributions condition is met in respect of the member; and (2) it is paid before the end of the period of six years beginning with the last day of the tax year in respect of which it is paid; but if such a lump sum exceeds the member's available excess contributions allowance for the tax year in respect of which it is paid, that excess is not a refund of excess contributions lump sum: *ibid* Sch 29 para 6(1), (2). The excess contributions condition is met in respect of a member and a tax year if the amount of relivable contributions (see s 188(2), (3) and PARA 873B.12) paid in respect of the member in the tax year exceeds the maximum amount of relief to which the member is entitled for the tax year under s 190 (see PARA 873B.12): Sch 29 para 6(3). If no refund of excess contributions lump sum has been paid to the member in respect of a tax year by any registered pension scheme, the available excess contributions allowance for that year is:

$$RPC - MAR$$

and if one or more such sums has or have been paid to him in respect of a tax year, the available excess contributions allowance for the year concerned is:

$$RPC - MAR - ALS$$

where RPC is the amount of the relivable pension contributions paid in respect of the member in the tax year; MAR is the maximum amount of relief to which the member is entitled for the tax year under s 190; and ALS is the aggregate of any refunds of excess contributions lump sums previously paid to the member in respect of the tax year; and if any relief given in accordance with s 192(1) (see PARA 873B.12) in relation to any contribution included in RPC is in excess of the maximum amount of relief to which the member is entitled under s 190 (see PARA 873B.12), RPC is taken to be reduced by the amount of that excess: Sch 29 para 6(4)-(7) (Sch 29 para 6(7) added by the 2006 Act Sch 23 para 28). 'Tax year' means, in relation to income tax, a year for which any Act provides for income tax to be charged: 2004 Act s 279(1).

4 A lump sum is a trivial commutation lump sum if (1) it is paid when no trivial commutation lump sum has previously been paid to the member (by any registered pension scheme) or, if such a lump sum has previously been paid, before the end of the commutation period; (2) on the nominated date, the value of the member's pension rights does not exceed the commutation limit; (3) it is paid when all or part of the member's lifetime allowance is available; (4) it extinguishes the member's entitlement to benefits under the pension scheme; and (5) it is paid when the member has reached the age of 60 but has not reached the age of 75: *ibid* Sch 29 para 7(1). The 'commutation period' is the period beginning with the day on which a trivial commutation lump sum is first paid to the member and ending 12 months after that day; and the 'commutation limit' is 1 per cent of the standard lifetime allowance (see PARA 873B.15) on the nominated date: Sch 29 para 7(2), (4). The 'nominated date' is the day within the period of three months ending with the first day of the commutation period which is nominated by the member (or, if no date is nominated, the first day of the commutation period); and the value of the member's pension rights on the nominated date is the aggregate of the value on that date of his relevant crystallised pension rights and his uncrystallised rights: Sch 29 paras 7(3), (5). The value of the member's

relevant crystallised pension rights is the aggregate of (a) the value of those rights on 5 April 2006, calculated in accordance with Sch 36 para 10 as if the member were the individual therein mentioned, as adjusted, and (b) the aggregate of the amounts crystallised on benefit crystallisation events in the period beginning with 6 April 2006 and ending with the nominated date, as adjusted: Sch 29 para 8(1). The adjustment referred to in head (a) is the multiplication of the value of the member's relevant crystallised pension rights on 5 April 2006 by:

$$\frac{SLAN}{FSLA}$$

where SLAN is the standard lifetime allowance on the nominated date; and FSLA is £1,500,000 (the standard lifetime allowance for the tax year 2006-07): Sch 29 para 8(2). The adjustment referred to in head (b) is the multiplication of the amount crystallised by a previous benefit crystallisation event by:

$$\frac{SLAN}{PSLA}$$

where SLAN has the meaning given above, and PSLA is the standard lifetime allowance when the previous benefit crystallisation event occurred: Sch 29 para 8(3).

The value of the member's uncrystallised rights on the nominated date is the aggregate value on that date of his uncrystallised rights under each arrangement relating to him under a registered pension scheme; and the value of such rights under each such arrangement is to be calculated in accordance with s 212 (see PARA 873B.21): Sch 29 para 9. As to benefit crystallisation events see PARA 873B.16. The 'tax year 2006-07' means the tax year beginning on 6 April 2006 (and any corresponding expression in which two years are simultaneously mentioned is to be read in the same way): s 279(1).

5 A lump sum is a winding-up lump sum if (1) the pension scheme is 'an occupational pension scheme; (2) the pension scheme is being wound up; (3) it is paid when all or part of the member's lifetime allowance is available; (4) it extinguishes the member's entitlement to benefits under the pension scheme; (5) it is paid when the member has not reached the age of 75; and (6) any person by whom the member is employed at the time the lump sum is paid, and who has made contributions under the pension scheme in respect of the member within the period of five years ending with the day on which it is paid (a) is not making contributions under any other registered pension scheme in respect of the member, and (b) undertakes to the Inland Revenue not to make such contributions during the period of one year beginning with the day on which the lump sum is paid: ibid Sch 29 para 10(1), (3) (Sch 29 para 10(1), (3) amended by Finance Act 2007 Sch 20 para 12). For the meaning of 'employer' see PARA 873B.2 NOTE 7; for the meaning of 'contribution' see PARA 873B.12; and for the meaning of 'Inland Revenue' see PARA 873B.2 NOTE 1. If a lump sum falling within head (1) exceeds 1 per cent of the standard lifetime allowance when the lump sum is paid, the excess is not a winding-up lump sum: 2004 Act Sch 29 para 10(2).

6 Ibid s 166(1). A lump sum is a lifetime allowance excess lump sum if (1) it is paid when none of the member's lifetime allowance is available; (2) it is not a short service refund lump sum or a refund of excess contributions lump sum; (3) it does not reduce the rate of payment of any pension to which the member has become (actually) entitled, or extinguish his entitlement to payment of any such pension; (4) it is paid when the member has reached normal minimum pension age (or the ill-health condition is met); and (5) it is paid when the member has not reached the age of 75: Sch 29 para 11.

7 Ibid Sch 29 para 12(6). Where, by virtue of Sch 29 para 1(2), or Sch 29 para 5(2), 6(2) or 10(2), an excess is not an authorised lump sum of one description, that does not prevent the excess from being an authorised lump sum of another description: Sch 29 para 12(5).

8 A pension is a relevant pension if it is income withdrawal, a lifetime annuity, or a scheme pension, and the member becomes entitled to it otherwise than by virtue of the operation of ibid Sch 28 para 8(2) (see PARA 873B.5), under the pension scheme: Sch 29 para 1(3) (amended by the 2005 Act Sch 10 para 34). For the meaning of 'pension' see PARA 873B.4 NOTE 4; for the meaning of 'income withdrawal' see PARA 873B.4 NOTE 4; and for the meaning of 'lifetime annuity' and 'scheme pension' see PARA 873B.5 NOTE 13. However, if a lump sum falling within heads (a)-(f) in the text exceeds the permitted maximum, the excess is not a pension commencement lump sum: 2004 Act Sch 29 para 1(2). If all the member's rights under the arrangement under which he becomes entitled to the relevant pension are attributable to a disqualifying pension credit, the permitted maximum is nil; and a pension credit is disqualifying if, when the member becomes entitled to it, the person subject to the corresponding pension debit has an actual (rather than a prospective) right to payment of a pension under the arrangement to which the pension sharing order or provision, by virtue of which the member becomes entitled to the pension credit, relates ('the relevant arrangement'): Sch 29 para 2(1)-(4). 'Pension credit' and 'pension debit' have the same meaning as in the Welfare Reform and Pensions Act 1999 s 46(1) or corresponding Northern Ireland legislation: 2004 Act ss 279(1), 280(1); and for the meaning of 'pension sharing order or provision' see PARA 873B.4 NOTE 7.

In any other case, the permitted maximum is the lower of (a) the available portion of the member's lump sum allowance; and (b) the applicable amount; but if the member dies before becoming entitled to the relevant pension in connection with which it was expected that the member would become entitled to the lump sum, the permitted maximum is the available portion of the member's lump sum allowance: Sch 29 para 2(5), (5A) (Sch 29 para 2(5A) added by the 2007 Act Sch 20 para 11(4)). The available portion of the member's lump sum allowance is:

$$\frac{CSLA - AAC}{4}$$

where CSLA is the current standard lifetime allowance, and AAC is the aggregate of the relevant amount in the case of each benefit crystallisation event which has occurred in relation to the member before he becomes entitled to the lump sum, as adjusted (and if no such event has occurred, is nil). The adjustment is the multiplication of the relevant amount in the case of a previous benefit crystallisation event by the fraction:

$$\frac{CSLA}{PSLA}$$

where CSLA has the meaning given above, and PSLA is the standard lifetime allowance at the time of the previous benefit crystallisation event: Sch 29 para 2(6), (7) (amended by the 2006 Act Sch 23 para 23(2), (4)). If the above calculations produce a negative amount, the permitted maximum is nil: 2004 Act Sch 29 para 2(8). The 'relevant amount' in the case of a benefit crystallisation event is the amount crystallised by it. If the event is becoming entitled to a scheme pension under a money purchase arrangement, the relevant amount is the aggregate of the amount of such of the sums held for the purposes of the scheme and the market value of such of the assets so held as are applied in (or in connection with) the purchase or provision of the scheme pension and any related dependants' scheme pension: Sch 29 para 2(6A), (6B) (added by the 2006 Act Sch 23 para 23(3)).

Where the member becomes entitled to income withdrawal, the applicable amount is one-third of the aggregate of the amount of the sums designated as available for the payment of unsecured pension on that occasion, and the market value of the assets so designated (but any of the sums and assets so designated which represent rights attributable to a disqualifying pension credit are to be disregarded): 2004 Act Sch 29 para 3(1), (2). For the meaning of 'unsecured pension' see PARA 873B.5 NOTE 5; and for the meaning of 'market value' see PARA 873B.3 NOTE 4.

Where the member becomes entitled to a lifetime annuity, the applicable amount is one-third of the annuity purchase price, ie the aggregate of the amount of such of the sums held for the purposes of the pension scheme, and the market value of such of the assets held for those purposes, as are applied in (or in connection with) the purchase of the lifetime annuity and of any related dependants' annuity: Sch 29 para 3(3), (4) (amended by the 2005 Act Sch 10 para 30). However, there is to be deducted from that aggregate (1) if the sums or assets applied in or in connection with the purchase of the annuity or any related dependants' annuity consist of or include sums or assets representing the whole or part of the member's unsecured pension fund, the aggregate value of the amount of those sums and the market value of those assets; and (2) in any case so much (if any) of the sums or assets applies in or in connection with the purchase of the annuity or any related dependants' annuity as represents rights which are attributable to a disqualifying pension credit: 2004 Act Sch 29 para 3(5) (amended by the 2005 Act Sch 10 para 35). A dependants' annuity is related to a lifetime annuity payable to a member of a registered pension scheme if they are purchased either in the form of a joint life annuity or separately in circumstances in which the day on which the one is purchased is no earlier than seven days before, and no later than seven days after, the day on which the other is purchased, and the dependant's annuity will be payable to a dependant of that member: 2004 Act Sch 29 para 3(4A) (added by the 2005 Act Sch 10 para 30). For the meaning of 'pension scheme' see PARA 873B.1.

Where the member becomes entitled to a scheme pension under a defined benefits arrangement, the applicable amount is:

$$\frac{LS + AC}{4}$$

where LS is the amount of the lump sum, and AC is the amount crystallised by reason of the member's becoming entitled to the pension (disregarding the 2004 Act Sch 32 para 3) (see PARA 873B.16): Sch 29 para 3(6), (7) (amended by 2005 Act Sch 10 para 35; and 2006 Act Sch 23 para 22(2)). Where the member becomes entitled to a scheme pension under a money purchase arrangement, the applicable amount is one third of the 'scheme pension purchase price', ie the aggregate of the amount of such of the sums held for the purposes of the pension scheme and the market value of such of the assets held for the purposes of the scheme, as are applied in (or in connection with) the purchase or provision of the scheme pension and any related dependants' scheme pension: 2004 Act Sch 29 para 3(7A), (7B) (added by the 2006 Act Sch 23 para 22(3)). A dependants' scheme pension is related to a scheme pension payable to a member of a registered pension scheme if the day

on which such a pension is purchased or sums or assets are applied for its provision is no earlier than seven days before, and no later than seven days after, the day on which the other is purchased, or sums or assets are applied for its provision; and the pension will be payable to a dependant of the member: 2004 Act Sch 29 para 3(7C) (added by the 2006 Act Sch 23 para 22(3)). For the meaning of 'defined benefits arrangement' and 'money purchase arrangement', see PARA 873B.5 NOTE 13.

However, there is to be deducted from the aggregate of the lump sum and the amount so crystallised (ie from the total of LS and AC) or, as the case may be, from the scheme pension purchase price (i) if the scheme pension is funded (in whole or in part) by the application of sums or assets representing the whole or part of the member's unsecured pension fund, the aggregate of the amount of those sums and the market value of those assets; and (ii) in any case, so much (if any) of the aggregate of the lump sum and the amount crystallised (or, as the case may be, of the aggregate of the lump sum and the scheme pension purchase price) as represents rights which are attributable to a disqualifying pension credit: 2004 Act Sch 29 para 3(8) (amended by the 2005 Act Sch 10 para, 24; and the 2006 Act Sch 23 para 22(4)). For the meaning of 'unsecured pension fund' see PARA 873B.5 NOTE 5.

If sums or assets held for the purposes of, or representing accrued rights under, a money purchase arrangement relating to the member under a registered pension scheme ('member money purchase funds') are subject to a relevant surrender or a relevant transfer, the sole or main purpose of which is to increase the applicable amount on the member's becoming entitled to a scheme pension, and the member becomes entitled to a scheme pension under a relevant defined benefits arrangement, the pension scheme under which that arrangement exists is treated as making an unauthorised payment to the member of any amount by which the applicable amount in relation to the scheme pension under the 2004 Act Sch 29 para 3(6) exceeds the amount which would be that applicable amount under Sch 29 para 3(7A) were the arrangement a money purchase arrangement: Sch 29 para 3(9), (10) (added by the 2006 Act Sch 23 para 22(5)). Member money purchase funds are subject to a 'relevant surrender' if they are surrendered and, in consequence of that surrender, there is a corresponding increase in the sums or assets held for the purposes of, or representing rights under, a defined benefits arrangement relating to the member under the pension scheme (or such an arrangement is established); and such funds are subject to a 'relevant transfer' if they are transferred to as to become held for the purposes of, or to represent rights under, a defined benefits arrangement relating to the member under any other registered pension scheme: 2004 Act Sch 29 para 3(11) (added by the 2006 Act Sch 23 para 22(5)). 'Relevant defined benefits scheme' means the defined benefits arrangement mentioned in the 2004 Act Sch 29 para 3(11), or any other defined benefits arrangement relating to the member (under the pension scheme or any other registered pension scheme) in the case of which any of the sums or assets held for the purposes of, or representing accrued rights under, the arrangement directly or indirectly represent sums or assets previously held for the purposes of, or representing accrued rights under, the defined benefits arrangement so mentioned: Sch 29 para 3(12) (added by the 2006 Act Sch 23 para 22(5)).

9 A person becomes entitled to a lump sum under a registered pension scheme (1) in the case of a pension commencement lump sum, immediately before he becomes entitled to the pension in connection with which it is paid (or, if he dies before becoming entitled to the pension in connection with which it was expected it would be paid, immediately before death); and (2) in any other case, when the person acquires an actual (rather than a prospective) right to receive the lump sum: 2004 Act s 166(2) (amended by the 2007 Act Sch 20 para 9). As to registration of pension schemes see PARA 873B.2. As to becoming entitled to a pension see PARA 873B.5 NOTE 5.

10 For the meaning of 'normal minimum pension age' see PARA 873B.5. As to the ill-health condition see PARA 873B.5 NOTE 4.

11 2004 Act Sch 29 para 1(1) (amended by the 2007 Act Sch 20 para 11(2)). A lump sum is an excluded lump sum if (1) the pension in connection with which the member becomes entitled to it is a scheme pension the rate of which is to decrease (or which is to cease to be payable) in accordance with the 2004 Act Sch 28 para 2(4)(c) (see PARA 873B.5 NOTE 6) at a time not earlier than when the member reaches the age of 60 and not later than when he reaches the age of 65; and (2) the sole or main purpose of making provision for the pension to be such a pension was to increase the member's entitlement to a lump sum on which there is no liability to income tax: Sch 29 para 1(4) (amended by the 2006 Act Sch 23 para 21). The Board of Inland Revenue may by regulations provide that, where incorrect income tax has been paid by the scheme administrator in relation to the member by way of the lifetime allowance charge in circumstances prescribed by the regulations, a lump sum subsequently paid to the member in circumstances so prescribed is to be treated as a pension commutation lump sum even though either or both of the conditions in heads (a) and (d) of the text are not met: 2004 Act Sch 29 para 1(6) (added by the 2005 Act Sch 10 para 34; amended by the 2007 Act Sch 20 para 11(3)). See the Registered Pension Schemes (Meaning of Pension Commencement Lump Sum) Regulations 2006, SI 2006/135 (amended by SI 2007/3533).

12 Ie the lump sum would otherwise satisfy the requirements of 2004 Act Sch 29 para 1(1), 4(1), 7(1) or 10(1).

13 Ibid Sch 29 para 12(2), (3). However, this provision does not apply (1) in the case of a lump sum that would satisfy all the requirements of Sch 29 para 1(1), to so much of it as would be prevented from being a

pension commencement lump sum by Sch 29 para 1(2); or (2) in the case of a lump sum that would satisfy all the requirements of Sch 29 para 10(1), to so much of it as would be prevented from being a winding-up lump sum by Sch 29 para 10(2): Sch 29 para 12(4).

14 Ibid Sch 29 para 3A(1), (3) (Sch 29 para 3A added by 2006 Act s 159). The 'relevant time' is the time when the lump sum is paid (or, if the contributions paid are already significantly greater at the time the lump sum is paid, the time when they became so); and the 'appropriate amount' is so much of the amount crystallised by the benefit crystallisation event constituted by the payment of the lump sum as does not exceed the amount of the member's lifetime allowance which is available thereon: 2004 Act Sch 29 para 3A(5), (6). However, Sch 29 para 3A does not apply (1) in relation to any lump sum paid to the member on any day if the amount of that sum, when added to any other pension commencement lump sum paid to the member within the period of 12 months ending with that day, does not exceed 1% of the standard lifetime allowance (see PARA 873B NOTE 15) on that day; or (2) if the amount by which the amount by which the member's contributions are greater as a result of the payment of the lump sum does not exceed 30% of that sum: Sch 29 para 3A(3), (4). This provision was enacted to prevent the reinvestment in the scheme of tax-free lump sums.

## **8. Authorised member payments by registered pension schemes: the lump sum death benefit rule**

No lump sum death benefit<sup>1</sup> may be paid other than:

- 2191 (1) a defined benefits lump sum death benefit<sup>2</sup>;
- 2192 (2) a pension protection lump sum death benefit<sup>3</sup>;
- 2193 (3) an uncrystallised funds lump sum death benefit<sup>4</sup>;
- 2194 (4) an annuity protection lump sum death benefit<sup>5</sup>;
- 2195 (5) an unsecured pension fund lump sum death benefit<sup>6</sup>;
- 2196 (6) a charity lump sum death benefit<sup>7</sup>;
- 2197 (7) a trivial commutation lump sum death benefit<sup>8</sup>; or
- 2198 (8) a winding-up lump sum death benefit<sup>9</sup>.

Each of the above is an 'authorised lump sum death benefit'<sup>10</sup>.

1 'Lump sum death benefit' means a lump sum payable on the death of the member: Finance Act 2004 s 168(2). For the meaning of 'member' see PARA 873B.4 NOTE 3.

2 A lump sum death benefit is a defined benefits lump sum death benefit if (1) the member had not reached the age of 75 at the time of his death; (2) it is paid in respect of a defined benefits arrangement; (3) it is paid before the end of the period of two years beginning with the earlier of the day on which the scheme administrator first knew of the member's death and the day on which the scheme administrator could first be reasonably expected to have known of it; and (4) it is not a pension protection lump sum death benefit, trivial commutation lump sum death benefit or winding-up lump sum death benefit: *ibid* Sch 29 para 13 (amended by the Finance Act 2007 Sch 20 para 13(2)). For the meaning of 'defined benefits arrangement' see PARA 873B.5 NOTE 13.

3 A lump sum death benefit is a pension protection lump sum death benefit if (1) the member had not reached the age of 75 at the date of his death; (2) it is paid in respect of a defined benefits arrangement; (3) it is paid in respect of a scheme pension to which the member was entitled at the date of his death; and (4) the member has specified that it is to be treated as a pension protection lump sum death benefit (instead of a defined benefits lump sum death benefit): 2004 Act Sch 29 para 14(1). However, if the amount of a lump sum falling within these provisions exceeds the pension protection limit, the excess is not a pension protection lump sum death benefit: Sch 29 para 14(2). The pension protection limit is:

*AC - AP - TPLS*

where AC is the amount crystallised by reason of the member's becoming entitled to the pension (see s 216 and PARA 873B.16); AP is the amount of the pension paid in respect of the period between the member becoming entitled to the pension and his death; and TPLS is the total amount of pension protection lump sum death benefit previously paid in respect of the pension under these provisions: Sch 29 para 14(3). For the meaning of 'scheme pension' see PARA 873B.5 NOTE 6.

4 A lump sum death benefit is an uncrystallised funds lump sum death benefit if (1) the member had not reached the age of 75 at the time of his death; (2) it is paid in respect of a money purchase arrangement; (3) it

is paid before the end of the period of two years beginning with the earlier of the day on which the scheme administrator first knew of the member's death and the day on which the scheme administrator could first be reasonably expected to have known of it; and (4) it is paid in respect of relevant uncrystallised funds: *ibid* Sch 29 para 15(1) (amended by the 2007 Act Sch 20 para 13(3)). 'Relevant uncrystallised funds' means such of the sums and assets held for the purposes of the arrangement at the member's death as (a) had not been applied for purchasing a scheme pension, a lifetime annuity, a dependants' scheme pension or a dependants' annuity; and (b) had not been designated under the arrangement as available for the payment of unsecured pension: 2004 Act Sch 19 para 15(2). For the meaning of 'money purchase arrangement' see PARA 873B.5 NOTE 13; and for the meaning of 'arrangement' see PARA 873B.5 NOTE 5. For the meaning of 'unsecured pension' see PARA 873B.5 NOTE 5; for the meaning of 'lifetime annuity' see PARA 873B.5 NOTE 13; for the meaning of 'dependants' scheme pension' see PARA 873B.6 NOTE 4; and for the meaning of 'dependants' annuity' see PARA 873B.6 NOTE 6. As to sums and assets held for the purposes of the arrangement see PARA 873B.5 NOTE 5.

However, a lump sum death benefit is not an uncrystallised funds lump sum death benefit in so far as it exceeds the permitted maximum, ie the aggregate of the amount of the sums, and the market value of the assets, which constitute the relevant uncrystallised funds immediately before the payment is made: Sch 29 para 15(3), (4). For the meaning of 'market value' see PARA 873B.3 NOTE 4.

5 A lump sum death benefit is an annuity protection lump sum death benefit if (1) the member had not reached the age of 75 at the date of his death; (2) it is paid in respect of a money purchase arrangement; and (3) it is paid in respect of a scheme pension or lifetime annuity to which the member was entitled at the date of his death: *ibid* Sch 29 para 16(1). However, if the amount of a lump sum falling within these provisions exceeds the annuity protection limit, the excess is not an annuity protection lump sum: Sch 29 para 16(2). The annuity protection limit is:

### *AC - AP - TPLS*

where AC is the amount crystallised by reason of the member's becoming entitled to the pension or annuity (see s 216 and PARA 873B.16); AP is the amount of the pension paid in respect of the period between the member becoming entitled to the pension or annuity and his death (but disregarding Sch 32 paras 3, 4) (see PARA 873B.16); and TPLS is the total amount of annuity protection lump sum death benefit previously paid in respect of the pension or annuity under these provisions: Sch 29 para 16(3) (amended by the Finance Act 2006 Sch 23 para 29).

6 A lump sum death benefit is an unsecured pension fund lump sum death benefit if either (1) the member had not reached the age of 75 at the date of his death, and the benefit is paid in respect of income withdrawal to which the member was entitled under an arrangement at the date of his death; or (2)(a) the benefit is paid on the death of a dependant of the member, (b) the dependant had not reached the age of 75 at the date of the dependant's death, and (c) the benefit is paid in respect of dependants' income withdrawal to which the dependant was entitled at the date of the dependant's death in respect of an arrangement relating to the member: 2004 Act Sch 29 para 17(1), (2). For the meaning of 'income withdrawal' see PARA 873B.4 NOTE 4. For the meaning of 'dependant' and 'dependants' income withdrawal' see PARA 873B.6 NOTES 2, 7. However, a lump sum death benefit is not an unsecured pension fund lump sum death benefit insofar as it exceeds the permitted maximum, ie the aggregate of the amount of the sums, and the market value of the assets, representing the member's or dependant's unsecured pension fund in respect of the arrangement immediately before the payment is made: Sch 29 para 17(3), (4). For the meaning of 'unsecured pension fund' see PARA 873B.5 NOTE 5.

7 A lump sum death benefit is a charity lump sum death benefit if either (1)(a) the member had reached the age of 75 at the date of his death; (b) there are no dependants of the member; (c) it is paid in respect of the member's alternatively secured pension fund (or what would be such a fund but for Sch 28 para 11(6), (7) (see PARA 873B.5) in respect of an arrangement at the date of his death; and (d) it is paid to a charity nominated by the member (or, if the member made no nomination, selected by the scheme administrator); or (2)(a) it is paid on the death of a dependant of the member; (b) the dependant had reached the age of 75 at the date of the dependant's death; (c) there are no other dependants of the member; (d) it is paid in respect of the dependant's alternatively secured pension fund at the date of the dependant's death in respect of an arrangement relating to the member; and (e) it is paid to a charity nominated by the member (or, if the member made no nomination, by the dependant; and if neither the member nor the dependant made a nomination, selected by the scheme administrator): *ibid* Sch 29 para 18(1), (2) (amended by the Finance Act 2007 Sch 19 para 16). However, a lump sum death benefit is not a charity lump sum death benefit insofar as it exceeds the permitted maximum, ie the aggregate of the amount of the sums, and the market value of the assets, representing what is (or but for the 2004 Act Sch 18 para 11(6), (7) would be) the member's or dependant's alternatively unsecured pension fund in respect of the arrangement immediately before the payment is made: Sch 29 para 18(3), (4) (Sch 29 para 18(4) amended by the 2007 Act Sch 19 para 16). For the meaning of 'alternatively secured pension fund' see PARA 873B.5 NOTE 13. 'Charity' has the same meaning as in the Income and Corporation Taxes Act 1988 s 506 (see *INCOME TAXATION* vol 23(2) (Reissue) PARA 1172): 2004 Act ss 279(1), 280(1).

8 A lump death benefit is a trivial commutation lump sum death benefit if (1) the member had not reached the age of 75 at the date of his death; (2) it is paid to a dependant entitled under the pension scheme to

pension death benefit in respect of the member; (3) it is paid before the day on which the member would have reached the age of 75; and (4) it extinguishes the dependant's entitlement under the pension scheme to pension death benefit and lump sum death benefit in respect of the member: *ibid* Sch 29 para 20(1). For the meaning of 'pension death benefit' see PARA 873B.6 NOTE 1. However, if the amount of a lump sum falling within these provisions exceeds 1 per cent of the standard lifetime allowance on the date it is paid, the excess is not a trivial commutation lump sum death benefit: Sch 29 para 20(2). For the meaning of 'standard lifetime allowance' see PARA 873B.15.

9 2004 Act s 168(1) (amended by the 2007 Act Sch 19 para 4). A lump sum death benefit is a winding-up lump sum death benefit if (1) the pension scheme is being wound up; (2) it is paid to a dependant entitled under the pension scheme to pension death benefit in respect of the member; and (3) it extinguishes the dependant's entitlement under the pension scheme to pension death benefit and lump sum death benefit in respect of the member: 2004 Act Sch 29 para 21(1). However, if the amount of a lump sum falling within these provisions exceeds 1 per cent of the standard lifetime allowance on the date it is paid, the excess is not a winding-up lump sum death benefit: Sch 29 para 21(2).

For the charge to tax in respect of payments falling within head (2), (4) or (5) of the text see PARA 873B.21.

10 *Ibid* Sch 29 para 22(3). Where, by virtue of Sch 29 para 14(2), 20(2), or 21(2), an excess is not an authorised lump sum death benefit of one description, that does not prevent the excess from being an authorised lump sum death benefit of another description: Sch 29 para 22(2).

## 9. Unauthorised payments by registered pension schemes; in general

If a member<sup>1</sup> of a registered pension scheme<sup>2</sup> (or his personal representatives) assigns or agrees to assign any benefit, other than an excluded pension<sup>3</sup>, to which the member (or any dependant of his) has an actual or prospective entitlement under the pension scheme or any right in respect of any sums or assets held for the purposes of any arrangement under the scheme, that scheme is treated as making an unauthorised payment to the member (or to his personal representatives in respect of the member)<sup>4</sup>. The amount of the unauthorised payment is the greater of the consideration received in respect of the assignment or agreement, and the consideration which might be expected to be so received if the parties to the transaction were at arm's length and any power to reduce the entitlement to the benefit or right did not exist<sup>5</sup>.

A registered pension scheme is also treated as having made an unauthorised payment to or in respect of a person who is or has been a member of the scheme if:

2199 (1) an asset held for the purposes of the pension scheme is used to provide a benefit (other than a payment) to the person or to a member of his family or household<sup>6</sup>;

2200 (2) after the person's death, an asset held for the purposes of the pension scheme is used to provide a benefit (other than a payment) to a person who, at the date of the member's death, was a member of his family or household<sup>7</sup>.

The amount of an unauthorised payment so treated as having been made is (a) in relation to such benefits, and in such circumstances, as may be prescribed by regulations made by the Board of Inland Revenue<sup>8</sup>, an amount determined in accordance with the regulations; and (b) otherwise, is the amount which would be the cash equivalent of the benefit under the benefits code if the benefit were received by reason of an employment and that code applied to it<sup>9</sup>.

A registered pension scheme is also treated as having made an unauthorised payment to a person who is or has been a member of the scheme if, in connection with any of the following events, or a change in the value of a currency:

2201 (i) the value of an asset held for the purposes of the pension scheme is reduced or a liability of the scheme is increased; and

2202 (ii) the value of an asset held by, or for the benefit of, that person is increased, a liability of that person is reduced, or a liability of another person is reduced for the benefit of that person<sup>10</sup>.

The events are:

- 2203 (A) the creation, alteration, release or extinction of any power, right, option or liability relating to assets held for the purposes of the pension scheme (whether or not provided for in the terms on which the asset is acquired or held);
- 2204 (B) the creation, alteration, release or extinction of any power, right or option relating to a liability of the pension scheme (whether or not provided for in the terms on which the liability is incurred);
- 2205 (C) the exercise of, or failure to exercise, any power, right or option in relation to assets held for the purposes of the pension scheme or a liability of the pension scheme; or
- 2206 (D) the exercise of, or failure to exercise, any power, right or option which constitutes an asset held for the purposes of the pension scheme,

in a way which differs from that which might be expected if the parties to the transaction were at arm's length<sup>11</sup>.

The amount of such an unauthorised payment is the amount by which the reduction in value of the asset held for the purposes of the pension scheme, or the increase in the liability of the pension scheme, exceeds that which might be expected if the parties to the transaction were at arm's length<sup>12</sup>. The unauthorised payments set out above are referred to as 'unauthorised member payments'<sup>13</sup>.

A registered pension scheme that is an occupational pension scheme is treated as having made an unauthorised payment to a sponsoring employer if, in connection with any of the events specified in heads (A) to (D) above, the value of an asset held for the purposes of the pension scheme is reduced or a liability of the scheme is increased, or the value of an asset held for the benefit of a person who is or has been a sponsoring employer is increased, a liability of such a person is reduced, or a liability of another person is reduced for the benefit of such a person<sup>14</sup>. Such payments are referred to as 'unauthorised employer payments'<sup>15</sup>. 'Unauthorised payment' means an unauthorised member payment or an unauthorised employer payment<sup>16</sup>.

If a member of a registered pension scheme surrenders or agrees to surrender any benefit other than an excluded pension, to which the member (or any dependant of his) has a prospective entitlement under an arrangement under the pension scheme; any rights to payments under a lifetime annuity or dependants' annuity purchased by the application of sums or assets held for the purposes of the pension scheme; or any right in respect of any sums or assets held for the purposes of any arrangement under the scheme, that scheme is treated as making an unauthorised payment to the member<sup>17</sup>.

If a person surrenders or agrees to surrender any benefit, other than an excluded pension, to which he has a prospective entitlement under an arrangement under the pension scheme in respect of a member of a scheme or any right in respect of any sums or assets held for the purposes of any arrangement relating to a member of the pension scheme under that scheme, the scheme is treated as making an unauthorised payment to the person in respect of the member<sup>18</sup>.

If at any time after the death of a relevant member<sup>19</sup> of a registered pension scheme, there is an increase in the pension rights<sup>20</sup> of another member of the pension scheme which is attributable to the death, and the dead member and other member were connected persons<sup>21</sup> immediately before the death, the scheme is treated as making an unauthorised payment to the other member (or to the other member's personal representatives) of an amount equal to the excess<sup>22</sup>.

Where contributions are paid under a registered pension scheme by an employer<sup>23</sup> otherwise than in respect of any individual and in any tax year<sup>24</sup> any of the contributions become held for the purposes of the provision of benefits to or in respect of a member of the scheme under any relevant arrangement<sup>25</sup> or arrangements ('the allocated contributions'), then if the amount of the allocated contribution exceeds the permitted maximum<sup>26</sup>, and the member and the employer, or the member and any person connected with the employer at any time during the tax year, are connected persons at any time during that year, the pension scheme is treated as making an unauthorised payment to the member (or to his personal representatives)<sup>27</sup>.

Where, at any time during any pension input period<sup>28</sup> in respect of a relevant arrangement<sup>29</sup> relating to a member of an occupational pension scheme<sup>30</sup> that is a registered pension scheme, and the member and a sponsoring employer<sup>31</sup> or a person connected with a sponsoring employer are connected persons, then if the pension input amount<sup>32</sup> for the pension input period in respect of the arrangement exceeds the notional unconnected person input amount<sup>33</sup> for that period in respect of that arrangement, the pension scheme is treated as making an unauthorised payment to the member (or to his personal representatives) of an amount equal to the excess<sup>34</sup>.

If at any time (the 'relevant time') after the death of a member of a registered pension scheme, another member of the scheme becomes entitled to alternatively secured rights<sup>35</sup>, the scheme is treated as making to that other member (or his personal representatives) an unauthorised payment of the amount by which the consideration which might be expected to be received in respect of an assignment of the benefits to which that other member is actually or prospectively entitled under the pension scheme immediately after the relevant time exceeds the consideration which might be expected to be received in respect of such an assignment immediately before the relevant time<sup>36</sup>.

1 For the meaning of 'member' see PARA 873B.4 NOTE 3.

2 For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2.

3 In so much of any pension which, under pension rule 2 (see PARA 873B.5 head (2)) may continue to be paid after the member's death as may be so paid: Finance Act 2004 ss 172(7), 172A(10) (s 172(7) amended by the Finance Act 2005 Sch 10 para 37; 2004 Act ss 172A-172D added by the 2005 Act Sch 10 para 38; 2004 Act s 172A(10) amended by the Finance Act 2007 Sch 20 para 6(3)).

4 Finance Act 2004 s 172(1), (2) (amended by the 2005 Act Sch 10 para 37). If a person (or a person's personal representatives) assigns or agrees to assign any benefit, other than an excluded pension, to which the person has a prospective entitlement under a registered pension scheme in respect of a member of the pension scheme or any right in respect of any sums or assets held for the purposes of any arrangement relating to such a member under the pension scheme, that scheme is treated as making an unauthorised payment to the person (or to his personal representatives) in respect of the member: Finance Act 2004 s 172(3), (4) (amended by 2005 Act Sch 10 para 37; and Finance Act 2008 Sch 28 para 2(2)). 'Assignment' includes assignation, and related expressions are to be read accordingly: Finance Act 2004 s 172(8). However, these provisions do not apply if the agreement or assignment is pursuant to a pension sharing order or provision: s 172(2), (4). For the meaning of 'pension sharing order or provision' see PARA 873B.4 NOTE 7. 'Personal representatives', in relation to a person who has died, means (1) in the United Kingdom, persons responsible for administering the estate of the deceased; and (2) in a country or territory outside the United Kingdom, the persons having functions under its law equivalent to those of administering the estate of the deceased: s 279(1). A benefit to which the member or a person has an entitlement under the pension scheme includes rights to payments under (a) a scheme pension or a dependants' scheme pension provided by the scheme administrator or as a result of the application of sums or assets held for the purposes of the pension scheme; or (b) a lifetime annuity or dependants' annuity purchased by the application of sums or assets held for the purposes of the pension scheme: ss 172(6A), 172A(5), 172B(7B) (added by Finance Act 2008 Sch 28 paras 2(3), 3(5), 4(5)).

5 Finance Act 2004 s 172(5) (amended by the 2005 Act Sch 10 para 37). Where a pension scheme is treated under these provisions as having made an unauthorised payment in relation to an assignment (or an agreement to assign), payments by the scheme of the benefit or right assigned (or agreed to be assigned) are not unauthorised payments: Finance Act 2004 s 172(6) (amended by the 2005 Act Sch 10 para 37).

6 Finance Act 2004 s 173(1) (amended by the Finance Act 2006 Sch 23 para 8(2)). If the benefit is received by reason of an employment which is not an excluded employment, this provision does not apply; and if the benefit is received by reason of an excluded employment, the provision applies only if (1) the benefit is one to which Chapter 6 or 10 of the benefits code would apply if the employment were not excluded employment; (2) the pension scheme is an occupational pension scheme; and (3) the person, or a member of his family or household, is a director of, and has a material interest in, a sponsoring employer: 2004 Act s 173(2), (3) (s 173(3) amended by the 2006 Act Sch 23 para 8(3)). 'Excluded employment' and 'the benefits code' have the meaning given by the Income Tax (Earnings and Pensions) Act 2003 s 63; 'director' has the meaning given by s 67; and 'material interest' has the meaning given by s 68: Finance Act 2004 s 173(10). The Income Tax (Earnings and Pensions) Act 2003 s 721 applies for the purposes of determining the members of a person's family or household: Finance Act 2004 s 173(11). For the meaning of 'occupational pension scheme' see PARA 873B.2 NOTE 7; and for the meaning of 'sponsoring employer' see PARA 873B.4 NOTE 10. For the meaning of 'payment' see PARA 873B.4 NOTE 1.

7 Finance Act 2004 s 173(4) (amended by the 2006 Act Sch 23 para 8(4)). The person who receives the benefit is treated as having received the unauthorised payment: Finance Act 2004 s 173(5). If the benefit is received by reason of an employment which is not an excluded employment, this provision does not apply; and if the benefit is received by reason of an excluded employment, the provision applies only if NOTE 6 heads (1) and (2) are satisfied, and at the date of the person's death he or a member of his family or household was a director of, and had a material interest in, a sponsoring employer: s 173(7) (amended by the 2006 Act Sch 23 para 8(5)).

8 For the meaning of 'Board of Inland Revenue' see PARA 873B.2 NOTE 1. As to the making of such regulations see PARA 873B.1 NOTE 2. See the Registered Pension Schemes (Co-ownership of Living Accommodation) Regulations 2006, SI 2006/133.

9 Finance Act 2004 s 173(8). For the purposes of this provision, references in the benefits code to the employee are treated as references to the person who is or has been a member, and references to the employer as references to the pension scheme: s 173(9) (amended by the 2006 Act Sch 23 para 8(6)). The Finance Act 2004 s 173 does not apply if the pension scheme is an investment-regulated pension scheme (see PARA 873B.29): s 173(7A) (added by the 2006 Act Sch 21 para 4).

10 Finance Act 2004 s 174(1) (amended by the 2006 Act Sch 23 para 9(1)). If the event or the change in the value of the currency occurs after the person's death (1) the pension scheme is treated as having made an unauthorised payment in respect of the person (rather than to the person); and (2) the person who holds the asset or is subject to the liability in relation to which head (ii) of the text is satisfied is treated as having received the unauthorised payment: Finance Act 2004 s 174(2) (amended by the 2006 Act Sch 23 para 9(2)).

11 Finance Act 2004 s 174(3). A liability is a liability of a registered pension scheme if it is to be met from sums or assets held for the purposes of the scheme: s 163(1), (3).

12 Ibid s 174(4). Regulations made by the Board of Inland Revenue may make provision as to how the excess is to be calculated in relation to events of a description specified in the regulations (including provision as to the times at which the asset or liability is to be valued): s 174(5). As to the making of such regulations see PARA 873B.1 NOTE 2.

13 Ibid s 160(2)(b) (amended by the 2006 Act Sch 23 para 3(3)). The term also includes a payment by a registered pension scheme to or in respect of a person who is or has been a member of the scheme which is not an authorised member payment (see PARA 873B.4 et seq): Finance Act 2004 s 160(2)(a) (amended by the 2006 Act Sch 23 para 3(3)).

14 Finance Act 2004 s 181(1), (2) (amended by the 2006 Act Sch 23 para 13). The amount of the payment is calculated in the same way as under the Finance Act 2004 s 174(3), and the Board of Inland Revenue has a similar power to make regulations in relation to such a payment: s 181(3), (4).

15 Ibid s 160(4)(b) (s 160(4) amended by 2006 Act Sch 23 para 3(3)). The term also includes a payment by a registered pension scheme that is an occupational pension scheme, to or in respect of a person who is or has been a sponsoring employer which is not an authorised employer payment (see PARA 873B.4 et seq): Finance Act 2004 s 160(4)(a).

16 Ibid s 160(5). If an unauthorised member payment or an unauthorised employer payment made to or in respect of any person would have been greater but for a reduction made in respect of the whole, or any proportion, of the amount which the scheme administrator considers may be the amount of the liability to the scheme sanction charge in respect of it, it is regarded for the purposes of these provisions as increased by the amount of that reduction: s 160(4A) (s 160(4A), (4B) added by 2007 Act Sch 20 para 5). If the amount, or that proportion of the amount, of that liability is in fact less than the amount of the reduction, a subsequent payment of an amount not exceeding the difference between that amount and the amount of the reduction made to or in respect of the same person and before the end of the period of two years beginning with the date

on which the unauthorised payment was made, is not regarded for those purposes as an unauthorised member payment or an unauthorised employer payment: Finance Act 2004 s 160(4B).

17 Ibid s 172A(1), (2) (s 172A(1) amended by Finance Act 2008 Sch 28 para 3(2)). See also NOTE 18. The amount of the unauthorised payment is the consideration that might be expected to be received if what is surrendered were assigned by a transaction between parties at arm's length and any power to reduce the entitlement to the benefit or right did not exist: Finance Act 2004 s 172A(8). 'Surrender', in relation to any benefit or right of a member (or a dependant of his) of a pension scheme or other person, includes any schemes, arrangements or understandings of any kind (whether or not legally enforceable) the main purpose, or one of the main purposes, of which is to reduce the member's (or dependant's), or person's entitlement to the benefit or right: s 172A(9).

18 Ibid s 172A(3), (4) (s 172A(3) amended by Finance Act 2008 Sch 28 para 3(3)). The Finance Act 2004 s 172A(2), (4) does not apply to (1) a surrender pursuant to a pension sharing order or provision; (2) a surrender (or agreement to surrender) by the member in return for the conferring on a dependant of an entitlement to benefits after the member's death; (3) a transfer of (or agreement to transfer) benefits or rights so as to become benefits or rights under another arrangement under the pension scheme relating to the member or dependant; (4) a surrender of (or agreement to surrender) benefits or rights in order to fund the making of an authorised surplus payment; (5) a surrender made as part of a retirement-benefit activities compliance exercise; (6) a surrender of prospective entitlement to pension death benefits within s 167(1) (see PARA 873B.6) or lump sum death benefits within s 168(1) (see PARA 873B.8) (or both) made in order to comply with the Employment Equality (Age) Regulations 2006 (or corresponding Northern Ireland legislation); (7) a surrender (or agreement to surrender) which constitutes an assignment (or agreement to assign) within s 172; (8) any surrender (or agreement to surrender) of a description prescribed by regulations made by the Board of Inland Revenue; or (9) a surrender of (or agreement to surrender) rights to payments under an annuity in any case covered by regulations under Sch 28 para 3(2B) (see PARA 873B.5) or 17(3) (see PARA 873B.6): s 172A(5) (amended by 2007 Act Sch 20 para 6(2); and Finance Act 2008 Act Sch 28 para 3(4)). Such regulations may include provision having effect in relation to times before they are made: Finance Act 2004 s 172A(6). See the Registered Pension Schemes (Surrender of Relevant Excess) Regulations 2006, SI 2006/211.

For the meaning of 'pension sharing order or provision' see PARA 873B.4 NOTE 7; and for the meaning of 'authorised surplus payment' see PARA 873B.4 NOTE 12. Further, the Finance Act 2004 s 172A(2), (4) does not apply to the surrender of a benefit to which the member (or a dependant of his) has a prospective entitlement, or to which the person has a prospective entitlement in respect of a member, under an arrangement that is a defined benefits arrangement or a cash balance arrangement, unless (a) in consequence of the surrender, the actual or prospective entitlement of another member (or dependant of another member) of the pension scheme, or of another person in respect of another member, to benefits under the scheme is increased; and (b) the two members are or have been connected persons: s 172A(7). For the meaning of 'connected persons', see the Income and Corporation Taxes Act 1988 s 839; and INCOME TAXATION vol 23(2) (Reissue) PARA 1258 (definition applied for the purposes of the Finance Act 2004 ss 172A-172D by ss 172A(11), 172B(9), 172C(7) and 172D(6)). For the meaning of 'surrender' and the amount of the unauthorised payment, see NOTE 17. As to defined benefits arrangements and cash balance arrangements, see PARA 873B.5 NOTE 13.

A surrender relating to an arrangement under the pension scheme (the 'old arrangement') is made as part of a retirement-benefit activities compliance exercise if (i) it is made in connection with the making of an arrangement under another pension scheme relating to the member (the 'new arrangement'); (ii) the old arrangement and the new arrangement related to the same employment; (iii) both the rights surrendered and the rights conferred under the new arrangement consist of or include a prospective entitlement to pension death benefits within s 167(1) or lump sum death benefits within s 168(1) (or both); (iv) the surrender and the making of the new arrangement constitute or form part of an arrangement the purpose of which is to secure that the activities of the pension scheme are limited to retirement-benefit activities within the meaning of the Pensions Act 2004 s 255 (see PARA 798A) or corresponding Northern Ireland legislation: Finance Act 2004 s 172A(10A) (added by the 2007 Act Sch 20 para 6(4)).

19 A member of a registered pension scheme is a relevant member if, immediately before his death, any of his rights under the pension scheme are (1) rights to benefit to which the member (or any dependant of his) has a prospective entitlement under an arrangement under the pension scheme; or (2) rights to payments under a scheme pension or dependants' scheme pension provided by the scheme administrator or as a result of the application of sums or assets held for the purposes of the pension scheme or under a lifetime annuity or dependants' annuity purchased by the application of sums or assets held for the purposes of the pension scheme, or (3) rights representing the member's unsecured pension fund, or dependant's unsecured pension fund in respect of an arrangement under the pension scheme: Finance Act 2004 s 172B(2) (s 172B as added (see NOTE 3); s 172B(2) amended by the 2007 Act Sch 19 para 12; and the Finance Act 2008 Sch 28 para 4(2)). For the meaning of 'unsecured pension fund' see PARA 873B.5 NOTE 5; and for the meaning of 'dependant's unsecured pension fund', see PARA 873B.6 NOTE 7.

20 There is at any time an increase in the pension rights of the other member of the pension scheme which is attributable to the death if (1) the consideration which might be expected to be received in respect of an assignment (or assignation) of the benefits to which he has an actual or prospective entitlement under the

pension scheme at that time, exceeds (2) the consideration which might be expected to be received in respect of such an assignment (or assignation) immediately before that time, in consequence of the death (ignoring for this purpose any power to reduce the entitlement to the benefits): Finance Act 2004 s 172B(3) (amended by the Finance Act 2008 Sch 28 para 4(3)).

21 For the meaning of 'connected persons' see NOTE 18.

22 Finance Act 2004 s 172B(1), (4) (s 172B(4) amended by the 2007 Act Sch 19 para 12). The amount which would (apart from this provision) constitute the unauthorised payment is to be reduced by so much of the excess as arises (1) from the other member becoming entitled to pension death benefits or lump sum death benefits in respect of the dead member; or (2) in any manner prescribed by regulations made by the Board of Inland Revenue: Finance Act 2004 s 172B(5) (amended by 2007 Act Sch 19 para 4). Such regulations may include provision having effect in relation to times before they are made: Finance Act 2004 s 172B(6). For the meaning of 'transfer lump sum death benefit' see PARA 873B.8 NOTE 8. As to pension death benefits, see PARA 873B.6; and as to lump sum death benefits, see PARA 873B.8.

Section 172B does not apply if the benefits to which each of at least 20 members of the pension scheme has an actual or prospective entitlement under the scheme are increased at the same rate in consequence of the death (s 172B(7) (amended by 2007 Act Sch 19 para 12; and Finance Act 2008 Sch 28 para 4(3), 94)); nor does it apply if the increase in the pension rights of the other member is brought about by an assignment (or agreement to assign) within the Finance Act 2004 s 172 (s 172B(8)). However, nothing in s 172B applies in relation to the rights representing the member's unsecured pension fund if those rights would represent the member's alternatively secured pension fund but for Sch 28 para 11(6), (7) (see PARA 873B.5); s 172B(8A) (added by 2007 Act 2007 Sch 19 para 12). The 2004 Act s 172B(7) does not apply if (1) the increase in the pension rights mentioned in the TEXT is an increase in the rate of a dependants' annuity or a dependants' scheme pension or in rights representing a dependants' unsecured pension fund or dependants' alternatively secured pension fund; and (2) the increase is attributable to rights of the deceased member for payments under a dependants' annuity or dependants' scheme pension or rights representing a dependants' unsecured pension fund: s 172B(7A) (added by Finance Act 2008 Sch 28 para 4(5)).

23 For the meaning of 'employer', see PARA 873B.2 NOTE 7.

24 For the meaning of 'tax year', see PARA 873B.7 NOTE 3.

25 An arrangement is a relevant arrangement if it is (1) a money purchase arrangement that is not a cash balance arrangement; or (2) a hybrid arrangement under which the benefits that may be provided to or in respect of the member are, or include, money purchase benefits other than cash balance benefits: 2004 Act s 172C(2). For the meaning of 'money purchase arrangement', 'money purchase benefits', 'cash balance arrangement', 'cash balance benefits' and 'hybrid arrangement', see PARA 873B.5 NOTE 13.

26 The 'permitted maximum' is (1) the maximum amount of relief to which the member is entitled under *ibid* s 188 (see PARA 873B.12) in respect of relievable pension contributions paid during the tax year (see s 190; and PARA 873B.12), less (2) the amount of any contributions paid by employers under any registered pension scheme in respect of the member in the tax year: s 172C(3). If the member is also a member of one or more other registered pension schemes, the permitted maximum in relation to each of the schemes of which he is a member is

$$\frac{PM}{N}$$

where PM is the amount arrived at under s 172C(3) and N is the number of registered pension schemes of which he is a member: s 172C(4).

27 *Ibid* s 172(1), (5). The amount of the unauthorised payment is the amount by which the amount of the allocated contributions exceeds the permitted maximum: s 172C(6).

28 For the meaning of 'pension input period', see PARA 873B.18.

29 A relevant arrangement is an arrangement under the pension scheme that is (1) a defined benefits arrangement; (2) a cash balance arrangement; or (3) a hybrid arrangement under which the benefits that may be provided to or in respect of the member are, or include, defined benefits or cash balance benefits: 2004 Act s 172D(3).

30 For the meaning of 'occupational pension scheme', see PARA 873B.2 NOTE 7.

31 For the meaning of 'sponsoring employer', see PARA 873B.4 NOTE 10.

32 The pension input amount for a pension input period in respect of the relevant arrangement is determined in accordance with the 2004 Act ss 230-232 (see PARA 873B.18) if the relevant arrangement is a cash balance arrangement; in accordance with ss 234-236 (see PARA 873B.18) if it is a defined benefits arrangement; and in accordance with s 237 (see PARA 873B.18) if it is a hybrid arrangement: s 172D(4).

33 The notional unconnected person input amount for the pension input period in respect of the relevant arrangement is what the pension input amount, as so determined, would have been if the member were connected with a sponsoring employer (or with a person connected with the sponsoring employer) at no time during the pension input period: *ibid* s 172D(5).

34 *Ibid* s 172D(5). For other provisions relating to unauthorised payments, see PARA 873B.5 NOTE 6.

35 'Alternatively secured rights' are rights representing the whole or part of the deceased member's alternatively secured pension fund, or dependant's alternatively secured pension fund, in respect of an arrangement under the pension scheme: Finance Act 2004 s 172BA(2) (s 172BA added by 2007 Act Sch 19 para 13). Rights representing the member's unsecured pension fund are alternatively secured rights for this purpose if they would be such rights but for the Finance Act 2004 Sch 28 para 11(6), (7) (see PARA 873B.5): s 172BA(7).

36 *Ibid* s 172BA(1), (3), (4). However, the amount of the unauthorised payment is reduced by so much (if any) of the excess as arises from the other member becoming entitled to pension death benefits or lump sum death benefits in respect of the deceased member: s 173BA(5). Section 172BA does not apply if the other member's entitlement to the alternatively secured rights is brought about by an assignment within s 172: s 172BA(6).

## 10. Unauthorised payments by registered pension schemes; employer loans

If an employer loan is not authorised<sup>1</sup> at the time it is made, there is an unauthorised payment of an amount equal to the largest of the amounts set out below in relation to the loan<sup>2</sup>.

2207 (1) If the loan exceeds 50 per cent of the pension scheme assets<sup>3</sup>, the amount is:

$$\frac{\left(\frac{AL}{VA} \times 100\right) - 100}{100} \times VA$$

2208 where AL is the amount of the loan and VA is an amount equal to 50 per cent of the aggregate of the amount of the sums, and the market value of the assets, held for the purposes of the pension scheme before the loan is made<sup>4</sup>.

2209 (2) If the loan is not adequately secured<sup>5</sup>, the amount is:

$$AO - VA$$

2210 where AO is the amount owing (including interest) at the relevant time, and VA is the market value at that time of the assets charged, but if the loan is not secured by a charge, or is secured by a charge which has insufficient priority<sup>6</sup>, VA is nil<sup>7</sup>.

2211 (3) If the interest rate is too low<sup>8</sup>, the amount is:

$$100 - \frac{\left(\frac{IR}{PIR} \times 100\right)}{100} \times AO$$

2212 where IR is the rate of interest payable at the relevant time, PIR is the rate of interest prescribed by regulations<sup>9</sup> and AO is the amount owing (not including interest) at that time<sup>10</sup>.

2213 (4) If the loan repayment period is too long<sup>11</sup>, the amount is:

$$\frac{\left(\frac{DLRP}{DFY} \times 100\right) - 100}{100} \times AO$$

2214 where DLRP is the number of days in the period which begins with the date on which the loan is made and ends with the loan repayment date, DFY is the number of days in the period which begins with the date on which the loan is made and ends five years after that date; and AO is the amount owing (including interest) at the relevant time<sup>12</sup>.

2215 (5) If the amount payable for a period is less than the required amount<sup>13</sup>, the amount is the largest of those found by calculating, in relation to each period beginning with the date on which the loan is made and ending with the last day of a loan year:

*RA - AP*

2216 where RA is the required amount in relation to that period, and AP is the amount payable during that period<sup>14</sup>.

1 As to authorised employer loans see PARA 873B.4 NOTE 14.

2 Finance Act 2004 s 179, Sch 30 para 5.

3 *Ibid* s 179(1)(a) (see PARA 873B.4 NOTE 14 head (1)) is not complied with.

4 *Ibid* Sch 30 para 12. For the meaning of 'market value' see PARA 3(4); and for the meaning of 'pension scheme' see PARA 873B.1.

5 *Ibid* s 179(1)(b) (see PARA 873B.4 NOTE 14 head (2)) is not complied with.

6 *Ibid* Condition C in *ibid* Sch 30 para 1 (see PARA 873B.4) is not complied with.

7 *Ibid* Sch 30 para 13. If, at any time after a loan is made, it ceases to be secured by a charge of adequate value, there is an unauthorised payment of an amount calculated in accordance with head (2) of the text: Sch 30 para 6. If, at any time after a loan is made, it is secured by a charge which is not of adequate value, and (1) it ceases altogether to be secured by a charge; (2) a charge is given which does not comply with Sch 30 para 1, Condition A or C; (3) there is a reduction in the value of the assets charged which does not comply with condition B; or (4) the charge ceases to comply with condition C, there is an unauthorised payment of an amount equal to:

*AAE - ABE*

where AAE is the amount calculated in accordance with head (2) of the text after the event, and ABE is the amount so calculated before the event: Sch 30 para 7. See also NOTE 14.

8 *Ibid* s 179(2)(a) (see PARA 873B.4 NOTE 14 head (3)(a)) is not complied with.

9 *Ibid* regulations made under *ibid* s 179(2)(a).

10 *Ibid* Sch 30 para 14. If, at any time after a loan is made, there is an alteration in the repayment terms such that those terms cease to comply with one or more paragraphs of s 179(2), there is an unauthorised payment equal to the largest of such of the amounts calculated in accordance with head (3), (4) or (5) of the text as arise when that paragraph or those paragraphs are not complied with: Sch 30 para 8. If, at any time

after a loan is made, there is an alteration in the repayment terms as a result of which the deterioration condition is met in relation to one or more paragraphs of s 179(2) which were not complied with before the alteration, there is an unauthorised payment of the largest of the amounts calculated by applying, for each paragraph of s 179(2) in relation to which the deterioration condition is met, the formula:

$$\frac{AAA - ABA}{2}$$

where AAA (in relation to a paragraph of s 179(2) which was not complied with before the alteration in the repayment terms) is the amount arising following the non-compliance consequent on the alteration; and ABA, in relation to such a paragraph, is the amount arising before that non-compliance: Sch 30 para 9(1), (3)-(5). The deterioration condition is met in relation to a paragraph of s 179(2) if  $AAA > ABA$ : Sch 30 para 9(2). See also NOTE 14.

11 *Ibid* s 179(2)(b) (see PARA 873B.4 NOTE 14 head (3)(b)) is not complied with.

12 *Ibid* Sch 30 para 15(1), (2). However, if the amount produced by the fraction given in the text is greater than 1, the amount to be taken is the amount owing (including interest) at the relevant time: Sch 30 para 15(3). If the loan repayment date has been postponed under s 179(3), the fraction applies as if references to the date on which the loan is made were to the standard loan repayment date on which the loan repayment date was postponed: Sch 30 para 15(4).

13 *Ibid* s 179(2)(c) (see PARA 873B.4 NOTE 14 head (3)(c)) is not complied with. See also NOTE 10.

14 *Ibid* Sch 30 para 16(1), (2), (4). If any amount so calculated is negative, it must be treated as nil: Sch 30 para 16(3). See also NOTE 10.

If there is a single unauthorised payment which falls within more than one of Sch 30 paras 6-9 (see NOTES 7, 10), the amount of that payment is equal to the amount of the greater or greatest of the amounts calculated under each of those provisions: Sch 30 para 10. If the aggregate amount of the unauthorised payments in relation to a loan under any of the provisions set out above exceeds the amount of the loan when it was made, the excess is not an authorised payment: Sch 30 para 11.

## 11. Registered pension schemes: other unauthorised borrowing

A registered pension scheme<sup>1</sup> is not authorised to borrow an amount in respect of a money purchase arrangement<sup>2</sup> unless the arrangement borrowing condition is met<sup>3</sup>. The arrangement borrowing condition is met if:

$$(APB + PB) < \frac{VA}{2}$$

where APB is the aggregate of the amounts previously borrowed in respect of the arrangement (excluding any amount which has been repaid); PB is the amount proposed to be borrowed in respect of the arrangement; and VA is the value of the arrangement<sup>4</sup>.

The value of the arrangement is the aggregate of:

- 2217 (1) the amount of such of the sums, and the market value<sup>5</sup> of such of the assets, as represent the member's unsecured pension fund or alternatively secured pension fund in respect of the arrangement (if any)<sup>6</sup>;
- 2218 (2) the amount of such of the sums, and the market value of such of the assets, as represent dependants' unsecured pension funds or alternatively secured pension funds in respect of the arrangement (if any);
- 2219 (3) the aggregate of the value of each scheme pension or dependants' scheme pension payable in respect of the arrangement<sup>7</sup>; and
- 2220 (4) the value of the uncrystallised rights<sup>8</sup> under the arrangement<sup>9</sup>.

A registered pension scheme is not authorised to borrow an amount in respect of any arrangement which is not a money purchase arrangement unless the scheme borrowing condition is met<sup>10</sup>. The scheme borrowing condition is met if:

$$(APB + PB) < \frac{AARA}{2}$$

where APB is the aggregate of the amounts previously borrowed by the pension scheme in respect of arrangements which are not money purchase arrangements (excluding any amount which has been repaid); PB is the amount proposed to be borrowed by the pension scheme; and AARA is the aggregate amount of the relevant sums and assets<sup>11</sup>.

If a registered pension scheme borrows an amount which it is not authorised to borrow under the provision set out above, it is treated as having made a scheme chargeable payment<sup>12</sup>.

Borrowing is borrowing by a registered pension scheme if the amount borrowed is to be repaid from sums or assets held for the purposes of the scheme; and such borrowing is in respect of an arrangement if it is properly attributable to the arrangement in accordance with the provisions of the pension scheme and any just and reasonable apportionment<sup>13</sup>.

1 For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2.

2 For the meaning of 'money purchase arrangement' see PARA 873B.5 NOTE 7.

3 Finance Act 2004 s 182(1).

4 Ibid s 182(2). For the meaning of 'arrangement' see PARA 873B.5 NOTE 5.

5 For the meaning of 'market value' see PARA 873B.3 NOTE 4.

6 For the meaning of 'unsecured pension fund' see PARA 873B.5 NOTE 5; for the meaning of 'alternatively secured pension fund' see PARA 873B.5 NOTE 13; and for the meaning of 'member' see PARA 873B.4 NOTE 3.

7 The value of a scheme pension or dependants' scheme pension payable in respect of the arrangement is:

$$RVF \times ARP$$

where RVF is the relevant valuation factor; and ARP is the annual rate at which the pension is payable: 2004 Act s 182(4). The relevant valuation factor in relation to any registered pension scheme or any arrangement under such a scheme, is 20; but the Inland Revenue and the scheme administrator of any registered pension scheme may agree that the relevant valuation factor in relation to the pension scheme, or to any arrangement thereunder, is to be a number greater than 20: s 276. For the meaning of 'scheme pension' see PARA 873B.5 NOTE 6; and for the meaning of 'dependant' see PARA 873B.6 NOTE 2. For the meaning of 'Inland Revenue' see PARA 873B.2 NOTE 1; and for the meaning of 'scheme administrator' see PARA 873B.2 NOTE 4.

8 Rights are uncrystallised if no-one has become entitled to the present payment of benefits in respect of the rights; and a person is treated as entitled to the present payment of benefits in respect of the sums and assets representing his unsecured pension fund or alternatively secured pension fund: *ibid* s 182(5). If the arrangement is a cash balance arrangement, the value of the uncrystallised rights thereunder is the amount which, on specified assumptions (the 'valuation assumptions'), would be available for the provision of benefits in respect of those rights if a person became entitled to benefits in respect of those rights: s 182(6). If the arrangement is a money purchase arrangement other than a cash balance arrangement, the value of the uncrystallised rights thereunder is the aggregate of the amount of such of the sums, and the market value of such of the assets, held for the purposes of the arrangement as represent those rights: s 182(7). If the arrangement is a hybrid arrangement under which either cash balance benefits or other money purchase benefits (but not defined benefits) may be provided, the value of the uncrystallised rights under the arrangement is the greater of (1) their values calculated under s 182(6) (on the assumption that cash balance benefits are provided); and (2) their value calculated under s 182(7) (on the assumption that other money purchase benefits are provided): s 182(8). For the meaning of 'cash balance arrangement', 'hybrid arrangements' and 'defined benefit' see PARA 873B.5 NOTE 13. As to sums and assets held for the purposes of an arrangement see PARA 873B.5 NOTE 5. The valuation assumptions in relation to a person, benefits and a date are (a) if the person has not reached such age (if any) as must have been reached to avoid any reduction in the benefits on account of age, that the person reached that age on that date; and (b) that the person's right to receive the benefits had not been occasioned by physical or mental impairment: s 277.

9 Ibid s 182(3).

10 Ibid s 184(1).

11 Ibid s 184(2). The aggregate amount of the relevant sums and assets is the aggregate of (1) the amount of the sums held for the purposes of such of the arrangements under the scheme as are not money purchase arrangements; and (2) the market value of the assets held for the purposes of such of the arrangements under the pension scheme as are not money purchase arrangements: s 184(3).

12 Ibid ss 183(1), (2), 185(1), (2). In the case of a money purchase arrangement if, immediately before the amount is borrowed:

$$APB < \frac{VA}{2}$$

the amount of the scheme chargeable payment is:

$$APB + AB - \frac{VA}{2}$$

s 183(2)(a), (3), (4). Otherwise it is the amount borrowed: s 183(2)(b). APB and VA have the meanings given in the text, and AB is the amount borrowed: s 183(5). In any other case, if, immediately before the amount is borrowed:

$$APB < \frac{AARA}{2}$$

the amount of the scheme chargeable payment is:

$$APB + AB - \frac{AARA}{2}$$

s 185(2)(a), (3), (4). Otherwise it is the amount borrowed: s 185(2)(b). APB and AARA have the meanings given in the text, and AB is the amount borrowed: s 185(5).

13 Ibid s 163(1), (2), (4).

## 12. Income tax reliefs for scheme investments and individual contributions

No liability to income tax arises in respect of income derived from investments<sup>1</sup> or deposits held for the purposes of a registered pension scheme<sup>2</sup>, or underwriting commissions applied for the purposes of such a scheme which would otherwise be chargeable<sup>3</sup> to tax<sup>4</sup>.

An individual who is an active member<sup>5</sup> of a registered pension scheme is entitled to relief in respect of relievable pension contributions<sup>6</sup> paid during a tax year<sup>7</sup> if he is a relevant UK individual for that year<sup>8</sup>. The maximum amount of such relief is the amount of his relevant UK earnings chargeable to income tax for the tax year<sup>9</sup>.

The individual or other person by whom a contribution subject to relief is paid is entitled, on making the payment, to deduct and retain thereout a sum equal to income tax on the contribution at the basic rate for the tax year for which the payment is made; and

2221 (1) the scheme administrator<sup>10</sup> must allow the reduction on receipt of the residue;

2222 (2) the payer is acquitted and discharged of so much money as is represented by the deduction as if the sum had actually been paid; and

2223 (3) the sum so deducted is treated as income tax paid by the scheme administrator<sup>11</sup>.

However, if:

- 2224 (a) the pension scheme is an occupational pension scheme<sup>12</sup>, the member is an employee of a sponsoring employer<sup>13</sup>, and relief in respect of contributions made under the scheme by all of the other members of the scheme who are employees of that employer is given in the same manner; or
- 2225 (b) the pension scheme is a public service pension scheme or marine pilots' benefit fund<sup>14</sup>, and the member is an employee,

the amount of the contribution may instead be deducted by the sponsoring employer from the employment income from the individual's employment with the employer for the tax year in which the payment is made<sup>15</sup>.

Where contributions are made under a public service pension scheme or a marine pilots' benefit fund by a member who is not an employee, or contributions are made otherwise than by a member under a net pay pension scheme, relief may instead be given by deducting the contribution from the total income of the individual for the tax year in which it is paid<sup>16</sup>.

1 In relation to a registered pension scheme 'investments' includes futures contracts and options contracts, and income derived from transactions relating to such contracts is treated as derived therefrom: Finance Act 2004 s 186(3). For this purpose, a contract is not prevented from being a futures contract or an options contract by the fact that a party is or may be entitled to receive or liable to make, or entitled to receive and liable to make, only a payment of a sum (as opposed to a transfer of assets) in full settlement of all obligations: s 186(4). A payment made or benefit provided under or in connection with an investment (including an insurance contract or annuity) acquired using sums or assets held for the purposes of a registered pension scheme is treated as made or provided from sums or assets held for those purposes, even if the scheme has been wound up since the investment was acquired: s 161(3), (4).

2 For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2.

3 I.e. under Schedule D Case VI. For the charge to tax under the Income and Corporation Taxes Act 1988 s 18 (Schedule D Case VI) see INCOME TAXATION vol 23(1) (Reissue) PARA 560 et seq.

4 2004 Act s 186(1). This exemption does not apply to income derived from investments or deposits held as a member of a property investment LLP; and for this purpose 'income' includes relevant stock lending fees, in relation to any investments, to which s 186(1) would apply by virtue of the 1988 Act s 129B (see INCOME TAXATION vol 23(1) (Reissue) PARA 690): 2004 Act s 186(2). For the meaning of 'property investment LLP' see INCOME TAXATION vol 23(2) (Reissue) PARA 1433. Section 186(1) does not prevent income from being charged to tax by virtue of s 185A (see PARA 873B.33): s 186(2A) (added by the Finance Act 2006 Sch 21 para 7).

5 For the meaning of 'active member' see PARA 873B.4 NOTE 3.

6 'Relievable pension contributions', in relation to an individual and a pension scheme, means contributions paid by him or on his behalf under the pension scheme, other than (1) contributions paid after he has reached the age of 75; (2) any life assurance premium contributions; (3) any contributions paid by his employer; and (4) any amounts paid by the Board of Inland Revenue under the Pension Schemes Act 1993 s 42A(3) (see PARA 912) or 43 (see PARA 913) or equivalent Northern Ireland legislation: 2004 Act s 188(1)-(3) (s 188(3) amended by the Finance Act 2007 Sch 18 para 2). For the meaning of 'Board of Inland Revenue' see PARA 873B.2 NOTE 1; and for the meaning of 'employer' see PARA 873B.2 NOTE 7.

Contributions paid by or on behalf of an individual under a registered pension scheme are life assurance premium contributions if (a) rights under a non-group life policy are (or later become) held for the purposes of the scheme, and (b) the contributions are treated by s 195A as paid in respect of premiums under that policy: 2004 Act s 195A(1) (s 195A added by 2007 Act Sch 18 para 3). A 'non-group life policy' is a policy of insurance under which the only benefits which may become payable are benefits payable in consequence, or in anticipation, of (i) the death of the individual or one of a group of individuals which includes the individual; or (ii) the deaths of more than one of a group of individuals which includes the individual and the other members of which are connected with the individual: 2004 Act s 195A(2). An individual ('A') is connected with another individual ('B') if A is B's spouse or civil partner, A is a relative of B, A is the spouse or civil partner of a relative of B, A is a relative of B's spouse or civil partner, or A is the spouse or civil partner of a relative of B's spouse or civil partner; and 'relative' means brother, sister, ancestor or lineal descendant: s 195A(8).

Contributions paid by or on behalf of the individual under the pension scheme are treated as paid in respect of premiums under the non-group life policy if the payment of the contributions constitutes the payment of premiums under the policy, or the person by whom they are paid intend them (or an amount equivalent to them) to be applied towards paying such premiums: s 195A(3). Where the premiums under the policy in a tax

year exceeds the amount of any contributions so treated as paid in respect of the premiums, other contributions paid by or on behalf of the individual under the pension scheme in the tax year are treated as paid in respect of premiums under the policy to the extent that their amount does not exceed that excess: s 195A(4). However, where the benefits under the policy relate to the death of one or more of a group of individuals, and contributions are also paid under the pension scheme in the tax year by or on behalf of another member or other members of the group, the amount of the contributions paid by or on behalf of the individual which are treated as paid in respect of premiums under the policy by s 195A(4) does not exceed what is just and reasonable having regard to the operation of s 188(3)(aa) (see head (2)) in relation to the contributions paid by or on behalf of another member or other members of the group: s 195A(5). The Commissioners for Her Majesty's Revenue and Customs may by regulations amend s 195A(2)-(5); and regulations so made which limit the policies of insurance which are non-group life assurance policies or the contributions which are treated as paid in respect of premiums in respect of such policies, may be made so as to have effect in relation to times before they are made: s 195A(6), (7).

The provisions of s 195A do not apply to specified existing policies ('protected policies') unless and until a 'relevant event' (as defined) occurs: 2007 Act Sch 18 para 4(2), 5, 6(2), 7.

An amount recovered by the individual's employer under regulations made under the 1993 Act s 8(3) (see PARA 881) or corresponding Northern Ireland legislation, in respect of minimum payments made to a registered pension scheme is treated for the purposes of the 2004 Act ss 188-194, as a contribution paid by an individual under the scheme: s 188(6). Also for those purposes, references to contributions paid by an individual include contributions made in the form of the transfer by the individual of eligible shares in a company within the permitted period, and the amount of such a contribution is the market value of the shares at the date of the transfer: s 195(1), (2). 'Eligible shares' means shares which the individual has exercised a right to acquire in accordance with the provisions of an SAYE option scheme, or which have been appropriated to him in accordance with the provisions of a share incentive plan; and 'the permitted period' means, in the former case, the period of 90 days following the exercise of the right to acquire, and in the latter, the period of 90 days following the date when the individual directed the trustees of the share incentive plan to transfer the ownership of the shares to him: s 195(3), (4). 'SAYE option scheme' has the meaning given by the Income Tax (Earnings and Pensions) Act 2003 s 516, and 'share incentive plan' that given by s 488: 2004 Act s 195(5). For the meaning of 'market value' see PARA 873B.3 NOTE 4.

A pension credit which increases the rights of the individual under the pension scheme is only treated as a contribution on that individual's behalf if it is derived from a pension scheme that is not a registered pension scheme: s 188(4).

7 For the meaning of 'tax year' see PARA 873B.7 NOTE 3.

8 2004 Act s 188(1)-(3). An individual is a relevant UK individual for a tax year if (1) he has relevant UK earnings chargeable to income tax for that year; (2) he is resident in the United Kingdom at some time during that year; (3) he was so resident both at some time during the five tax years immediately before that year and when he became a member of the pension scheme; or (4) he, or his spouse or civil partner, has for the tax year general earnings from overseas Crown employment subject to UK tax: s 189(1) (amended by the Tax and Civil Partnership Regulations 2005, SI 2005/3229). 'Relevant UK earnings' means employment income, income which is chargeable to tax under Schedule D and is immediately derived from the carrying on or exercise of a trade, profession or vocation (whether personally or as a partner acting personally in a partnership), and income to which the 1988 Act s 529 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1484) applies: 2004 Act s 189(2). Such earnings are treated as not chargeable to income tax if, in accordance with arrangements having effect by virtue of the 1988 Act s 788 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1087 et seq) they are not taxable in the United Kingdom: 2004 Act s 189(3). 'General earnings from Crown employment subject to UK tax' has the meaning given by the 2003 Act s 28: 2004 Act s 189(4). As to the meaning of 'residence' see INCOME TAXATION vol 23(2) (Reissue) PARA 1259 et seq. As to the meaning of 'trade' see INCOME TAXATION vol 23(1) (Reissue) PARA 105; as to the meaning of 'profession' see INCOME TAXATION vol 23(1) (Reissue) PARA 135; and as to the meaning of 'vocation' see INCOME TAXATION vol 23(1) (Reissue) PARA 13. As to the charge under Schedule D see INCOME TAXATION vol 23(1) (Reissue) PARA 88 et seq.

9 Ibid s 190(1). If the amount of such earnings which are so subject is less than the basic amount, the maximum amount of relief is increased to the basic amount; but these provisions do not apply to any amount of relief to which the individual is entitled in respect of any amount recovered by his employer under regulations made under the 1993 Act s 8(3) (see PARA 881) or corresponding Northern Ireland legislation: 2004 Act s 190(2), (5). The 'basic amount' is £3,600 or such greater amount as the Treasury may by order specify: s 190(4). As to the making of such orders see PARA 873B.1 NOTE 2.

10 For the meaning of 'scheme administrator' see PARA 873B.2 NOTE 4.

11 2004 Act ss 191(1), (2), 192(1), (2). When payment of the contribution is received, the scheme administrator is entitled to recover from the Board of Inland Revenue the amount which is treated as income tax paid by him in relation to the contribution, and any amount so recovered is treated for the purposes of the Tax Acts (see INCOME TAXATION vol 23(1) (Reissue) PARA 21) in the same manner as the payment of the

contribution: 2004 Act s 192(3). If (apart from this provision) income tax at the higher rate or the additional rate (see INCOME TAXATION vol 23(1) (Reissue) PARA 4) is chargeable in respect of any part of the individual's total income (see INCOME TAXATION vol 23(2) (Reissue) PARA 1271) for the tax year, on the making of a claim the basic rate limit and the higher rate limit (see INCOME TAXATION vol 23(1) (Reissue) PARA 4) for that year in the individual's case are treated as increased by the amount of the contribution: s 192(4) (amended by Finance Act 2009 Sch 2 para 11). For the purposes of the 1988 Act ss 257(5), 257A(5) (see INCOME TAXATION vol 23(2) (Reissue) PARAS 992, 996) and 257AB(4) (see INCOME TAXATION), the individual's total income for the tax year is treated as reduced by the amount of the contribution: 2004 Act s 192(5) (amended by SI 2005/3229). For the meaning of 'chargeable gains' see CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 8.

Where, after relief is given to an individual in accordance with the above provisions for a tax year, an assessment, alteration of an assessment or other adjustment of his liability to tax is made, any appropriate consequential adjustments must be made in relief so given; and where relief is so given to an individual, no relief is given in respect of the contribution under any other provision of the Income Tax Acts (see INCOME TAXATION vol 23(1) (Reissue) PARA 21), or (in the case of a contribution under an annuity contract) in respect of any other premium or consideration for an annuity under the same contract: 2004 Act s 192(9), (10).

Section 192(1), (2) has effect subject to such conditions as the Board of Inland Revenue may prescribe by regulations, which may make provision for carrying s 192(1)-(3) into effect, in particular by making provision (1) about how a sum is to be recovered under s 192(3)(a) (including the manner in which a claim for the recovery of a sum is to be made); (2) for the giving of such information, in such form, as may be prescribed by or under the regulations; (3) for the inspection of documents by persons authorised by the Board of Inland Revenue; and (4) specifying the consequences of failure to comply with conditions prescribed by the regulations: s 192(6), (7). Such regulations may, in particular, modify the operation of any provision of the Tax Acts, or provide for the application of any provision of the Tax Acts (with or without modification): 2004 Act s 192(8). As to the making of such regulations see PARA 873B.1 NOTE 2. The regulations so far made are the Registered Pension Schemes (Relief at Source) Regulations 2005, SI 2005/3448 (amended by SI 2009/56, SI 2009/571).

This method of giving relief is known as 'relief at source'.

12 For the meaning of 'occupational pension scheme' see PARA 873B.2 NOTE 7.

13 For the meaning of 'sponsoring employer' see PARA 873B.4 NOTE 10.

14 'Marine pilots' benefit fund' means a fund established under the Pilotage Act 1983 s 15(1)(i), or any scheme supplementing or replacing such a fund: 2004 Act s 191(8). For the meaning of 'public service pension scheme' see PARA 873B.2 NOTE 8.

15 Ibid ss 191(3), (4), 193(1), (2). For the meaning of 'employment' and related expressions see PARA 873B.2 NOTE 7. A deduction may be made only once in respect of the same contribution: s 193(3). A claim for excess relief may be made if (1) the amount of the contributions paid by an individual under one or more relevant net pay pension schemes in a tax year exceeds the employment income from the individual's employment or employments with the sponsoring employer or employers for the tax year; or (2) it is not possible for the sponsoring employer or employers for any other reason to deduct the whole amount of the contributions from the individual's employment income: s 193(4). On the making of such a claim, the amount of the excess may be deducted from the total income of the individual for the tax year: s 193(6). Where, after relief is given to an individual for a tax year in accordance with these provisions, an assessment, alteration of an assessment or other adjustment of his liability to tax is made, any appropriate consequential adjustments must be made in relief so given; and where relief is so given to an individual, no relief is given in respect of the contribution under any other provision of the Income Tax Acts: 2004 Act s 193(7), (8). A net pay pension scheme is a relevant net pay pension scheme if the members of the scheme entitled to be given relief in accordance with s 193 in respect of contributions by them under the scheme include the individual; and 'net pay pension scheme' means a pension scheme some or all of the members of which are entitled to be given such relief in respect of such contributions: ss 191(9), 193(5). Relief to which an individual is entitled by virtue of s 190(2) may only be given in accordance with s 192, and is not required to be given in respect of contributions under a net pay pension scheme: s 191(7).

This method of giving relief is known as 'relief under net pay arrangements'.

16 2004 Act ss 191(5), (6), 194(1). Such relief must be claimed: s 194(1). Relief to which an individual is entitled by virtue of s 190(2) may only be given in accordance with s 192, and is not required to be given in respect of contributions under a net pay pension scheme: s 191(7).

Where, after relief is given to an individual in accordance with the above provisions for a tax year, an assessment, alteration of an assessment or other adjustment of his liability to tax is made, any appropriate consequential adjustments must be made in relief so given; and where relief is so given to an individual, no relief is given in respect of the contribution under any other provision of the Income Tax Acts: 2004 Act s 194(2), (3).

For relevant capital gains tax reliefs see the Taxation of Chargeable Gains Act 1992 s 271; and CAPITAL GAINS TAXATION.

### 13. Registered pension schemes; tax relief for employers

Contributions<sup>1</sup> paid by an employer<sup>2</sup> under a registered pension scheme<sup>3</sup> in respect of any individual are treated<sup>4</sup> as not being payments of a capital nature to the extent that they would otherwise be; and if they are allowed to be deducted in computing the amount of the employer's profits, the relevant profits are those of the period of account in which the contributions are paid<sup>5</sup>. Such contributions are treated as being expenses of management<sup>6</sup> to the extent that they would not otherwise be so treated, and as referable to the accounting period in which they are paid<sup>7</sup>.

Where contributions are paid by an employer under a registered pension scheme in two consecutive chargeable periods<sup>8</sup> (the 'previous chargeable period' and the 'current chargeable period') and the amount of the contributions paid in the current chargeable period otherwise than for an excepted purpose<sup>9</sup> ('CCCP') exceeds 210 per cent of the contributions paid in the previous chargeable period ('CPCP'), relief is given in respect of so much of CCCP as exceeds 110 per cent of CPCP ('the amount of the relevant excess contributions')<sup>10</sup>.

If the employer ceases to carry on business in the current chargeable period or a later chargeable period in which the above provisions would require a fraction of the amount of the relevant excess contributions to be treated as paid and, were those provisions to apply, relief in relation to the whole of the amount of the relevant excess contributions would not be given pre-cessation<sup>11</sup>, then, at the employer's option, either:

- 2226 (1) the portion of that amount in relation to which relief would not otherwise be so given ('the unrelieved portion') is treated as paid in the chargeable period in which the employer ceases to carry on business; or
- 2227 (2) a specified amount is treated as paid on each day in the period beginning with the current chargeable period and ending with the day on which the employer ceases to carry on business ('the relevant period')<sup>12</sup>.

Where a sum is paid to the trustee or managers of a registered pension scheme by an employer in or towards the discharge of any liability of the employer relating to deficiencies in the assets of the scheme<sup>13</sup>, the making of the payment is treated<sup>14</sup> as if it were the payment of a contribution by the employer under the scheme<sup>15</sup>. If the employer's trade<sup>16</sup>, profession<sup>17</sup>, vocation<sup>18</sup> or business is discontinued before the making of the payment, relief is to be given to the same extent as it would have been given before the discontinuance, and as if the payment had been made on the last day on which the trade, profession, vocation or business was carried on<sup>19</sup>.

The Board of Inland Revenue may make regulations for restricting the extent to which contributions paid by an employer under a registered pension scheme in respect of an individual are subject to relief in cases where

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- 259. (a) any of the benefits which will or may be payable to or in respect of the individual under the scheme will be payable only if relevant benefits expected to be so paid under an employer-financed retirement benefits scheme are not so paid and/or
- 260. (b) because relevant benefits are or may be payable to or in respect of the individual under an employer-financed retirement benefits scheme, the aggregate of the amount of any sums and the market value of any assets held for the purposes of, or representing accrued rights under, the registered pension scheme which may be transferred by way of a recognised transfer in respect of the individual will or may be less than it otherwise would be<sup>20</sup>.

Where an employer ('E') pays contributions under a registered pension scheme ('the original scheme') in a chargeable period, and would otherwise<sup>21</sup> be entitled in the next chargeable period to an amount of relief in respect of a payment all or part of which is intended to facilitate the payment of pension contributions under the original scheme or a substitute scheme<sup>22</sup> by a person other than E, then if the avoidance condition<sup>23</sup> is met, the amount of the relevant relief<sup>24</sup> is treated<sup>25</sup> as the amount of a pension contribution paid by E under the original scheme in the chargeable period<sup>26</sup>.

1 For the meaning of 'contributions' see PARA 873B.12 NOTE 6. For this purpose, the term includes minimum payments under the Pension Schemes Act 1993 s 8 or under corresponding Northern Ireland legislation, other than any part recovered from a member of the scheme under regulations made under s 8(3) (see PARA 881): Finance Act 2004 s 196(5).

2 For the meaning of 'employer' and related expressions see PARA 873B.2 NOTE 7.

3 For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2.

4 Ie for the purposes of Schedule D Case I or II. As to the charge to tax under Schedule D Cases I and II see the Income and Corporation Taxes Act 1988 s 18; and INCOME TAXATION vol 23(1) (Reissue) PARA 95 et seq, PARA 134 et seq.

5 2004 Act s 196(1), (2). For the meaning of 'period of account' see INCOME TAXATION vol 23(1) (Reissue) PARA 155.

6 Ie for the purposes of the 1988 Act s 75: see INCOME TAXATION vol 23(2) (Reissue) PARA 1345.

7 2004 Act s 196(1), (3). For the purposes of the 1988 Act s 76 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1383), such contributions are to be brought into account at Step 1 in s 76(7) to the extent that they would not otherwise be, and they are referable to the accounting period in which they are paid: 2004 Act s 196(1), (4). For the meaning of 'accounting period' see INCOME TAXATION vol 23(1) (Reissue) PARA 837.

8 'Chargeable period' means, in a case where the contributions are deducted in computing profits to be charged under Schedule D Case I or II, a period of account; and in a case where relief in respect of the contributions is given under the 1988 Act s 75 or s 76, an accounting period: 2004 Act ss 197(10), 199A(11) (s 199A added by Finance Act 2008 s 90(1)).

9 Contributions are paid for an excepted purpose if they are paid with a view to funding (1) an increase in the amount of pensions paid to pensioner members of the pension scheme to reflect the increases in the cost of living; or (2) benefits which may accrue under the scheme to or in respect of individuals who become members of the scheme in the current chargeable period as a result of future service as employees of the employer: 2004 Act s 197(6), (7). For the meaning of 'member' and 'pensioner member' see PARA 873B.4 NOTE 3; and for the meaning of 'pension' see PARA 873B.4 NOTE 4.

10 Ibid s 197(1), (2) (s 197(2) amended by Finance Act 2008 Sch 29 para 14). The relevant excess contributions must be £500,000 or more: 2004 Act s 197(2)(a).

A fraction of the whole of the amount of the relevant excess contributions is treated for the purposes of the relieving provisions as if it had been paid in the chargeable period, or in each of the two or three chargeable periods, immediately after the current chargeable period (leaving only the remainder to be treated as paid in the current chargeable period), in accordance with the following table: s 197(4), (5) (s 197(4) amended by Finance Act 2008 Sch 29 para 14). The 'relieving provisions' are the provisions mentioned in the 2004 Act s 196(2)-(4): s 197(9A) (added by Finance Act 2008 Sch 29 para 14).

<i>AMOUNT OF THE RELEVANT EXCESS CONTRIBUTIONS</i>	<i>FRACTION AND CHARGEABLE PERIOD OR PERIODS</i>
£500,000 or more but less than £1m	One-half of the whole of the amount of the relevant excess contributions is to be treated as paid in the chargeable period immediately after the current chargeable period

£1m or more but less than £2m	One-third of the whole of the amount of the relevant excess contributions is to be treated as paid in the two chargeable periods immediately after the current chargeable period
£2m or more	One-quarter of the whole of the amount of the relevant excess contributions is to be treated as paid in each of the three chargeable periods immediately after the current chargeable period

Where the previous chargeable period and the current chargeable period are not of equal length, the amount which would otherwise represent CPCP must be adjusted by multiplication by:

$$\frac{DCCP}{DPCP}$$

where DCCP is the number of days in the current chargeable period, and DPCP is the number of days in the previous chargeable period: s 197(8), (9).

11 Relief is given pre-cessation if it is given for the chargeable period in which the employer ceases to carry on business or any earlier chargeable period: *ibid* s 198(2).

12 *Ibid* ss 197(3)(b), 198(1), (3), (4). The specified amount is calculated by applying the fraction:

$$\frac{UP}{DRP}$$

where UP is the amount of the unrelieved portion, and DRP is the number of days in the relevant period: s 198(5).

13 *Ie* a payment under the Pensions Act 1995 s 75 (see PARA 850) or corresponding Northern Ireland legislation.

14 *Ie* for the purposes of the relieving provisions: see NOTE 10. For the purposes of the Income and Corporation Taxes Act 1988 s 76, such a sum is treated (to the extent that it would not otherwise be so treated) as part of expenses payable falling to be brought into account at Step 1 in s 76(7): 2004 Act s 199(5).

15 *Ibid* s 199(1), (2) (s 199(2) amended by Finance Act 2008 Sch 29 para 14).

16 As to the meaning of 'trade' see INCOME TAXATION vol 23(1) (Reissue) PARA 105.

17 For the meaning of 'profession' see INCOME TAXATION vol 23(1) (Reissue) PARA 135.

18 For the meaning of 'vocation' see INCOME TAXATION vol 23(1) (Reissue) PARA 136.

19 2004 Act s 199(3), (4).

No sum other than contributions paid by an employer under a registered pension scheme is deductible in computing the amount of the profits of the employer for the purposes of Schedule D Case I or II, or is an expense of management for the purposes of the 1988 Act s 75, or is to be brought into account at Step 1 in s 76(7), in connection with the cost of providing benefits under the scheme: 2004 Act s 200.

20 *Ibid* s 196A(1)-(3) (s 196A added by the Finance Act 2005 Sch 10 para 39). The reference in this provision to contributions paid by an employer being subject to relief is to (1) their being deductible in computing the amount of the profits of the employer for the purposes of the Income Tax (Trading and Other Income) Act 2005 Pt 2 (ss 3-259) (trading income) or Schedule D Case I or II (see INCOME TAXATION vol 23(1) (Reissue) PARA 95 et seq, PARA 134 et seq); (2) their being expenses of management of the employer for the purposes of the Income and Corporation Taxes Act 1988 s 75 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1345); or (3) their being brought into account at Step 1 in the 1988 Act s 76(7) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1383) in respect of the employer (depending on which is appropriate in relation to the employer): 2004 Act s 196A(4). 'Employer-financed retirement benefits scheme' and 'relevant benefits' have the same meaning as in the Income Tax (Earnings and Pensions) Act 2003 ss 393A, 393B (see PARA 758): 2004 Act s 196A(5). For the

meaning of 'Board of Inland Revenue', see PARA 873B.2 NOTE 1; and as to the making of such regulations, see PARA 873B.1 NOTE 2. The regulations so far made are the Registered Pension Schemes (Restriction of Employers' Relief) Regulations 2005, SI 2005/3458.

21 le apart from this provision.

22 A 'substitute scheme' is any registered pension scheme (1) to which there is a relevant transfer in the period of two years ending with the day on which the payment concerned is made; or (2) to which it is envisaged that a relevant transfer will or may be made after that day: 2004 Act s 199A(6). A 'relevant transfer' is a recognised transfer from the original scheme of more than 30% of the aggregate of (a) in a case within head (1) above, the amount of the sums, and the market value of the assets held for the purposes of, or representing accrued rights under, the original scheme immediately before the transfer; and (b) in a case within head (2) above, the amount of those sums and the market value of the assets on the day on which the payment is made: s 199A(7). If there is a transfer from a substitute scheme to another registered pension scheme which would have been a relevant transfer had it been a transfer from the original scheme at the time the relevant transfer was made, that other scheme is also a substitute scheme: s 199A(8).

23 The avoidance condition is that (1) the 2004 Act s 197 would apply if, in the chargeable period in question, E paid pension contributions under the original scheme of the amount of the relevant relief; and (2) the purpose, or one of the purposes, of facilitating the payment of pension contributions by a person other than E is to enable pension contributions to be paid without that provision applying: s 199A(3) (s 199A added by Finance Act 2008 s 90).

24 The 'relevant relief' is the relief to which the employer would (apart from this provision) be entitled in the chargeable period in respect of the payment concerned or, where part only of the payment is intended to facilitate the payment of pension contributions, that part of the payment: *ibid* s 199A(5).

25 le for the purposes of *ibid* ss 197, 198 and 199A: s 199A(4), (11).

26 *Ibid* s 199A(1), (2), (4). The relief referred to in the text includes relief for a liability in respect of the making of the payment by a person other than E: s 199A(9). References to E being entitled to an amount of relief are to any amount (1) being deductible in computing the amount of E's profits for the purposes of the Income Tax (Trading and Other Income) Act 2005 Pt 2 (ss 3-259) or Schedule D Case I or II (as to the charge to tax under Schedule D see *INCOME TAXATION*); (2) being expenses of management of E for the purposes of the Income and Corporation Taxes Act 1988 s 75 (see *INCOME TAXATION*); or (3) being brought into account in respect of E at step 1 in s 76(7) (see *INCOME TAXATION*): 2004 Act s 199A(10).

## 14. Taxation of benefits: in general

In relation to any pension under a registered pension scheme<sup>1</sup>, the taxable pension income for a tax year<sup>2</sup> is the full amount of the pension that accrues in that year, irrespective of when any amount is actually paid, and the person liable for any tax charged thereon is the person receiving or entitled to the pension under the scheme<sup>3</sup>.

If a trivial commutation lump sum or a winding-up lump sum is paid to a member<sup>4</sup> of a registered pension scheme under the scheme, the member is treated as having taxable pension income for the tax year in which the payment is made equal to the amount of the lump sum; but if immediately before the lump sum is paid, he has uncrystallised rights under any one or more arrangements under the pension scheme, the amount of the taxable pension income if all his rights under the scheme are uncrystallised is 75 per cent of the amount of the lump sum, and in any other case is reduced by 25 per cent of the value of the uncrystallised rights<sup>5</sup>. If a trivial commutation lump sum death benefit, or a winding-up lump sum death benefit is paid to a person under a registered pension scheme, that person is treated as having taxable pension income for the tax year in which the payment is made equal to the amount of the lump sum<sup>6</sup>.

No liability to income tax arises on a lump sum paid under a registered pension scheme if the lump sum is (1) a pension commencement lump sum; (2) a serious ill-health lump sum; (3) a refund of excess contributions lump sum; (4) a defined benefits lump sum death benefit; (5) an uncrystallised funds lump sum death benefit; or (6) a transfer lump sum death benefit<sup>7</sup>. The following sums are chargeable to tax on the scheme administrator<sup>8</sup>: (a) a short service refund lump sum<sup>9</sup>; (b) pension protection lump sum<sup>10</sup>; (c) an annuity protection lump sum death

benefit<sup>11</sup>; and (d) an unsecured pension fund lump sum death benefit<sup>12</sup>. A lifetime allowance excess lump sum<sup>13</sup> is chargeable to income tax in accordance with specific provisions<sup>14</sup>, but not otherwise<sup>15</sup>.

1 'Pension under a registered pension scheme' includes (1) an annuity under, or purchased with sums or assets held for the purposes of, or representing acquired rights under, a registered pension scheme; and (2) income withdrawal or dependants' income withdrawal under a registered pension scheme: Income Tax (Earnings and Pensions) Act 2003 s 579D (ss 579A-579D added by the Finance Act 2004 Sch 31 para 6). For the meaning of 'income withdrawal' see PARA 873B.4 NOTE 4; and for the meaning of 'dependants' income withdrawal; see PARA 873B.6 NOTE 7. For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2.

2 For the meaning of 'tax year' see PARA 873B.7 NOTE 3.

3 2003 Act ss 579A(1), 579B, 579C. These provisions do not, however, apply to a pension under a registered pension scheme if and to the extent that, when it is paid, a liability to the unauthorised payments charge (see PARA 873B.21) arises in respect of the amount of the payment: s 579A(2).

4 For the meaning of 'member' see PARA 873B.4 NOTE 3

5 2003 Act s 636B (ss 636A-636C added by 2004 Act Sch 31 para 11; 2003 Act s 636B amended by Finance Act 2005 Sch 10 para 59)). For the meaning of 'trivial commutation lump sum' see PARA 873B.7 NOTE 4; and for the meaning of 'winding-up lump sum' see PARA 873B.7 NOTE 5. For the meaning of 'uncrystallised rights' and for their value, see the 2004 Act s 212; and PARA 873B.21).

6 2003 Act s 636C. For the meaning of 'trivial commutation lump sum death benefit' see PARA 873B.8 NOTE 9; and for the meaning of 'winding-up lump sum death benefit' see PARA 873B.8 NOTE 10.

7 Ibid s 636A(1). For the meaning of 'pension commencement lump sum', 'serious ill-health lump sum' and 'refund of excess contributions lump sum' see PARA 873B.7. For the meaning of 'defined benefits lump sum death benefit' see PARA 873B.8 NOTE 2; for the meaning of 'uncrystallised funds lump sum death benefit' see PARA 873B.8 NOTE 4; and for the meaning of 'transfer lump sum death benefit' see PARA 873B.8 NOTE 8. Section 636A(1) does not limit the operation of the lifetime allowance charge: see PARA 873B.15.

8 For the meaning of 'scheme administrator' see PARA 873B.2 NOTE 4.

9 For the meaning of 'short service refund lump sum' see PARA 873B.7 NOTE 2.

10 For the meaning of 'pension protection lump sum death benefit' see PARA 873B.8 NOTE 3.

11 For the meaning of 'annuity protection lump sum death benefit' see PARA 873B.8 NOTE 5.

12 2003 Act s 636A(3), (4), (6), (7). For the meaning of 'unsecured pension fund lump sum death benefit' see PARA 873B.8 NOTE 6. The sums concerned are taxable under the 2004 Act ss 205, 206 (see PARA 873B.21) but not otherwise: 2003 Act s 636A(3), (4).

13 For the meaning of 'lifetime allowance excess lump sum' see PARA 873B. 7 NOTE 7.

14 Ie the 2004 Act ss 214-226: see PARA 873B.15.

15 2003 Act s 636A(5).

## 15. Lifetime allowance charge

A charge to income tax (the 'lifetime allowance charge') arises where a benefit crystallisation event<sup>1</sup> occurs in relation to an individual who is a member of one or more registered pension schemes<sup>2</sup> and either the first or second lifetime allowance charge condition is met<sup>3</sup>.

The first lifetime allowance charge condition is that the whole or any part of the individual's lifetime allowance is available on the benefit crystallisation event, but the amount crystallised on that event exceeds the amount of that allowance then available<sup>4</sup>. The second lifetime allowance charge condition is that none of the individual's lifetime allowance is available on the benefit crystallisation event<sup>5</sup>.

The individual's lifetime allowance is the standard lifetime allowance<sup>6</sup>. However, where one or more lifetime allowance enhancement factors operate in relation to a benefit crystallisation event occurring in relation to the individual, his lifetime allowance at the time of that event is:

$$SLA + (SLA \times LAEF)$$

where SLA is the standard lifetime allowance at that time, and LAEF is the lifetime allowance enhancement factor which operates with respect to the benefit crystallisation event and the individual or (where more than one so operates) the aggregate thereof<sup>7</sup>. The lifetime allowance enhancement factors are as follows.

- 2228 (1) If a benefit crystallisation event occurs in relation to an individual who has (at any time after 5 April 2006 but before that event) acquired rights under a registered pension scheme by reason of having become entitled to a pension credit which is derived from the same or another registered pension scheme, and the rights under that scheme which became subject to the corresponding pension debit consisted of or included rights to a-commencement pension in payment<sup>8</sup>, the lifetime allowance enhancement factor is the pension credit factor<sup>9</sup>.
- 2229 (2) Where, during any part of the period that is the active membership period<sup>10</sup> in relation to an arrangement<sup>11</sup> relating to the individual under a registered pension scheme, he is a relevant overseas individual<sup>12</sup>, then:
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261. (a) if the arrangement is a money purchase arrangement<sup>13</sup> which is a cash balance arrangement<sup>14</sup>, the lifetime allowance enhancement factor is the cash balance arrangement non-residence factor<sup>15</sup>, and if it is any other kind of money purchase arrangement, the lifetime allowance enhancement factor is the other money purchase arrangement non-residence factor<sup>16</sup>;
262. (b) if the arrangement is not a money purchase arrangement, the lifetime allowance enhancement factor is either the defined benefits arrangement non-residence factor (in the case of a defined benefits arrangement)<sup>17</sup> or the hybrid arrangement non-residence factor (in the case of a hybrid arrangement)<sup>18</sup>.
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- 2230 (3) Where (at any time after 5 April 2006 but before the benefit crystallisation event) there has been a recognised overseas scheme transfer<sup>19</sup>, the lifetime allowance enhancement factor is the recognised overseas scheme transfer factor<sup>20</sup>; and in calculating that factor:
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263. (a) if the arrangement is a money purchase arrangement which is a cash balance arrangement, the relevant relievable amount is the cash balance arrangement relevant relievable amount<sup>21</sup>, and if it is any other kind of money purchase arrangement, the relevant relievable amount is the other money purchase arrangement relevant relievable amount<sup>22</sup>;
264. (b) if the arrangement is not a money purchase arrangement, the relevant relievable amount is either the defined benefits arrangement relevant relievable amount (in the case of a defined benefits arrangement)<sup>23</sup> or the hybrid arrangement relevant relievable amount (in the case of a hybrid arrangement)<sup>24</sup>.
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The lifetime allowance charge is a charge at the rate of 55 per cent in respect of so much (if any) of the chargeable amount<sup>25</sup> as constitutes the lump-sum amount<sup>26</sup>; and at the rate of 25 per cent in respect of so much (if any) of the chargeable amount as constitutes the retained amount<sup>27</sup>. The chargeable amount is not treated as income for any purpose of the Tax Acts<sup>28</sup>. The persons liable to the charge are the individual concerned and the scheme administrator of the pension scheme, the liability of whom is joint and several<sup>29</sup>.

Where the scheme administrator is liable to the lifetime allowance charge in respect of a benefit crystallisation event, the scheme administrator may apply to the Inland Revenue for the discharge of that liability on the ground that the scheme administrator reasonably believed that there was no such liability and that, in all the circumstances of the case, it would not be just and reasonable for the liability to be enforced<sup>30</sup>. The liability may be partially discharged if it can be shown that the scheme administrator reasonably believed that the amount of the charge was less than the actual amount and that, in all the circumstances of the case, it would not be just and reasonable for the liability for the balance ('the excess amount') to be enforced<sup>31</sup>.

1 For the meaning of 'benefit crystallisation event' and the amount crystallised see PARA 873B.16.

2 For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2. For the meaning of 'member' see PARA 873B.4 NOTE 3.

3 Finance Act 2004 s 214(1), (5).

4 Ibid s 214(2).

5 Ibid s 214(3)

6 Ibid s 218(1). For the tax year 2006-07 the standard lifetime allowance is £1,500,000, and for each subsequent tax year it is such amount, not being less than the standard lifetime allowance for the immediately preceding tax year, as is specified by an order made by the Treasury: s 218(3). See the Registered Pension Schemes (Standard Lifetime and Annual Allowances) Order 2007, SI 2007/494, which sets out the following figures for the standard lifetime allowance: 2007-08, £1,600,000; 2008-09, £1,650,000; 2009-10, £1,750,000; 2010-11, £1,800,000. For the meaning of 'tax year' see PARA 873B.7 NOTE 3; and for the meaning of 'the tax year 2006-07' see PARA 873B.7 NOTE 4. For transitional provisions see the 2004 Act Sch 36 paras 7-11, 18, 19 (amended by Finance Act 2005 Sch 10 para 52, Sch 11 Pt 4; Finance Act 2006 Sch 23 paras 36, 44, 45; Income Tax Act 2007 Sch 1 para 485; and Finance Act 2007 Sch 1 paras 15-17). References (however expressed) to a person's lifetime allowance at any time are to what that allowance would be, calculated in accordance with these provisions, if a benefit crystallisation event occurred in relation to the person at that time: 2004 Act s 218(7).

7 Ibid s 218(4).

8 'Post-commencement pension in payment' means a pension to which a person became actually entitled on or after 6 April 2006: ibid s 220(2).

9 Ibid s 220(1), (3). The pension credit factor is:

$$\frac{APC}{SLA}$$

where APC is the-commencement pension in payment portion of the amount which is the appropriate amount for the purposes of the Welfare Reform and Pensions Act 1999 s 26(1) (or corresponding Northern Ireland legislation) in relation to the pension credit, and SLA is the standard lifetime allowance at the time when the rights were acquired: 2004 Act ss 220(4), 280(1) (s 220(4) amended by the Finance Act 2005 Sch 10 para 45). The-commencement in payment portion of the appropriate amount (1) in a case where the appropriate amount is arrived at under the 1999 Act 29(2) or (3)(b) (or corresponding Northern Ireland legislation) is so much of that amount as is attributable to rights to a-commencement pension in payment, and (2) in a case where the appropriate amount is arrived at under the 1999 Act s 29(3)(a) (or corresponding Northern Ireland legislation), is so much of that amount as is just and reasonable: 2004 Act s 220(4A) (added by the Finance Act 2005 Sch 10 para 45). As to pension credits and pension debits see PARA 873B.7 NOTE 8. The 2004 Act s 220 applies only if notice of intention to rely thereon is given to the Inland Revenue in accordance with regulations made by the Board of Inland Revenue: s 220(5). See the Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006, SI 2006/131 (amended by SI 2006/3261, SI 2009/56); and the Registered Pension Schemes (Provision of Information) Regulations 2006, 2006/567 (see PARA 873B.1). For the meaning of 'Inland Revenue' and 'Board of Inland Revenue' see PARA 873B.2 NOTE 1.

Such regulations are referred to as 'enhanced lifetime allowance regulations' and may include any provision that appears appropriate for ensuring that the correct tax is charged by way of the lifetime allowance charge in respect of amounts crystallised by benefit crystallisation events and in respect of the payment of lump sums by

registered pension schemes: 2004 Act s 256(1)-(3) (s 256(1) amended by the Finance Act 2006 Sch 23 para 42). Such regulations may, for that purpose, in particular contain provision requiring any person to produce or make available documents, produce certificates or provide information, and for the review from time to time of any matter registered in accordance with the regulations: 2004 Act s 256(4). See SI 2006/567.

Where an individual fraudulently or negligently produces or makes available an incorrect document, or produces an incorrect certificate, in connection with any matter registered in accordance with enhanced lifetime allowance regulations, or provides false information in connection with any such matter; and (1) the amount of the individual's lifetime allowance at the relevant time, or (2) the amount of the pension commencement lump sums to which he may be entitled at the relevant time, would be greater than it actually is were the document or certificate correct or the information true, the individual is liable to a penalty not exceeding 25 per cent of the relevant excess: 2004 Act s 261(1)-(3). In a case within head (1), the relevant excess is the difference between what would be the amount of the individual's lifetime allowance at the relevant time (were the document or certificate correct or the information true) and whichever is the higher of the actual amount of that allowance at that time and the standard lifetime allowance at that time: s 261(4). The 'relevant time' for the purposes of head (1) is (a) where a benefit crystallisation event has occurred in relation to the individual since the document was produced or made available, the certificate produced, or the information provided (but before a penalty under s 261 is imposed), the time when that event occurs; and (b) in any other case, the time when the document was produced or made available, the certificate produced, or the information provided: s 261(5). In a case within head (2), the relevant excess is the difference between what would be the amount of the pension commencement lump sums to which the individual may be entitled at the relevant time (were the document or certificate correct or the information true) and the actual amount at that time of the pension commencement lump sums to which he may be entitled: s 261(6). The 'relevant time' for the purposes of head (2) is the time when the document was produced or made available, the certificate produced, or the information provided: s 261(7). For the meaning of 'pension commencement lump sum' see PARA 873B.7.

An individual who fails to produce or make available any document required to be produced by enhanced lifetime allowance regulations, to produce any certificate so required to be produced, or to provide any information so required to be provided, is liable to a penalty not exceeding £3,000: s 262.

As to the making of such regulations see PARA 873B.1 NOTE 2.

10 The 'active membership period', in relation to a benefit crystallisation event occurring in relation to an arrangement relating to the individual, is the period beginning with the date on which benefits first began to accrue to or in respect of him under the arrangement or, if later 6 April 2006, and ending immediately before the benefit crystallisation event: *ibid* s 221(4). If benefits ceased to accrue to or in respect of the individual under the arrangement before the benefit crystallisation event, the active membership period is treated as having terminated at that time: s 221(5).

11 For the meaning of 'arrangement' see PARA 873B.5 NOTE 5.

12 If he is not a relevant UK individual (see PARA 873B.12 NOTE 8); or he is a relevant UK individual only by virtue of the 2004 Act s 189(1)(c) (see PARA 873B.12 NOTE 8) and is not employed by a person resident in the United Kingdom: s 221(3). As to residence generally see *INCOME TAXATION* vol 23(2) (Reissue) PARA 1259 et seq. Section 221 applies only if notice of intention to rely thereon is given to the Inland Revenue in accordance with regulations made by the Board of Inland Revenue: s 221(6). As to the description and scope of such regulations, and the penalties for non-compliance see NOTE 9. See SI 2006/131; and SI 2006/567, NOTE 9.

13 For the meaning of 'money purchase arrangement' see PARA 873B.5 NOTE 13.

14 For the meaning of 'cash balance arrangement' see PARA 873B.5 NOTE 13.

15 The cash balance arrangement non-residence factor is:

$$\frac{CV - OV}{SLA}$$

where CV is the closing value of the individual's rights under the arrangement, OV is the opening value of those rights, and SLA is the standard lifetime allowance at the end of that part of the active membership period during which the individual was a relevant overseas individual: 2004 Act s 222(3)(a), (4). If there have been two or more parts of the active membership period during which the individual was a relevant overseas individual, the cash balance arrangement non-residence factor is the aggregate of the factors arrived at by the application of the above formula to each of those parts of that period: s 222(3)(b).

For this purpose, the closing value of the individual's rights under the arrangement is the amount which would, on the valuation assumptions, be available for the provision of benefits to or in respect of the individual under the arrangement if he became entitled to the benefits at the end of the part of the active membership period during which he was a relevant overseas individual; and the opening value of those rights is the amount which

would, on those assumptions, be available for the provision of benefits to or in respect of the individual under the arrangement if he became entitled to the benefits at the beginning of that part of that period: s 222(5). As to the valuation assumptions see PARA 873B.11 NOTE 8.

16 Ibid ss 221(1), (2), 222(3). The other money purchase arrangement non-residence factor is:

$$\frac{ROIC}{SLA}$$

where ROIC is the amount of the contributions made under the arrangement by or in respect of the individual in any part of the active membership period during which he is a relevant overseas individual, and SLA is the standard lifetime allowance at the time when that part of that period ended: s 222(6)(a), (7). If there have been two or more parts of the active membership period during which the individual was a relevant overseas individual, the other money purchase arrangement non-residence factor is the aggregate of the factors arrived at by the application of the above formula to each of those parts of that period: s 222(6)(b). For the meaning of 'contributions' see PARA 873B.12 NOTE 6.

17 The defined benefits arrangement non-residence factor is:

$$\frac{(RVF \times PE + LSE) - (RVF \times PB + LSB)}{SLA}$$

where RVF is the relevant valuation factor; PE is the amount of the annual rate of the pension which would, on the valuation assumptions, be payable to the individual under the arrangement if he became entitled to payment thereof at the end of that part of the active membership period during which he was a relevant overseas individual; LSE is the amount of the lump sum to which he would, on those assumptions, be entitled under the arrangement (otherwise than by commutation of pension) if he became entitled to payment thereof at the end of that part of that period; PB is the amount of the annual rate of the pension which would, on those assumptions, be payable to the individual under the arrangement if he became entitled to payment thereof at the beginning of that part of that period; LSB is the amount of the lump sum to which he would, on those assumptions, be entitled under the arrangement (otherwise than by commutation of pension) if he became entitled to payment thereof at the beginning of that part of that period; and SLA is the standard lifetime allowance at the time when that part of that period ended: ibid s 223(3)(a), (4). If there have been two or more parts of the active membership period during which the individual was a relevant overseas individual, the defined benefits arrangement non-residence factor is the aggregate of the factors arrived at by the application of the above formula to each of those parts of that period: s 223(3)(b). For the meaning of 'defined benefits arrangement' see PARA 873B.5 NOTE 13; and for the meaning of 'relevant valuation factor' see PARA 873B.11 NOTE 7.

18 Ibid ss 221(1), (2), 223(1), (2). The hybrid arrangement non-residence factor is the greater or greatest of whichever of the cash balance arrangement non-residence factor, the other money purchase arrangement non-residence factor or the defined benefits arrangement non-residence factor as are relevant in the case of the hybrid arrangement: s 223(5). A factor is a relevant factor in a hybrid arrangement if, in any circumstances, the benefits that may be provided to or in respect of the individual under the arrangement may be benefits linked to that factor; and for this purpose cash balance benefits are linked to the cash balance arrangements non-residence factor, other money purchase benefits to the other money purchase arrangement non-residence factor, and defined benefits to the defined benefits arrangement non-residence factor: s 223(6), (7).

19 There is a 'recognised overseas scheme transfer' if any sum or asset held for the purposes of an arrangement (a 'recognised overseas scheme arrangement') under a recognised overseas pension scheme or representing accrued rights under such an arrangement, is transferred so as to become held for the purposes of, or to represent rights under, an arrangement under a registered pension scheme relating to the individual: ibid s 224(2), (3). For the meaning of 'recognised overseas pension scheme' see PARA 873B.4 NOTE 8. As to sums or assets held for the purposes of an arrangement see PARA 873B.5 NOTE 5.

20 Ibid s 224(1), (4). The recognised overseas scheme transfer factor is:

$$\frac{AAT - RRA}{SLA}$$

where AAT is the aggregate of the amount of any sum transferred, and the market value of any asset transferred, on the recognised overseas scheme transfer; RRA is the relevant relievable amount; and SLA is the standard lifetime allowance at the time when the recognised overseas scheme transfer took place: s 224(5). For the meaning of 'market value' see PARA 873B.3 NOTE 4. Section 224 applies only if notice of intention to rely thereon is given to the Inland Revenue in accordance with regulations made by the Board of Inland Revenue: s

224(9). As to the description and scope of such regulations, and the penalties for non-compliance see NOTE 9. See SI 2006/131; and SI 2006/567, NOTE 9.

21 The cash balance relevant relievable amount is:

$$CV - OV$$

where CV is the closing value of the individual's rights under the arrangement, and OV is the opening value of those rights: 2004 Act s 225(3)(a), (4). For this purpose, the closing value of the individual's rights under the recognised overseas scheme arrangement is the amount which would, on the valuation assumptions, be available for the provision of benefits to or in respect of the individual under the arrangement if he became entitled to the benefits at the end of the part of the overseas arrangement active membership period during which he was not a relevant overseas individual; and the opening value of those rights is the amount which would, on those assumptions, be available for the provision of benefits to or in respect of the individual under the arrangement if he became entitled to the benefits at the beginning of that part of that period: s 225(5). If there have been two or more parts of that period during which the individual was not a relevant overseas individual, the cash balance relevant relievable amount is the aggregate of the factors arrived at by the application of the above formula to each of those parts of that period: s 225(3)(b).

'Overseas arrangement active membership period' is the period beginning with the date on which the benefits first began to accrue to or in respect of the individual under the recognised overseas scheme arrangement or, if later, 6 April 2006, and ending immediately before the recognised overseas scheme transfer: s 224(7). However, if benefits ceased to accrue to or in respect of the individual under that arrangement before that transfer, the overseas arrangement active membership period is treated as having terminated at that time: s 224(8).

22 Ibid s 225(1), (2). The other money purchase relevant relievable amount is the amount of the contributions made under the arrangement by or in respect of the individual in any part of the overseas arrangement active membership period during which the individual was not a relevant overseas individual: s 225(6)(a), (7). If there have been two or more parts of that period during which the individual was not a relevant overseas individual, the other money purchase relevant relievable amount is the aggregate of the factors arrived at by the application of the above formula to each of those parts of that period: s 225(6)(b).

23 The defined benefits relevant relievable amount is:

$$(RVF \times PE + LSE) - (RVF \times PB + LSB)$$

where RVF is the relevant valuation factor; PE is the amount of the annual rate of the pension which would, on the valuation assumptions, be payable to the individual under the recognised overseas scheme arrangement if he became entitled to payment thereof at the end of that part of the overseas arrangement active membership period during which he was not a relevant overseas individual; LSE is the amount of the lump sum to which he would, on those assumptions, be entitled under the arrangement (otherwise than by commutation of pension) if he became entitled to payment thereof at the end of that part of that period; PB is the amount of the annual rate of the pension which would, on those assumptions, be payable to the individual under the arrangement if he became entitled to payment thereof at the beginning of that part of that period; and LSB is the amount of the lump sum to which he would, on those assumptions, be entitled under the arrangement (otherwise than by commutation of pension) if he became entitled to payment thereof at the beginning of that part of that period: ibid s 226(3)(a), (4). If there have been two or more parts of the overseas arrangement active membership period during which the individual was not a relevant overseas individual, the defined benefits relevant relievable amount is the aggregate of the factors arrived at by the application of the above formula to each of those parts of that period: s 226(3)(b).

24 Ibid s 226(1), (2). The hybrid relevant relievable amount is the greater or greatest of whichever of the cash balance arrangement relevant relievable amount, the other money purchase relevant relievable amount or the defined benefits relevant relievable amount as are relevant in the case of the hybrid arrangement: s 226(5). An amount is relevant to a hybrid arrangement if, in any circumstance, the benefits that may be provided to or in respect of the individual under the arrangement may be benefits linked to that amount; and for this purpose cash balance benefits are linked to the cash balance relevant relievable amount, other money purchase benefits to the other money purchase relevant relievable amount, and defined benefits to the defined benefits relevant relievable amount: s 226(6), (7).

25 The 'chargeable amount' is the aggregate of the basic amount and any amount which is treated as forming part of the lump-sum amount under ibid s 215(6) (see NOTE 26, head (2)) or of the retained amount under s 215(8) (see NOTE 27 head (2)): s 215(3). The 'basic amount' is (1) if the first lifetime allowance charge condition is met, the amount by which the amount crystallised by the benefit crystallisation event exceeds the amount of the individual's lifetime allowance available thereon; and (2) if the second lifetime allowance charge condition is met, the amount crystallised by the benefit crystallisation event: s 215(4) (amended by Finance Act 2008 Sch 29 para 15).

26 The 'lump-sum amount' is the aggregate of (1) so much of the basic amount as is paid as a lump sum to the individual or a lump sum death benefit in respect of him and (2) if and to the extent that the tax payable under 2004 Act s 215 is covered by a scheme-funded tax payment, the amount so covered: s 215(5), (6). An amount of tax is covered by a scheme-funded tax payment if the tax is paid by the scheme administrator, and the individual's rights under the pension scheme are not reduced so as fully to reflect the amount of that payment: s 215(9). For the meaning of 'scheme administrator' see PARA 873B.2 NOTE 4; and for the meaning of 'lump sum death benefit' see PARA 873B.8 NOTE 1.

27 Ibid s 215(1), (2). The 'retained amount' is the aggregate of (1) so much of the basic amount as is not paid as a lump sum to the individual or a lump sum death benefit in respect of the individual; and (2) if and to the extent that the tax payable under s 215 is covered by a scheme-funded tax payment, the amount so covered: s 215(5), (6). The Treasury may by order amend s 215(2) so as to vary the rate of the lifetime allowance charge, and such an order may make provision for there to be different rates in different circumstances: s 215(2A), (2B) (added by Finance Act 2009 Sch 2 para 14). As to the making of such orders, see INCOME TAXATION vol 23(1) (Reissue) PARA 27.

28 2004 Act s 215(11). For the meaning of 'the Tax Acts' see INCOME TAXATION vol 23(1) (Reissue) PARA 21.

29 Ibid s 217(1). However, where the liability arises by reason of the payment of a relevant lump sum death benefit, it is a liability of the person to whom the lump sum death benefit is paid: s 217(2). A person is liable whether or not that person, any other person liable to the charge, or the scheme administrator (if not so liable) is resident, ordinarily resident or domiciled in the United Kingdom: s 217(5). If more than one relevant lump sum death benefit is paid in respect of an individual and tax is not chargeable on the whole amount of all of them, each of the persons to whom any of those benefits is paid is liable to such portion of the total amount of the tax consequently payable as appears to the Inland Revenue to be just and reasonable: s 217(3), (4). As to the meaning of 'residence' and 'ordinary residence' see INCOME TAXATION vol 23(2) (Reissue) PARA 1260; and for the meaning of 'domicile' see INCOME TAXATION vol 23(2) (Reissue) PARA 1265.

30 Ibid s 267(1)-(3). On the receipt of such an application, the Inland Revenue must decide whether to discharge the liability, and must notify the scheme administrator accordingly: s 267(4), (9). See also NOTE 31.

31 Ibid s 267(5), (6). On the receipt of such an application, the Inland Revenue must decide whether to discharge the liability for the excess amount (or for part of the excess amount) and must notify the scheme administrator accordingly: s 267(7), (9). No discharge (whether total or partial) under s 267 affects the liability of any other person to the charge concerned: s 267(8). Regulations made by the Board of Inland Revenue may make provision supplementing s 267, and such regulations may in particular make provision as to the time limits for the making of an application: s 267(10). For the meaning of 'Board of Inland Revenue' see PARA 873B.2 NOTE 1. As to the making of such regulations see PARA 873B.1 NOTE 2. As to appeal against a decision on such an application see PARA 873B.19 NOTE 13. The regulations so far so made are the Registered Pension Schemes (Discharge of Liabilities under Sections 267 and 268 of the Finance Act 2004) Regulations 2005, SI 2005/3452.

## 16. Benefit crystallisation events and amounts crystallised

The events which are benefit crystallisation events in relation to an individual, and the amount which is crystallised by each of those events, are set out below.

2231 (1) The designation of sums or assets held for the purposes of a money purchase arrangement<sup>1</sup> under any of the relevant pension schemes<sup>2</sup> as available for the payment of unsecured pension<sup>3</sup> to the individual is a benefit crystallisation event, and the amount so crystallised is the aggregate of the amount of the sums and the market value<sup>4</sup> of the assets designated<sup>5</sup>.

2232 (2) The individual's becoming entitled to a scheme pension<sup>6</sup> under any of the relevant pension schemes is a benefit crystallisation event, and the amount crystallised is<sup>7</sup>

$RVF \times P$ .

2233 (3) A benefit crystallisation event occurs where a scheme pension to which the individual has become entitled, becomes payable, otherwise than in excepted circumstances<sup>8</sup>, at an increased annual rate which (a) exceeds the threshold annual rate<sup>9</sup>; and (b) exceeds by more than the permitted margin<sup>10</sup> the rate at which it was

payable on the day on which the individual became entitled to it. The amount crystallised is<sup>11</sup>

$$RVF \times P.$$

2234 (4) The individual's becoming entitled to a lifetime annuity<sup>12</sup> purchased under a money purchase arrangement under any of the relevant pension schemes is a benefit crystallisation event. The amount so crystallised is the aggregate of the amount of such of the sums, and the market value of such of the assets, representing the individual's rights under the arrangement as are applied to purchase the lifetime annuity<sup>13</sup>.

2235 (5) A benefit crystallisation event occurs where the individual reaches the age of 75 when prospectively entitled to a scheme pension or a lump sum (or both) under a defined benefits arrangement<sup>14</sup> under any of the relevant pension schemes. The lump sum is<sup>15</sup>

$$(RVF \times DP) + DSLS.$$

2236 (6) The individual's becoming entitled to a relevant lump sum<sup>16</sup> under any of the relevant pension schemes is a benefit crystallisation event, and the amount crystallised is the amount of the lump sum paid to the individual<sup>17</sup>.

2237 (7) A person's being paid a relevant lump sum death benefit<sup>18</sup> in respect of the individual under any of the relevant pension schemes<sup>19</sup> is a benefit crystallisation event, and the amount crystallised is the amount of the lump sum death benefit<sup>20</sup>.

2238 (8) The transfer of sums or assets held for the purposes of, or representing accrued rights under, any of the relevant pension schemes is a benefit crystallisation event if as a result those sums or assets become held for the purposes of or to represent rights under, a qualifying recognised overseas pension scheme<sup>21</sup> in connection with the individual's membership of that pension scheme. The amount crystallised is the aggregate of the amount of any sums transferred and the market value of any assets transferred<sup>22</sup>.

2239 (9) The individual reaching the age of 75 having designated sums or assets held for the purposes of a money purchase arrangement under any of the relevant pension schemes as available for the payment of unsecured pension to him<sup>23</sup>.

2240 (10) The happening of a prescribed event in relation to a prescribed payment<sup>24</sup>.

1 For the meaning of 'money purchase arrangement' see PARA 873B.5 NOTE 13.

2 The 'relevant pension schemes' means the registered pension schemes of which the individual is a member: Finance Act 2004 s 216(2), Sch 32 para 1. For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2. For the meaning of 'member' see PARA 873B.4 NOTE 3. See also NOTE 18.

3 For the meaning of 'unsecured pension' see PARA 873B.5 NOTE 5.

4 For the meaning of 'market value' see PARA 873B.3 NOTE 4.

5 2004 Act s 216(1). Where, immediately before the individual reaches the age of 75, there is under any of the relevant pension schemes a hybrid arrangement relating to the individual, and the benefits that may be provided to or in respect of him under the arrangement may, depending on the circumstances, be money purchase benefits or defined benefits, head (1) of the text applies as if, at that time, the circumstances are such that the benefits to be provided are money purchase benefits (with the effect that, under Sch 28 para 8(2) (see PARA 873B.5), any relevant uncrystallised funds are treated as having been designated under the arrangement as available for the provision of unsecured pension to the individual): Sch 32 para 5(1), (2) (amended by the Finance Act 2005 Sch 10 para 25). The amount crystallised is the greater of the amount found under head (1)

and that found under head (5) of the text: 2004 Act Sch 32 para 5(4). See also NOTE 14. For the meaning of 'hybrid arrangement' see PARA 873B.5 NOTE 13.

6 For the meaning of 'scheme pension' see PARA 873B.5 NOTE 6.

7 2004 Act s 216(1). 'RVF' is the relevant valuation factor (see PARA 873B.11 NOTE 7) and 'P' is the amount of the pension which will be payable to the individual in the period of 12 months beginning with the day on which he becomes entitled to it (assuming that it remains payable throughout that period at the rate at which it is payable on that day): Sch 32 paras 6, 9(1). If the pension is under a public service pension scheme (see PARA 873B.2 NOTE 8), any abatement of the pension must be left out of account in determining the amount of the pension which will be so payable for this purpose: Sch 32 para 9(1A) (added by the 2005 Act Sch 10 para 8). If the amount of the pension is reduced so as to reflect the amount of any tax under the 2004 Act s 215 (see PARA 873B.15) to be paid by the scheme administrator, that reduction must be left out of account in determining the amount of the pension for the purpose of determining 'P'; and if the reduction is such that, in accordance with normal actuarial practice, it would be taken fully to reflect the amount of the tax, the tax is not treated as tax paid by the scheme administrator for the purposes of s 215(9): Sch 32 para 9(2), (3) (Sch 32 para 9(2) amended, Sch 32 para 9(3) added by 2005 Act Sch 10 para 43). If the scheme pension is funded (in whole or in part) by the application of sums or assets representing the whole or part of the individual's unsecured pension fund, the amount crystallised by the event is reduced by the amount (or an appropriate proportion of the amount) previously crystallised on the designation of the sums or assets as available for the payment of unsecured pension (ie where head (1) of the text has applied): 2004 Act Sch 32 para 3 (amended by the 2005 Act Sch 10 para 25). 'Abatement', in relation to a scheme pension to which a person has become entitled under a public service pension scheme, means the reduction of the pension (including its reduction to nil) in accordance with the rules of the pension scheme by reason of the person's employment in public service: 2004 Act s 279(1) (amended by 2005 Act Sch 10 para 9; and Finance Act 2006 Sch 23 para 33).

If the individual becomes entitled to the pension before reaching normal minimum pension age, and the ill-health condition is not satisfied immediately before he becomes so entitled, he is treated as having become entitled to the pension only on reaching normal minimum pension age; and if he becomes entitled before reaching normal minimum pension age to the payment of a lifetime annuity purchased under a money purchase arrangement under any of the relevant pension schemes, and the ill-health condition is not satisfied immediately before he becomes so entitled, head (2) of the text applies as if the lifetime annuity were a scheme pension under the pension scheme and the individual became entitled to it only on reaching normal minimum pension age: 2004 Act Sch 32 paras 7(1), (2), 8. For the meaning of 'normal minimum pension age' see PARA 873B.5 NOTE 3; and for the meaning of 'ill-health condition' see PARA 873B.5 NOTE 4.

8 'Excepted circumstances' means (1) that at the time when the annual rate of the individual's pension is increased there are at least 50 pensioner members of the pension scheme; and (2) that the individual is one of a class of at least 20 pensioner members of the pension scheme, and all the scheme pensions being paid under the pension scheme to pensioner members of that class are at that time increased at the same rate: *ibid* Sch 32 para 10(1) (amended by Finance Act 2008 Sch 29 para 7). A class may consist of all the pensioner members of the pension scheme: 2004 Act Sch 32 para 10(2) (Sch 32 para 10(2)-(4) added by Finance Act 2008 Sch 29 para 7). Where (a) the annual rate of the individual's pension is increased in excepted circumstances (the 'excepted increase'); (b) before the period of 12 months beginning with the date of the excepted increase, the annual rate of the individual's pension is increased in circumstances which would (apart from head (a) above) be excepted circumstances (the 'subsequent increase'); and (c) the class by virtue of which head (2) above is satisfied on the subsequent increase (the 'new class') is not the class by virtue of which it was satisfied on the excepted increase, then if the purpose, or one of the main purposes, of the individual's being included in the new class is to increase the annual rate of the individual's pension without the benefit crystallisation event referred to in head (3) of the text occurring, the subsequent increase is not in excepted circumstances: 2004 Act Sch 32 para 10(3), (4). For the meaning of 'pensioner member' see PARA 873B.4 NOTE 3. For the purposes of this benefit crystallisation event, any abatement of the scheme pension must be left out of account in determining the increased annual rate of the pension and the rate at which it was payable on the day on which the individual became entitled to it: Sch 32 para 9A (added by 2005 Act Sch 10 para 8). For the meaning of 'abatement', see NOTE 7.

9 The 'threshold annual rate' is the annual rate of the pension on the date of which the increase date is the first anniversary, increased by the greatest of (1) the relevant percentage rate; (2) the relevant indexation percentage; and (3) £250, and rounded up to the next greatest amount which (a) where the pension is payable monthly, gives an amount of whole pounds when divided by 12; or (b) where the pension is payable weekly, gives an amount of whole pounds when divided by 52: 2004 Act Sch 32 para 10A(1), (2), (8) (Sch 32 para 10A added by Finance Act 2008 Sch 29 para 8). The Treasury may by order substitute the amount in head (3) above, and such substituted amount may be calculated as a percentage of the standard lifetime allowance: Sch 32 para 10A(11). As to the making of such orders, see INCOME TAXATION.

If the person became entitled to the pension after the date of which the increase date is the first anniversary, the threshold annual rate is the annual rate of the pension on the date on which the person became entitled to the pension, so increased and rounded up: *ibid* Sch 32 para 10A(3). The 'increase date' is the date on which the individual becomes entitled to payment of the pension at the increased annual rate; and the 'relevant

percentage rate' is, in a case where the pension is paid under a pension scheme, or an arrangement under a pension scheme, in relation to which the relevant valuation factor is a number greater than 20, the rate agreed by the Commissioners for HM Revenue and Customs (formerly the Board of Inland Revenue) and the scheme administrator; otherwise, the relevant percentage rate is 5%: Sch 32 para 10A(5). The 'relevant indexation percentage' means (i) if the retail prices index for the reference month is higher than the retail prices index for the same calendar month in the previous year, the percentage increase in that index; and (ii) if it is not, 0%: Sch 32 para 10A(6). The scheme administrator may select as the reference month any month in the period of 12 months ending with the month in which the increase date falls: Sch 32 para 10A(7). If the pension is under a public service pension scheme, any abatement of the pension must be left out of account in determining for these purposes the annual rate of the pension on the date of which the increase date is the first anniversary (or, as the case may be, the date on which the person became entitled to the pension): Sch 32 para 10A(9). A person who becomes entitled to payment of a scheme pension at an increased annual rate on 29 February in any year is treated for these purposes as having become so entitled on 28 February: Sch 32 para 10A(10).

10 If the person becomes entitled to the pension on or after 6 April 2006, the permitted margin is the amount by which the annual amount of the pension at the rate at which it was payable on the day on which the individual became entitled to it would be greater if it had been increased by whichever of the following calculations gives the greater amount: *ibid* Sch 32 para 11(1), (2). The first calculation involves increasing that annual amount at the relevant annual percentage rate for the whole of the period beginning with the month in which the individual became entitled to the pension, and ending with the month in which he becomes entitled to payment of the pension at the increased rate: Sch 32 para 11(3). The second calculation involves increasing that annual amount by the relevant indexation percentage: Sch 32 para 11(5). The relevant annual percentage rate is (1) in a case where the pension is paid under a pension scheme, or an arrangement under a pension scheme, in relation to which the relevant valuation factor is a number greater than 20, the annual rate agreed by the Inland Revenue and the scheme administrator; and (2) otherwise, 5 per cent per annum: Sch 32 para 11(4). For the meaning of 'Inland Revenue' see PARA 873B.2 NOTE 1; and for the meaning of 'scheme administrator' see PARA 873B.2 NOTE 4. If the retail prices index for the reference month in which the individual becomes entitled to payment of the pension at the increased rate is higher than it was for the base month, the relevant indexation percentage is the percentage increase in that index. Otherwise, it is 0 per cent: Sch 32 para 11(6), (7) (Sch 32 para 11(6) amended by Finance Act 2008 Sch 29 para 9). 'Retail prices index' means the general index (for all items) published by the Office for National Statistics or, if that index is not published for a relevant month, any substituted index or index figures published by that Office: 2004 Act s 279(1). The scheme administrator may select as the reference month any month in the period of 12 months ending with the month in which the individual become entitled to payment of the pension at the increased rate; and the 'base month' is the month which is the same number of months before the month in which the individual became entitled to the pension, as the reference month is before the month in which the individual become entitled to payment of the pension at the increased rate: Sch 32 para 11(7A), (7B) (added by Finance Act 2008 Sch 29 para 9). If the pension is under a public service pension scheme, any abatement of the pension is left out of account in determining for this purpose the annual amount of the pension at the rate at which it was payable on the day on which the individual became entitled to it: 2004 Act Sch 32 para 11(8) (added by 2005 Act Sch 10 para 8). For the meaning of 'abatement', see NOTE 7.

If the individual became entitled to the pension before 6 April 2006, the permitted margin is the greater of what would be the permitted margin at that time if the individual had become entitled to the pension on or after that date and the amount by which the annual amount of the pension at the rate at which it was payable on the day on which he became entitled to it would be greater if it had been increased for the whole or the period specified in Sch 32 para 11(3) at the rate of P% per annum, where 'P%' is the percentage by which, in accordance with the rules of the pension scheme immediately before 6 April 2006, the annual rate of the pension is to be increased each year: 2004 Act Sch 32 para 12. If the pension is under a public service pension scheme, any abatement of the pension is left out of account in determining for this purpose the annual amount of the pension at the rate at which it was payable on the day on which the individual became entitled to it: Sch 32 para 12(4) (added by 2005 Act Sch 10 para 8).

11 2004 Act s 216(1) (amended by Finance Act 2008 Sch 29 para 5). 'XP' is the amount by which the increased annual rate of the pension exceeds the rate at which it was payable on the day on which the individual became entitled to it, as increased by the permitted margin: 2004 Act Sch 32 para 13(1). However, if one or more benefit crystallisation events has or have previously occurred by reason of the individual's having become entitled to payment of the pension at an increased rate, 'XP' does not include the amount of XP on that event, or the aggregate of the amounts of XP on by those events: Sch 32 para 13(2) (amended by Finance Act 2008 Sch 29 para 10). The amount of XP on a previous benefit crystallisation event is increased by whichever of the following produces the greater amount (1) increasing the amount of XP on the previous event at the relevant annual percentage rate (see NOTE 9) for the whole of the period beginning with the month in which the previous event occurred, and ending with the month in which the individual becomes entitled to payment of the pension at the increased rate; or (2) increasing that amount by the relevant indexation percentage: 2004 Act Sch 32 para 13(2A)-(2D) (Sch 32 para 13(A)-(2G) added by Finance Act 2008 Sch 29 para 10). The relevant indexation percentage is (a) if the retail prices index for the reference month is higher than that for the base month, the percentage increase in that index and (b) if it is not, 0%. The scheme administrator may select as the reference month any month in the period of 12 months ending with the month in which the individual becomes entitled to payment of the pension at the increased rate; and the base month is the month which is

the same number of months before the month in which the previous event occurred, as the reference month is before the month in which the individual became entitled to payment of the pension at the increased rate: 2004 Act Sch 32 para 13(2E)-(2G). If the pension is under a public service pension scheme, any abatement of the pension must be left out of account in determining for this purpose the increased annual amount of the pension and the rate at which it was payable on the day on which the individual became entitled to it: Sch 32 para 13(3) (added by 2005 Act Sch 10 para 8). If the rate at which the pension is payable is reduced so as to reflect the amount of any tax under the 2004 Act s 215 (see PARA 873B.15) to be paid by the scheme administrator, that reduction must be left out of account in determining the rate at which the pension is payable for this purpose; and if the reduction is such that, in accordance with normal actuarial practice, it would be taken fully to reflect the amount of the tax, the tax is not treated as tax paid by the scheme administrator for the purposes of s 215(9): Sch 32 para 13(4), (5) (added by 2005 Act Sch 10 para 43). For the meaning of 'RVF' see NOTE 7.

This is the only benefit crystallisation event that can arise after the individual has reached the age of 75: 2004 Act Sch 32 para 2.

12 For the meaning of 'lifetime annuity' see PARA 873B.5 NOTE 13.

13 2004 Act s 216(1) (amended by 2005 Act Sch 10 para 31). If the individual becomes entitled before reaching normal minimum pension age to the payment of a lifetime annuity purchased under a money purchase arrangement under any of the relevant pension schemes, and the ill-health condition is not satisfied immediately before he becomes so entitled, head (4) of the text does not apply in relation to the lifetime annuity: 2004 Act Sch 32 para 7(1), (3). If the lifetime annuity or a related dependants' annuity is, or both the lifetime annuity and a related dependants' annuity are, purchased (in whole or in part) with sums or assets representing the whole or part of the individual's unsecured pension fund, the amount crystallised by the event is reduced by the amount (or an appropriate proportion of the amount) previously crystallised on the designation of the sums or assets as available for the payment of unsecured pension: Sch 32 para 4 (amended by the 2005 act Sch 10 para 32). For the meaning of 'unsecured pension fund' see PARA 873B.5 NOTE 5; and for the meaning of 'related dependants' annuity, see PARA 873B.7 NOTE 8.

14 For the meaning of 'defined benefits arrangement' see PARA 873B.5 NOTE 13.

15 2004 Act s 216(1). 'DP' is the annual rate of the scheme pension to which the individual would be entitled if, on the date on which he reaches 75, the individual acquired an actual (rather than a prospective) right to receive it: Sch 32 para 14(1). If the rate at which the scheme pension would be payable would be reduced so as to reflect the amount of any tax under s 215 (see PARA 873B.15) to be paid by the scheme administrator, that reduction must be left out of account in determining the rate at which the pension would be payable for this purpose; and if the reduction is such that, in accordance with normal actuarial practice, it would be taken fully to reflect the amount of the tax, the tax is not treated as tax paid by the scheme administrator for the purposes of s 215(9): Sch 32 para 14(1A), (1B) (added by the Finance Act 2005 s 101, Sch 10 paras 1, 43). 'DSLS' is so much of any lump sum to which he would be entitled (otherwise than by way of commutation of pension) as would be paid to him if, on that date, the individual acquired an actual (rather than a prospective) right to receive it: Sch 32 para 14(2) (amended by the 2005 Act Sch 10 para 43). For the meaning of 'RVF' see NOTE 7. Where, immediately before the individual reaches the age of 75, there is under any of the relevant pension schemes a hybrid arrangement relating to the individual, and the benefits that may be provided to or in respect of him under the arrangement may, depending on the circumstances, be money purchase benefits or defined benefits, head (5) of the text applies as if, at that time, the circumstances are such that the benefits to be provided are defined benefits: Sch 32 para 5(1), (3). The amount crystallised is the greater of the amount found under head (5) and that found under head (1) of the text: Sch 32 para 5(4). For the meaning of 'defined benefits' see PARA 873B.5 NOTE 13.

16 A lump sum is a relevant lump sum if it is a pension commencement lump sum (see PARA 873B.7), a serious ill-health lump sum (see PARA 873B.7 NOTE 1), or a lifetime allowance excess lump sum (see PARA 873B.7 NOTE 6): *ibid* Sch 32 para 15.

17 *Ibid* s 216(1) (amended by the 2005 Act Sch 10 para 42).

18 A lump sum death benefit is a relevant lump sum death benefit if it is a defined benefits lump sum death benefit (see PARA 873B.8 NOTE 2) or an uncrystallised funds lump sum death benefit (see PARA 873B.8 NOTE 4): 2004 Act Sch 32 para 16.

19 For this purpose 'relevant pension schemes' includes a scheme of which the individual was a member immediately before his death: *ibid* Sch 32 para 1.

20 *Ibid* s 216(1).

21 For the meaning of 'qualifying recognised overseas pension scheme' see PARA 873B.4 NOTE 8.

22 2004 Act s 216(1). Where any of the sums or assets transferred represent the whole or part of the individual's unsecured pension fund, the amount crystallised by the event is reduced by the amount (or the

appropriate proportion of the amount) previously crystallised on the designation of the sums or assets as available for the payment of unsecured pension; and where after the transfer a scheme pension to which the individual has become entitled before the transfer is to be payable out of sums or assets transferred, the amount crystallised by the event is reduced by the amount (or the appropriate proportion of the amount) previously crystallised in relation to the scheme pension: Sch 32 para 17.

23 Ibid s 216(1) (amended by the 2006 Act Sch 23 para 30). The amount crystallised is the aggregate of the amount of the sums and the market value of the assets representing the individual's unsecured pension fund under the arrangement less the aggregate of amounts crystallised by an event falling within head (1) of the text in relation to the arrangement and the individual: 2004 Act s 216(1).

24 Ibid s 216(1) (amended by Finance Act 2008 Sch 29 para 1(3)). 'Prescribed' means prescribed by regulations under the 2004 Act s 164 (see PARA 873B.4): s 216(1). The amount crystallised is the amount determined in accordance with such regulations: s 216(1).

## 17. Availability of individual's lifetime allowance

The following provisions determine the availability of an individual's lifetime allowance<sup>1</sup> on the occurrence of a benefit crystallisation event<sup>2</sup> in relation to the individual ('the current benefit crystallisation event')<sup>3</sup>.

If no benefit crystallisation event has occurred in relation to the individual before the current benefit crystallisation event, the whole of his lifetime allowance is available on the current benefit crystallisation event<sup>4</sup>. If one or more benefit crystallisation events has or have occurred before the current benefit crystallisation event, then:

- 2241 (1) in a case in which the previously-used amount is equal to or greater than the amount of the individual's lifetime allowance, none of that allowance is available on the current benefit crystallisation event; and
- 2242 (2) in any other case, so much of the individual's lifetime allowance as is left after deducting the previously-used amount is available on the current benefit crystallisation event<sup>5</sup>.

Where one benefit crystallisation event has occurred in relation to the individual before the current benefit crystallisation event, the previously-used amount is the amount which is the relevant untaxed amount in relation to that earlier event, as appropriately adjusted; and where more than one benefit crystallisation events have so occurred, the previously-used amount is the aggregate of the relevant untaxed amounts in relation to each of those early events, as appropriately adjusted<sup>6</sup>.

1 See PARA 873B.15.

2 See PARA 873B.16.

3 Finance Act 2004 s 219(1).

4 Ibid s 219(2).

5 Ibid s 219(3). References (however expressed) to the portion of a person's lifetime allowance that is available at any time are to the portion of that allowance that would be available in accordance with s 219 if a benefit crystallisation event occurred in relation to that person at that time: s 219(9).

6 Ibid s 219(4) (amended by the Finance Act 2006 Sch 23 para 31(2)). The appropriate adjustment is the multiplication of the relevant untaxed amount in relation to each earlier event by:

$$\frac{CSLA}{PSLA}$$

where CSLA is the standard lifetime allowance at the time of the current benefit crystallisation event; and PSLA is the standard lifetime allowance at the time of the earlier event: s 219(5) (amended by the 2006 Act Sch 23

para 31(4)). The 'relevant untaxed amount', in relation to a previous benefit crystallisation event, is (1) where no tax was charged in relation to that event, the amount in respect of which tax would have been so charged if none of the individual's lifetime allowance had been available; and (2) where tax was charge in relation to that event, so much of the amount in respect of which tax would have been so charged if none of the individual's lifetime allowance had been available as exceeds the amount in respect of which tax was so charged: 2004 Act s 219(4A) (added by 2006 Act Sch 23 para 31(3)).

Where more than one benefit crystallisation event occurs in relation to an individual on the same day, it is for the individual to decide the order in which they are to be treated as occurring for the purposes of the 2004 Act s 219, but this provision is subject to s 166(2) (see PARA 873B.7): s 219(6). Where more than one such event occurs by reason of the payment of lump sum death benefits in respect of an individual, those events are treated for the purposes of s 219 as occurring immediately before his death (but immediately after any benefit crystallisation event occurring immediately before the individual's death by virtue of s 166(2) (see PARA 873B.7): s 219(7) (amended by Finance Act 2007 Sch 20 para 10).

## **18. Annual allowance charge**

A charge to tax (the 'annual allowance charge') arises where the total pension input amount for a tax year<sup>1</sup> in the case of an individual who is a member of one or more registered pension schemes<sup>2</sup> exceeds the annual allowance for the tax year<sup>3</sup>. The charge is at the rate of 40 per cent of that excess, which excess is not treated as income for any purpose of the Tax Acts<sup>4</sup>. The person liable to the charge is the individual, who is so liable whether or not he or the scheme administrator of the pension scheme or schemes concerned is resident, ordinarily resident or domiciled in the United Kingdom<sup>5</sup>.

The total pension input amount is arrived at by aggregating the pension input amounts in respect of each arrangement relating to the individual under a registered pension scheme of which he is a member; but there is no input tax in respect of an arrangement if, before the end of the tax year, the individual has become entitled to all the benefits which may be provided to him under the arrangement, or has died<sup>6</sup>.

The pension input amount is determined as follows. In each of heads (1) to (4) below, the 'pension input period' is the period beginning with the relevant commencement date and ending with the earlier of a nominated date and the anniversary of the relevant commencement date, and each subsequent period beginning immediately after the end of such a period (or of such a subsequent period) and ending with the appropriate date<sup>7</sup>.

2243 (1) If the arrangement is a cash balance arrangement<sup>8</sup>, the pension input amount is the amount of any increase in the value of the individual's rights under the arrangement during the pension input period of the arrangement that ends in the tax year<sup>9</sup>. There is an increase in the value of the individual's rights under the arrangement during the pension input period if the opening value<sup>10</sup> of those rights is exceeded by the closing value<sup>11</sup> of those rights; and the amount of that increase is the amount of that excess<sup>12</sup>.

2244 (2) If the arrangement is a money purchase arrangement<sup>13</sup> other than a cash balance arrangement, the pension input amount is the total of any relievable pension contributions<sup>14</sup> paid by or on behalf of the individual under the arrangement and contributions paid in respect of the individual under the arrangement by an employer of the individual, during the pension input period of the arrangement that ends in the tax year<sup>15</sup>.

2245 (3) If the arrangement is a defined benefits arrangement<sup>16</sup>, the pension input amount is the amount of any increase in the value of the individual's rights under the arrangement during the pension input period of the arrangement that ends in the tax year<sup>17</sup>. There is an increase in the value of the individual's rights under the arrangement during the pension input period if the opening value<sup>18</sup> of those rights is exceeded by the closing value<sup>19</sup> of those rights, and the amount of the increase is the amount of that excess<sup>20</sup>.

2246 (4) If the arrangement is a hybrid arrangement<sup>21</sup>, the pension input amount is the greater or greatest of such of the amounts calculated in accordance with heads (1) to (3) above<sup>22</sup> as are relevant input amounts; and an input amount is a relevant input amount if, in any circumstances, the benefits that may be provided to or in respect of the individual under the arrangement may be benefits of the variety mentioned in the definition of that input amount<sup>23</sup>.

1 For the meaning of 'tax year' see PARA 873B.7 NOTE 3.

2 For the meaning of 'pension scheme' see PARA 873B.1, and for the meaning of 'member' see PARA 873B.4 NOTE 3. As to registration see PARA 873B.2.

3 Finance Act 2004 s 227(1). The annual allowance for the tax year 2006-07 is £215,000, and for each subsequent tax year is such amount, not being less than the annual allowance for the immediately preceding tax year, as is specified by order made by the Treasury: s 228. See the Registered Pension Schemes (Standard Lifetime and Annual Allowances) Order 2007, SI 2007/494, which sets out the following figures for the annual allowance: 2007-08, £225,000; 2008-09, £235,000; 2009-10, £245,000; 2010-11, £255,000. For the meaning of 'the tax year 2006-07' see PARA 873B.7 NOTE 4. As to the making of such an order see PARA 873B.1 NOTE 2.

4 2004 Act s 227(4), (5). For the meaning of 'the Tax Acts' see INCOME TAXATION vol 23(1) (Reissue) PARA 21.

5 Ibid s 227(2), (3). For the meaning of 'scheme administrator' see PARA 873B.3 NOTE 4. As to the meaning of 'residence' and 'ordinary residence' see INCOME TAXATION vol 23(2) (Reissue) PARA 1260; and for the meaning of 'domicile' see INCOME TAXATION vol 23(2) (Reissue) PARA 1265.

6 Ibid s 229(1), (3). For the meaning of 'arrangement' see PARA 873B.5 NOTE 5.

7 Ibid s 238(1). The 'relevant commencement date' is (1) in the case of a cash balance arrangement, a defined benefits arrangement, or a hybrid arrangement the only benefits under which may be cash balance benefits or defined benefits, the date on which rights under the arrangement begin to accrue to or in respect of the individual; (2) in the case of a money purchase arrangement other than a cash balance arrangement, the first date on which a contribution within s 233(1) is made; and (3) in the case of a hybrid arrangement not within head (1), whichever is the earlier of the date mentioned in head (1) or (2): s 238(2). 'Nominated date' means (a) in the case of a money purchase arrangement other than a cash balance arrangement, such date as the individual or scheme administrator nominates; and (b) in any other case, such date as the scheme administrator nominates: s 238(3). Such nomination by the individual must be made by notice to the scheme administrator, and such nomination by the scheme administrator must be made by notice to the individual: s 238(4). If more than one date is so nominated (i) in relation to the period beginning with the relevant commencement date; or (ii) in relation to a tax year following that in which the pension input period beginning with that date ends, the date nominated first is the nominated date: s 238(5). The 'appropriate date' is the earlier of a nominated date falling in the tax year immediately after that in which the last pension input period ended, and the anniversary of the date on which that period ended: s 238(6). Once the individual has become entitled to all the benefits which may be provided to him under an arrangement, the last pension input period in the case of that arrangement is treated as having ended when that was first so: s 238(7).

8 For the meaning of 'cash balance arrangement' see PARA 873B.5 NOTE 13.

9 2004 Act s 230(1).

10 The opening value of the individual's rights under the arrangement is the amount which would, on the valuation assumptions, be available for the provision of benefits to or in respect of the individual under the arrangement if the individual became entitled to the benefit at the beginning of the pension input period: ibid s 230(4). As to the valuation assumptions see PARA 873B.11 NOTE 8. The opening value as so ascertained is to be increased by the appropriate percentage, ie whichever is the greatest of (1) 5 per cent; (2) the percentage (if any) by which the retail prices index for the month in which the pension input period ends is higher than it was for the month in which it began; and (3) if provision made by regulations made by the Board of Inland Revenue applies in relation to the arrangement, the percentage to which the regulations refer: s 231. For the meaning of 'Board of Inland Revenue' see PARA 873B.2 NOTE 1; and for the meaning of 'retail prices index' see PARA 873B.5 NOTE 5. As to the making of such regulations see PARA 873B.1 NOTE 2.

11 The closing value of the individual's rights under the arrangement is the amount which would, on the valuation assumptions, be available for the provision of benefits to or in respect of the individual under the arrangement if he became entitled to the benefits at the end of the pension input period: ibid s 230(5). If, during the pension input period, the rights of the individual under the arrangement have been reduced by having become subject to a pension debit, the amount of that debit is to be added to the closing value as so ascertained; and if those rights have been increased by reason of his having become entitled to a pension

credit derived from the same or another registered pension scheme, the amount of the credit is to be subtracted from that value: s 232(1)-(3). For the meaning of 'pension credit' and 'pension debit' see PARA 873B.7 NOTE 8.

If, during the pension input period, the rights of the individual under the arrangement have been reduced by virtue of a transfer of any sum or asset held for the purposes of, or representing accrued rights under, the arrangement so as to become held for the purposes of, or to represent rights under, any other pension scheme (ie a registered pension scheme or a qualifying recognised overseas pension scheme), the aggregate of any sums transferred and the market value of any assets transferred is to be added to the closing value as ascertained under the above provisions; and if those rights have been similarly increased by virtue of a transfer from any other pension scheme to the arrangement, the aggregate of any sums so transferred and the market value of any assets so transferred must be subtracted from that value: s 232(4)-(7). For the meaning of 'market value' see PARA 873B.3 NOTE 4; and for the meaning of 'qualifying recognised overseas pension scheme' see PARA 873B.4 NOTE 8. As to sums and assets held for the purposes of an arrangement see PARA 873B.5 NOTE 5.

Subject to s 229(3) (see TEXT AND NOTE 6), if, during the pension input period, a benefit crystallisation event (see PARA 873B.16) occurs in relation to the individual and the arrangement, the amount crystallised (see PARA 873B.16) is to be added to the closing value as ascertained under the above provisions: s 232(8). If, during that period, minimum payments are made under the Pension Schemes Act 1993 s 8 (see PARA 878) or corresponding Northern Ireland legislation in relation to the individual and in connection with the arrangement, the amount paid must be subtracted from the closing value as so ascertained: 2004 Act s 232(9).

12 Ibid s 230(2), (3).

13 For the meaning of 'money purchase arrangement' see PARA 873B.5 NOTE 13.

14 The references to contributions do not include minimum payments under the 1993 Act s 8 (see PARA 878) or corresponding Northern Ireland legislation, or any amount recovered under regulations made thereunder: 2004 Act s 233(2). When at any time contributions paid under a pension scheme by an employer otherwise than in respect of an individual become held for the purposes of the provision under an arrangement under that scheme of benefits to or in respect of an individual, they are treated as contributions paid at that time in respect of the individual under the arrangement: s 233(3). For the general meaning of 'contributions' see PARA 873B.12 NOTE 6; and for the meaning of 'employer' see PARA 873B.2 NOTE 7.

15 Ibid s 233(1).

16 For the meaning of 'defined benefits arrangement' see PARA 873B.5 NOTE 13.

17 2004 Act s 234(1).

18 The opening value of the individual's rights under the arrangement during the pension input period is:

$$(10 \times PB) + LSB$$

where PB is the annual rate of the pension which would, on the valuation assumptions, be payable to the individual under the arrangement if he became entitled to payment thereof at the beginning of the pension input period; and LSB is the amount of the lump sum to which he would, on those assumptions, be entitled under the arrangement (otherwise than by commutation of pension) if he became entitled to payment thereof at that time: ibid s 234(4). Where rights do not accrue to the individual under the arrangement during the pension input period, the opening value is increased by the appropriate percentage, ie whichever is the greatest of (1) 5 per cent; (2) the percentage (if any) by which the retail prices index for the month in which the pension input period ends is higher than it was for the month in which it began; and (3) if provision made by regulations made by the Board of Inland Revenue applies in relation to the arrangement, the percentage to which the regulations refer: s 235. As to the making of such regulations see PARA 873B.1 NOTE 2. See the Registered Pension Schemes (Uprating Percentages for Defined Benefits Arrangements and Enhanced Protection Limits) Regulations 2006, SI 2006/130.

19 The closing value of the individual's rights under the arrangement is:

$$(10 \times PE) + LSE$$

where PE is the annual rate of the pension which would, on the valuation assumptions, be payable to the individual under the arrangement if he became entitled to payment thereof at the end of the pension input period; and LSE is the amount of the lump sum to which he would, on those assumptions, be entitled under the arrangement (otherwise than by commutation of pension) if he became entitled to the payment thereof at that time: 2004 Act s 233(5). If, during the pension input period, the rights of the individual under the arrangement have been reduced by having become subject to a pension debit, the amount of that debit is to be added to the closing value as so ascertained; and if those rights have been increased by reason of his having become

entitled to a pension credit derived from the same or another registered pension scheme, the amount of the credit is to be subtracted from that value: s 236(1)-(3).

If, during the pension input period, there is a transfer relating to the individual of any sum or asset held for the purposes of, or representing accrued rights under, the arrangement so as to become held for the purposes of, or to represent rights under, any other pension scheme (ie a registered pension scheme or a qualifying recognised overseas pension scheme), the aggregate of any sums transferred and the market value of any assets transferred is to be added to the closing value as ascertained under the above provisions; and if there has been such a transfer from any other pension scheme to the arrangement, the aggregate of any sums so transferred and the market value of any assets so transferred must be subtracted from that value: s 236(4)-(7).

Subject to s 229(3) (see TEXT AND NOTE 6), if, during the pension input period, a benefit crystallisation event occurs in relation to the individual and the arrangement, the amount crystallised is to be added to the closing value as ascertained under the above provisions: s 236(8). If, during that period, minimum payments are made under the 1993 Act s 8 (see PARA 878) or corresponding Northern Ireland legislation in relation to the individual and in connection with the arrangement, the amount paid must be subtracted from the closing value as so ascertained: 2004 Act s 236(9).

20 Ibid s 234(2), (3).

21 For the meaning of 'hybrid arrangement' see PARA 873B.5 NOTE 13.

22 Ie what would be the amount calculated under head (1) of the text if the benefits provided to or in respect of the individual under the arrangement were cash balance benefits; under head (2) if those benefits were other money purchase benefits; and under head (3) if those benefits were defined benefits: ibid s 237(3)-(5). References to payments made, or benefits provided, by a pension scheme are to payments made or benefits provided from sums or assets held for the purposes of the scheme: s 279(2).

23 Ibid s 237(1), (2).

## 19. Scheme sanction charge

A charge to income tax (the 'scheme sanction charge') arises where in any tax year<sup>1</sup> one or more scheme chargeable payments is or are made by a registered pension scheme<sup>2</sup>. The charge is at the rate of 40 per cent in respect of the scheme chargeable payment (or the aggregate payments) made by the scheme in the tax year; but if that payment (or any of those payments) is an unauthorised payment, and tax charged<sup>3</sup> in relation to that payment (or those payments) has been paid, a deduction must be made from the amount of tax that would otherwise be chargeable for that year under these provisions<sup>4</sup>. The amount of the deduction is the lesser of:

2247 (1) 25 per cent of the amount of the scheme chargeable payment, or of the aggregate amount of such of those payments as are tax-paid; and

2248 (2) the amount of the tax which has been paid<sup>5</sup> in relation to the scheme chargeable payment (or in relation to such of the scheme chargeable payments as are tax-paid)<sup>6</sup>.

The person liable to the charge is the scheme administrator<sup>7</sup>; but in the case of a payment treated<sup>8</sup> as having been made by a pension scheme which has been wound up, the person so liable is the person who was, or each of the persons who were, the scheme administrator immediately before the pension scheme was wound up<sup>9</sup>.

A 'scheme chargeable payment' in relation to a registered pension scheme means an unauthorised payment by the pension scheme, other than one which is exempt from being scheme chargeable<sup>10</sup>, and a scheme chargeable payment which the scheme is treated<sup>11</sup> as having made<sup>12</sup>.

A scheme administrator who is liable to the scheme sanction charge in respect of a scheme chargeable payment, may apply to the Inland Revenue for the discharge of that liability on the basis that the scheme administrator reasonably believed that the unauthorised payment was

not a scheme chargeable payment, and that, in all the circumstances of the case, it would not be just and reasonable for the liability to be enforced<sup>13</sup>.

Where the scheme administrator of a registered pension scheme has become liable to the scheme sanction charge in respect of an unauthorised member payment, and property or money is transferred, or a sum paid<sup>14</sup> towards a registered pension scheme as a result of that payment, the scheme administrator may, within the period of one year beginning with the day on which the property or money is transferred, or the sum paid, claim relief from the relevant proportion<sup>15</sup> of the scheme sanction charge<sup>16</sup>.

1 For the meaning of 'tax year' see PARA 873B.7 NOTE 3.

2 Finance Act 2004 s 239(1). For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2. Section 239 is subject to provision made by regulations under s 273ZA (see PARA 873B.34): s 293(6) (added by Finance Act 2006 Sch 21 para 8).

3 Ie under the Finance Act 2004 s 208: see PARA 873B.21.

4 Ibid s 240(1), (2). For the meaning of 'unauthorised payment' see PARA 873B.9 et seq.

5 Ie under ibid s 208. The Treasury may by order vary the rate of charge; and such an order may make provision for there to be different rates in different circumstances: s 240(3A), (3B) (added by Finance Act 2009 Sch 2 para 16). As to the making of such orders see PARA 873B.1.

6 2004 Act s 240(3). A scheme chargeable payment is 'tax-paid' if the whole or any part of the tax chargeable in relation to it under s 208 has been paid: s 240(4).

7 For the meaning of 'scheme administrator' see PARA 873B.2 NOTE 4.

8 Ie under the Finance Act 2004 s 161(3), (4): see PARA 873B.4.

9 Ibid s 239(3). A person is liable to the scheme sanction charge whether or not he or any other person who is so liable is resident, ordinarily resident or domiciled in the United Kingdom: s 239(4). As to the meaning of 'residence' and 'ordinary residence' see INCOME TAXATION vol 23(2) (Reissue) PARA 1260; and for the meaning of 'domicile' see INCOME TAXATION vol 23(2) (Reissue) PARA 1265.

10 An unauthorised payment is exempt from being scheme chargeable if (1) it is treated as having been made by ibid s 173 (see PARA 873B.9) and the asset used to provide the benefit in question is not a wasting asset; (2) it is a compensation payment (see PARA 873B.4); (3) it is made to comply with an order of a court or of a person or body with power to order the making of the payment; (4) it is made on the ground that a court or any such person or body is likely to order the making of the payment (or would be were it asked to do so); or (5) it is of a description prescribed by regulations made by the Board of Inland Revenue: s 241(2). For the meaning of 'Board of Inland Revenue' see PARA 873B.2 NOTE 1. 'Wasting asset' has the same meaning as in the Taxation of Chargeable Gains Act 1992 s 44 (see CAPITAL GAINS TAXATION) vol 5(1) (2004 Reissue) PARA 14: Finance Act 2004 s 241(3). As to the making of such regulations see PARA 873B.1 NOTE 2. See the Registered Pension Schemes (Unauthorised Payments by Existing Schemes) Regulations 2006, SI 2006/365.

11 Ie under the Finance Act 2004 s 183 or 185: see PARA 873B.11.

12 Ibid s 241(1). The term also includes a scheme chargeable payment which the pension scheme is treated as having made by s 181A, or s 185A or 185F (see PARA 873B.33): s 241(1)(c) (added by 2006 Act Sch 21 para 9; and amended by Finance Act 2007 Sch 19 para 15).

The total amount of alternatively secured pension paid to a member of a registered pension scheme in each alternatively secured pension year in respect of a money purchase arrangement under the scheme must be at least 55% of the basis amount for the alternatively secured pension year; and the total amount of dependants' alternatively secured pension paid to a dependant of a member of a registered pension scheme in each alternatively secured pension year in respect of a money purchase arrangement under the scheme must be at least 55% of the basis amount for the alternatively secured pension year: Finance Act 2004 s 181A(1), (2) (s 181A added by 2007 Act Sch 19 para 14). If these requirements are not met, the scheme is treated as having made, when the alternative payment year ends, a scheme chargeable payment of the difference between the total amount of alternatively secured pension paid to the member (or of the dependant's alternatively secured pension paid to the dependant) in respect of the arrangement in that year and 55% of the basis amount for that year: Finance Act 2004 s 181A(3), (4). However, this provision does not apply in relation to an alternatively secured pension year which (1) ends immediately before the death of the member or dependant; or (2) in which the member's alternatively secured pension fund, or the dependant's alternatively secured pension fund, in

respect of the arrangement is applied on pension or annuity provision; and such a fund is so applied if all of the sums and assets representing it are applied in one or more of the following ways: (a) towards the provision of a scheme pension or dependants' scheme pension; (b) to purchase a scheme pension or a dependant's scheme pension; (c) to purchase a lifetime annuity or a dependants' annuity: s 181A(5), (6). For the meaning of 'alternatively secured pension' and 'money purchase arrangement' see PARA 873B.5 NOTE 13; and for the meaning of 'alternatively secured pension year' see PARA 873B.5 NOTE 14.

13 Ibid s 268(1), (5), (7). If the scheme chargeable payment is treated as being an unauthorised member payment by s 172, 172A, 172B, 172BA, 172C or 172D (see PARA 873B.9) or arises under s 181A, the basis is that, in all the circumstances, it would not be reasonable for the liability to be enforced: s 268(6) (amended by 2007 Act Sch 19 para 17). On the receipt of such an application, the Inland Revenue must decide whether to discharge the liability, and must notify the scheme administrator accordingly: s 268(8), (9). Regulations made by the Board of Inland Revenue may make provision supplementing s 268, and such regulations may in particular make provision as to the time limits for the making of an application: s 268(10). For the meaning of 'Board of Inland Revenue' see PARA 873B.2 NOTE 1. As to the making of such regulations see PARA 873B.1 NOTE 2. The regulations so far so made are the Registered Pension Schemes (Discharge of Liabilities under Sections 267 and 268 of the Finance Act 2004) Regulations 2005, SI 2005/3452.

If an application under the Finance Act 2004 s 268 (see above and PARA 873B.21) or under s 267 (see PARA 873B.15) is refused, the applicant may appeal within the period of 30 days beginning with the day on which he was given notification of the decision: s 269(1), (2), (5). On an appeal that is notified to it, the tribunal, if they consider that the liability ought not to be discharged, must dismiss the appeal. If the tribunal decides that the liability ought to be discharged, it must grant the application: s 269 (6)-(8) (amended by SI 2009/56). If the application relates to an excess amount under s 267(6) (see PARA 873B.15), the tribunal may increase that part of the excess amount the liability for which is discharged: s 269(9)-(11) (amended by SI 2009/56).

14 Ie pursuant to an order under the Pension Schemes Act 2004 s 19(4) or s 21(2)(a) or the Pensions (Northern Ireland) Order 2004 art 15(2) or 17(2)(a).

15 The relevant proportion is

$$\frac{ASO}{UMP}$$

where ASO is the amount subject to the order, ie the aggregate of the market value of any property and the amount of any money transferred, or the amount of the sum paid, towards a registered pension scheme pursuant to the provisions referred to in note 14 in respect of the unauthorised member payment; and UMP is the amount of that payment: Finance Act 2004 s 266B(3) (s 266B added by Finance Act 2005 Sch 10 para 4). If ASO is greater than UMP, the relevant proportion is the whole thereof: s 266B(4). For the meaning of 'market value', see PARA 873B.3 NOTE 4.

16 Ibid s 266B(1), (2).

## 20. De-registration charge

A charge to income tax (the 'de-registration charge') arises where the registration of a registered pension scheme is withdrawn<sup>1</sup>. The charge is at the rate of 40 per cent in respect of the aggregate of the amount of any sums held for the purposes of the pension scheme immediately before it ceased to be a registered pension scheme, and the market value at that time of any assets held for the purposes of the scheme<sup>2</sup>. The liability to the charge is a liability of the person who was, or each of the persons who were, the scheme administrator immediately before the registration was withdrawn<sup>3</sup>.

1 Finance Act 2004 s 242(1). For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2.

2 Ibid s 242(4). For the meaning of 'market value' see PARA 873B.3 NOTE 4.

3 Ibid s 242(2). For the meaning of 'scheme administrator' see PARA 873B.2 NOTE 4. That person, or each of those persons, is so liable whether or not that person or any other such person is resident, ordinarily resident or domiciled in the United Kingdom: s 242(3). As to the meaning of 'residence' and 'ordinary residence' see INCOME TAXATION vol 23(2) (Reissue) PARA 1260; and for the meaning of 'domicile' see INCOME TAXATION vol 23(2) (Reissue) PARA 1265.

## 21. Charge to tax on authorised and unauthorised payments

A charge to income tax arises on the following authorised payments made by a registered pension scheme<sup>1</sup>:

- 2249 (1) in respect of a short service refund lump sum<sup>2</sup>, at the rate of 20 per cent on so much of that sum as does not exceed £20,000, and of 50 per cent on any excess<sup>3</sup>;
- 2250 (2) in respect of a pension protection lump sum death benefit, an annuity protection lump sum death benefit, or an unsecured pension fund lump sum death benefit, at the rate of 35 per cent of the benefit<sup>4</sup>.

In each case, the tax is charged on the amount of the lump sum paid or, if the rules of the scheme permit the scheme administrator<sup>5</sup> to deduct the tax before payment, on the amount of the lump sum before such deduction<sup>6</sup>. The person liable to the charge is the scheme administrator, whether or not he, or the person to whom the lump sum is paid, is resident, ordinarily resident, or domiciled in the United Kingdom<sup>7</sup>. None of the payments falling within head (1) or (2) above is treated as income for any purpose of the Tax Acts<sup>8</sup>.

A tax charge arises in respect of an authorised surplus payment<sup>9</sup> made to a sponsoring employer by an occupational pension scheme, at the rate of 35 per cent of the payment<sup>10</sup>. The person liable to the charge is the scheme administrator, whether or not he, or the sponsoring employer, is resident, ordinarily resident, or domiciled in the United Kingdom<sup>11</sup>.

A charge to tax ('the unauthorised payments charge') arises where an unauthorised payment<sup>12</sup> is made by a registered pension scheme, at the rate of 40 per cent of the payment<sup>13</sup>. A payment is also liable to a surcharge ('the unauthorised payments surcharge') at the rate of 15 per cent of the payment if it is a surchargeable unauthorised payment<sup>14</sup>, that is to say:

- 2251 (a) if the surcharge threshold<sup>15</sup> is reached before the end of the period of 12 months beginning with a reference date<sup>16</sup> any unauthorised member payment<sup>17</sup> made in the surcharge period<sup>18</sup> to or in respect of a person who is or has been a member of the scheme<sup>19</sup>; or
- 2252 (b) if the surcharge threshold<sup>20</sup> is reached before the end of the period of 12 months beginning with a reference date<sup>21</sup> any unauthorised employer payment<sup>22</sup> made in the surcharge period to or in respect of a person who is or has been a sponsoring employer<sup>23</sup>.

The person liable to pay the unauthorised payments charge (or, as the case may be, the surcharge) is:

- 2253 (i) in the case of an unauthorised member payment made to or in respect of a person before the person's death, the person to whom or in respect of whom the payment is made;
- 2254 (ii) in the case of an unauthorised member payment made in respect of a person after the person's death, the recipient; and
- 2255 (iii) in the case of an unauthorised employer payment, the person to or in respect of whom the payment was made<sup>24</sup>.

Where a person is liable to the unauthorised payments surcharge in respect of an unauthorised payment, he may apply to the Inland Revenue for the discharge of that liability on the ground that, in all the circumstances of the case, it would not be just and reasonable for the liability to be enforced<sup>25</sup>.

Where a liability to the unauthorised payments charge (or to both the unauthorised payments charge and the unauthorised payments surcharge) has arisen in respect of an unauthorised member payment, and property or money is transferred, or a sum paid<sup>26</sup>, towards a registered pension scheme as a result of that payment, the member of the scheme to or in respect of whom the payment was made (or, if it was paid after his death, the recipient) may claim relief from the relevant proportion<sup>27</sup> of the unauthorised payments charge and (subject to specified requirements<sup>28</sup>) any unauthorised payments surcharge that arises<sup>29</sup>.

1 For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2.

2 For the meaning of 'short service refund lump sum' see PARA 873B.7 NOTE 2.

3 Finance Act 2004 s 205(1), (4) (amended by SI 2010/56). This is known as the 'short service refund lump sum charge': Finance Act 2004 s 205(1). The Treasury may by order amend s 205(4) so as to increase or reduce either or both of the rates for the time being, or increase the financial limit: s 205(5). As to the making of such orders see PARA 873B.1 NOTE 2.

4 Ibid s 206(1), (4). This is known as the 'special lump sum death benefits charge': s 206(1). For the meaning of 'pension protection lump sum death benefit' see PARA 873B.8 NOTE 3; for the meaning of 'annuity protection lump sum benefit' see PARA 873B.8 NOTE 5; and for the meaning of 'unsecured pension fund lump sum death benefit' see PARA 873B.8 NOTE 6. The Treasury may by order increase or reduce the rate of charge: s 206(5). As to the making of such orders see PARA 873B.1 NOTE 2.

5 For the meaning of 'scheme administrator' see PARA 873B.2 NOTE 4.

6 Finance Act 2004 ss 205(6), 206(6).

7 Ibid ss 205(2), (3), 206(2), (3). As to the meaning of 'residence' and 'ordinary residence' see INCOME TAXATION vol 23(2) (Reissue) PARA 1260; and for the meaning of 'domicile' see INCOME TAXATION vol 23(2) (Reissue) PARA 1265.

8 Ibid ss 205(7), 206(7). For the meaning of 'the Tax Acts' see INCOME TAXATION vol 23(1) (Reissue) PARA 21.

9 For the meaning of 'authorised surplus payment' see PARA 873B.4 NOTE 12; and for the meaning of 'sponsoring employer' see PARA 873B.4 NOTE 10.

10 Finance Act 2004 s 207(1), (4). This is known as the 'authorised surplus payments charge': s 207(1). The Treasury may by order increase or reduce the rate of charge: s 207(5). As to the making of such orders see PARA 873B.1 NOTE 2. The charge does not apply to any authorised surplus payment to the extent that (if s 207 had not been enacted), the sponsoring employer would have been exempt, or entitled to claim exemption, from income tax or corporation tax in respect thereof, or if the sponsoring employer is a charity: s 207(6). For the meaning of 'charity' see PARA 873B.8 NOTE 7. An authorised surplus payment in respect of which tax is charged under s 207 is not treated as income for any purpose of the Tax Acts: Finance Act 2004 s 207(7).

11 Ibid s 207(2), (3).

12 As to unauthorised payments see PARA 873B.9 et seq. An unauthorised payment is not to be treated as income for any purpose of the Tax Acts: Finance Act 2004 s 208(8).

13 Ibid s 208(1), (5). The Treasury may by order vary the rate of charge; and such an order may make provision for there to be different rates in different circumstances: s 208(6), (6A) (s 208(6) amended, s 208(6A) added, by Finance Act 2009 Sch 2 para 12). As to the making of such orders see PARA 873B.1.

14 2004 Act ss 208(7), 209(1), (6). The Treasury may by order vary the rate of charge; and such an order may make provision for there to be different rates in different circumstances: s 209(7), (8) (substituted by Finance Act 2009 Sch 2 para 13). As to the making of such orders see PARA 873B.1. A scheme sanction charge (see PARA 873B.19) may also arise in appropriate circumstances: 2004 Act s 208(7).

15 The surcharge threshold for the purposes of head (a) of the text is reached if the unauthorised payments percentage reaches 25 per cent: ibid s 210(7). The unauthorised payments percentage is the aggregate of the percentages of the pension fund used up by each unauthorised member payment made by the scheme to or in respect of the person on or after the reference date; and the percentage of the pension fund used up on the occasion of such a payment is:

$$\frac{UMP}{VR} \times 100$$

where UMP is the amount of the unauthorised member payment and VR is an amount equal to the aggregate of the value of the member's rights under arrangements relating to the member under the pension scheme when the unauthorised payment is made (or, if the unauthorised member payment is made after the member has died or has otherwise ceased to be a member of the scheme, on the date of death or cessation): s 210(8), (9) (amended by the Finance Act 2006 Sch 23 para 16(3), (4)). The value of the member's rights under an arrangement on any date is the aggregate of the value on that date of his crystallised and uncrystallised rights under the arrangement: 2004 Act s 210(9), (10) (amended by 2006 Act Sch 23 para 16(4), (5)).

The value of a member's crystallised rights under an arrangement on any date is the aggregate of (1) the value of each scheme pension or lifetime annuity to which he has an actual (rather than a prospective) entitlement under the arrangement on that date; and (2) the aggregate of the amount of the sums, and the market value of the assets, representing the member's unsecured pension fund or alternatively secured pension fund in respect of the arrangement on that date (if any): 2004 Act s 211(1) (amended by 2006 Act Sch 23 para 17). The value of a scheme pension or a lifetime annuity is:

$$RVF \times ARP$$

where RVF is the relevant valuation factor and ARP is an amount equal to the annual rate of the pension or annuity on the date: 2004 Act s 211(2). For the meaning of 'scheme pension' and 'lifetime annuity' see PARA 873B.5 NOTE 6. For the meaning of 'unsecured pension fund' see PARA 873B.5 NOTE 5; and for the meaning of 'alternatively secured pension' see PARA 873B.5 NOTE 13. For the meaning of 'market value' see PARA 873B.3 NOTE 4; and for the meaning of 'relevant valuation factor' see PARA 873B.11 NOTE 7.

The value of a member's uncrystallised rights under an arrangement on any date: (a) if the arrangement is a cash balance arrangement, is the amount which would, on the valuation assumptions, be available for the provision of benefits in respect of those rights if the member became entitled to benefits in respect of those rights on the date concerned; (b) if the arrangement is a money purchase arrangement other than a cash balance arrangement, is the aggregate of the amount of such of the sums and of the market value of such of the assets held for the purposes of the arrangement on the date concerned as represent those rights; (c) if the arrangement is a defined benefits arrangement, is:

$$(RVF - ARP) + LS$$

where RVF is the relevant valuation factor; ARP is the annual rate of pension to which the member would, on the valuation assumptions, be entitled under the arrangements on the date concerned if, on that date, he acquired an actual (rather than a prospective) right to receive a pension in respect of those rights, and LS is the amount of any lump sum to which the member would, on the valuation assumptions, be entitled under the arrangement on the date concerned (otherwise than by way of commutation of pension) if, on that date, he acquired an actual (rather than a prospective) right to payment of a lump sum in respect of those rights; and (d) if the arrangement is a hybrid arrangement, is the greatest of the values arrived at by virtue of heads (a)-(c) (or, if only two of those heads are relevant, the greater value): s 212(3)-(7) (s 212(3) amended by 2006 Act Sch 23 para 18). If, in any circumstances, cash balance benefits may be provided to or in respect of the member under a hybrid arrangement, head (a) is relevant; if in any circumstances, other money purchase benefits may be so provided, head (b) is relevant; and if in any circumstances defined benefits may be so provided, head (c) is relevant: 2004 Act s 212((8)-(10). As to sums and assets held for the purposes of an arrangement see PARA 873B.5 NOTE 5.

Rights are uncrystallised if the member is not entitled to the present payment of benefits in respect thereof; and he is treated as entitled to the present payment of benefits in respect of the sums and assets representing his unsecured pension fund or alternatively secured pension fund: s 212(1), (2). For the meaning of 'cash balance arrangement', 'money purchase arrangement', 'defined benefits arrangement' and 'hybrid arrangement' see PARA 873B.11.

16 The first reference date is the date on which the pension scheme first makes an unauthorised member payment to or in respect of the person, and each subsequent reference date is the date, after the end of the previous reference period, on which the scheme next makes an unauthorised member payment to or in respect of the person: *ibid* s 210(4), (5) (amended by 2006 Act Sch 23 para 16(3)). The previous reference period is the period of 12 months beginning with the previous reference date (or, if the surcharge threshold is reached in that period, is the surcharge period ending with the date on which it was reached): 2004 Act s 210(6).

17 For the meaning of 'unauthorised member payment' see PARA 873B.9.

18 The surcharge period is the period beginning with the reference date and ending with the day on which the surcharge threshold is reached: Finance Act 2004 ss 210(3), 213(3).

19 Ibid s 210(1), (2) (amended by 2006 Act Sch 23 para 16(2), (3)). For the meaning of 'arrangement' see PARA 873B.5; and for the meaning of 'member' see PARA 873B.4.

20 The surcharge threshold for the purposes of head (b) of the text is reached if the unauthorised payments percentage reaches 25 per cent: 2004 Act s 213(7). In this case, the unauthorised payments percentage is the aggregate of the percentages of the pension fund used up by each unauthorised employer payment made by the pension scheme to or in respect of the person on or after the reference date: s 213(8) (amended by 2006 Act Sch 23 para 19(3)). The percentage of the pension fund used up on the occasion of an unauthorised employer payment is:

$$\frac{UEP}{AA} \times 100$$

where UEP is the amount of the payment and AA is an amount equal to the aggregate of the amount of the sums, and the market value of the assets, held for the purposes of the pension scheme at the time when the unauthorised employer payment is made: 2004 Act s 213(9).

21 The first reference date is the date on which the pension scheme first makes an unauthorised employer payment to or in respect of the employer, and each subsequent reference date is the date, after the end of the previous reference period, on which the scheme next makes an unauthorised employer payment to or in respect of the employer: ibid s 213(4), (5) (amended by 2006 Act Sch 23 para 19(3)). The previous reference period is the period of 12 months beginning with the previous reference date (or, if the surcharge threshold is reached in that period, is the surcharge period ending with the date on which it was reached): 2004 Act s 213(6).

22 For the meaning of 'unauthorised employer payment' see PARA 873B.9.

23 2004 Act s 213(1), (2) (amended by 2006 Act Sch 23 para 19). For the meaning of 'surcharge period' see NOTE 18.

24 2004 Act ss 208(2), 209(2), (3) (s 208(2) amended by 2006 Act Sch 23 para 14; 2004 Act s 209(3) amended by 2006 Act Sch 23 para 15). If more than one person is so liable, those persons are jointly and severally so liable: 2004 Act ss 208(3), 209(4). A person is so liable whether or not (1) that person; (2) any other person so liable; or (3) the scheme administrator, is resident, ordinarily resident or domiciled in the United Kingdom: ss 208(4), 209(5).

25 Ibid s 268(1)-(3). On the receipt of such an application, the Inland Revenue must decide whether to discharge the liability, and must notify the applicant accordingly: s 268(4), (9). Regulations made by the Board of Inland Revenue may make provision supplementing s 268, and such regulations may in particular make provision as to the time limits for the making of an application: s 268(10). As to the making of such regulations see PARA 873B.1. For the meaning of 'Board of Inland Revenue' see PARA 873B.2. As to appeals against the refusal of an application see PARA 873B.19.

26 Ie pursuant to an order under the Pension Schemes Act 2004 s 19(4) or s 21(2)(a) or the Pensions (Northern Ireland) Order 2004 art 15(2) or 17(2)(a).

27 The relevant proportion is

$$\frac{ASO}{UMP}$$

where ASO is the amount subject to the order, ie the aggregate of the market value of any property and the amount of any money transferred, or the amount of the sum paid, towards a registered pension scheme pursuant to the provisions referred to in NOTE 26 in respect of the unauthorised member payment; and UMP is the amount of that payment: Finance Act 2004 s 266A(5) (s 266A added by Finance Act 2005 Sch 10 para 4). If ASO is greater than UMP, the relevant proportion is the whole thereof: s 266A(6). For the meaning of 'market value', see PARA 873B.3.

28 The requirements are that no part of the unauthorised member payment and no asset or sum representing it has been (1) received by or on behalf of the member or a person connected with him, or (2) held for more than 180 days by a person or succession of persons, other than the member or a person connected with him, involved in any transaction by which the unauthorised member payment was made: ibid s 266A(4). For the meaning of 'connected person' see the Income and Corporation Taxes Act 1988 s 839; and INCOME TAXATION vol 23(2) (Reissue) PARA 1858 (definition applied by Finance Act 2004 s 266A(7) (s 266A as added)).

29 Ibid s 266A(1), (2). The relief must be claimed within the period of one year beginning with the day on which the property or money is transferred or the sum paid: s 266A(3).

## 22. Overseas pension schemes; migrant member relief

An individual who is a relevant migrant member of a qualifying overseas pension scheme is entitled to relief<sup>1</sup> in respect of relievable pension contributions paid during a tax year<sup>2</sup> if he has relevant UK earnings chargeable to income tax for that year, he is resident in the United Kingdom when the contributions are paid, and he has notified the scheme manager of an intention to claim such relief<sup>3</sup>. Relief is also given for employers' contributions<sup>4</sup>.

An overseas pension scheme<sup>5</sup> is a qualifying overseas pension scheme if:

- 2256 (1) the scheme manager<sup>6</sup> has given to the Inland Revenue<sup>7</sup> notification that it is an overseas pension scheme and has provided any such evidence to that effect as the Inland Revenue may require;
- 2257 (2) the scheme manager has undertaken to the Inland Revenue to inform them if it ceases to be an overseas pension scheme, and to comply with any prescribed benefit crystallisation information requirements<sup>8</sup> imposed on the scheme manager;
- 2258 (3) the overseas pension scheme is not excluded from being a qualifying overseas pension scheme<sup>9</sup>.

An individual who is a member of an overseas pension scheme is a relevant migrant member of that scheme, in relation to any contributions, if:

- 2259 (a) he was not resident in the United Kingdom when first a member of the scheme;
- 2260 (b) he was a member of the scheme at the beginning of the period of residence in the United Kingdom which includes the time when the contributions are paid;
- 2261 (c) either he was, immediately before the beginning of that period of residence, entitled to tax relief in respect of contributions paid under the scheme under the law of the country or territory in which the individual was then resident, or he meets such other condition as may be prescribed by regulations made by the Board of Inland Revenue; and
- 2262 (d) he has been notified by the scheme manager that information concerning events that are benefit crystallisation events in relation to the individual and the pension scheme will be given to the Inland Revenue<sup>10</sup>.

1 le under the Finance Act 2004 s 188: see PARA 873B.12.

2 For the meaning of 'tax year' see PARA 873B.7.

3 2004 Act s 243, Sch 33 para 1(1). Section 190 (see PARA 873B.12) applies in relation to the aggregate of the amount of relief to which an individual is entitled under s 188 by virtue of these provisions and any to which he otherwise is so entitled: Sch 33 para 1(2). Relief to which an individual is entitled under s 188 by virtue of these provisions is given in accordance with s 194 (see PARA 873B.12), so that nothing in ss 191-193 (see PARA 873B.12) applies in relation to such relief: Sch 33 para 1(3). Section 195 (see PARA 873B.11) has effect as if the references to ss 188-194 included ss 188-190 and 194 as they apply by virtue of these provisions: Sch 33 para 1(4). Subject to transitional provisions, no deduction may be allowed under the Income Tax (Earnings and Pensions) Act 2003 Pt 5 Ch 2 (ss 333-360) (see INCOME TAXATION) in accordance with s 355 (see INCOME TAXATION) in respect of contributions under a pension scheme: 2004 Act Sch 33 para 1(5). For the meaning of 'contributions' see PARA 873B.12.

4 le ibid s 196(2)-(5) (see PARA 873B.13) applies in relation to relevant migrant member contributions paid by an employer as it applies in relation to contributions paid by an employer under a registered pension scheme in respect of an individual: Sch 33 para 2(1). Section 200 (see PARA 873B.13) applies as if the reference to contributions under a registered pension scheme included relevant migrant member contributions: Sch 33 para

2(2). 'Relevant migrant member contributions' means contributions paid under a qualifying overseas pension scheme in respect of an individual who is a relevant migrant member of the scheme in relation to the contributions: Sch 33 para 2(3). For the meaning of 'employer' see PARA 873B.2.

No liability to income tax arises in respect of earnings where an employer makes contributions under a qualifying overseas pension scheme in respect of an employee who is a relevant migrant member of the scheme: 2003 Act s 308A (added by 2004 Act Sch 33 para 3).

5 For the meaning of 'overseas pension scheme' see PARA 873B.4.

6 For the meaning of 'scheme manager' see PARA 873B.4.

7 For the meaning of 'Inland Revenue' see PARA 873B.2.

8 The requirements imposed by or under regulations made by the Board of Inland Revenue (see PARA 873B.2) to provide to the Inland Revenue any information relating to events that are benefit crystallisation events in relation to members of the pension scheme who have at any time been relevant migrant members of the scheme: 2004 Act Sch 33 paras 4(c), 5(2). As to benefit crystallisation events see PARA 873B.16. As to the making of such regulations see PARA 873B.1. See the Pension Schemes (Information Requirements - Qualifying Overseas Pension Schemes, Qualifying Recognised Overseas Pensions Schemes and Corresponding Relief) Regulations 2006, SI 2006/208; and the Pension Schemes (Relevant Migrant Members) Regulations 2006, SI 2006/212.

9 2004 Act Sch 33 para 5(1). An overseas pension scheme is excluded from being a qualifying overseas pension scheme if the Inland Revenue have decided that there has been a failure to comply with any prescribed benefit crystallisation information requirements imposed on the scheme manager, that that failure is significant, and that it is accordingly not appropriate for relief from tax to be given in respect of contributions under the scheme: Sch 33 para 5(3). A failure to comply with such requirements is significant if the amount of information not provided is substantial or if the failure to provide it is likely to result in serious prejudice to the assessment or collection of tax: Sch 33 para 5(4). The Inland Revenue may at any time after an overseas pension scheme becomes excluded decide that that exclusion should cease, and must notify the scheme manager of their decision: Sch 33 para 5(5).

The scheme manager may appeal against a decision to exclude the scheme, within the period of 30 days beginning with the day on which notification of the exclusion decision was given: Sch 33 para 6(1), (2), (5). If, on an appeal notified to it, the tribunal considers that the scheme ought to be excluded, it must dismiss the appeal. If the tribunal decides that it ought not to have been excluded, the scheme is treated as having remained a qualifying overseas pension scheme (subject to any further appeal): Sch 33 para 6(6)-(8) (amended by SI 2009/56).

10 Finance Act 2004 Sch 33 para 4(1) (amended by Finance Act 2005 Sch 10 para 46; so numbered by the Finance Act 2006 Sch 23 para 32(2)). As to the meaning of 'residence' see INCOME TAXATION vol 23(2) (Reissue) PARA 1260. See the Registered Pension Schemes (Extension of Migrant Member Relief) Regulations 2006, SI 2006/1957.

The Commissioners for Her Majesty's Revenue and Customs may by regulations provide that in circumstances prescribed by the regulations, heads (1)-(3) of the text have effect as if the references therein to the pension scheme were to either the pension scheme or such other pension scheme as is prescribed by the regulations; and such regulations may include provision having effect in relation to times before they are made: 2004 Act Sch 33 para 4(2), (3) (added by Finance Act 2006 Sch 23 para 32(3)).

## **23. Non-UK schemes: application of certain charges**

For the purposes of the member payment charges<sup>1</sup>, the member payment provisions<sup>2</sup> apply in relation to payments made or treated<sup>3</sup> as made to or in respect of:

- 2263 (1) a relieved member<sup>4</sup> of a relevant non-UK scheme<sup>5</sup>, or
- 2264 (2) a transfer member<sup>6</sup> of such a scheme,

as in relation to payments made or so treated as made to or in respect of a member of a registered pension scheme<sup>7</sup>. The amount of any liability to tax imposed on any individual in relation to a payment by virtue of the operation of the member payment charges in consequence of the above provisions is to be reduced by the amount of any tax paid in respect of the payment under the law of any country or territory outside the United Kingdom<sup>8</sup>.

The member payment provisions do not, however, apply in relation to:

- 2265 (a) a payment made or treated as made to or in respect of a relieved member or transfer member of a relevant non-UK scheme unless he is resident in the United Kingdom when the payment is made or treated as made or, although not so resident at that time, has been so resident earlier in the tax year in which the payment is made or treated as made or in any of the five tax years immediately preceding that tax year<sup>9</sup>;
- 2266 (b) a payment made or treated as made to or in respect of a relieved member of a relevant non-UK scheme unless the payment is referable to his UK tax-relieved fund under the scheme<sup>10</sup>;
- 2267 (c) a payment made or treated as made to or in respect of a transfer member of a relevant non-UK scheme unless it is referable to his relevant transfer fund under the scheme<sup>11</sup>.

The annual allowance provisions<sup>12</sup> apply in relation to an individual who is a currently-relieved member of a currently-relieved non-UK pension scheme as if that scheme were a registered pension scheme<sup>13</sup>.

The lifetime allowance provisions<sup>14</sup> apply in relation to an individual who is a relieved member of a relieved non-UK pension scheme as if that scheme were a registered pension scheme<sup>15</sup>. What would otherwise be the amount crystallised on the occurrence of an event which is a benefit crystallisation event<sup>16</sup> in relation to such an individual is reduced by so much (if any) thereof as exceeds the amount of the untested portion of the relevant relieved amount<sup>17</sup> immediately before the event concerned (so that if that amount is nil, there is no amount crystallised)<sup>18</sup>. Where a transfer of sums or assets held for the purposes of, or representing accrued rights under, a relieved non-UK pension scheme would otherwise be a benefit crystallisation event in relation to an individual who is a relieved member of that scheme, that transfer is not such an event if the transfer is a block transfer<sup>19</sup>.

The Commissioners for Her Majesty's Revenue and Customs may by regulations make provision for a transfer member of a relevant non-UK scheme to be liable to the unauthorised payment charge<sup>20</sup>.

1 The 'member payment charges' are (1) the unauthorised payments charge (see PARA 873B.21) (except as imposed by virtue of the Finance Act 2004 s 174A (see PARA 873B.30); (2) the unauthorised payments surcharge (see PARA 873B.21); (3) the short service refund lump sum charge (see PARA 873B.21); (4) the special lump sum death benefits charge (see PARA 873B.21); (5) the charge on trivial commutation lump sums and on winding-up lump sums (see PARA 873B.14) and (6) the charge on trivial commutation lump sum death benefits and winding-up lump sum death benefits (see PARA 873B.14): Sch 34 para 1(3) (amended by Finance Act 2006 Sch 1 para 14).

2 In the provisions of the 2004 Act Pt 4 (ss 149-284) (see PARA 873B.1 et seq, PARA 873B.24 et seq) (apart from the taxable property provisions) (see PARA 873B.29) relating to payments made (or treated by those provisions as made) to or in respect of a member of a registered pension scheme: Sch 34 para 1(4) (amended by 2006 Act Sch 1 para 14). Those provisions apply with respect to a payment made or treated as made to or in respect of a relieved member of a relevant non-UK scheme or a transfer member of such a scheme, subject to any omissions, additions and other modifications contained in regulations made by the Board of Inland Revenue: 2004 Act Sch 34 para 7(1). Such regulations may (1) include provision having effect in relation to times before they are made; (2) confer discretion on the Board of Inland Revenue or the Inland Revenue (subject to a right of appeal against any decision taken in exercise of the discretion); (3) make different provision in relation to payments treated (in accordance with regulations under Sch 34 para 3(6) or 4(4)) as being referable to a member's tax-relieved fund, or to a member's relevant transfer fund, under a relevant non-UK scheme; and (4) otherwise make different provision for different cases: Sch 34 para 7(2). For the meaning of 'Board of Inland Revenue' and 'Inland Revenue' see PARA 873B.2. As to the making of such regulations see PARA 873B.1. See the Pensions Schemes (Application of UK Provisions to Relevant Non-UK Schemes) Regulations 2006, SI 2006/207 (amended by SI 2006/1960, SI 2007/493).

3 In accordance with the 2004 Act Pt 4: see NOTE 2.

4 A member of a relevant non-UK scheme is a relieved member of the scheme if any of the contributions in respect of which relief has been given as mentioned in NOTE 5 head (1) or (2) were contributions paid by or on behalf of, or in respect of, the member; or (2) he is the member, or one of the members, who has been exempt from liability to tax as mentioned in NOTE 5 head (3): 2004 Act Sch 34 para 1(7). For the meaning of 'member' see PARA 873B.4.

5 A scheme is a relevant non-UK scheme if (1) relief from tax has been given in respect of contributions paid under the scheme by virtue of *ibid* Sch 33 (see PARA 873B.22); (2) relief from tax has been so given at any time after 5 April 2006 under double tax arrangements; (3) a member of the scheme has been, or members of the scheme have been, exempt from liability to tax by virtue of the Income Tax (Earnings and Pensions) Act 2003 s 307 in respect of provision made under the scheme at any time after 5 April 2006 when the scheme was an overseas pension scheme; or (4) there has been a relevant transfer at any time after 5 April 2006 when the scheme was a qualifying recognised overseas pension scheme: 2004 Act Sch 34 para 1(5). 'Double tax arrangements' means arrangements having effect by virtue of the Income and Corporation Taxes Act 1988 s 788 (see INCOME TAXATION): 2004 Act Sch 34 para 20. For the meaning of 'qualifying recognised overseas pension scheme' see PARA 873B.22; and for the meaning of 'relevant transfer' see NOTE 6.

6 A member of a relevant non-UK scheme is a transfer member of the scheme if a relevant transfer related to him: *ibid* Sch 34 para 1(8). A 'relevant transfer' means a direct or indirect transfer of sums or assets held for the purposes of, or representing accrued rights under, an arrangement made under a registered pension scheme or another scheme which is a relevant non-UK scheme, in relation to a member, so as to become held for the purposes of, or to represent rights under, an arrangement under the scheme relating to the member: Sch 34 para 1(6) (amended by the Finance Act 2007 Sch 19 para 18). The term also includes a transfer lump sum death benefit paid so as to become held for the purposes of, or to represent rights under, such an arrangement: 2004 Act Sch 34 para 1(6). For the meaning of 'pension scheme' see PARA 873B.1; and for the meaning of 'arrangement' see PARA 873B.5. As to registration see PARA 873B.2. For the meaning of 'transfer lump sum death benefit' see PARA 873B.8. As to sums and assets held for the purposes of an arrangement see PARA 873B.5.

7 *Ibid* Sch 34 para 1(1). Sections 205, 206 (see PARA 873B.21) apply with respect to a short service refund lump sum and to a special lump sum death benefit paid to or in respect of a relieved member of a relevant non-UK scheme, or a transfer member of such a scheme, so as to make the person to whom the payment is made (rather than the scheme administrator) liable to any charge imposed by either of those provisions: Sch 34 para 5.

8 *Ibid* Sch 34 para 6(1). Where, after any tax which an individual is liable to pay in respect of a payment in consequence of Sch 34 para 1 has been paid, tax is paid in respect of that payment under the law of any country or territory outside the United Kingdom, an appropriate adjustment must be made in his liability to tax (by way of discharge or repayment of tax): Sch 34 para 6(2).

9 *Ibid* Sch 34 para 2. For the meaning of 'tax year' see PARA 873B.7. As to the meaning of 'residence' see INCOME TAXATION vol 23(2) (Reissue) PARA 1260.

10 *Ibid* Sch 34 para 3(1). A member's UK tax-relieved fund under a relevant non-UK scheme is so much of the sums or assets held for the purposes of, or representing accrued rights under, the scheme as, in accordance with regulations made by the Board of Inland Revenue, represents any tax-relieved contributions made under the scheme by or on behalf of, or in respect of, the member and any tax-exempt provision made under the scheme in respect of the member: Sch 34 para 3(2). 'Tax-relieved contributions' means contributions in respect of which relief from tax has been given by virtue of Sch 33, or has been given at any time after 5 April 2006 under double tax arrangements: Sch 34 para 3(3). 'Tax-exempt provision' means provision in respect of which exemption from tax has been given by virtue of the 2003 Act s 307 at any time after 5 April 2006 when the scheme was an overseas pension scheme: 2004 Act Sch 34 para 3(4). As to the making of such regulations see PARA 873B.1. Such regulations may (in particular) provided that the sums or assets which represent any tax-relieved contributions or tax-exempt provision are to be determined otherwise than by reference to the actual amount of the contributions or the amount or value of the provision (for instance by reference to the increase in value of the member's rights under the scheme during a period for which relief or exemption in respect of such contributions or provision was given); and may make provision for determining whether or not payments made or treated as made by a relevant non-UK scheme are to be treated as referable to a member's UK tax-relieved fund under the scheme (and so whether or not they reduce the fund): Sch 34 para 3(5), (6). See the Pension Schemes (Application of UK Provisions to Relevant Non-UK Schemes) Regulations 2006, SI 2006/207 (amended by SI 2006/1960, SI 2007/493, SI 2009/2047).

11 2004 Act Sch 34 para 4(1). A member's relevant transfer fund under a relevant non-UK scheme is so much of the sums or assets held for the purposes of, or representing accrued rights under, the scheme as, in accordance with regulations made by the Board of Inland Revenue, represents relevant transferred sums or assets: Sch 34 para 4(2). 'Relevant transferred sums or assets' means sums or assets held for the purposes of, or representing accrued rights under, an arrangement under a registered pension scheme or another scheme

which is a relevant non-UK scheme, which at any time after 5 April 2006 when the scheme was an overseas pension scheme have been transferred (directly or indirectly) so as to become held for the purposes of, or to represent rights under, an arrangement under the scheme relating to the member: Sch 34 para 4(3) (amended by 2007 Act Sch 19 para 18). Regulations so made may make provision for determining whether payments or transfers made (or treated as made) by a relevant non-UK scheme are to be treated as referable to a member's relevant transfer fund under the scheme (and so whether or not they reduce that fund): 2004 Act Sch 34 para 4(4). As to the making of such regulations see PARA 873B.1.

12    le the provisions of *ibid* Pt 4 (ss 149-284) (see PARA 873B.1 et seq, PARA 873B.24 et seq) relating to the annual allowance charge (see PARA 873B.18): Sch 34 para 8(1). Those provisions apply by virtue of Sch 34 para 8 subject to any omissions, additions and other modifications contained in regulations made by the Board of Inland Revenue: Sch 34 para 12(1). Such regulations may include provision having effect in relation to times before they are made, confer discretion on the Board of Inland Revenue or the Inland Revenue (subject to a right of appeal against any decision taken in exercise of the discretion), and make different provision for different cases: Sch 34 para 12(2). As to the making of such regulations see PARA 873B.1. See also NOTE 13.

13    *Ibid* Sch 34 para 8(1), (2). A pension scheme is a currently-relieved non-UK pension scheme in relation to a tax year if (1) relief from tax is given in respect of contributions paid during the tax year under the pension scheme by virtue of Sch 33 or double tax arrangements; or (2) a member of the pension scheme is, or members of the scheme are, exempt from liability to tax by virtue of the 2003 Act s 307 in respect of provision made under the scheme at any time during the tax year when the pension scheme is an overseas pension scheme: 2004 Act Sch 34 para 8(3). An individual is a currently-relieved member of a currently-relieved non-UK pension scheme in a tax year if any of the contributions in respect of which relief is given as mentioned in head (1) are contributions paid by or on behalf of, or in respect of, the individual, or the individual is the member, or one of the members, who is exempt from liability to tax as mentioned in head (2): Sch 34 para 8(3), (4).

The annual allowance provisions apply by virtue of Sch 34 para 8 as if references to the pension input period of an arrangement under the scheme that ends in a tax year were to the tax year; and ss 230(1), 234(1) (see PARA 873B.18) so apply in relation to a tax year as if the increase in the value of the individual's rights under an arrangement under the pension scheme relating to the individual during the tax year were the greater of (a) the appropriate fraction of what it otherwise would be, and (b) the amount of any contributions paid under the arrangement during the tax year by or on behalf of the individual (otherwise than by an employer) in respect of which relief from tax is given by virtue of Sch 33 or double tax arrangements: Sch 34 para 10(1). Section 237 (see PARA 873B.18) applies accordingly: Sch 34 para 10(1). The 'appropriate fraction' is:

$$\frac{TE}{EI}$$

where EI is the total amount of employment income of the individual from any relevant employment or employments for the tax year (excluding any such income which is exempt income (within the meaning of the Income Tax (Earnings and Pensions) Act s 8), and TE is so much of EI as constitutes taxable earnings from any such employment (within the meaning of s 10(2)): Finance Act 2004 Sch 34 para 10(2) (amended by Finance Act 2008 Sch 29 para 19). An employment is a relevant employment if it is an employment with an employer who is a sponsoring employer in relation to the currently-relieved non-UK pension scheme: 2004 Act Sch 24 para 10(3). For the meaning of 'sponsoring employer' see PARA 873B.4.

Section 233(1) (see PARA 873B.18) applies by virtue of Sch 34 para 8 in relation to a tax year as if (i) the reference in s 233(1)(a) to relievable pension contributions paid by or on behalf of the individual under an arrangement under the pension scheme relating to an individual were to those in respect of which relief from tax is given by virtue of Sch 33 or double tax arrangements, and (ii) the reference in s 233(1)(b) to contributions paid in respect of the individual under such an arrangement by an employer of the individual were to the appropriate fraction of contributions so paid: Sch 34 para 11(1). Section 237 applies accordingly: Sch 34 para 11(1). The 'appropriate fraction' is:

$$\frac{TE}{EI}$$

where EI is the total amount of employment income of the individual from any employment or employments with the employer for the tax year (excluding any such income which is exempt income (within the meaning of the Income Tax (Earnings and Pensions) Act s 8), and TE is so much of EI as constitutes taxable earnings from any such employment (within the meaning of s 10(2)): 2004 Act Sch 34 para 11(2) (amended by Finance Act 2008 Sch 29 para 19). For the meaning of 'employer' see PARA 873B.4.

14    le the provisions of the 2004 Act Pt 4 (ss 149-284) (see PARAS 873B.1 et seq, 873B.24 et seq) relating to the lifetime allowance charge (see PARA 873B.15): Sch 34 para 13(1). Those provisions apply by virtue of Sch 34 para 13 subject to any omissions, additions and other modifications contained in regulations made by the Board of Inland Revenue: Sch 34 para 19(1). Such regulations may include provision having effect in relation to times

before they are made, confer discretion on the Board of Inland Revenue or the Inland Revenue (subject to a right of appeal against any decision taken in exercise of the discretion), and make different provision for different cases: Sch 34 para 19(2). As to the making of such regulations see PARA 873B.1.

15 Ibid Sch 34 para 13(1), (2). A pension scheme is a relieved non-UK pension scheme if (1) relief from tax has been given in respect of contributions paid during under the pension scheme by virtue of Sch 33; (2) relief from tax has been so given at any time after 5 April 2006 under double tax arrangements; or (3) a member of the pension scheme has been, or members of the scheme have been, exempt from liability to tax by virtue of the 2003 Act s 307 in respect of provision made under the scheme at any time after 5 April 2006 when the pension scheme was an overseas pension scheme: Sch 34 para 13(3). An individual is a relieved member of a relieved non-UK pension scheme in a tax year if any of the contributions in respect of which relief has been given as mentioned in head (1) or (2) were contributions paid by or on behalf of, or in respect of, the individual, or the individual is the member, or one of the members, who has been exempt from liability to tax as mentioned in head (3): Sch 34 para 13(3), (4).

Section 217 (see PARA 873B.15) applies with respect to a liability to the lifetime allowance charge arising by reason of the occurrence of a benefit crystallisation event by virtue of these provisions with the omission of references to the scheme administrator: Sch 34 para 17.

16 For the meaning of 'benefit crystallisation event' see PARA 873B.16.

17 The relevant relieved amount is the aggregate of (1) the amounts which for each tax year before that in which the benefit crystallisation event occurs would have been arrived at in relation to arrangements under the relieved non-UK pension scheme relating to the individual as pension input amounts under the 2004 Act ss 230-237 (see PARA 873B.18) as they apply by virtue of Sch 34; and (2) the amount which would be so arrived at if the period beginning with the tax year in which that event occurs and ending immediately before that event were a tax year (in each case assuming that s 229(3) (see PARA 873B.18) did not apply): Sch 34 para 14(3). The untested portion of the relevant relieved amount is so much of that amount as exceeds the aggregate of the amount which (in accordance with Sch 34 para 14(2)) is the amount crystallised by each previous event that was a benefit crystallisation event by virtue of these provisions in relation to the individual and the relieved non-UK pension scheme (so that if there has been no such previous event, the untested portion of the relevant relieved amount is the whole of that amount): Sch 34 para 14(4).

18 Ibid Sch 34 para 14(1), (2). An individual who is a relieved member of a relieved non-UK pension scheme may at any time elect by giving notice to the Inland Revenue in a form specified by the Board of Inland Revenue that a benefit crystallisation event is to be treated as occurring on a date specified in the notice in relation to the individual and the scheme: Sch 34 para 15(1). The amount crystallised on that event is the untested portion of the relevant relievable amount: Sch 34 para 15(2).

19 Ibid Sch 34 para 16(1), (2). A transfer is a block transfer if it involves the transfer in a single transaction of all the sums and assets held for the purposes of, or representing accrued rights under, the arrangements under the relieved non-UK pension scheme which relate to the individual and at least one other member of the scheme (whether or not that member is a relieved member): Sch 34 para 16(3). Where sums and assets held for the purposes of, or representing accrued rights under, a relieved non-UK pension scheme are transferred to as to become held for the purposes of, or to represent rights under, another pension scheme ('the transferee pension scheme') in circumstances in which, by virtue of Sch 34 para 16, the transfer does not constitute a benefit crystallisation event, Sch 34 paras 13-17, 18(1) have effect after the transfer as if (1) reference to a relieved non-UK pension scheme included the transferee pension scheme (if not a relieved non-UK pension scheme); (2) references to an individual who is a relieved member of a relieved non-UK pension scheme included the individual to whom the transfer related (if not such a member); and (3) the relevant relieved amount consisted of (or, if there is a relevant relieved amount in relation to the individual and the transferee scheme apart from this provision) included, the amount which would have been the amount crystallised had the transfer constituted a benefit crystallisation event: Sch 34 para 18.

20 Ibid Sch 34 para 7A(1) (Sch 34 para 7A added by 2006 Act Sch 21 para 14). The liability may be so imposed in circumstances which are the same as, or similar to, those in which (1) a member of a registered pension scheme is so liable by virtue of the 2004 Act s 174A and Sch 29A (see PARA 873B.30 et seq); (2) the scheme administrator of such a scheme is liable to the scheme sanction charge by virtue of s 185A or 185F (see PARA 873B.33); or (3) a member of such a scheme is liable to the scheme sanction charge by virtue of those provisions in consequence of provision made by regulations under s 273ZA (see PARA 873B.34): Sch 34 para 7A(1). Such regulations may (a) make provision for the application of any or all of the taxable property provisions (see PARA 873B.29) in relation to a transfer member of a relevant non-UK scheme subject to any omissions, additions and other modifications contained in the regulations; (b) include provision having effect in relation to times before they are made; (c) contain transitional provisions and savings; and (d) make different provision for different cases: Sch 34 para 7A(2). The Commissioners may also by regulations make provision for a relieved member of a relevant non-UK scheme, or a transfer member of such a scheme, to be liable to the unauthorised payment charge in circumstances which are the same or similar to those in which the scheme administrator of such a scheme is liable to the scheme sanction charge by virtue of s 181A (see PARA 873B.19):

Sch 34 para 7ZA (Sch 34 para 7ZA added by Finance Act 2007 Sch 19 para 18; and amended by Finance Act 2008 Sch 29 para 15).

## **24. Information requirements**

The Inland Revenue<sup>1</sup> may, in relation to any tax year<sup>2</sup> by notice require the scheme administrator<sup>3</sup> of any registered pension scheme<sup>4</sup> to make and deliver to the Inland Revenue a return containing any information reasonably required by the notice, and to deliver with the return any accounts, statements or other documents relating to information contained in the return which may reasonable be required by the notice<sup>5</sup>. The information required to be so included is any information relating to:

- 2268 (1) contributions made under the pension scheme;
- 2269 (2) transfers of sums or assets held for the purposes of, or representing accrued rights under, another pension scheme so as to become held for the purposes of, or to represent rights under, the pension scheme in question;
- 2270 (3) income and gains derived from investments or deposits held for the purposes of the pension scheme;
- 2271 (4) other receipts of the pension scheme;
- 2272 (5) the sums and other assets held for the purposes of the pension scheme;
- 2273 (6) the liabilities of the pension scheme;
- 2274 (7) the provision of benefits by the pension scheme;
- 2275 (8) transfers of sums or assets held for the purposes of, or representing accrued rights under, the pension scheme so as to become held for the purposes of, or to represent rights under, another pension scheme;
- 2276 (9) other expenditure of the pension scheme;
- 2277 (10) the membership of the pension scheme;
- 2278 (11) any other matter relating to the administration of the pension scheme<sup>6</sup>.

Where the notice requiring the return is given after 31 October in the next tax year, a return relating to the whole or part of, or to a period or periods ending in, a tax year must be delivered before the end of the period of three months beginning with the day on which the notice is given. Otherwise, it must be delivered not later than 31 January in the following tax year<sup>7</sup>. Failure to provide such a return is visited with a penalty of £100<sup>8</sup>.

The Inland Revenue may require any person of a description prescribed by regulations made by the Board of Inland Revenue to produce to the Inland Revenue, or to make available for inspection by them, any documents within the person's possession or power relating to any of the specified matters, and to provide to the Inland Revenue any particulars relating to any of those matters, which the Inland Revenue may reasonably require<sup>9</sup>. The Inland Revenue may also by notice require any other person to produce to them or to make available for inspection by them any documents which they may reasonably require, which are within that person's possession or power which relate to any of the specified matters and which were created not more than six years before the day on which the notice is given<sup>10</sup>. Any such notice must specify the period within which it is to be complied with, which must not end earlier than the period of 30 days beginning with the day on which the notice is given<sup>11</sup>. Such a notice does not require a person to produce or make available for inspection any document, or to provide any particulars, relating to any pending appeal by the person relating to tax<sup>12</sup>. Failure to comply with such a notice is visited with a penalty not exceeding £300<sup>13</sup>.

The recipient of a notice under these provisions may appeal, within the period of 30 days beginning with the day on which the notice is given, against any requirement imposed thereby<sup>14</sup>.

1 For the meaning of 'Inland Revenue' see PARA 873B.2.

2 For the meaning of 'tax year' see PARA 873B.7.

3 For the meaning of 'scheme administrator' see PARA 873B.2.

4 For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2.

5 Finance Act 2004 s 250(1). The notice must specify the period to be covered by the return, which may be the whole or any specified part of the tax year or, if audited accounts of the pension scheme have been prepared for any period or periods ending in the tax year, the period or periods covered by the accounts: s 250(4), (5). 'Audited accounts' means accounts audited by a person of a description specified in regulations made by the Board of Inland Revenue: s 250(6). For the meaning of 'Board of Inland Revenue' see PARA 873B.2. As to the making of such regulations see PARA 873B.1. The regulations so far so made are the Registered Pension Schemes (Audited Accounts) (Specified Persons) Regulations 2005, SI 2005/3456 (amended by SI 2008/948, SI 2008/954).

6 The Board of Inland Revenue may by regulations make provision requiring persons of a prescribed description to provide to the Inland Revenue, in a form specified by the Board of Inland Revenue, information of a prescribed description relating to any of the specified matters, and to preserve for a prescribed period any documents relating to such information: 2004 Act s 251(1). The specified matters are (1) any matter relating to a registered pension scheme; (2) any matter relating to a pension scheme which has ceased to be a registered pension scheme; (3) any matter relating to a pension scheme in relation to which an application for registration has been made; (4) any matter relating to an annuity purchased with sums or assets held for the purposes of a registered pension scheme; (5) the coming into operation of an employer-financed retirement benefits scheme; and (6) the provision of relevant benefits under an employer-financed retirement benefits scheme: s 251(2). 'Employer-financed retirement benefits scheme' and 'relevant benefits' have the same meaning as in the Income Tax (Earnings and Pensions) Act 2003 ss 393A, 393B (see PARA 758): Finance Act 2004 ss 251(3), 252(4). The Board of Inland Revenue may also by regulations make provision requiring scheme administrators of registered pension schemes or other persons of a prescribed description to provide information of a prescribed description to persons of such of the specified descriptions as may be prescribed (or to the scheme administrators of other registered pension schemes), or requiring persons of such of the specified descriptions as are prescribed to provide information of a prescribed description to the scheme administrators of registered pension schemes: s 251(4) (amended by the Finance Act 2005 Sch 10 para 47). The persons so specified are (a) members of a registered pension scheme; (b) persons who have ceased to be members of a registered pension scheme; (c) persons to whom benefits under a registered pension scheme are being, or have been, provided; (d) the personal representatives of any person within head (a), (b) or (c); and (e) insurance companies who pay annuities purchased with sums or assets held for the purposes of registered pension schemes: 2004 Act s 251(5). 'Prescribed' means prescribed by the regulations: s 251(6). For the meaning of 'personal representatives' see PARA 873B.9; and for the meaning of 'insurance company' see PARA 873B.2. As to the making of such regulations see PARA 873B.1. The regulations so far so made are the Employer-Financed Retirement Benefits Schemes (Provision of Information) Regulations 2005, SI 2005/3453; the Registered Pension Schemes and Employer-Financed Retirement Benefits Schemes (Information) (Prescribed Descriptions of Persons) Regulations 2005, SI 2005/3455; the Registered Pension Schemes (Enhanced Lifetime Allowance) Regulations 2006, SI 2006/131 (see PARA 873B.15); and the Registered Pension Schemes (Provision of Information) Regulations 2006, SI 2006/567 (see PARA 873B.1).

For the penalties for failure to comply with regulations made under the 2004 Act s 251 see the Taxes Management Act 1970 s 98; and INCOME TAXATION vol 23(2) (Reissue) PARA 1711. A person who fails to comply with regulations under s 251(1)(b) relating to preservation of documents is liable to a penalty not exceeding £3,000: 2004 Act s 258(2).

7 Ibid s 250(7). Where the latter deadline would apply, but the winding-up of the pension scheme has been completed before 31 October in the next tax year, the return must be delivered before the end of the period of three months beginning with the day on which the winding-up is completed: s 250(8). This provision does not, however, apply if the end of that three-month period is before the end of the period of three months beginning with the day on which the notice is given; and in that case the return must be delivered before the end of that latter period: s 250(9).

8 Ibid s 257(1). If the failure continues after such a penalty is imposed, the scheme administrator is liable to a further penalty not exceeding £60 for each day of continuance after the day on which that penalty was imposed (but not including any day for which a penalty under this provision has already been imposed): s 257(2). No penalty may be imposed under s 257(1) or (2) in respect of a failure after it has been remedied: s 257(3).

If the scheme administrator of a registered pension scheme fraudulently or negligently makes an incorrect return required by a notice under s 250, or delivers any incorrect accounts, statements or other documents with such a return, the scheme administrator is liable to a penalty not exceeding £3,000: s 257(4).

9 Ibid s 252(1). The specified matters are (1) any matter relating to a registered pension scheme; (2) any matter relating to a pension scheme which has ceased to be a registered pension scheme; (3) any matter relating to a pension scheme in relation to which an application for registration has been made; (4) any matter relating to an annuity purchased with sums or assets held for the purposes of a registered pension scheme; (5) the coming into operation of an employer-financed retirement benefits scheme; and (6) the provision of relevant benefits under an employer-financed retirement benefits scheme: s 252(3).

10 Ibid s 252(2). Such a notice must specify the pension scheme or employer-financed retirement benefits scheme to which it relates: s 252(6). The Inland Revenue must notify the scheme administrator of the pension scheme, or the responsible person in relation to the employee-financed retirement benefits scheme, to which such a notice relates that the notice has been given no later than the end of the period of 30 days beginning with the day on which it is given: s 252(7). 'Responsible person' has the meaning given by the 2003 Act s 399A (see PARA 758): 2004 Act s 252(8).

11 Ibid s 252(5). A person may comply with a notice requiring the production of a document by producing a copy of the document; but where a person does so, the Inland Revenue may by notice require the production of the original for inspection within a period specified in the notice, which must not end earlier than the period of 30 days beginning with the day on which the notice is given: s 252(10). The Inland Revenue may take copies of, or make extracts from, any document produced in compliance with a notice under s 252: s 252(11).

12 Ibid s 252(12).

13 Ibid s 259(1). If the failure continues after such a penalty is imposed, the defaulter is liable to a further penalty not exceeding £60 for each day of continuance after the day on which that penalty was imposed (but not including any day for which a penalty under this provision has already been imposed): s 259(2). No penalty may be imposed under s 259(1) or (2) in respect of a failure after it has been remedied: s 259(3).

If a person fraudulently or negligently produces or makes available for inspection any incorrect documents, or provides any incorrect particulars, in response to a notice under s 252, he is liable to a penalty not exceeding £3,000: s 259(4).

14 Ibid s 253(1), (2), (5). On an appeal notified to it, the tribunal, if it considers that the provision of the document or particulars was reasonably required by the Inland Revenue, must confirm the notice so far as relating to that requirement. If the tribunal decides that it was not reasonably required, the tribunal must set aside the notice so far as relating to that requirement: s 253(6)-(8) (amended the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, SI 2009/56). If the notice is confirmed, it has effect in relation to the requirement to which the appeal relates as if it specified as the period within which it must be complied with the period of 30 days beginning with the day on which the appeal was determined: s 253(9). Notwithstanding the provisions of the Tribunals, Courts and Enforcement Act 2007 ss 11 (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A.7), 13 (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 13A.8), the tribunal's decision is final and conclusive: s 253(10) (substituted by SI 2009/56).

## **25. Registered pension schemes: accounting for tax by scheme administrators; assessments**

A scheme administrator<sup>1</sup> of a registered pension scheme<sup>2</sup> must make returns to the Inland Revenue<sup>3</sup> of the income tax to which he is liable for each period of three months ending with 31 March, 30 June, 30 September or 31 December if tax has been charged on the scheme administrator by virtue of these provisions in that period<sup>4</sup>. The return must be made before the end of the period of 45 days beginning with the day immediately following the end of the three-month period concerned, and must show the income tax to which the scheme administrator is liable and include such particulars of the events or other circumstances giving rise to the liability (including particulars as to the persons to whom the events or other circumstances relate) as are required to be included in such returns by regulations made by the Board of Inland Revenue<sup>5</sup>. The income tax shown in such a return is due at the time by which the return is to be made, and is payable without the making of an assessment<sup>6</sup>.

A scheme administrator who fails to make such a return is liable to a penalty or penalties of the relevant quarterly amount for each quarter (or part of a quarter) for which the failure continues, excluding any quarter after the fourth or for which such a penalty has already been imposed; and if the failure continues beyond the fourth quarter (whether or not any quarterly penalty is imposed), the scheme administrator is liable to a penalty not exceeding the amount of income tax to which the administrator is liable<sup>7</sup> for the quarter for which the return should

have been made<sup>8</sup>. A scheme administrator who fraudulently or negligently makes an incorrect return is liable to a penalty not exceeding the difference between the amount of the tax shown in the return and the amount of the tax which should have been so shown (or, if no tax is so shown, the amount of the tax which should have been so shown)<sup>9</sup>.

The Board of Inland Revenue may by regulations make provision for and in connection with the making of assessments in respect of the unauthorised payments charge<sup>10</sup>, the unauthorised payments surcharge<sup>11</sup>, liability to the lifetime allowance charge<sup>12</sup>, the scheme sanction charge<sup>13</sup>, the liability of trustees<sup>14</sup>, the liability of members<sup>15</sup>, and the liability of a responsible person<sup>16</sup>; and the provision that may be so made includes (in particular) provision for the charging of interest on tax due under such assessments which remains unpaid<sup>17</sup>.

The Board of Inland Revenue may give directions requiring specified persons to use electronic means for the making of specified payments required to be made under or by virtue of these provisions<sup>18</sup>; and such directions may make provision (1) as to conditions that must be complied with in connection with the use of such means for the making of any payment; (2) for treating a payment as not having been made unless conditions imposed by the directions are satisfied; (3) for determining the time when a payment in accordance with such directions is taken to be made; (4) as to the manner of proving for any purpose (a) whether any use of electronic means for making a payment is to be taken as having resulted in the payment being made, (b) the time of the making of any payment made by electronic means, (c) any other matter for which provision may be made by such directions<sup>19</sup>. Such directions may also (a) be specific or general; (b) provide that the conditions of any authorization or requirement imposed by the directions are taken to be satisfied only where the Inland Revenue is satisfied as to specified matters; (c) suspend for any period during which the use of electronic means for the making of payments is impossible or impractical, any requirements imposed by the directions relating to the use of such means; (d) substitute alternative requirements for the suspended ones; and (e) make any provision that is necessary in consequence of the imposition of the substituted requirements<sup>20</sup>.

A payment made to the Board of Inland Revenue under or by virtue of these provisions<sup>21</sup> (otherwise than in cash) is treated as not having been made until the earliest date on or before which all the transactions that need to be completed before the whole amount of the payment becomes available to the Board are capable of being completed<sup>22</sup>.

1 For the meaning of 'scheme administrator' see PARA 873B.2. Where the registration of a scheme has been withdrawn, the Finance Act 2004 ss 254, 260 have effect as if references to the scheme administrator were to the person who was, or each of the persons who were, the scheme administrator immediately before such withdrawal: ss 254(9), 260(7).

2 For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2.

3 For the meaning of 'Inland Revenue' see PARA 873B.2.

4 2004 Act s 254(1), (2).

5 Ibid s 254(3), (4). The Board of Inland Revenue may by regulations make provision for and in connection with (1) the charging of interest on tax due under s 254 which is not paid on or before the due date; (2) the making of amended returns by scheme administrators in the event of error in a return under s 254; (3) the making of assessments, repayments or adjustments in cases where the correct tax due under s 254 has not been paid on or before the due date; and (4) otherwise for supplementing s 254: s 254(6). The regulations may in particular modify the operation of any provision of the Tax Acts or provide for the application of any such provision (with or without modifications): 2004 Act s 254(7). For the meaning of 'Board of Inland Revenue' see PARA 873B.2. For the meaning of 'the Tax Acts' see INCOME TAXATION vol 23(1) (Reissue) PARA 21. As to the making of such regulations see PARA 873B.1. The regulations so far so made are the Registered Pension Schemes (Accounting and Assessment) Regulations 2005, SI 2005/3454.

6 2004 Act s 254(5). The income tax to which a scheme administrator is liable under ss 149-284 (see PARA 873B.1 et seq, PARA 873B.26 et seq) does not include any to which the scheme administrator is liable under s 239 (see PARA 873B.19): s 254(8).

7 Ie otherwise than under ibid s 239: see PARA 873B.19.

8 Ibid s 260(1). 'Quarter' means any of the periods of three months referred to in the text; and 'the relevant quarterly amount' is £100 if the number of persons in respect of whom particulars should be included in the return is ten or fewer. If that number is greater than ten, the 'relevant quarterly amount' is £100 for each ten such persons and an additional £100 where that number is not a multiple of ten: s 260(2). These amounts are subject to amendment at any time by order made by the Treasury: s 260(3). No tax-based penalty under s 260(1)(b) may be imposed unless the amount of income tax to which the scheme administrator is liable (otherwise than under s 239 see PARA 873B.19) for the quarter concerned has been determined by the Inland Revenue, and the scheme administrator has been notified of that amount: s 260(4). As to the making of orders by the Treasury see PARA 873B.1.

9 Ibid s 260(6).

10 As to the unauthorised payments charge see PARA 873B.21.

11 As to the unauthorised payments surcharge see PARA 873B.21.

12 Ie under the 2004 Act s 217(2): see PARA 873B.15.

13 See PARA 873B.19.

14 Ie under the 2004 Act s 272: see PARA 873B.27.

15 Ie under ibid s 273: see PARA 873B.27.

16 Ie under the Income Tax (Earnings and Pensions) Act 2003 s 394: see PARA 758.

17 2004 Act s 255(1), (2). Such regulations may, in particular, modify the operation of any provision of the Tax Acts and provide for the application of any such provision (with or without modification): 2004 Act s 255(3). As to the making of such regulations see PARA 873B.1.

18 Ie the Finance Act 2004 Pt 4 (ss 149-284) (see PARA 873B.1 et seq, PARA 873B.26 et seq).

19 Ibid s 255A(1)-(3) (ss 255A, 255B added by Finance Act 2005 Sch 10 para 48). Directions under head (4) of the text may include provision for the application of conclusive or other presumptions: 2004 Act s 255A(3). 'Inland Revenue' includes any person who for the purposes of the electronic means of payment is acting under the authority of the Board of Inland Revenue; and 'specified' means specified in a direction under this provision: s 255A(7).

20 Ibid s 255A(4), (5). Such directions may also make different provision for different cases, and make such incidental, supplementary, consequential and transitional provision in connection with any provision contained in such directions as the Board of Inland Revenue thinks fit: s 255A(6).

21 Ie the 2004 Act Pt 4 (ss 149-284) (see PARA 873B.1 et seq, PARA 873B.26 et seq).

22 Ibid s 225B(1). The same applies to a payment made to the Inland Revenue (defined as including any person who is acting under the authority of the Board of Inland Revenue): s 255B(1), (2).

## 26. Penalties in general

A person who fraudulently or negligently makes a false statement or representation is liable to a penalty not exceeding £3,000 if, in consequence of the statement or representation, he or any other person obtains relief from, or repayment of, tax chargeable<sup>1</sup>; or a registered pension scheme<sup>2</sup> makes a payment which is an unauthorised payment<sup>3</sup>. A person who assists in or induces the preparation of any document which he knows is incorrect and will, or is likely to, cause a registered pension scheme to make an unauthorised payment, is liable to a penalty not exceeding £3,000<sup>4</sup>.

Where the winding-up of a registered pension scheme has begun and the Inland Revenue<sup>5</sup> consider that it is taking place wholly or mainly for the purpose of facilitating the payment of winding-up lump sums or winding-up lump sum death benefits (or both) under the scheme, the scheme administrator<sup>6</sup> is liable to a penalty not exceeding £3,000 for each member to whom a winding-up lump sum or a winding-up lump sum death benefit is paid under the scheme<sup>7</sup>.

Where sums held for the purposes of, or representing accrued rights under, a registered pension scheme ('the transferor scheme') are transferred so as to become held for the purposes of, or to represent rights under, a registered pension scheme that is an insured scheme<sup>8</sup> (the 'transferee scheme'), the scheme administrator of the transferor scheme is liable to a penalty not exceeding £3,000 unless the sums are transferred either to the scheme administrator of the transferee scheme or to a relevant insurance company<sup>9</sup>.

1    le tax chargeable under the Finance Act 2004 Pt 4 (ss 149-284): see PARA 873B.1 et seq, PARA 873B.27.

2    For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2.

3    2004 Act s 264(1). For the meaning of 'unauthorised payment' see PARA 873B.9.

4    Ibid s 264(2).

5    For the meaning of 'Inland Revenue' see PARA 873B.2.

6    For the meaning of 'scheme administrator' see PARA 873B.2.

7    2004 Act s 265. For the meaning of 'winding-up lump sum' see PARA 873B.7e; and for the meaning of 'winding-up lump sum death benefit' see PARA 873B.8.

8    'Insured scheme' means a pension scheme all the income and assets of which are invested in policies of insurance: ibid s 266(3).

9    Ibid s 266(1), (2). 'Relevant insurance company' means an insurance company that issued any of the policies of insurance referred to in NOTE 8: s 266(3). For the meaning of 'insurance company' see PARA 873B.2.

## **27.    Liability of scheme administrator**

Any liability of a person who is, or of any of the persons who are, the scheme administrator<sup>1</sup> of a registered pension scheme<sup>2</sup> ceases to be a liability of that person on his ceasing to be such a person<sup>3</sup>. By the same token, where a person becomes (or becomes one of the persons who is) the scheme administrator, that person assumes any existing liabilities of the scheme administrator, other than any liability to pay a penalty<sup>4</sup>.

If:

- 2279 (1)    there is no scheme administrator of a registered pension scheme, and no one who remains subject to the liabilities of the scheme administrator<sup>5</sup>;
- 2280 (2)    the person who is (or all the persons who are) the scheme administrator cannot be traced, or
- 2281 (3)    the person who is (or all the persons who are) the scheme administrator, or who remain so, are in serious default<sup>6</sup>,

then the following persons assume liability:

- 2282 (a)    if there are one or more trustees of the pension scheme who are resident<sup>7</sup> in the United Kingdom, that trustee or each of those trustees;
- 2283 (b)    if there are one or more persons who control the management of the pension scheme, that person or each of those persons;
- 2284 (c)    if alive or still in existence, the person, or any of the persons, who established the pension scheme and any person by whom that person, or any of those persons, has been directly or indirectly succeeded in relation to the provision of benefits under the pension scheme;
- 2285 (d)    if the pension scheme is an occupational pension scheme<sup>8</sup>, any sponsoring employer<sup>9</sup>;

2286 (e) if there are one or more trustees of the pension scheme who are not resident in the United Kingdom, that trustee or each of those trustees<sup>10</sup>.

If a person assumes, or persons assume, liability by virtue of being specified under one of the above heads, and that person or any of those persons can be traced and is not in default, no one assumes liability by virtue of being specified under a later head<sup>11</sup>. Any person who assumes liability under the above provisions is liable to pay any tax (or interest on tax) due<sup>12</sup> from the scheme administrator, and is responsible for the discharge of all other obligations imposed<sup>13</sup> on the scheme administrator<sup>14</sup>. Where a person assumes liability under the above provisions, the Inland Revenue must, as soon as is reasonably practicable, notify the person accordingly, but failure to do so does not affect the person's liability<sup>15</sup>.

If a person has (or persons have) assumed liability under the above provisions, and

2287 (i) that person has (or those persons have) become liable to pay a scheme sanction charge<sup>16</sup> or a de-registration charge<sup>17</sup> or interest on either before such assumption;

2288 (ii) that person, or each of those persons, has failed (in whole or in part) to satisfy the liability; and

2289 (iii) that person, or each of those persons, has either died or ceased to exist or is a person in the case of which the Inland Revenue considers the failure to satisfy the liability to be of a serious nature, then

any person who was a member<sup>18</sup> of the pension scheme at any time during the relevant three-year period<sup>19</sup> is liable to pay the appropriate share of the unpaid amount<sup>20</sup> if any of the specified conditions<sup>21</sup> is met and the Inland Revenue notify the person of that person's liability to do so<sup>22</sup>.

The fact that any person is liable to pay any tax or interest, or is responsible for the discharge of any other obligation<sup>23</sup>, does not relieve any other person of any liability to pay the tax or interest, or any obligation to discharge the obligation, arising by reason of that other person's being, or being one of the persons who is, the scheme administrator<sup>24</sup>. Where a liability imposed on the scheme administrator falls to be satisfied by two or more persons (whether or not they constitute the scheme administrator), they are jointly and severally liable<sup>25</sup>.

The Board of Inland Revenue may make regulations in relation to cases where an insurance company makes a payment of a pension protection lump sum death benefit, an annuity protection lump sum death benefit, or an unsecured pension fund lump sum death benefit, which is treated<sup>26</sup> as made by a registered pension scheme; and such regulations may provide that the insurance company is to be treated as the scheme administrator for the purposes of the special lump sum death benefit charge<sup>27</sup> and is responsible for the discharge of all obligations imposed<sup>28</sup> on the scheme administrator so far as related to the liability to that charge<sup>29</sup>.

1 For the meaning of 'scheme administrator' see PARA 873B.2.

2 For the meaning of 'pension scheme' see PARA 873B.1. As to registration see PARA 873B.2.

3 Finance Act 2004 s 271(1). This provision does not, however, apply to a liability to a penalty; and any liability of the person or persons concerned remains his or their liability as if he or they remained the scheme administrator (unless the person concerned is dead or has ceased to exist) until another person becomes, or other persons become, the scheme administrator: s 271(1), (3), (4). However, a person who retains (or persons who retain) a liability under s 271(4) may apply to the Inland Revenue to be released therefrom: s 271(5). On receipt of the application, the Inland Revenue must decide whether or not to release the person or persons concerned, and must notify him or them accordingly: s 271(6). If no release is granted, the applicant or applicants may appeal against the Inland Revenue's decision within the period of 30 days beginning with the day on which that person was (or those persons were) notified thereof: s 271(7), (9). On an appeal that is notified to it, the tribunal, if it considers that the person or persons ought not to be so released, must dismiss

the appeal: s 271(11), (12) (amended by SI 2009/56). If the tribunal considers that release is appropriate, the applicant is (or the applicants are) deemed to have been so released (subject to any further appeal): 2004 Act s 271(11), (13) (amended by SI 2009/56).

4 2004 Act s 271(2).

5 Ie under ibid s 271(4): see NOTE 3.

6 A person is in default if he has failed to pay all or any of the tax (or interest on tax) due from the person by virtue of ibid Pt 4 (ss 149-284) (see PARA 873B.1 et seq), or has failed to discharge any other obligation imposed on him by or under those provisions; and the default is a serious default if the Inland Revenue considers the failure to be of a serious nature: s 272(6).

7 As to the meaning of 'residence' see INCOME TAXATION vol 23(2) (Reissue) PARA 1260.

8 For the meaning of 'occupational pension scheme' see PARA 873B.2.

9 For the meaning of 'sponsoring employer' see PARA 873B.4.

10 2004 Act s 272(1), (4).

11 Ibid s 272(4).

12 Ie by virtue of ibid Pt 4 (ss 149-284).

13 Ie by or under ibid Pt 4.

14 Ibid s 272(2). The references to tax and to interest on tax include any that has become due before s 272 applied in relation to the pension scheme and remains unpaid; and the reference to obligations includes any that have become due before s 272 applied in relation to the scheme and remain unsatisfied, other than any liability to pay a penalty which has become due before s 272 so applied: s 272(3).

15 Ibid s 272(5).

16 Ie under ibid s 239: see PARA 873B.19.

17 Ie under ibid s 242: see PARA 873B.20.

18 For the meaning of 'member' see PARA 873B.4.

19 Ie the period of three years ending with the date on which the liability to pay the tax arose: 2004 Act s 273(3).

20 The 'appropriate share of the unpaid amount', in relation to a person, is:

$$\frac{AAP}{AA} \times UT$$

where AA is an amount equal to the aggregate of the amount of the sums and the market value of the assets held for the purposes of the scheme at the time when the liability to pay the tax arose; AAP is an amount equal to so much of AA as is held for the purposes of such of the arrangements under the scheme as relate to the person or a person connected with the person; and UT is so much of the tax (and any interest thereon) as remains unpaid: ibid s 273(4). For the meaning of 'market value' see PARA 873B.3; and for the meaning of 'arrangement' see PARA 873B.5. 'Connected person' has the meaning given by the Income and Corporation Taxes Act 1988 s 839 (see INCOME TAXATION vol 23(2) (Reissue) PARA 1258); 2004 Act s 273(11).

21 The specified conditions are that (1) the pension scheme was not an occupational pension scheme; (2) at any time during the relevant three-year period, the pension scheme received a transfer value in which there were represented relevant personal pension contributions made by or in respect of the person; (3) the pension scheme was an occupational pension scheme and at any time during the relevant three-year period the person was a controlling director of a company that was a sponsoring employer; and (4) at any time during the relevant three-year period the pension scheme received a transfer value in which there were represented relevant controlling director contributions made by or in respect of the person: s 273(5) (amended by Finance Act 2007 Sch 20 para 4). 'Relevant personal pension contributions' means contributions under a pension scheme (whether or not the scheme from which the transfer value was received) which was not an occupational pension scheme: 2004 Act s 273(7) (amended by 2007 Act Sch 20 para 4). 'Relevant controlling director contributions' means contributions under an occupational pension scheme (whether or not the pension scheme from which the transfer value was received) made by reference to service (or remuneration in respect of

service) as a controlling director of a company that was a sponsoring employer; and a person is a 'controlling director' of a company if he is a director of that company and is within the Income and Corporation Taxes Act 1988 s 417(5)(b) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1300 et seq): 2004 Act s 273(8), (9). References to the receipt of a transfer value by the pension scheme are to the transfer, so as to become held for the purposes of, or to represent rights under, the scheme, of any sum or asset held for the purposes of, or representing accrued rights under, any other pension scheme: s 273(10).

22 Ibid s 273(2). Such notification may be included in an assessment in respect of a liability under s 273, and such an assessment made in relation to an amount is not out of time if it is made within the period of three years beginning with the date on which the person assessed first became liable to pay the amount: s 273(6).

23 Ie under ibid s 272 or 273.

24 Ibid s 274(1). Nor does it relieve any other person of an obligation under s 271(4): s 274(1). No liability to pay tax or interest, or any other obligation, of any person in relation to a registered pension scheme arising by virtue of the person's being, or being one of the persons who is, the scheme administrator of the pension scheme concerned, or under s 271(4), 272, 273 or 273A is affected by the termination of the pension scheme or by its ceasing to be a registered pension scheme: s 274(3) (amended by Finance Act 2005 Sch 10 para 49).

25 2004 Act s 274(2).

26 Ie so treated for the purposes of ibid Pt 4 Ch 3 (ss 160-185) (see PARAS 873B.4-873B.12) by virtue of s 161(3), (4) (see PARA 873B.12).

27 Ie the charge imposed by ibid s 206: see PARA 873B.21.

28 Ie by ibid Pt 4 (ss 149-284): see PARA 873B.1 et seq.

29 Ibid s 273A(1), (2) (s 273A added by Finance Act 2005 Sch 10 para 49). See the Pension Benefits (Insurance Company Liable as Scheme Administrator) Regulations 2006, SI 2006/136. Where an insurance company is liable to pay any tax or interest, or is responsible for the discharge of any other obligation, by virtue of such regulations, no other person is so liable or responsible, under the 2004 Act ss 270-273 (see PARA 873B.2): s 273A(3). As to lump sum benefits, see PARA 873B.7. For the meaning of 'insurance company', see PARA 873B.2.

## **28. Pension Protection Fund etc**

The Treasury may by regulations make provision for and in connection with the application of the relevant taxes<sup>1</sup> in relation to the Pension Protection Fund<sup>2</sup>, the Fraud Compensation Fund<sup>3</sup> and the Board of the Pension Protection Fund<sup>4</sup>, and in relation to any person in connection with either of those Funds or that Board<sup>5</sup>. The provision that may be made by the regulations includes provision imposing any of the relevant taxes (as well as provision for exemption or reliefs); and such regulations may, in particular, include provision for and in connection with the taxation of payments made in accordance with the pension compensation provisions<sup>6</sup>.

The exemptions and reliefs that may be given by the regulations include, in particular, exemption from

- 2290 (1) charges to corporation tax in respect of any income arising from any assets of the Board (or in either Fund) and other receipts of the Board (or either Fund) and any chargeable gains arising from the disposal of any assets of the Board (or in either Fund);
- 2291 (2) charges to income tax and corporation tax in respect of specified levies<sup>7</sup>;
- 2292 (3) any charge to capital gains tax, or corporation tax on chargeable gains, in respect of the receipt of fraud compensation payments<sup>8</sup>.

The regulations may include provision amending any enactment or instrument and consequential, supplementary and transitional provisions, and must be made by statutory instrument which is subject to annulment in pursuance of a resolution of the House of Commons<sup>9</sup>.

1 The relevant taxes are income tax, capital gains tax, corporation tax, inheritance tax, value added tax and stamp duty land tax: Finance Act 2005 s 102(3).

2 The Pension Protection Fund means the Fund required to be held, managed and applied by the Board of that Fund under the Pensions Act 2004 s 110(1)(a) (see PARA 659A.2): 2005 Act s 102(10).

3 The Fraud Compensation Fund means the Fund required to be held, managed and applied by the Board of the Pension Protection Fund under *ibid* s 110(1)(b) (see PARA 659A.2): 2005 Act s 102(10).

4 The Board of the Pension Protection Fund means the body corporate established under the 2004 Act s 107 (see PARA 659A.1): 2005 Act s 102(10).

5 *Ibid* s 102(1). The regulations may make provision in relation to any time after 5 April 2005, and such provision may be framed as provision applying with appropriate modifications (1) for times before 6 April 2006, provisions having effect in relation to exempt approved schemes (within the meaning of the Income and Corporation Taxes Act 1988 s 592(1) (see PARA 754); and (2) for times on or after that date, provisions having effect in relation to registered pension schemes (see PARA 873B.1): 2005 Act s 102(6), (7). See the Pension Protection Fund (Tax) (2005-06) Regulations 2005, SI 2005/1907 (amended by SI 2005/3230); and the Pension Protection Fund (Tax) Regulations 2006, SI 2006/575.

6 2005 Act s 102(4). For the meaning of 'pension compensation provisions', see the 2004 Act s 162(2) (definition applied by 2005 Act s 102(4)).

7 *le* the levies referred to in the 2004 Act ss 117 (see PARA 659A.8), 174 (see PARA 659C.37), 175 (see PARA 659C.38), 189 (see PARA 659D.6) and 209 (see PARA 659F.3).

8 2005 Act s 102(5). 'Fraud compensation payments' are as defined in the 2004 Act s 182(1) (see PARA 659D.1): see 2005 Act s 102(5)(c).

9 *Ibid* s 102(8), (9).

## 29. Investment-regulated pension scheme: meaning

Specific provision is made for investment-regulated pension schemes. A registered pension scheme which is not an occupational pension scheme is an investment-regulated pension scheme if any member of which (or a person related<sup>1</sup> to such a member) is or has been able (directly or indirectly) to direct, influence or advise on the manner of investment or any of the sums and assets held for the purposes of an arrangement under the pension scheme relating to the member<sup>2</sup>. A registered pension scheme which is an occupational pension scheme is an investment-regulated pension scheme if there are 50 or fewer members of the scheme and any member (or a person related to such a member) is or has been able (directly or indirectly) to direct, influence or advise on the manner of investment of any of the sums and assets held for the purposes of the scheme<sup>3</sup>. Where sums or assets held for the purposes of an investment-regulated pension scheme are held otherwise than for the purposes of the administration or management of the scheme and would not otherwise be treated as held for the purposes of an arrangement relating to a member under the scheme, those sums or assets are treated as held for the purposes of the arrangements under the scheme by reference to the respective rights under the scheme or the members to which the arrangements relate<sup>4</sup>.

This definition applies for the purposes of the taxable property provisions<sup>5</sup>.

1 A person is related to a member of a pension scheme if he and the member are connected persons (within the meaning of the Income and Corporation Taxes Act 1988 s 839) (see INCOME TAXATION), or he acts on behalf of the member or a person connected with the member: Finance Act 2004 Sch 29A para 4 (Sch 29A added by Finance Act 2006 Sch 21 para 13).

2 2004 Act Sch 29A para 1(1), (2). For the meaning of 'registered pension scheme' see PARA 873B.1; for the meaning of 'occupational pension scheme' see PARA 873B.2; for the meaning of 'member' see PARA 873B.4; and for the meaning of 'arrangement' see PARA 873B.5.

3 Ibid Sch 29A para 2 (amended by Finance Act 2008 Sch 29 para 3). In the case of an arrangement under a registered pension scheme which is an occupational pension scheme but is not an investment-regulated pension scheme by virtue of the 2004 Act Sch 29A para 2, if any member (or a person related to him) is or has been able (directly or indirectly) to direct, influence or advise on the manner of investment of any sums or assets which are linked to an arrangement relating to the member, the scheme is treated as if it were an investment-regulated pension scheme: Sch 29A para 3(1), (2), (4). For this purpose, sums or assets are linked to an arrangement relating to a member if they are held for the purposes of an arrangement under the scheme relating to him, but are not held for those purposes merely by virtue of a just and reasonable apportionment of the sums and assets held for the purposes of the scheme: Sch 29A para 3(3). The Treasury may by regulations amend this provision and provide for any of the provisions of Sch 29A Pt 1 (paras 1-5) to apply to the arrangement with modifications: Sch 29A para 3(5). As to the making of such regulations, see INCOME TAXATION.

4 Ibid Sch 29A para 5.

5 Ibid Sch 29A para 1(1). The 'taxable property provisions' are ss 173(7A), 174A, 185A-185I, 273ZA, Sch 29A and Sch 36 paras 37A-37I (transitional provisions): Sch 29A para 1(1). Unless otherwise stated, the definitions given in PARAS 873B.30-873B.33 apply for the purposes of those provisions.

### **30. Unauthorised payments by investment-regulated pension schemes**

An investment-regulated pension scheme<sup>1</sup> is treated as making an unauthorised payment to a member of the scheme if:

- 2293 (1) the pension scheme acquires<sup>2</sup> an interest in taxable property<sup>3</sup> which interest is held by the scheme for the purposes of an arrangement under the scheme relating to the member;
- 2294 (2) an interest in taxable property is held by the scheme for the purposes of such an arrangement and the property is improved; or
- 2295 (3) an interest in property which is not residential property is held by the scheme for the purposes of such an arrangement and the property is converted or adapted to become residential property<sup>4</sup>.

'Residential property' is:

- 2296 (a) a building<sup>5</sup> that is used or suitable for use as a dwelling;
- 2297 (b) any land consisting of, or forming part of, the garden or grounds of such a building (including a building on any such land) which is used or intended for use for a purpose connected with the enjoyment of the building;
- 2298 (c) hotel or similar accommodation; or
- 2299 (d) a beach hut,

in the United Kingdom or elsewhere<sup>6</sup>.

A building used for any of the following purposes is not residential property:

- 2300 (i) a home or other institution providing residential accommodation for children;
- 2301 (ii) a hall of residence for students;
- 2302 (iii) a home or other institution providing residential accommodation with personal care for persons in need of such care by reason of old age, disability, past or present dependence on alcohol or drugs, or past or present mental disorder;
- 2303 (iv) a hospital or hospice;
- 2304 (v) a prison or similar establishment<sup>7</sup>.

An investment-regulated pension scheme holds an interest in property if it holds the interest directly or indirectly<sup>8</sup>.

A person holds an interest in property directly if that person (whether jointly, in common, or alone):

- 2305 (A) holds the property or any estate, right or power in or over it;
- 2306 (B) has the right to use, or to participate in arrangements relating to the use of, that property or a description of property to which that property belongs;
- 2307 (C) has the benefit of any obligation, restriction or condition affecting the value of any estate, interest, right or power in or over the property,

under the law of any country or territory<sup>9</sup>. However, a person does not hold an interest in residential property consisting of hotel accommodation directly unless that person holds part only of that accommodation or any estate, interest, right or power in or over such a part and, as a result, any person has a right to use or occupy that or any other part of the hotel accommodation; or that person has a right to use, or to participate in arrangements relating to the use of, part only of the hotel accommodation or a description of property to which that part belongs<sup>10</sup>.

A person holds an interest in property indirectly if the person does not hold the interest directly but (whether jointly, in common or alone) that person holds an interest<sup>11</sup> in a person who holds an interest in the property directly, and so on through a succession of such holdings<sup>12</sup>.

1 For the meaning of 'investment-regulated pension scheme' see PARA 873B.29.

2 An investment-regulated pension scheme acquires an interest in property if it comes to hold the interest (however the scheme comes so to hold it, ie by act of the parties to a transaction, by order of a court or other authority, by or under any statutory provision, or by operation of law): Finance Act 2004 Sch 29A para 12 (Sch 29A added by Finance Act 2006 Sch 21 para 13). Where a scheme holds an interest in property which is not taxable property, and that property becomes taxable property otherwise than by reason of its conversion or adaptation as residential property, the scheme is treated as acquiring an interest in the property: 2004 Act Sch 29A para 27. Where a scheme holds an interest in taxable property, directly or indirectly, and there is an increase in the extent of the interest held directly or indirectly in a vehicle by the pension scheme or another vehicle, the scheme is treated as having disposed of the interest in the property immediately before the increase in the extent of the interest in the vehicle, and having reacquired the interest immediately afterwards: Sch 29A para 28). Where there is an increase in the extent of the interest held directly in the vehicle otherwise than by reason of the acquisition of a further interest in the vehicle, Sch 29A para 28 does not apply unless the event by which the increase is effected forms part of a scheme or arrangement the main purpose or one of the main purposes of which is to enable the amount of the unauthorised payment treated as arising on the original acquisition of the interest in the property by the pension scheme to be lower than it otherwise would have been, or to prevent an unauthorised payment from being treated as made on that original acquisition: Sch 29A para 29(1), (2). For the definition of 'vehicle' and further provisions as to property held by or through a vehicle, see PARA 873B.31.

3 Property is taxable property if it is residential property or tangible movable property: *ibid* Sch 29A para 6. The Treasury may, however, by order provide that any specified description of tangible movable property be treated as not being taxable property, and such an order may include provision having effect in relation to times before it is made: Sch 29A para 11. As to the making of such regulations, see INCOME TAXATION. See the Investment-related Pension Schemes (Exception of Tangible Movable Property) Order 2006, SI 2006/1959.

4 2004 Act s 174A (added by 2006 Act Sch 21 para 5). For the meaning of 'member' see PARA 873B.4; and for the meaning of 'arrangement' see PARA 873B.5.

5 'Building' includes a structure and part of a building or structure: 2004 Act Sch 29A para 7(2).

6 *Ibid* Sch 29A para 7(1). However, residential property is not taxable property in relation to a pension scheme if it is (or, if unoccupied, is to be) occupied (1) by an employee who (a) is neither a member of the pension scheme nor connected with such a member, (b) is not connected with the employer, and (c) is required as a condition of employment to occupy the property; or (2) by a person who is neither a member of the pension scheme nor connected with such a member and used in connection with business premises held as an investment of the pension scheme: Sch 29A para 10(1), (2). 'Connected person' has the meaning given by the Income and Corporation Taxes Act 1988 s 839 (see INCOME TAXATION): 2004 Act Sch 29A para 10(3). For the meaning of 'United Kingdom' see PARA 15 NOTE 4.

7 Ibid Sch 29A para 8. The Treasury may by order amend Sch 29A Pt 2 (paras 6-11) to specify descriptions of buildings which are, or are not, to be treated as residential property: Sch 29A para 9 (amended by Finance Act 2009 s 75(2)).

8 2004 Act Sch 29A para 13(1). References in these provisions to a person holding an interest in property include, in the case of (1) an investment-related pension scheme; (2) an arrangement under a pension scheme; or (3) a trust which is not a pension scheme, references to the interest in the property being held for the purposes of the pension scheme, the arrangement or the trust: Sch 29A para 13(2).

9 Ibid Sch 29A para 14(1). A person holds an interest in property directly if that person is entitled (whether jointly, in common or alone) to receive payments determined by reference to the value of, or the income from, the property: Sch 29A para 14(3). However, this provision does not apply where (1)(a) the person concerned is entitled to receive the payments by virtue of a policy of life insurance, a contract for a life annuity or a capital redemption policy, and (b) the policy or contract is issued by an insurance company; (2) the property (a) does not constitute a linked asset, or (b) has been appropriated by the insurance company to an internal linked fund; and (3)(a) where the person is an occupational pension scheme (see PARA 873B.2) the policy or contract, either by itself or taken together with one or more associated policies, does not entitle the pension scheme, either alone or together with one or more associated persons, to receive payments representing 10% or more of the market value of the income from the property, (b) where the person is a pension scheme other than an occupational pension scheme, the policy or contract, either by itself or taken together with one or more associated policies, does not entitle an arrangement under the pension scheme, either alone or together with one or more associated persons, to receive such payments, or (c) otherwise the policy or contract does not entitle the person to receive such payments: Sch 29A para 15(1)-(4). For this purpose, an annuity is a life annuity if it is granted for a consideration in money or money's worth in the ordinary course of a business of granting annuities on human life, and payable for a term ending at a time ascertainable only by reference to the end of a human life, and it does not matter that the annuity may in some circumstances end before or after the life: Sch 29A para 15(9). 'Capital redemption policy' means a contract made in the course of a capital redemption business, as defined in the Income and Corporation Taxes Act 1988 s 458(3) (see INCOME TAXATION); 'linked asset' means an asset of the insurance company which is identified in its records as an asset by reference to the value of which benefits provided for under a policy or contract are to be determined; and 'internal linked fund' has the meaning given by the Interim Prudential Sourcebook for Insurers made by the Financial Services Authority under the Financial Services and Markets Act 2000: Finance Act 2004 Sch 29A para 15(8). 'Associated policy' means a policy or contract which entitles an associated person to receive payments determined by reference to the value of, or the income from, the property: Sch 29A para 15(6). 'Associated person', in relation to a pension scheme, means (a) any member of the pension scheme; (b) any person connected with such a member; (c) any arrangement (under that or another pension scheme) relating to a member of the pension scheme or to a person connected with such a member; and (d) any associated pension scheme: Sch 29A paras 15(7), 30(1). In relation to an arrangement under a pension scheme, the term means (i) the member of the pension scheme to which that arrangement relates; (ii) any person connected with such a member; and (iii) any arrangement (under that or another pension scheme) relating to a member of the pension scheme to which that arrangement relates, or to any person connected with such a member: Sch 29A para 30(4). A pension scheme is associated with another pension scheme if members representing at least 10% by value of one pension scheme are members of the other or connected with such members; and the percentage by value represented by a member of a pension scheme is:

$$\frac{AM}{AA} \times 100$$

where AM is an amount equal to the aggregate of the amount of the sums and the market value of the assets held for the purposes of an arrangement under the scheme relating to the member; and AA is an amount equal to the aggregate of the amount of the sums and the market value of the assets held for the purposes of the pension scheme: Sch 29A para 30(2), (3).

For the meaning of 'market value' see PARA 873B.3 NOTE 4.

10 Ibid Sch 29A para 14(2).

11 A person holds an interest in another person if (1) the person holds an interest, right or power in or over that other person; or (2) the person lends money to that other person to fund the acquisition by that other person of an interest in taxable property: ibid Sch 29A para 16(2). Head (2) does not apply where (a) the loan is an authorised employer loan made by a pension scheme to or in respect of a sponsoring employer (see s 179; and PARA 873B.4), (b) the interest in the property is acquired so that the property may be used for the purposes of a trade, profession or vocation carried on by the sponsoring employer or for the purposes of the sponsoring employer's administration or management, and (c) after the acquisition, the property is not occupied or used by a member of the pension scheme or a person connected with such a member: Sch 29A para 16(3). For the meaning of 'trade', 'profession' and 'vocation' see INCOME TAXATION.

A person holds an interest in a company for these purposes if that person (i) has, or is entitled to acquire, share capital or voting rights in the company; (ii) has, or is entitled to acquire, a right to receive or participate in distributions of the company; (iii) is entitled to secure that income or assets (whether present or future) of the company will be applied directly or indirectly for that person's benefit; or (iv) the person, either alone or together with other persons, has control of the company: Sch 29A paras 16(5), 17(1). A person is entitled to do something for this purpose if that person is currently entitled to do it at a future date, or will at a future date be entitled to do it: Sch 29A para 17(2). 'Control' has the meaning given by the Income and Corporation Taxes Act 1988 s 416 (see INCOME TAXATION): 2004 Act Sch 29A para 17(2), (3).

A person holds an interest in a collective investment scheme for these purposes if that person is a participant in the scheme: Sch 29A paras 16(5), 18(1). 'Collective investment scheme' has the meaning given by the Financial Services and Markets Act 2000 s 235 (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 603); and 'participant', in relation to such a scheme, has the meaning given by s 235(2) (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 603): 2004 Act Sch 29A para 18(2).

A person holds an interest in a trust for these purposes if either (A) the pension scheme has a relevant interest in the trust, and that scheme or a member thereof or a person connected with such a member has made a payment to the trust on or after the acquisition of the interest; or (B) a member of the scheme or person connected with such a member has a relevant interest in the trust, and the scheme has made a payment to the trust on or after the acquisition of the interest: Sch 29A paras 16(5), 19(1)-(3). In order for head (A) or (B) to apply, the payment must not be a payment made as part of an arm's-length transaction by which property or a benefit is to be provided in return for the payment; or made otherwise than for the purposes of enabling a member of the scheme or a person connected with such a member to use such property: Sch 29A para 19(7). A person other than the pension scheme concerned holds an interest in a trust if that person has a relevant interest in the trust or has made a payment to the trust on or after the acquisition of the interest, and the payment falls within Sch 29A para 19(7): Sch 29A para 19(4). A person has a relevant interest in a trust if any property which may at any time be comprised in the trust, or any derived property, is, or will or may become, payable to or applicable for the benefit of the person in any circumstances; or if the person enjoys a benefit which arises directly or indirectly from any property which is comprised in the trust or any derived property: Sch 29A para 19(5). 'Derived property', in relation to any property, means income from that property or any other property directly or indirectly representing proceeds of, or income from, that property: Sch 29A para 19(6). 'Connected person' has the meaning given by the Income and Corporation Taxes Act 1988 s 839 (see INCOME TAXATION): 2004 Act Sch 29A para 19(8) (Sch 29A as added). Schedule 29A para 19 does not apply in relation to a unit trust scheme within the meaning of the Financial Services and Markets Act 2000 s 237(1): 2004 Act Sch 29A para 19(9). The Treasury may by regulations amend Sch 29A paras 17-19, or amend Sch 29A paras 12-30 for the purposes of explaining what it means for a person to hold an interest, right or power in or over another person in other cases: Sch 29A para 16(6).

12 Ibid Sch 29A para 16(1). References in these provisions to a person holding an interest in another person include, in the case of an investment-regulated pension scheme, an arrangement under such a scheme, or a trust which is not a pension scheme, references to the interest in the other person being held for the purposes of the pension scheme, arrangement or trust: Sch 29A para 16(4). As to the extent of such holdings, see PARA 873B.32.

### **31. Investment-regulated pension schemes: further provisions relating to property ownership**

A pension scheme<sup>1</sup> does not hold an interest in property indirectly through a vehicle<sup>2</sup> through which the scheme would otherwise hold the property indirectly<sup>3</sup> in any of the circumstances set out below<sup>4</sup>. A person holds an interest in a vehicle directly if that person holds an interest<sup>5</sup> in the vehicle<sup>6</sup>.

2308 (1) If the main activity of the vehicle in question is the carrying on of a trade, profession or vocation and (a) the pension scheme does not, whether alone or together with one or more associated persons<sup>7</sup>, have control<sup>8</sup> of the vehicle; and (b) neither a member of the scheme nor a person connected<sup>9</sup> with such a member is a controlling director<sup>10</sup> of the vehicle or any other vehicle which holds an interest in the vehicle, directly or indirectly<sup>11</sup>.

2309 (2) If the vehicle in question is a real estate investment trust<sup>12</sup>.

2310 (3) If:

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265. (a) the total value of the assets held directly by the vehicle in question is at least £1 million, or the vehicle holds directly at least three assets which consist of an

interest in residential property<sup>13</sup>, and no asset held directly by the vehicle which consists of an interest in taxable property<sup>14</sup> has a value which exceeds 40% of the total value of the assets so held<sup>15</sup>;

266. (b) the vehicle is a company which is resident in the United Kingdom and is not a close company, or is not so resident and would not be a close company were it so resident<sup>16</sup>;

267. (c) the vehicle does not have as its main purpose, or one of its main purposes, the direct or indirect holding of an animal or animals used for sporting purposes<sup>17</sup>.

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Heads (2) and (3) above apply only if the first, and either the second or the third, of the following conditions are met:

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268. (i) the pension scheme does not hold the interest in the vehicle for the purpose of enabling a member of the scheme or a person connected with such a member to occupy or use the property<sup>18</sup>;

269. (ii) the pension scheme is an occupational pension scheme and does not, either alone or together with one or more associated persons, directly or indirectly holds a specified interest in the vehicle<sup>19</sup>;

270. (iii) the pension scheme is not an occupational pension scheme, and no arrangement under it, either alone or together with one or more associated persons, directly or indirectly holds such an interest<sup>20</sup>.

201

2311 (4) If the vehicle in question holds the interest in the property directly<sup>21</sup> and either:

202

271. (a) where the pension scheme is an occupational pension scheme, the scheme is not, either alone or together with one or more associated persons, deemed to be entitled<sup>22</sup> to 10% or more of the market value of the income from the property<sup>23</sup>, or

272. (b) where the pension scheme is not an occupational pension scheme, no arrangement thereunder, either alone or together with one or more associated persons, is deemed to be so entitled<sup>24</sup>.

203

1 For the meaning of 'pension scheme' see PARA 873B.1.

2 'Vehicle', in relation to a pension scheme which holds an interest in taxable property indirectly, means a person through whom the scheme holds that interest: Finance Act 2004 Sch 29A para 20(2) (Sch 29A added by Finance Act 2006 Sch 21 para 13).

3 For the general meaning of indirect ownership see PARA 873B.30.

4 2004 Act Sch 29A para 20(1) (amended by Finance Act 2007 Sch 20 para 14(2)). A person holds an interest in a vehicle indirectly if the person does not hold the interest directly (see PARA 873B.30) but (1) holds an interest in a person who holds an interest in the vehicle directly; or (2) holds an interest in a person who holds the interest in the vehicle indirectly by virtue of head (1) or head (2): 2004 Act Sch 29A para 20(4). As to the extent of such a holding, see PARA 873B.32.

5 Ie an interest of the kind mentioned in ibid Sch 29A para 16(2): see PARA 873B.30.

6 Ibid Sch 29A para 20(3).

7 For the meaning of 'associated person' see PARA 873B.31.

8 'Control' has the same meaning as in the Income and Corporation Taxes Act 1988 s 416 (see INCOME TAXATION), reading references in that provision to a company as references to the vehicle and references to associates as including associated persons: 2004 Act Sch 29A para 21(3)(a). A pension scheme or an

arrangement under a pension scheme has control of a vehicle if the scheme or arrangement holds such interest as would, if it were a person, would mean that it had control of the vehicle: Sch 29A para 21(4). For the meaning of 'arrangement' see PARA 873B.5.

9 'Connected person' has the meaning given by the Income and Corporation Taxes Act 1988 s 839 (see INCOME TAXATION): 2004 Act Sch 29A paras 21(5), 22(3), 24(6).

10 'Controlling director', in relation to a vehicle means a director to whom the Income and Corporation Taxes Act 1988 s 417(5)(b) applies (reading the reference to associates in that provision as including associated persons): 2004 Act Sch 29A para 21(3)(b).

11 Ibid Sch 29A para 21(1). Head (1) of the text does not apply if the purpose or one of the purposes for which the scheme holds the interest in the vehicle is to enable a member of the scheme or a person connected with such a member to use the property: Sch 29A para 21(2). For the meaning of 'trade', 'profession' and 'vocation' see INCOME TAXATION. For the meaning of 'member' see PARA 873B.4.

12 2004 Act Sch 29A para 22(1) (amended by 2007 Act Sch 20 para 14(3)). A real estate investment trust is a company or group within the Finance Act 2006 Pt 4 (ss 103-145) (see INCOME TAXATION vol 23(2) (Reissue) PARA 1445A): 2004 Act Sch 29A para 22(1).

13 For the meaning of 'residential property' see PARA 873B.30.

14 For the meaning of 'taxable property' see PARA 873B.30.

15 2004 Act Sch 29A para 23(1), (2)). For this purpose: (1) assets must be valued in accordance with generally accepted accounting practice; (2) no account is taken of liabilities secured against or otherwise relating to assets (whether generally or specifically); and (3) where generally accepted accounting practice offers a choice of valuation between cost basis and fair value, the latter must be used: Sch 29A para 23(5). As to generally accepted accounting practice, see INCOME TAXATION. The Treasury may by order increase the amount or the percentage for the time being specified in head (2)(a) of the text: Sch 29A para 23(6). As to the making of such orders, see INCOME TAXATION.

16 2004 Act Sch 29A para 23(1), (3). For the meaning of 'company', 'close company' and 'resident' see INCOME TAXATION. For the meaning of 'United Kingdom' see PARA 15 NOTE 45.

17 Ibid Sch 29A para 23(1), (4).

18 Ibid Sch 29A para 24(1), (2) (Sch 29A para 24(1) amended by 2007 Act Sch 20 para 14(4)).

19 2004 Act Sch 29A para 24(1), (3). The specified interests are (1) 10% or more of the share capital or issued share capital of the vehicle; (2) 10% or more of the voting rights therein; (3) a right to receive 10% or more of the income of the vehicle; (4) such interest in the vehicle as gives an entitlement to 10% or more of the amounts distributed on a distribution in relation to the vehicle; (5) such interest in the vehicle as gives an entitlement to 10% or more of the assets of the vehicle on a winding-up or in any other circumstances; (6) such interest in the vehicle as gives rise to income or gains from a specific property: Sch 29A para 24(5). The percentage of an interest held indirectly by a person in a vehicle is equal to the percentage of the total taxable amount that would be apportioned to the person under Sch 29A paras 41-43 (see PARA 873B.32) (a) where the person is not the pension scheme, if the person were that scheme; and (b) in any case, if the person were treated as making an unauthorised payment by virtue of the vehicle coming to hold the interest in the property directly at that time: Sch 29A para 25(1), (3), (4). For the meaning of 'occupational pension scheme' see PARA 873B.2.

20 Ibid Sch 29A para 23(1), (4). Where this condition is not met in relation to an arrangement under the pension scheme, and accordingly the pension scheme holds an interest in property indirectly through the vehicle, the interest in the property is treated as held through the vehicle for the purposes of another arrangement under the pension scheme only if that arrangement, either alone or together with one or more associated persons, directly or indirectly holds a specified interest in the vehicle: Sch 29A para 25(1), (2) (Sch 29A para 25(2) amended by 2007 Act Sch 20 para 14(5)).

21 Ie because it does not meet the requirements set out in PARA 873B.30 NOTE 9 head (3).

22 The percentage of the market value of, or of the income from, the property to which a person is deemed to be entitled at any time is IG - TTA, where IG is the percentage to which the vehicle that holds the interest in the property directly is entitled at that time; and TTA is the percentage of the total taxable amount that would be apportioned to the person at that time on the assumptions that (1) if the person is not the pension scheme, that the person is the pension scheme; and (2) in any case, that the person is treated as making an unauthorised payment by virtue of the vehicle coming to hold the interest in the property directly at that time: Sch 29A para 26(4).

23 Ibid Sch 29A para 26(1), (2)(a). For the meaning of 'market value' see PARA 873B.3.

24 Finance Act 2004 Sch 29A para 26(1), (2)(b).

### **32. Investment-regulated pension schemes; amount and timing of unauthorised payments**

The amount of an unauthorised payment treated<sup>1</sup> as made to a member of an investment-regulated pension scheme is determined by finding the total taxable amount in relation to the payment and apportioning it to the scheme<sup>2</sup>.

An unauthorised payment which arises<sup>3</sup> because of the acquisition of taxable property is treated as made at the time of the acquisition<sup>4</sup>. The total taxable amount is:

- 2312 (1) if the interest is acquired because the pension scheme or another person comes to hold the interest directly, the amount of consideration, in money or money's worth, given directly for the interest, plus the amount of any fees and other costs incurred in connection with the acquisition;
- 2313 (2) if the interest is acquired because the pension scheme or another person comes to hold an interest in a person who already holds the first-mentioned interest directly or indirectly, the market value, at the date the interest in the person is acquired, of the interest in the property held by the person who holds it directly; or, if the interest in the property is a lease at a rent, the amount of consideration that would be treated as given by the person for the lease if it were assigned to the person at that time;
- 2314 (3) if the interest is treated as acquired by the pension scheme, the market value, at the date the interest is to be treated, of the interest in the property held by the person who holds it directly; or, if the interest in the property is a lease at a rent, the amount of consideration that would be treated as given by the person for the lease if it were assigned to the person at that time<sup>5</sup>.

An unauthorised payment which arises<sup>6</sup> because of the improvement of taxable property is made when a payment is made in connection with the improvement works, and the total taxable amount is the amount of the last-mentioned payment<sup>7</sup>.

An unauthorised payment which arises<sup>8</sup> because of the conversion or adaptation of taxable property to residential property is treated as made on the occurrence of whichever of the following first occurs after the property has become residential property:

- 2315 (a) the substantial completion of the works to convert or adapt the property;
- 2316 (b) the interest in the property ceasing to be held by the pension scheme<sup>9</sup>.

However, if the property becomes residential property<sup>10</sup> after the end of the period of three years beginning with the date on which the first payment was made in connection with the conversion or adaptation works, the unauthorised payment is treated as made when the property becomes residential property<sup>11</sup>.

If the works began before the end of the period of 12 months beginning with the acquisition of the interest in the property by the pension scheme, the total taxable amount is the amount of consideration<sup>12</sup> for the interest plus the development costs<sup>13</sup>; and if the works began after the end of that period, the total taxable amount is the relevant market value<sup>14</sup> plus the development costs<sup>15</sup>.

Where an unauthorised payment arises under the provisions outlined above, the amount of that payment is the whole of the taxable amount if:

- 2317 (i) the pension scheme directly holds the interest in the taxable property which gives rise to the unauthorised payment;
- 2318 (ii) the pension scheme holds the interest indirectly through one vehicle and that vehicle is wholly owned by the scheme; or
- 2319 (iii) the pension scheme holds the interest indirectly through more than one vehicle (a 'chain' of vehicles), and each vehicle in the chain is wholly owned by another such vehicle or by the scheme itself<sup>16</sup>.

Where the pension scheme holds the interest indirectly through one vehicle, which vehicle is not wholly owned by the scheme itself, the amount of an unauthorised payment is a proportion of the total taxable amount determined by reference to the extent of the pension scheme's interest in the vehicle<sup>17</sup>. Where the scheme holds the interest indirectly through one or more chains of vehicles, and one or more vehicles in such a chain is not wholly owned by another such vehicle or by the scheme itself, the amount of the unauthorised payment is the amount or the total of all the amounts found for each chain through which the scheme holds the interest<sup>18</sup>. The amount (or each amount) is a proportion of the total taxable amount determined by reference to the extent of the interest held directly by the pension scheme or another vehicle in the chain in each vehicle in the chain, starting with the vehicle which holds the interest in the property directly, and ending with the vehicle in which the scheme directly holds an interest<sup>19</sup>.

If an investment-regulated pension scheme is treated<sup>20</sup> as acquiring an interest in taxable property, the amount of the unauthorised payment treated as made by the scheme is:

*UP – UPB*

where UP is the amount that would have been the amount of the payment apart from this provision, and UPB is the amount that would have been the amount of any unauthorised payment treated as made by the pension scheme had it acquired the interest in the property immediately before the increase in the extent of the interest in the vehicle<sup>21</sup>.

If the interest in the taxable property which gives rise to the unauthorised payment is held by the pension scheme for the purposes of the arrangement made thereunder relating to the member, and at least one other arrangement under the scheme, the unauthorised payment must be apportioned on a just and reasonable basis among all the arrangements for the purposes of which the interest in the property is held. Otherwise, the whole of the payment is treated as made to the member<sup>22</sup>.

1    Ie by virtue of the Finance Act 2004 s 174A: see PARA 873B.30.

2    Ibid Sch 29A para 31(1), (2) (Sch 29A added by Finance Act 2006 Sch 21 para 13). For the meaning of 'investment-related pension scheme' see PARA 873B.29; and for the meaning of 'member' see PARA 873B.4.

3    Ie where the 2004 Act s 174A(1) (see PARA 873B.30 head (1)) applies.

4    Ibid Sch 29A para 32(1), (2). For the meaning of 'taxable property' see PARA 873B.30.

5    Finance Act 2004 Sch 29A para 32(3), (4). Where (1) an investment-regulated pension scheme acquires an interest in taxable property because it acquires a chargeable interest in the property within the meaning of the Finance Act 2003 s 48(1) (see PARA 1117A.5); and (2) the interest is acquired because the pension scheme or another person comes to hold the interest directly, the following provisions apply:

202 (a) if the whole or part of the consideration for the interest is consideration other than rent, the following provisions apply for determining the amount of the consideration (or the part that is not rent) as they apply for determining the amount of chargeable consideration for a land transaction for the purposes of the 2003 Act Pt 4 (ss 42-124): ss 51, 52 (see PARA 1117A.10), Sch 4 paras 2-16 (see PARA 1117A.7); 2004 Act Sch 29A para 33(3).

- 203 (b) if the whole or part of the consideration is rent, the amount of the consideration (or of the part that is rent) is taken to be the relevant rental value of the property, and the 2003 Act Sch 5 paras 2(4)(a), 3, 8 (see PARA 1117A.12) applies for determining that value: 2004 Act Sch 29A para 34(1), (2). The following provisions of the 2003 Act apply for determining the amount of rent payable for this purpose as they apply for determining the amount of rent payable under a lease to which the 2003 Act applies: Sch 17A paras 2, 5-7A, 9, 16 and (subject to those provisions) the provisions mentioned in the 2004 Act Sch 29A para 33(3): Sch 29A para 34(3). Where on an assignment of a lease the assignee assumes the obligation to pay rent, the assumption counts as consideration for the assignment: Sch 29A para 34(5).

The Treasury may by regulations provide for the provisions of the 2003 Act mentioned in head (a) or (b) to apply with modifications to cases to which these provisions apply, and for any other provision of the 2003 Act Pt 4 to apply (with or without modifications) to such cases: 2004 Act Sch 29A paras 33(4), 324(4). As to the making of such regulations, see INCOME TAXATION.

Where (i) an investment-regulated pension scheme acquires an interest in taxable property because the scheme or another person comes to hold the interest directly, and (ii) the interest is acquired for less than its market value, the following provisions apply if either (A) immediately before the acquisition the interest was held by a registered pension scheme which was not an investment-regulated pension scheme, or (B) tax relief is available under s 188 (see PARA 873B.12) or s 196 (see PARA 873B.13) in respect of the transfer of the interest: Sch 29A para 35(1), (2). In such a case, the amount of the consideration for the interest is treated as the market value, at the date the interest is acquired, of the interest in the property held by the person who holds it directly (or, if the interest in the property is a lease at a rent, the amount of consideration that would be treated as given by the person for the lease by virtue of Sch 29A para 34 above if it were assigned to the person at that time: Sch 29A para 35(3). For the meaning of 'registered pension scheme' see PARA 873B.1; and for the meaning of 'market value' see PARA 873B.3.

The Treasury may by regulations make provision with respect to what is to count as consideration for the acquisition of an interest in taxable property and the determination of the amount of such consideration, and with respect for the determination of the market value of an interest held in taxable property: Sch 29A para 36(1), (2). Such regulations may, in particular, make provision for cases where an investment-regulated pension scheme acquires an interest in taxable property outside the United Kingdom, a licence to use or occupy taxable property, or an interest in taxable property which is tangible movable property; and such regulations may amend the 2004 Act Sch 29A Pt 4 (paras 31-45) and include provision having effect in relation to times before they are made: Sch 29A para 36(3), (4). The Treasury may also by regulations made provision for an investment-regulated pension scheme which has acquired an interest in taxable property to be treated as making one or more further unauthorised payments where (1) the amount of consideration for the acquisition was determined on the basis of a reasonable estimate, and the actual amount of the consideration turns out to be higher than the estimated amount; (2) in the case of an interest which is a lease, there is a variation in the rent payable thereunder; or (3) in such a case, the amount of the consideration for the acquisition was determined on an assumption about the length of the term of the lease, and the lease continues after the end of the term: Sch 29A para 37(1). Such regulations may amend s 174A or Sch 21 (apart from this provision) and include provision having effect in relation to times before they are made: Sch 29A para 37(2). References to unauthorised payment treated as made under s 174A include payments treated as made under such regulations: Sch 29A para 37(3).

6 le under ibid s 174A(2): see PARA 873B.30.

7 Ibid Sch 29A para 38.

8 le under ibid s 174A(3): see PARA 873B.30.

9 Ibid Sch 29A para 39(1), (2).

10 For the meaning of 'residential property' see PARA 873B.30.

11 2004 Act Sch 29A para 39(3).

12 le the consideration as determined in accordance with ibid Sch 29A paras 32-36.

13 le the total cost of the conversion or adaptation works at the time when the unauthorised payment is treated as made: ibid Sch 29A para 39(7). Where, at the time the unauthorised payment is treated as made, (1) an amount will be payable for the works only if some uncertain future event occurs, or (2) an amount will cease to be so payable if some such event occurs, the development costs must be determined on the assumption that the amount will be payable or, as the case may be, will not cease to be payable; and where, at that time, an amount payable for the works depends on uncertain future events, or cannot otherwise be ascertained, that amount must be determined on the basis of a reasonable estimate: Sch 29A para 39(8), (9). If head (1) or (2) applies and an amount estimated in accordance with those provisions is later ascertained, then if the ascertained amount is greater than the estimated amount, an unauthorised payment is treated as made when

the amount becomes ascertained, and the total taxable amount is the amount of the increase: Sch 29A para 40(1)-(4). References to unauthorised payments treated as made under s 174A include references to payments treated as made under this provision: Sch 29A para 40(5).

14 The 'relevant market value' is the market value, at the date the works began, of the interest in the property held by the person who holds it directly or, if the interest in the property is a lease at a rent, the amount of consideration that would be treated as given by the person for the lease by virtue of *ibid* Sch 29A para 34 if it were assigned to the person at that time: Sch 29A para 39(6).

15 *Ibid* Sch 29A para 39(4), (5).

16 *Ibid* Sch 29A para 41(1)-(5). As to direct and indirect ownership see PARAS 873B.30, 873B.31. For the meaning of 'vehicle' see PARA 873B.31.

17 *Ibid* Sch 29A para 41(1), (6). References in Sch 29A to the extent of an interest held directly by a person in a vehicle are references to the proportion of the interests of everyone who directly holds an interest in the vehicle which, on a just and reasonable apportionment, is represented by that interest: Sch 29A para 42(1). The extent of a person's interest in a company is whichever is the greatest of: (1) the percentage of the share capital or issued share capital of the company owned by the person; (2) the percentage of the voting rights in the company owned by the person; (3) the percentage of all the income of the company to which the person has a right; (4) the percentage of the amounts distributed on a distribution in relation to the company to which the person has a right; (5) the percentage of the assets of the company to which the person has a right on a winding-up or in any other circumstances; (6) where the person has a right to a percentage of a particular asset or description of assets of the company, or of the income or gains from such an asset or description (either generally or in particular circumstances), that percentage or the highest of all the percentages found under this head: Sch 29A paras 42(2), 43(1). For this purpose, a person is treated as owning or having a right to anything which that person will only acquire (a) at some future date, (b) on the exercise of a right to acquire it; or (c) if some other uncertain future event occurs or does not occur: Sch 29A para 43(2).

Where a person has an interest in a company as a result of lending the company money to fund the acquisition of an interest in taxable property, the extent of that interest is determined by the proportion borne by the value of the loan to the total value of the assets held directly by the company (but only if the result would be to produce a greater interest than any of heads (1)-(6) above): Sch 29A para 43(3). For this purpose, assets must be valued in accordance with generally accepted accounting practice (see INCOME TAXATION vol 23(1) (Reissue) PARA 604); no account is taken of liabilities secured against or otherwise relating to assets (whether generally or specifically); and where generally accepted accounting practice offers a choice of valuation between cost basis and fair value, the latter must be used: Sch 29A para 43(4). The Treasury may by regulations amend Sch 29A para 43; or amend Pt 4 (paras 31-45) for the purposes of explaining how to determine the extent of a person's interest in a vehicle in other cases: Sch 29A para 43(3)).

For the purposes of Sch 29A para 41, a vehicle is wholly owned by a person if no other person directly holds an interest in that vehicle: Sch 29A para 44(9).

18 *Ibid* Sch 29A para 41(7).

19 *Ibid* Sch 29A para 41(8).

20 *Ie* by virtue of *ibid* Sch 29A para 28: see PARA 873B.30.

21 *Ibid* Sch 29A para 44. In calculating UPB, it must be assumed that the total taxable amount is that given by Sch 29A para 32(5): Sch 29A para 44(2).

22 *Ibid* Sch 29A para 45.

### **33. Investment-regulated pension schemes; scheme chargeable payments**

An investment-regulated pension scheme<sup>1</sup> is treated as having made a scheme chargeable payment if it holds an interest in taxable property<sup>2</sup> in a tax year<sup>3</sup>.

If a person who holds the interest in the property directly receives profits arising from that interest in the tax year, the amount of the payment is the greater of:

- 2320 (1) the amount of the annual profits from that interest, and
- 2321 (2) the amount of the deemed profits from the interest in the property for the year<sup>4</sup>.

If no person who holds the interest directly receives such profits in the year, the amount of the payment is the amount of the deemed profits from the interest for that year<sup>5</sup>.

Where the pension scheme holds the interest in the property indirectly for the whole of the period in the tax year for which the property is scheme-held taxable property<sup>6</sup>, the amount that would otherwise be the amount of the scheme chargeable payment is apportioned<sup>7</sup> to the pension scheme<sup>8</sup>.

The amount of the annual profits from the interest in the property is the total amount of profits received from the interest in the tax year by each person who holds the interest directly and at a time when the property is scheme-held taxable property<sup>9</sup>. The amount of the deemed property from such an interest in the tax year is:

$$\frac{DMV}{10} \times \frac{DTP}{DY}$$

10 where DMV is the deemed market value of the interest in the property for the year; DTP is the number of days in the year for which the property is scheme-held taxable property; and DY is the number of days in the year<sup>11</sup>.

An investment-regulated pension scheme is also treated as having made a scheme chargeable payment where:

- 2322 (a) in a tax year the scheme holds an interest in property which is taxable property or which has been taxable property at any time whilst the interest has been held by the pension scheme (a 'taxable interest');
- 2323 (b) a gain is treated as accruing to the scheme in respect of the taxable interest in the tax year;
- 2324 (c) the total amount of gains treated as accruing<sup>12</sup> to the pension scheme in respect of taxable interests in the tax year exceeds the total amount of losses treated as accruing to the scheme in respect of taxable interests in the tax year<sup>13</sup>.

The amount of the payment is an amount equal to the difference between the total amount of gains accruing to the scheme in respect of taxable interest in the tax year and the total amount of losses treated as so accruing<sup>14</sup>.

Where the pension scheme or another vehicle ceases to hold all or part of an interest in a vehicle through which the scheme holds the taxable interest indirectly, the scheme is treated as disposing of the interest in that vehicle, and the amount of the gain or loss treated as accruing to the scheme on the disposal is the difference between the deemed consideration received<sup>15</sup> on the disposal of the interest in the vehicle, and the deemed consideration given<sup>16</sup> for it<sup>17</sup>.

1 For the meaning of 'investment-regulated pension scheme' see PARA 873B.29.

2 For the meaning of 'taxable property' see PARA 873B.30.

3 Finance Act 2004 s 185A(1) (ss 185A-185I added by Finance Act 2006 Sch 21 para 6).

4 Ibid s 185A(3).

5 Ibid s 185A(4).

6 ie property which is taxable property and an interest in which is held by the scheme: ibid s 185B(3).

7 ie by applying ibid Sch 29A paras 41-43 (see PARA 873B.32), as if the amount that would otherwise be the amount of the scheme chargeable payment were the total taxable amount in relation to an unauthorised

payment treated as made by the scheme in connection with the acquisition of the interest in the property, at the end of the last day in the tax year on which the property is scheme-held taxable property: s 185D(2). However, where the amount so found differs from the amount that would be so found on another day in the tax year on which the property is scheme-held taxable property, the amount to be apportioned to the scheme is the average of the amounts produced by applying the above provisions in relation to the scheme on each day in the tax year on which the property is scheme-held taxable property: s 185D(3).

Where (1) the pension scheme holds the interest in the property indirectly in the tax year; (2) a person who holds the interest directly receives profits arising from the interest at a time in the tax year when the property is scheme-held taxable property; (3) tax is payable on those profits by that person (assuming them to be the highest part of the person's income for the tax year in which they are received); and (4) that tax has been paid, an amount is allowed as a credit against any income tax charged under s 239 (see PARA 873B.19) in respect of the scheme chargeable payment treated as made by virtue of the scheme's holding the interest in the property in the tax year: s 185E(1), (2). The amount allowed is a proportion of the tax payable and paid determined by reference to the proportion of the amount that would otherwise be the amount of the scheme chargeable payment apportioned to the pension scheme under s 185D above: s 185E(3). If an amount is so allowed and the amount of tax payable and paid by reference to which it was calculated is subsequently varied, the amount allowed is to be similarly varied, and any necessary adjustments made to give effect to that variation, whether by making assessments or otherwise: s 185E(4).

8 Ibid ss 185A(5), 185D(1).

9 Ibid s 185B(1). As to direct and indirect holdings see PARAS 873B.30, 873B.31.

10 Where no person who holds the interest in the property directly during the tax year does so by virtue of a lease of residential property, the deemed market value of the interest for the year is:

$$(MV - UP) \times (I - RPI)$$

where MV is the opening market value; UP is the total of any unauthorised payments treated as made by the pension scheme under ibid s 174A (see PARA 873B.30) in relation to the property in the tax year, other than any such payment treated as made by virtue of the property becoming scheme-held taxable property in the year; and RPI is the figure expressed as a decimal which represents the percentage increase in the retail prices index between the first day in the tax year on which the property is scheme-held taxable property and the last such day (or, if there is no such increase, is nil): s 185C(1). The 'opening market value', if the property is not scheme-held taxable property immediately before the beginning of the tax year, is the market value of the interest in the property immediately after the time during the year when the property first becomes scheme-held taxable property. In any other circumstances it is the deemed market value of the interest for the previous tax year: s 185C(2). For this purpose, where a person who holds the interest in the property directly during the tax year does so by virtue of a lease of residential property, the deemed market value of the interest for the year is the relevant rental value of the property calculated in accordance with Sch 29A para 34 (see PARA 873B.32) on the assumptions that (1) the lease was granted when the property first became scheme-held taxable property; (2) the term of the lease is 50 years; (3) a fully commercial rent is payable for the first five years of that term; and (4) afterwards the rent is reviewed on an upwards-only basis: s 185C(3). For the meaning of 'market value' see PARA 873B.3; and for the meaning of 'residential property' see PARA 873B.30.

11 Ibid s 185B(2).

12 A gain or loss is treated as accruing to a pension scheme in respect of a taxable interest in a tax year if (1) by virtue of ibid s 185G a chargeable gain or allowable loss is treated as accruing in the tax year to the person who holds the taxable interest directly; or (2) in the tax year, the pension scheme or another vehicle ceases to hold or all or part of an interest in a vehicle through which the pension scheme holds the taxable interest indirectly: s 185F(3). For the meaning of 'vehicle' see PARA 873B.31.

A person ('the transferor') who holds the taxable interest directly is treated as holding an asset (a 'taxable asset') consisting of the interest; and for the purpose of determining whether the transferor disposes of the asset, when such a disposal takes place, and whether a chargeable gain or allowable loss is treated as accruing to the transferor on the disposal in the tax year (and, if so, the amount of that gain or loss), the Taxation of Chargeable Gains Act 1992 (see CAPITAL GAINS TAXATION) is treated as applying to the transferor and the taxable asset: Finance Act 2004 s 185G(1), (2). For this purpose, the 1992 Act is treated as applying as if (a) throughout the tax year the transferor were resident, ordinarily resident and domiciled in the United Kingdom; (b) no allowable losses accrued to the transferor in any previous tax year (so that there is no loss to carry forward); (c) notice under s 16(2A) were given by the transferor in relation to the year in respect of any loss treated as accruing to the transferor in that year from a disposal of the taxable asset; (d) s 45(1) did not apply to a disposal of the taxable asset; (e) for the purposes of s 53 the transferor were not chargeable to corporation tax in respect of any chargeable gain accruing to the transferor from a disposal of the taxable asset; (f) s 171(1) did not apply to a disposal of the taxable asset (so that no election could be made in relation to such a disposal under s 171A); and (g) ss 222-224 did not apply to a gain on a disposal of the taxable asset by virtue of s 225: 2004 Act s 185G(3) (amended by Finance Act 2008 Sch 2 para. 53). Where the taxable asset became taxable

property whilst held directly by the scheme, the 1992 Act is treated as applying to a disposal of the asset as if the asset had been acquired by the transferor at the time it became taxable property, and the amount deductible under s 38(1)(a) in respect of the disposal were the amount of the unauthorised payment treated as made by the pension scheme at that time: 2004 Act s 185G(4). For the meaning of 'resident', 'ordinarily resident' and 'domiciled' see INCOME TAXATION. For the meaning of 'United Kingdom' see PARA 15 NOTE 4. For the meaning of 'allowable loss' see CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 9); and for the meaning of 'chargeable gain' see CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 8.

If the pension scheme holds the taxable asset indirectly, the 1992 Act is treated as applying to a disposal of the asset as if the amount deductible under s 38 in respect of the disposal were the total amount of unauthorised payments treated as made by the pension scheme in respect of the asset up to the time of the disposal, except in so far as it has already been taken into account in calculating the gains or losses accruing to the scheme in respect of the taxable asset by virtue of the 2004 Act s 185G or s 185H: s 185G(5), (6). Section 185G(6) is subject to the 1992 Act s 42 (see CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 38), but in the application of the latter provision in relation to the taxable asset, the amount of the consideration for the disposal is taken to be that amount apart from the 2004 Act s 185G(7): s 185G(8). The amount that would otherwise be the amount of the consideration for which the disposal is made (or treated as made) is scaled down by applying Sch 29A paras 41-43 (see PARA 873B.32) to it as if it were the total taxable amount in relation to an unauthorised payment treated as made by the pension scheme in connection with the acquisition of the interest in the property which constitutes the taxable asset, at the time of the disposal: s 185G(7).

Where the taxable asset was not taxable property for the whole period beginning with the time when the scheme acquired the asset (or, if later, the time when the asset first became taxable property) and ending with the disposal, the amount that would otherwise be the amount of the chargeable gain or allowable loss treated as accruing on a disposal of the asset is reduced by reference to the proportion of the period for which the asset was not taxable property: s 185G(9).

13 Ibid s 185F(1).

14 Ibid s 185F(2). However, where the taxable asset (see NOTE 12) is a wasting asset consisting of tangible movable property, and by virtue of s 185F a loss is treated as accruing to the scheme from a disposal of the asset in a tax year, the loss is only allowable as a deduction from gains so treated as accruing from other disposals in the year of taxable assets which are wasting assets consisting of such property: s 185G(10).

15 The deemed consideration received for the disposal of the interest in the vehicle is the difference between (1) the market value of the taxable interest at the time of the disposal, as apportioned to the pension scheme, immediately before that time; and (2) the market value of that interest at the time of the disposal (as so apportioned) immediately after that time: *ibid* s 185H(4). The apportionment is made by applying Sch 29A paras 41-43 (see PARA 873B.32) to it as if it were the total taxable amount in relation to an unauthorised payment treated as made by the scheme in connection with the acquisition of the taxable interest, at the time at which the apportionment becomes necessary: s 185H(5).

16 The deemed consideration given for the interest in the vehicle is the total amount of unauthorised payments treated as made by the scheme in respect of the taxable interest up to the time of the disposal, less so much of that amount as has already been taken into account in calculating the gains or losses accruing to the scheme in respect of the taxable interest by virtue of *ibid* s 185G or s 185H: s 185H(6).

17 *Ibid* s 185H(1)-(3). Where a pension scheme is treated under s 185F as making a scheme chargeable payment which is to any extent attributable (1) to a chargeable gain treated by virtue of s 185G as accruing to another person on the disposal of a chargeable asset; or (2) to a gain treated by virtue of s 185H as accruing to the scheme as a result of another person disposing of an interest in a vehicle through which the pension scheme holds a taxable interest indirectly; and (a) tax is payable in respect of the disposal by the person who makes the disposal and (b) that tax has been paid, an amount is allowed as a credit against any income tax charged under s 239 (see PARA 873B.19) in respect of the scheme chargeable payment: s 185I(1), (2). The amount allowed is a proportion of the tax payable and paid determined by reference to the proportion of the amount of consideration for the disposal that is apportioned under s 185G(7): s 185I(3). In so far as the underlying gain accrues as a result of a disposal by another person, the amount is the amount of tax paid and a payable apportioned to the scheme by applying Sch 29A paras 41-43 as if it were the total taxable amount in relation to an unauthorised payment treated as made by the scheme in connection with the acquisition of the taxable interest by the person disposing of the interest in the vehicle, at the time of the disposal: s 185I(4). If an amount is so allowed and the amount of tax payable and paid by reference to which it was calculated is subsequently varied, the amount allowed is to be similarly varied, and any necessary adjustments made to give effect to that variation, whether by making assessments or otherwise: s 185I(5).

### **34. Investment-regulated pension schemes; overseas matters**

The Treasury may make regulations in relation to cases where a non-UK-resident investment-regulated pension scheme<sup>1</sup> holds an interest in taxable property which is not situated in the United Kingdom<sup>2</sup>.

Such regulations may make provision for a member of the scheme for the purposes of whose arrangement<sup>3</sup> the interest is held to be liable to the scheme sanction charge<sup>4</sup> so far as relating to a scheme chargeable payment treated<sup>5</sup> as made by the scheme<sup>6</sup>; and may also make provision:

- 2325 (1) for the member to be liable to all of the scheme sanction charge so far as relating to the scheme chargeable payment or to such part thereof as the regulations may provide;
- 2326 (2) for the charge to be apportioned amount members of the scheme where the interest in the property is held for the purposes of more than one arrangement under the scheme; and
- 2327 (3) for the scheme administrator not to be liable to the charge, or for his liability to be restricted as the regulations may provide<sup>7</sup>.

The regulations may make provision for cases where:

- 2328 (a) a member of a scheme would otherwise be liable to the scheme sanction charge so far as relating to a scheme chargeable payment treated<sup>8</sup> as made by the scheme;
- 2329 (b) the member does not meet such conditions as to residence in the tax year as the regulations may prescribe;
- 2330 (c) the member meets those conditions in a subsequent tax year; and
- 2331 (d) such other conditions as the regulations may prescribe are met<sup>9</sup>.

1 A pension scheme is non-UK resident if it is established in a country or territory outside the United Kingdom: Finance Act 2004 s 273ZA(7) (s 273ZA added by Finance Act 2006 Sch 21 para 10). For the meaning of 'resident' see INCOME TAXATION. For the meaning of 'investment-regulated pension scheme' see PARA 873B.21.

2 2004 Act s 273ZA(1). For the meaning of 'taxable property' see PARA 873B.30. For the meaning of 'United Kingdom' see PARA 15 NOTE 4. As to the making of such regulations see INCOME TAXATION.

3 For the meaning of 'arrangement' see PARA 873B.5.

4 For the meaning of 'scheme sanction charge' see PARA 873B.19.

5 I.e. under the 2004 Act s 185A or s 185F: see PARA 873B.33.

6 Ibid s 273ZA(2). For the meaning of 'member' see PARA 873B.2.

7 Ibid s 273ZA(3). For the meaning of 'scheme administrator' see PARA 873B.2.

8 I.e. under ibid s 185F: see PARA 873B.33.

9 Ibid s 273ZA(4). The regulations may also make provision for the member not to be liable to the charge in the tax year in which the scheme chargeable payment is treated as made, but to be liable thereto in a subsequent tax year to such extent as the regulations may provide: s 273ZA(5). The regulations may amend Pt 4 (ss 149-284) (apart from s 273ZA); include provision having effect in relation to times before they are made; contain transitional provisions and savings; and make different provision for different cases: s 273ZA(6).

See the Pension Schemes (Taxable Property Provisions) Regulations 2006, SI 2006/1958.

## UPDATE

### 741-873 Occupational Pension Schemes

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(13) MISCELLANEOUS PROVISIONS/(v) Overriding Requirements and Special Cases/873C. Restrictions on payment into occupational pension schemes.

## **873C. Restrictions on payment into occupational pension schemes.**

### **1. UK-based scheme to be trust with effective rules**

The following provisions<sup>1</sup> apply to an occupational pension scheme<sup>2</sup> that has its main administration in the United Kingdom<sup>3</sup>. If the scheme is not established under irrevocable trusts, the trustees or managers<sup>4</sup> of the scheme must secure that no funding payment<sup>5</sup> is accepted<sup>6</sup>. If the rules stipulating (1) the benefits under the scheme, and (2) any conditions subject to which benefits under the scheme accrue, are not in force, or if those rules are not set out in writing, the trustees or managers of the scheme must secure that no funding payment is accepted<sup>7</sup>. The above provisions<sup>8</sup> do not apply to an occupational pension scheme if it is a prescribed<sup>9</sup> scheme or a scheme of a prescribed description<sup>10</sup>. The civil penalty provisions in the Pensions Act 1995<sup>11</sup> apply to a trustee or manager of an occupational pension scheme that has its main administration in the United Kingdom if (a) the above provisions<sup>12</sup> require the trustees or managers of the scheme to secure that no funding payment is accepted, (b) a funding payment is accepted, and (c) the trustee or manager has failed to take all reasonable steps to secure that no funding payment is accepted<sup>13</sup>.

1    Ie the Pensions Act 2004 s 252(2) and (3).

2    For the meaning of 'occupational pension scheme' see PARA 636A.3.

3    Pensions Act 2004 s 252(1).

4    For the meaning of 'managers' see PARA 636A.11.

5    In the Pensions Act 2004 s 252 'funding payment', in relation to a scheme, means a payment made to the scheme to fund benefits for, or in respect of, any or all of the members: s 252(6). For the meaning of 'member' see PARA 636A.3.

6    Ibid s 252(2).

7    Ibid s 252(3).

8    Ie ibid s 252(2) or (3).

9    For the meaning of 'prescribed' see PARA 636A.3.

10   Pensions Act 2004 s 252(4). See Occupational Pension Schemes (Trust and Retirement Benefits Exemption) Regulations 2005, SI 2005/2360.

11   Ie the Pensions Act 1995 s 10: see PARA 611.

12   Ie the Pensions Act 2004 s 252(2) or (3).

13   Ibid s 252(5).

### **2. Non-European scheme to be trust with UK-resident trustee**

The following provisions<sup>1</sup> apply to an occupational pension scheme that has its main administration outside the member states<sup>2</sup>. An employer<sup>3</sup> based<sup>4</sup> in any part of the United Kingdom may cause a contribution to be paid to the scheme in respect of an employee<sup>5</sup>

(whether or not employed in the United Kingdom) only if the conditions below<sup>6</sup> are satisfied at the time of payment<sup>7</sup>. An employer based outside the United Kingdom may cause a contribution to be paid to the scheme in respect of an employee employed in the United Kingdom only if the conditions below<sup>8</sup> are satisfied at the time of payment<sup>9</sup>. Those conditions are (1) that the scheme is established under irrevocable trusts, and (2) that a trustee of the scheme is resident in the United Kingdom<sup>10</sup>. The above provisions<sup>11</sup> do not apply to an occupational pension scheme if it is a prescribed scheme or a scheme of a prescribed description<sup>12</sup>. The civil penalty provisions in the Pensions Act 1995<sup>13</sup> apply to an employer who causes a contribution to be paid to an occupational pension scheme that has its main administration outside the member States if (a) the above provisions<sup>14</sup> apply in relation to the payment of the contribution, (b) the above conditions<sup>15</sup> are not satisfied at the time of payment, and (c) the employer does not have a reasonable excuse for causing payment to occur at a time when those conditions are not satisfied<sup>16</sup>.

1    Ie the Pensions Act 2004 s 253(2) and (3).

2    Ibid s 253(1).

3    For the meaning of 'employer' see PARA 636A.15.

4    In the Pensions Act 2004 s 253 'based' (1) in relation to an employer who is a body corporate, means incorporated, and (2) in relation to any other employer, means resident: s 253(7).

5    For the meaning of 'employee' see PARA 636A.3.

6    Ie the conditions in the 2004 Act s 253(4).

7    Ibid s 253(2).

8    Ie the conditions in ibid s 253(4).

9    Ibid s 253(3).

10   Ibid s 253(4).

11   Ie ibid s 253(2) or (3).

12   Ibid s 253(5). As to which schemes are of a prescribed description see the Occupational Pension Schemes (Non-European Schemes Exemption) Regulations 2008, SI 2008/624.

13   Ie the Pensions Act 1995 s 10: see PARA 611.

14   Ie the 2004 Act s 253(2) or (3).

15   Ie the conditions in ibid s 253(4).

16   Ibid s 253(6).

### **3. Representative of non-European scheme to be treated as trustee**

In the case of an occupational pension scheme that has its main administration outside the member States, a reference in pensions legislation<sup>1</sup> to the trustees, or a trustee, of the scheme includes a person who is for the time being appointed by the trustees of the scheme to be a representative of the scheme for the purposes of these provisions<sup>2</sup>.

1    In the Pensions Act 2004 s 254(1) 'pensions legislation' means any enactment contained in or made by virtue of (1) the Pension Schemes Act 1993, (2) the Pensions Act 1995, (3) the Welfare Reform and Pensions Act 1999 Pts 1-4, or (4) the 2004 Act: s 254(3). For the meaning of 'enactment' see PARA 636A.2.

2 le for the purpose of ibid s 254: s 254(1). Section 254(1) does not apply to a prescribed reference: s 254(2).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/18. OCCUPATIONAL PENSION SCHEMES/(13) MISCELLANEOUS PROVISIONS/(v) Overriding Requirements and Special Cases/873D. Duty to establish a pension scheme.

### **873D. Duty to establish a pension scheme.**

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) (partly in force: SI 2009/1566, SI 2010/10) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation.

#### **1. Pension scheme**

The Secretary of State must establish a pension scheme and make provision for its administration and management: Pensions Act 2008 s 67(1). A scheme established under s 67 is to be treated for all purposes as established under an irrevocable trust: s 67(2). It must be a scheme that is able to be registered under the Finance Act 2004 Pt 4 Ch 2 (see PARA 873B): Pensions Act 2008 s 67(3). It must when registered under the Finance Act 2004 Pt 4 Ch 2 be a scheme such that a jobholder's employer, if a participating employer, may comply with an enrolment duty by arranging for the jobholder to become an active member of the scheme: Pensions Act 2008 s 67(4). For the meaning of 'jobholder', 'employer', 'enrolment duty' and 'active member' see Pensions Act 2008 s 99 (in force 5 July 2010: SI 2010/10). It must be a scheme that complies with any provision of Northern Ireland legislation corresponding to the Pensions Act 2008 s 67(4): s 67(5). The scheme administrator must ensure that the scheme is and remains registered under the Finance Act 2004 Pt 4 Ch 2: Pensions Act 2008 s 67(6). 'Scheme administrator' has the same meaning here as in the Finance Act 2004 Pt 4 Ch 2: Pensions Act 2008 s 67(7). The power to make provision in pursuance of s 67(1) is exercisable by order: s 67(8). If an order establishes a scheme, any further provision that may be made by order in relation to the scheme may also be made by rules (and rules may be made so as to come into force at the same time as the establishing order): s 67(9). That is subject to s 67(11) and (12): s 67(10). Rules are subject to any provision made by order: s 67(11). No provision may be made by rules about (1) the purpose or object of the scheme; (2) the appointment or removal of trustees; (3) (as regards trustees, or members of any corporate trustee) meetings, committees or delegation of functions; (4) any exclusion of liability on the part of trustees, or the provision of any indemnity or insurance out of the funds of the scheme: s 67(12). Except as expressly provided, nothing in the Pensions Act 2008 limits the generality of the powers conferred by s 67: s 67(13).

An order under s 67 establishing a scheme must provide for the trustee corporation (the body established by s 75: see PARA 873D.2) to be a trustee on the coming into force of the scheme: Pensions Act 2008 s 68(1). An order under s 67 may provide for any provision of the Trustee Act 2000 to apply as if an order or rules under the Pensions Act 2008 s 67 were a trust instrument: s 68(2). An order under s 67 may provide for the trustees to have power to make rules under s 67: s 68(3). Where the trustees have power to make rules, an order under s 67 may provide (a) that they may not exercise the power in specified circumstances; (b) that they may exercise it subject to conditions; (c) that they must comply with requirements for consultation or publication or other procedural requirements when exercising the power: s 68(4). An order under s 67 may make provision for the exclusion of, or indemnity against, liability of a trustee, or an officer or employee of a trustee, arising out of the administration or management of a scheme: s 68(5).

If an order under s 67 establishes a scheme, the Secretary of State must by order under that provision require the trustees to make and maintain arrangements for consulting the members

of the scheme and participating employers about the operation, development and amendment of the scheme; and the arrangements must include establishment and maintenance of a panel of persons to represent members, and a panel of persons to represent employers: see Pensions Act 2008 s 69.

An order under s 67 must prescribe the maximum amount of contributions that may be made by or in respect of a member in any tax year (and the Secretary of State may by order repeal this provision): see Pensions Act 2008 s 70. 'Tax year' means the 12 months beginning with 6 April in any year: Pensions Act 2008 s 99 (in force 5 July 2010: SI 2010/10).

Provision is made with respect to the procedure for scheme orders (see Pensions Act 2008 s 71) and the procedure for publication and consultation on proposed scheme rules (see Pensions Act 2008 s 72).

The Interpretation Act 1978 applies in relation to rules under the Pensions Act 2008 s 67 as if they were contained in a deed not made under an enactment: Pensions Act 2008 s 73(1). A scheme established under s 67 is not to be treated as a public service pension scheme for the purposes of any enactment: s 73(2).

The Secretary of State must appoint a person to review in relation to a scheme established under s 67 (i) the effect of provision made under s 70, (ii) the effect of any restrictions on rights to transfer into the scheme or transfer out to another pension scheme, and (iii) such other matters as the Secretary of State may direct: see Pensions Act 2008 s 74.

## **2. Trustee corporation**

The following provisions come into force on 5 July 2010 unless otherwise stated: SI 2010/10.

There is to be a body corporate, referred to in the Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) as the trustee corporation: Pensions Act 2008 s 75(1). The name of the body is to be determined by order made by the Secretary of State: s 75(2). The trustee corporation is not to be regarded as the servant or agent of the Crown or as enjoying any status, immunity or privilege of the Crown: s 75(3). Property held by the corporation is not to be regarded as property of, or property held on behalf of, the Crown: s 75(4). The Pensions Act 2008 Sch 1 makes provision about the trustee corporation, including provision with respect to (1) members and employees; (2) proceedings; and (3) money: s 75(5).

The functions of the trustee corporation are (a) to act as a trustee of any scheme established under the Pensions Act 2008 s 67 (see PARA 873D.1), and (b) any other functions it is given by or under an enactment in connection with the scheme: Pensions Act 2008 s 76(1). The corporation may do anything calculated to facilitate, or incidental or conducive to, the carrying out of any of its functions: s 76(2). In particular the corporation may (i) enter into agreements; (ii) borrow money; (iii) invest money: s 76(3). The corporation's powers within heads (ii) and (iii) are exercisable only with the consent of the Secretary of State: s 76(4). Section 76(3) and (4) are without prejudice to the exercise by the trustee corporation of any power vested in it as a trustee of a scheme established under s 67: s 76(5).

The Secretary of State may by regulations provide that legislation applying in relation to a person as trustee of a pension scheme, or as director of a company which is a trustee of a pension scheme, applies in relation to the trustee corporation, or its members, with any modifications prescribed in the regulations: Pensions Act 2008 s 77(1) (not yet in force). In s 77 'legislation' means any provision of an Act or subordinate legislation (and 'subordinate legislation' has the same meaning as in the Interpretation Act 1978): Pensions Act 2008 s 77(2) (not yet in force).

## **UPDATE**

### **741-873 Occupational Pension Schemes**

A new type of pension scheme, known as the stakeholder pension scheme, has been established: see the Welfare Reform and Pensions Act Pt I (ss 1-8); and PARA 873A.

The Income Tax (Earnings and Pensions) Act 2003 ss 580-608, 623-628 (which replaced those parts of the Income and Corporation Taxes Act 1988 and subsequent legislation dealing with approved retirement benefits schemes, former approved superannuation funds, approved personal pension schemes, and retirement annuity contracts) are repealed: Finance Act 2004 Sch 31 paras 7, 10, Sch 42 Pt 3. The 2004 Act introduces the concept of registered pension schemes: see Pt 4 (ss 149-284); and PARA 873B.

The Pensions Act 2008 Pt 1 Ch 5 (ss 67-78) makes provision for the establishment of a trust-based occupational pension scheme and for a trustee corporation; see para 873D.

### **861-873 Miscellaneous Provisions**

The Pensions Act 2004 ss 252-254 provide for restrictions on payment into occupational pension schemes; see PARA 873C.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/19. PUBLIC SERVICE PENSION SCHEMES/874. Meaning of 'public service pension scheme'.

## **19. PUBLIC SERVICE PENSION SCHEMES**

### **874. Meaning of 'public service pension scheme'.**

'Public service pension scheme' means an occupational pension scheme established by or under an enactment or the royal prerogative or a royal charter, being a scheme:

- 2332 (1) all the particulars of which are set out in, or in a legislative instrument made under, an enactment, royal warrant or charter; or
- 2333 (2) which cannot come into force, or be amended, without the scheme or amendment being approved by a Minister of the Crown or government department,

and includes any occupational pension scheme<sup>1</sup> established, with the concurrence of the Treasury, by or with the approval of any Minister of the Crown and any occupational pension scheme prescribed by regulations made by the Secretary of State<sup>2</sup> and the Treasury jointly as being a scheme which ought in their opinion to be treated as a public service pension scheme for the purposes of the Pension Schemes Act 1993<sup>3</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 741 ante.

2 As to the Secretary of State see PARA 1 ante.

3 Pension Schemes Act 1993 s 1. The following are prescribed schemes for these purposes: the Army Sports Control Board Superannuation Scheme 1974; the Royal Air Force Sports Control Board Superannuation Scheme 1974; the House of Commons Staff Pension Scheme; the House of Lords Staff Pension Scheme; the National Consumer Council Staff Pension Scheme; the National Institute of Agricultural Botany Superannuation Scheme 1975; the East European Trade Council Pension Scheme; the Committee for Middle East Trade Pension Scheme; the British Overseas Trade Group for Israel Pension Scheme; the Church Commissioners' Superannuation Scheme; the City of London Judges Occupational Pensions Scheme; the Crown Agents Superannuation Scheme; the Sir John Soane's Museum Superannuation Scheme; the Royal Navy and Royal Marines Sports Control Board Superannuation Scheme 1977; the Community Industry Superannuation Scheme 1977; the Simplification of International Trade Procedures Board Pension Scheme; the pension arrangement between the Department of Prices and Consumer Protection and the Chairman of the National Consumer Council, Michael James Shanks; the pension arrangement between the Department of Prices and Consumer Protection and the Vice-Chairman of the National Consumer Council, Joan Edith Mackintosh; the British Council Superannuation Scheme; the Schools Council Superannuation Scheme; the House of Commons Refreshment Department Pension Scheme; the Latin American Trade Advisory Group Pension Scheme; the China-Britain Trade Group Pension Scheme; the Great Britain-China Centre Staff Pension Scheme: see the Occupational Pension Schemes (Public Service Pension Schemes) Regulations 1978, SI 1978/289 (amended by SI 1978/1355; SI 1979/1645; SI 1980/288; SI 1993/1888; having effect by virtue of the Pension Schemes Act 1993 s 189(1), Sch 6 para 2(2)).

### **UPDATE**

#### **874 Meaning of 'public service pension scheme'**

TEXT AND NOTE 3--Pension Schemes Act 1993 s 1 now s 1(1): Pensions Act 2004 s 239(2) (s 239 all in force by 6 April 2006: SI 2005/1720).

NOTE 3--See also Occupational Pension Schemes (Public Service Pension Schemes) Regulations 2009, SI 2009/1907.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/19. PUBLIC SERVICE PENSION SCHEMES/875. Power to make regulations under the Superannuation Act 1972; in general.

### **875. Power to make regulations under the Superannuation Act 1972; in general.**

The Superannuation Act 1972 confers power on the relevant Secretaries of State<sup>1</sup> to make provision by regulations for superannuation schemes applying to civil servants and persons treated for those purposes as employed in the Civil Service<sup>2</sup>, persons employed in local government service<sup>3</sup>, teachers<sup>4</sup>, and persons engaged in health services<sup>5</sup>. Any regulations made with respect to local government service<sup>6</sup>, teachers<sup>7</sup> or persons engaged in health services<sup>8</sup> may be framed so as to apply in relation to the pensions<sup>9</sup> which are being paid or may become payable under the regulations to or in respect of persons who, having served in an employment or office service in which qualifies persons to participate in the benefits for which the regulations provide, have ceased to serve therein (whether or not they have subsequently recommenced any such service) or died before the regulations come into operation, or so as to require or authorise the payment of pensions to or in respect of such persons<sup>10</sup>. No provision must be made by any such regulations unless any person who is placed in a worse position than he would have been in if the provision had not applied in relation to any pension which is being paid or may become payable to him is by the regulations given an opportunity to elect that the provision must not so apply in relation to that pension except as follows<sup>11</sup>. If, at the coming into force of the provision made by the regulations, a person who makes such an election is serving in an employment or office to which the regulations governing the pension apply, or if he subsequently recommences service in such an employment or office, then:

- 2334 (1) the election has effect in relation to the pension only to the extent that it accrues or has accrued by virtue of periods of service rendered before the cessation of his service<sup>12</sup> or, if there has been more than one such cessation, the last of them before the coming into force of the provision in question, or by virtue of contributions paid in respect of any such periods of service; and
- 2335 (2) in determining entitlement to, or the amount of, the pension to that extent, he must (without prejudice to the application of this provision) be treated as if he had never recommenced service in such an employment or office at any time after that cessation,

and the provision in question applies accordingly<sup>13</sup>.

The provision which may be made in regulations relating to local government service, teachers or persons engaged in health services may include provision:

- 2336 (a) as to the means by which the cost of providing the benefits for which the regulations provide is to be defrayed, including provision for the making of contributions or other payments by persons entitled to participate in such benefits and by the employers of those persons or such other persons as may be prescribed by the regulations<sup>14</sup>;
- 2337 (b) for the establishment and administration of superannuation funds, the management and application of the assets of such funds, the amalgamation of all or any of such funds, and the winding up of, or other dealing with, any such fund<sup>15</sup>;
- 2338 (c) for the payment and receipt of transfer values or in lieu thereof for the transfer or receipt of any fund or part of a fund or policy of insurance<sup>16</sup>;
- 2339 (d) for reckoning in respect of a person to whom the regulations apply any service in employment<sup>17</sup> or as the holder of an office (other than service in respect

- of which benefits are payable under the regulations) as service in respect of which such benefits are payable, either unconditionally or subject to such conditions as may be prescribed by the regulations and either as respects the whole of the service or as respects such fraction thereof as may be so prescribed<sup>18</sup>;
- 2340 (e) for the making by such persons as may be prescribed by the regulations of payments towards the provision (otherwise than under the regulations) of pensions, allowances or gratuities in such cases as may be determined in accordance with the regulations<sup>19</sup>;
- 2341 (f) as to the circumstances in which contributions paid by any person in accordance with the regulations, or any part thereof, may be repaid with or without interest<sup>20</sup>;
- 2342 (g) for securing that where:
- 204 273. (i) the regulations provide for the payment to or in respect of a person of a pension in consequence of his having become incapacitated, or having died, as a result of an injury sustained, or disease contracted, in circumstances prescribed by the regulations; and
274. (ii) any damages in respect of the injury, disease or death in consequence of which the pension is paid are recovered by or on behalf of the person to whom the pension is paid,
- 205 2343 the amount of any payments made to that person in respect of the pension before the right to or amount of such damages is finally determined, or such part of those payments as may be determined in accordance with the regulations, may be recovered from that person in such circumstances and subject to such conditions as the regulations may provide<sup>21</sup>;
- 2344 (h) authorising the payment, without probate or other proof of title, of any sum due under the regulations in respect of a person who has died to his personal representatives or such other persons as may be prescribed by the regulations<sup>22</sup>;
- 2345 (i) rendering void any assignment of or charge on, or any agreement to assign or charge, any benefit under the regulations, and provision that on the bankruptcy of a person entitled to such a benefit no part thereof must pass to any trustee or other person acting on behalf of the creditors except in accordance with an order made by a court in pursuance of any enactment specified in the regulations<sup>23</sup>;
- 2346 (j) for the determination of all questions arising under the regulations and for any decision which falls to be taken by a Minister of the Crown in accordance with the regulations to be final<sup>24</sup>;
- 2347 (k) for conferring on such persons as may be prescribed by the regulations such functions as the Secretary of State considers necessary or expedient for purposes of the regulations<sup>25</sup>;
- 2348 (l) repealing or amending any provision in any Act of Parliament, whether public general, local or private, including an Act confirming a provisional order, or in any order or other instrument made under any such Act, where it appears to the Secretary of State that that provision is inconsistent with, or has become unnecessary or requires modification in consequence of, the regulations<sup>26</sup>;
- 2349 (m) such incidental, supplementary, consequential and transitional provisions as appear to the Secretary of State to be necessary or expedient<sup>27</sup>.

Provision may also be made under the Superannuation Act 1972 for the superannuation of the Comptroller and Auditor General<sup>28</sup> and certain provisions of that Act apply in relation to police and firemen's pension schemes<sup>29</sup>.

1 As to the office of Secretary of State generally see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 355 et seq.

2 See the Superannuation Act 1972 ss 1-6, Sch 1 (as amended); and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 566 et seq.

3 See *ibid* s 7, 8; the Local Government Pension Scheme Regulations 1977, SI 1977/1612; the Local Government Pension Scheme (Transitional Provisions) Regulations 1997, SI 1997/1613; 33 Halsbury's Statutes (1997 Reissue) 487; and LOCAL GOVERNMENT vol 69 (2009) PARA 448 et seq.

4 See the Superannuation Act 1972 s 9 (as amended); the Teacher's Superannuation (Consolidation) Regulations 1988, SI 1988/1652 (as amended); and EDUCATION vol 15(2) (2006 Reissue) PARA 867.

5 See the Superannuation Act 1972 s 10 (as amended); the National Health Service Pension Scheme Regulations 1995, SI 1995/300 (as amended); and HEALTH SERVICES vol 54 (2008) PARA 711.

6 *Ie* any regulations made under the Superannuation Act 1972 s 7.

7 *Ie* any regulations made under *ibid* s 9 (as amended).

8 *Ie* any regulations made under *ibid* s 10 (as amended).

9 For these purposes, 'pension' includes allowance and gratuity: *ibid* s 12(5); and see Sch 3 para 7.

10 *Ibid* s 12(2) (s 12(2), (4) amended, and s 12(4A) added, by the Pensions (Miscellaneous Provisions) Act 1990 s 10). Any regulations under the Superannuation Act 1972 ss 7, 8(2), 9 or 10 (as amended) may be framed so as to have effect as from a date earlier than the making of the regulations: s 12(1). Section 12(2) (as amended) applies in relation to regulations under s 7, being regulations made by virtue of s 8(3), as if for the first two references to those regulations in s 12(2)(a) (as amended) there were substituted references to the local Act scheme affected by the regulations: s 12(3). Regulations made under ss 7, 8, 9 or 10 (as amended) must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 12(6). Where under any regulations made under ss 7, 9 or 10 (as amended), in its application to England and Wales, any question falls to be determined by the Secretary of State, then, at any time before the question is determined, the Secretary of State may, and if so directed by the High Court must, state in the form of a special case for determination by the High Court any question of law arising out of the question which falls to be determined by him; and where such a case is so stated, an appeal to the Court of Appeal from the determination by the High Court lies only with the leave of the High Court or the Court of Appeal: s 11.

11 *Ibid* s 12(4) (as amended: see note 10 *supra*).

12 *Ie* the cessation referred to in *ibid* s 12(2) (as amended): see the text to note 10 *supra*.

13 *Ibid* s 12(4A) (as added: see note 10 *supra*).

14 *Ibid* Sch 3 para 1.

15 *Ibid* Sch 3 para 2.

16 *Ibid* Sch 3 para 3.

17 For these purposes, 'employment' includes engagement in any service: see *ibid* Sch 3 para 4.

18 *Ibid* Sch 3 para 4.

19 *Ibid* Sch 3 para 5.

20 *Ibid* Sch 3 para 6.

21 *Ibid* Sch 3 para 7.

22 *Ibid* Sch 3 para 8.

23 *Ibid* Sch 3 para 9.

24 *Ibid* Sch 3 para 10.

25 *Ibid* Sch 3 para 11.

26 *Ibid* Sch 3 para 12.

27 Ibid Sch 3 para 13.

28 See *ibid* s 13 (as substituted); and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 725.

29 See *ibid* ss 15, 16 (as amended); and FIRE SERVICES; POLICE.

## UPDATE

### **875 Power to make regulations under the Superannuation Act 1972; in general**

NOTE 3--'The Local Government Pension Scheme (Transitional Provisions) Regulations 1977, SI 1977/1612' should read 'The Local Government Pension Scheme Regulations 1997, SI 1997/1612' which are revoked subject to savings by SI 2008/238, and amended by SI 2008/2425. See now the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007, SI 2007/1166 (amended by SI 2008/1083, SI 2009/1025, SI 2009/3150) and the Local Government Pension Scheme (Administration) Regulations 2008, SI 2008/239.

NOTE 4--Teachers' Superannuation (Consolidation) Regulations 1988 now replaced by Teachers' Pensions Regulations 1997, SI 1997/3001: see EDUCATION vol 15(2) (2006 Reissue) PARA 867 et seq.

NOTE 6--See the Local Government Pension Scheme (Benefits, Membership and Contributions) Regulations 2007, SI 2007/1166 (amended by SI 2008/2425).

NOTE 19--Regulations made under s 7 limiting the amount payable in respect of gratuity payments will not apply to any such payments payable under a contract entered into before the regulations came into force: *Nicholls v Greenwich LBC* [2002] EWCA Civ 46, [2003] ICR 1020.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/19. PUBLIC SERVICE PENSION SCHEMES/876. Information about public service schemes.

### **876. Information about public service schemes.**

In prescribed<sup>1</sup> circumstances, the Secretary of State<sup>2</sup> may provide information to any prescribed person in connection with the following questions:

- 2350 (1) whether an individual who during any period:  
206  
275. (a) has been eligible to be an active member<sup>3</sup> of an occupational pension scheme<sup>4</sup> under the Superannuation Act 1972<sup>5</sup>; but  
276. (b) has instead made contributions to a personal pension scheme<sup>6</sup>,  
207  
2351 has suffered loss as a result of a contravention of rules made under the Financial Services Act 1986 which is actionable<sup>7</sup>; and  
2352 (2) if so, what payment would need to be made to the occupational scheme in respect of the individual to restore the position to what it would have been if the individual had been an active member of the occupational scheme throughout the period in question,

and may impose on that person reasonable fees in respect of administrative expenses incurred in providing that information<sup>8</sup>.

Where such an individual as is mentioned above is admitted or readmitted as an active member of an occupational pension scheme under the Superannuation Act 1972, or a payment is made to the Secretary of State in respect of such an individual for the purpose mentioned in head (2) above, the Secretary of State may impose on any prescribed person reasonable fees in respect of administrative expenses incurred in connection with the admission, readmission or payment<sup>9</sup>.

1 'Prescribed' means (1) in the case of a scheme made under the Superannuation Act 1972 s 1 (as amended) (see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 567), prescribed by a scheme made by the Minister for the Civil Service; or (2) in any other case, prescribed by regulations made by the Secretary of State: Pensions Act 1995 s 172(5).

2 As to the Secretary of State see PARA 1 ante. In the case of an occupational pension scheme under the Superannuation Act 1972 s 1 (as amended), the references in the Pensions Act 1995 s 172(1), (2) to the Secretary of State must be read as references to the Minister for the Civil Service, or such person as may be prescribed: s 172(3). In the case of an occupational pension scheme under the Superannuation Act 1972 s 7 (superannuation of persons employed in local government etc: see PARA 875 ante), the references in the Pensions Act 1995 s 172(1), (2) to the Secretary of State must be read as references to a prescribed person: s 172(4).

3 For the meaning of 'active member' see PARA 612 note 5 ante (definition applied by ibid s 172(5)).

4 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by ibid s 176). See also PARA 598 note 7 ante.

5 See PARA 875 ante.

6 For the meaning of 'personal pension scheme' see PARA 710 ante (definition applied by the Pensions Act 1995 s 176).

7     le actionable under the Financial Services Act 1986 s 62 (actions for damages in respect of contravention of rules etc made under that Act): see the Pensions Act 1995 s 172(1)(a). As to the mis-selling of personal pensions see PARA 738 ante.

8     Ibid s 172(1).

9     Ibid s 172(2).

## **UPDATE**

### **876 Information about public service schemes**

NOTE 7--Now, actionable under the Financial Services Act 1986 s 62 or under the Financial Services and Markets Act 2000 s 150: Pensions Act 1995 s 172(1)(a) (amended by the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(1) INTRODUCTION/877. In general.

## **20. CONTRACTING OUT**

### **(1) INTRODUCTION**

#### **877. In general.**

The employment of an earner<sup>1</sup> who is a member of an occupational pension scheme<sup>2</sup> or personal pension scheme<sup>3</sup> may, if his employer so elects<sup>4</sup> and the statutory requirements are satisfied<sup>5</sup>, become contracted-out employment<sup>6</sup>, with the result that a lower rate of contributions<sup>7</sup> will be paid to, and a lower rate of retirement pension<sup>8</sup> or widow's pension<sup>9</sup> or widowed mother's allowance<sup>10</sup> paid by, the state scheme<sup>11</sup>.

1 For the meaning of 'earner' see PARA 32 ante (definition applied by the Pension Schemes Act 1993 s 181(1)).

2 For the meaning of 'occupational pension scheme' see PARA 741 ante.

3 For the meaning of 'personal pension scheme' see PARA 710 ante.

4 As to election see PARAS 884-885 post.

5 See PARA 882 et seq post.

6 For the meaning of 'contracted-out employment' see PARA 878 post.

7 As to contributions generally see PARA 31 et seq ante.

8 As to state retirement pension see PARA 561 et seq ante.

9 As to widow's pension see PARA 86 ante.

10 As to widowed mother's allowance see PARA 85 ante.

11 See the Pension Schemes Act 1993 Pt III (ss 7-68) (as amended); and PARA 878 et seq post. As to state pensions see PARA 561 et seq ante.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(1) INTRODUCTION/878. Meaning of 'contracted-out employment' and 'guaranteed minimum pension'.

### **878. Meaning of 'contracted-out employment' and 'guaranteed minimum pension'.**

The employment of an earner<sup>1</sup> in employed earner's employment<sup>2</sup> is 'contracted-out employment' in relation to him during any period in which he is under pensionable age<sup>3</sup> and:

- 2353 (1) Either his service in the employment is for the time being service which qualifies him for a pension provided by an occupational pension scheme<sup>4</sup> contracted-out by virtue of satisfying the statutory requirements<sup>5</sup> for a salary-related contracted-out scheme<sup>6</sup>, or his employer<sup>7</sup> makes minimum payments<sup>8</sup> in respect of his employment to an occupational pension scheme which is contracted-out by virtue of satisfying the statutory requirements<sup>9</sup> for a money purchase contracted-out scheme<sup>10</sup>; and
- 2354 (2) there is in force a contracting-out certificate issued by the Secretary of State<sup>11</sup> stating that the employment is contracted-out employment by reference to the scheme<sup>12</sup>.

'Guaranteed minimum pension' means any pension which is provided by an occupational pension scheme in accordance with the statutory requirements<sup>13</sup> to the extent to which its weekly rate is equal to the earner's or, as the case may be, the earner's widow's or widower's guaranteed minimum as determined for the statutory purposes<sup>14</sup>.

1 For the meaning of 'earner' see PARA 32 ante (definition applied by the Pension Schemes Act 1993 s 181(1)).

2 For the meaning of 'employed earner's employment' see PARA 32 ante (definition as applied: see note 1 supra).

3 For the meaning of 'pensionable age' see PARA 562 ante.

4 For the meaning of 'occupational pension scheme' see PARA 741 ante.

5 I.e. by virtue of satisfying the Pension Schemes Act 1993 s 9(2) (as substituted): see PARA 882 post.

6 Ibid s 8(1)(a)(i) (substituted by the Pensions Act 1995 s 136(2)).

7 For the meaning of 'employer' see PARA 660 note 18 ante.

8 'Minimum payment', in relation to an earner's employment in any tax week, means the rebate percentage of so much of the earnings paid to or for the benefit of the earner in that week as exceeds the current lower earnings limit but not the current upper earnings limit (or the prescribed equivalents if he is paid otherwise than weekly); and for these purposes 'rebate percentage' means the appropriate flat rate percentage for the purposes of the Pension Schemes Act 1993 s 42A(2) (as added) (see PARA 912 post): s 8(2) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 23). 'Tax week' means one of the successive periods in a tax year beginning with the first day of that year and every seventh day thereafter, the last day of a tax year (or, in a leap year, the last two days) being treated accordingly as a separate tax week: Pension Schemes Act 1993 s 181(1). For the meaning of 'tax year' see PARA 863 note 1 ante. For the meaning of 'lower earnings limit' and 'upper earnings limit' see the Social Security Contributions and Benefits Act 1992 s 5; and PARA 34 ante (definition applied by the Pension Schemes Act 1993 s 181(1)). 'Current' in relation to those limits, means for the time being in force: s 181(1). 'The prescribed equivalent' means the equivalent prescribed under the Social Security Contributions and Benefits Act 1992 ss 6(1), 8(3) (see PARAS 35-36 ante): Pension Schemes Act 1993 s 181(1).

9 I.e. the requirements of ibid s 9(3) (as amended): see PARA 882 post.

10 Ibid s 8(1)(a)(ii).

11 Ie in accordance with ibid Pt III Ch I (ss 7-39) (as amended): see PARA 879 et seq post. As to the Secretary of State see PARA 1 ante.

12 Ibid s 8(1)(b) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 21). Where an earner has been employed in an employment during a period in which employment of that description was contracted-out but such employment was not otherwise contracted-out in relation to him, and the Secretary of State is satisfied (1) that it was not contracted-out in relation to him solely because he was not during that period a member of the relevant scheme; and (2) that he was not during that period a member of that scheme solely because of inadvertence, he may determine that that earner was in contracted-out employment by reference to that scheme during that period: Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 11.

13 Ie the requirements of the Pension Schemes Act 1993 ss 13, 17 (as amended): see PARAS 890, 893 post.

14 Ibid s 8(2).

## UPDATE

### **878 Meaning of 'contracted-out employment' and 'guaranteed minimum pension'**

TEXT AND NOTES--The following provisions are in force on the abolition date: see Pensions Act 2007 s 15 and PARA 880. 1993 Act s 8(1), (2) further amended: Pensions Act 2007 Sch 4 para 3(2), (4). See further 1993 Act s 8(1A) (added by 2007 Act Sch 4 para 3(3)). For savings see 2007 Act Sch 4 Pt 3.

NOTE 6--1995 Act s 136(2) repealed: Pensions Act 2007 Sch 7 Pt 6 (in force on the abolition date: see 2007 Act s 15 and PARA 880).

NOTE 8--In definition of 'minimum payment' for 'the current upper earnings limit' read 'the applicable limit': Pension Schemes Act 1993 s 8(2) (definition amended by the National Insurance Contributions Act 2008 Sch 1 para 8(2)). 'The applicable limit' means (1) in relation to a tax year before 2009-10, the upper earnings limit; and (2) in relation to 2009-10 or any subsequent tax year, the upper accrual point: Pension Schemes Act 1993 s 8(2A) (added by the National Insurance Contributions Act 2008 Sch 1 para 8(3)). In definition of 'rebate percentage' reference to Pension Schemes Act 1993 s 42A(2) is now to s 42A: s 8(2) (definition amended by the Social Security Act 1998 Sch 7 para 126: this amendment repealed on abolition date: 2007 Act Sch 7 Pt 6). Definition of 'the prescribed equivalent' in the Pension Schemes Act 1993 s 181(1) repealed: Welfare Reform and Pensions Act 1999 Sch 13 Pt VI.

TEXT AND NOTE 11--For 'Secretary of State' read 'Inland Revenue': 1993 Act s 8(1)(b) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 34).

NOTE 11--Secretary of State's functions under SI 1996/1172 reg 11 transferred to Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

TEXT AND NOTE 14--Definition of 'guaranteed minimum pension' in Pension Schemes Act 1993 s 8(2) amended so as to extend provision to surviving civil partners: SI 2005/2050.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(1) INTRODUCTION/879. General power to make regulations.

### **879. General power to make regulations.**

There are general powers to make regulations with regard to contracting out and the issue of certificates<sup>1</sup>. With regard to occupational pension schemes<sup>2</sup>, regulations may make provision in relation to:

- 2355 (1) the beginning and end of contracted-out employment<sup>3</sup>;
- 2356 (2) the modification of Part III of the Pension Schemes Act 1993<sup>4</sup> in special cases<sup>5</sup>;
- 2357 (3) state scheme premiums and the contributions equivalent premiums which replace them under the Pensions Act 1995<sup>6</sup>;
- 2358 (4) schemes covering different employers<sup>7</sup>;
- 2359 (5) public service pension schemes<sup>8</sup>; and
- 2360 (6) incidental matters<sup>9</sup>.

Regulations may make provision with regard to personal pension schemes<sup>10</sup> corresponding to that made under head (3) above<sup>11</sup>.

1 See the Pension Schemes Act 1993 s 39. For the meaning of 'regulations' see PARA 557 note 2 ante.

2 For the meaning of 'occupational pension scheme' see PARA 741 ante.

3 See the Pension Schemes Act 1993 s 39, Sch 2 paras 1-3 (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 84(a)). As to the exercise of this power see the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 43. For the meaning of 'contracted-out employment' see PARA 878 ante.

4 Ie the Pension Schemes Act 1993 Pt III (ss 7-68) (as amended): see PARAS 878 ante, 880 et seq post.

5 See ibid Sch 2 para 4 (amended by the Pensions Act 1995 Sch 5 paras 18, 84(b)). The Pension Schemes Act 1993 ss 18, 19, 67, 68 (as amended) (see PARAS 891, 894, 925 post) may not be so modified: Sch 2 para 4(1). Part IV Ch III (ss 87-92) (see PARA 947 et seq post) and Pt V Ch II (ss 109, 110) (as amended) (see PARA 926 post) may also be modified except in so far as they relate to personal pension schemes, the members of such schemes or rights in respect of them: see Sch 2 para 4(1).

6 See ibid Sch 2 para 5 (amended by the Pensions Act 1995 ss 141(2), 177, Sch 5 paras 18, 84(d), Sch 7 Pt III). As to the exercise of this power see the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, Pt VI (regs 49-54) (amended by SI 1977/786).

7 See the Pension Schemes Act 1993 Sch 2 para 6.

8 See ibid Sch 2 para 7. Provision has been made with relation to the fire service, the police, local government service, teachers and National Health Service staff: see 33 Halsbury's Statutes (1997 Reissue) 823 and Supp.

9 See the Pension Schemes Act 1993 Sch 2 para 8.

10 For the meaning of 'personal pension scheme' see PARA 710 ante.

11 See the Pension Schemes Act 1993 Sch 2 para 9 (amended by the Pensions Act 1995 Sch 5 paras 18, 84(e)).

## **UPDATE**

### **879 General power to make regulations**

NOTE 3--1993 Act Sch 2 paras 2, 3 further amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 62. Functions of the Secretary of State under SI 1996/1172, reg 43, transferred to Commissioners of Inland Revenue: 1999 Act s 1(2), Sch 2.

NOTE 5--1993 Act Sch 2 para 5 further amended: 1999 Act Sch 1 para 62.

NOTE 6--As to the exercise of the power under 1993 Act Sch 2 para 4, see also the Occupational Pension Schemes (Contracting-out) (Amount Required for Restoring State Scheme Rights and Miscellaneous Amendment) Regulations 1998, SI 1998/1397 (amended by SI 2005/891, SI 2005/3164, SI 2007/366). Functions of the Secretary of State under SI 1996/1172, Pt VI (regs 49-54), transferred to Commissioners of Inland Revenue: 1999 Act s 1(2), Sch 2. SI 1996/1172 Pt VI further amended: SI 2005/2050. SI 1996/1172 reg 49 amended: SI 2005/3377 (see also Sch 3 para 3), SI 2008/1903.

NOTE 8--1993 Act Sch 2 para 8 further amended: 1999 Act Sch 1 para 62.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(1) INTRODUCTION/880. Issue of contracting-out and appropriate scheme certificates.

### **880. Issue of contracting-out and appropriate scheme certificates.**

Regulations<sup>1</sup> must provide for the Secretary of State<sup>2</sup> to issue certificates stating:

- 2361 (1) that the employment<sup>3</sup> of an earner<sup>4</sup> in employed earner's<sup>5</sup> employment is contracted-out employment<sup>6</sup> by reference to an occupational pension scheme<sup>7</sup>; or
- 2362 (2) that a personal pension scheme<sup>8</sup> is an appropriate scheme<sup>9</sup>;

and in the Pension Schemes Act 1993 a certificate under head (1) above is referred to as 'a contracting-out certificate' and a certificate under head (2) above as 'an appropriate scheme certificate'<sup>10</sup>.

The regulations must provide for contracting-out certificates to be issued to employers<sup>11</sup> and to specify:

- 2363 (a) the employments which are to be treated, either generally or in relation to any specified description of earners, as contracted-out employments<sup>12</sup>; and
- 2364 (b) the occupational pension schemes by reference to which those employments are to be so treated<sup>13</sup>.

An occupational pension scheme is a contracted-out scheme in relation to an earner's employment if it is for the time being specified in a contracting-out certificate in relation to that employment; and references in the Pension Schemes Act 1993 to the contracting-out of a scheme are references to its inclusion in such a certificate<sup>14</sup>. An appropriate scheme certificate for the time being in force in relation to a scheme is conclusive that the scheme is an appropriate scheme<sup>15</sup>. Regulations must provide that any question whether a personal pension scheme is or at any time was an appropriate scheme must be determined by the Secretary of State<sup>16</sup>. Except in prescribed circumstances, no contracting-out certificate or appropriate scheme certificate is to have effect from a date earlier than that on which the certificate is issued<sup>17</sup>.

Any contracting-out certificate for the time being in force in respect of an employed earner's employment is conclusive that the employment is contracted-out employment<sup>18</sup>.

1 For the meaning of 'regulations' see PARA 557 note 2 ante.

2 As to the Secretary of State see PARA 1 ante.

3 For the meaning of 'employment' see PARA 560 note 5 ante.

4 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

5 For the meaning of 'employed earner' see PARA 32 ante (definition as applied: see note 4 supra).

6 For the meaning of 'contracted-out employment' see PARA 878 ante.

7 For the meaning of 'occupational pension scheme' see PARA 741 ante.

8 For the meaning of 'personal pension scheme' see PARA 710 ante.

9 A personal pension scheme is an 'appropriate scheme' if there is in force an appropriate scheme certificate issued in accordance with the Pension Schemes Act 1993 Pt III Ch I (ss 7-39) (as amended) (see PARAS 878 ante, 881 et seq post): see s 7(4) (amended by the Pensions Act 1995 s 177, Sch 7 Pt III).

10 Pension Schemes Act 1993 s 7(1) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 22). See the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172 (as amended); the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470; and PARA 885 et seq post.

11 For the meaning of 'employer' see PARA 660 note 18 ante.

12 Pension Schemes Act 1993 s 7(2)(a).

13 Ibid s 7(2)(b). The regulations may provide, in the case of contracting-out certificates issued before the principal appointed day, for their cancellation by virtue of the regulations: (1) at the end of a prescribed period beginning with that day; or (2) if prescribed conditions are not satisfied at any time in that period, but for them to continue to have effect until so cancelled; and the regulations may provide that a certificate having effect on and after that day by virtue of this provision is to have effect, in relation to any earner's service on or after that day, as if issued on or after that day: Pension Schemes Act 1993 s 7(2A) (added by the Pensions Act 1995 s 136(1)). For the purposes of the Pension Schemes Act 1993 Pt III (ss 7-68) (as amended) (see PARAS 878 ante, 881 et seq post), 'the principal appointed day' means the day designated by an order under the Pensions Act 1995 s 180 as the principal appointed day for the purposes of Pt III (ss 135-151) (ie 6 April 1997: see the Pensions Act 1995 (Commencement No 3) Order 1996, SI 1996/778, art 2(7)): Pension Schemes Act 1993 s 7(2) (B) (added by the Pensions Act 1995 s 136(1)).

14 Pension Schemes Act 1993 s 7(3).

15 Ibid s 7(5).

16 Ibid s 7(6) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 22). See the Occupational and Personal Pension Schemes (Contracting-out etc: Review of Determinations) Regulations 1997, SI 1997/358; and see PARA 929 post.

17 Pension Schemes Act 1993 s 7(7). For transitional provisions see the Occupational Pension Schemes (Contracting-out) Transitional Regulations 1997, SI 1997/38.

18 Pension Schemes Act 1993 s 8(4).

## UPDATE

### 880 Issue of contracting-out and appropriate scheme certificates

TEXT AND NOTES--The following provisions are in force unless otherwise stated. Any certificate which is either (1) a contracting-out certificate in relation to a money purchase contracted-out scheme, or (2) an appropriate scheme certificate, and is in force immediately before the abolition date, ceases to have effect on that date: Pensions Act 2007 s 15(1) (not yet in force). In s 15 'the abolition date' means the day appointed under s 30 for the coming into force of s 15(1); and 'contracting-out certificate', 'money purchase contracted-out scheme' and 'appropriate scheme certificate' have the meanings given by the Pension Schemes Act 1993 s 181(1) (as in force immediately before that day): Pensions Act 2007 s 15(2). Schedule 4 Pts 1 and 2 contain amendments which are consequential on, or related to, the provision made by s 15(1), and Sch 4 Pt 3 contains savings relating to amendments made by Pt 1: s 15(3). The amendments made by Sch 4 Pt 1 have effect as from the abolition date (but any power to make regulations conferred by those amendments may be exercised at any time so as to make regulations having effect as from the abolition date): s 15(4). The Secretary of State may by regulations make (a) such consequential, incidental or supplemental provision, and (b) such transitional, transitory or saving provision, as he thinks necessary or expedient in connection with, or in consequence of, the provisions of s 15(1) and Sch 4: s 15(5). Regulations under s 15(5) may in particular amend, repeal or revoke any provision of any Act or subordinate legislation (whenever passed or made): s 15(6). No regulations which amend or repeal any provision of an Act may

be made under s 15 unless a draft of the regulations has been laid before and approved by a resolution of each House of Parliament: s 15(7). A statutory instrument containing regulations under s 15 that do not fall within s 15(7) is subject to annulment in pursuance of a resolution of either House of Parliament: s 15(8). For further provision as to regulations under s 15 see s 25. As to the review of the operation of the Pensions Act 2007 see s 24.

References in the Pension Schemes Act 1993 to a contracting-out certificate, a contracted-out scheme and to contracting-out in a context relating to a money purchase contracted-out scheme are to be construed in accordance with s 181A: 1993 Act s 7(8) (added by 2007 Act Sch 4 para 2(5)) (in force on the abolition date: see *supra*).

Definition of 'appropriate scheme certificate' in 1993 Act s 181(1) substituted; now 'appropriate scheme' and 'appropriate scheme certificate' are to be construed in accordance with s 181A: s 181(1) (as substituted by Pensions Act 2007 Sch 4 para 34(2)(b)) (in force on the abolition date: see *supra*).

The following provisions apply for the interpretation of the Pension Schemes Act 1993 on and after the abolition date: s 181A(1) (added by Pensions Act 2007 Sch 4 para 35). An occupational pension scheme was a money purchase contracted-out scheme at a time before the abolition date if, at that time, the scheme was contracted-out by virtue of satisfying the 1993 Act s 9(3) (as it then had effect): s 181A(2) (as added). A money purchase contracted-out scheme was, at a time before the abolition date, a contracted-out scheme in relation to an earner's employment if it was, at that time, specified in a contracting-out certificate in relation to that employment; and references to the contracting-out of a scheme are, in relation to a money purchase contracted-out scheme, references to its inclusion in such a certificate: s 181A(3) (as added). Any reference to a contracting-out certificate is, in relation to a money purchase contracted-out scheme, a reference to a certificate issued by virtue of s 7, as it had effect before the abolition date, in relation to the employment of an earner in employed earner's employment which was contracted-out by reference to that scheme: s 181A(4) (as added). Any certificate so issued that was, at a time before the abolition date, in force in respect of an employed earner's employment is to be taken as conclusive that the employment was, at that time, contracted-out employment: s 181A(5) (as added). A personal pension scheme was an appropriate scheme at a time before the abolition date if, at that time, there was in force a certificate issued under s 7(1)(b) (as it then had effect) stating that the scheme was an appropriate scheme; and 'appropriate scheme certificate' means such a certificate: s 181A(6) (as added). Any appropriate scheme certificate in force in relation to a scheme at any time before the abolition date is to be taken as conclusive that the scheme was, at that time, an appropriate scheme: s 181A(7) (as added).

TEXT AND NOTE 2--For 'Secretary of State' read 'Inland Revenue': 1993 Act s 7(1), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 33. 1999 Act Sch 1 para 33 repealed: Pensions Act 2007 Sch 7 Pt 6 (in force on the abolition date: see TEXT AND NOTES).

NOTE 9--1993 Act s 7(4) omitted: Pensions Act 2007 Sch 4 para 2(3), Sch 7, Pt 6 (in force on the abolition date: see TEXT AND NOTES).

TEXT AND NOTE 10--The following provisions come into force on the abolition date (see TEXT AND NOTES). Regulations must provide for HMRC to issue certificates stating that the employment of an earner in employed earner's employment is contracted-out employment by reference to an occupational pension scheme: 1993 Act s 7(1) (substituted by Pensions Act 2007 Sch 4 para 2(2)). In the 1993 Act such a certificate is referred to as 'a contracting-out certificate': s 7(1A) (as so substituted).

NOTE 10--SI 1996/1172 further amended: SI 1997/3038, SI 1998/1397, Employment Rights (Dispute Resolution) Act 1998 s 1(2), SI 1999/3198, SI 2000/2975, SI 2001/943, SI 2002/681, SI 2005/706, SI 2005/2050, SI 2005/3377, SI 2006/744, SI 2006/1337, SI 2007/60, SI 2007/814, SI 2007/834, SI 2007/1154, SI 2007/3014, SI 2008/2301, SI 2009/598, SI 2009/615, SI 2009/846. The functions of the Secretary of State under SI 1996/1172 (except those under regs 23, 61) and 1997/470 now transferred to the Commissioners of Inland Revenue: 1999 Act s 1(2), Sch 2.

TEXT AND NOTES 15, 16--1993 Act s 7(5), (6) omitted: 2007 Act Sch 4 para 2(3), Sch 7, Pt 6 (in force on the abolition date: see TEXT AND NOTES).

TEXT AND NOTE 16--For 'Secretary of State' read 'Inland Revenue': 1993 Act s 7(6), amended by 1999 Act Sch 1 para 33. 1999 Act Sch 1 para 33 repealed: Pensions Act 2007 Sch 7 Pt 6 (in force on the abolition date: see TEXT AND NOTES). Secretary of State's functions under SI 1997/358 transferred to Commissioners of Inland Revenue: 1999 Act s 1(2), Sch 2.

TEXT AND NOTE 17--In 1993 Act s 7(7) omit 'or appropriate scheme certificate': Pensions Act 2007 Sch 4 para 2(4), Sch 7, Pt 6 (in force on the abolition date: see TEXT AND NOTES).

NOTE 17--Secretary of State's functions under SI 1997/38 transferred to Commissioners of Inland Revenue: 1999 Act s 1(2), Sch 2.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(1) INTRODUCTION/881. General provisions that may be made.

### **881. General provisions that may be made.**

Regulations may make provision:

- 2365 (1) for the manner in which, and time at which or period within which, minimum payments<sup>1</sup> are to be made<sup>2</sup>;
- 2366 (2) for the recovery by employers<sup>3</sup> of amounts in respect of the whole or part of minimum payments by deduction from earnings<sup>4</sup>;
- 2367 (3) for calculating the amounts payable according to a scale prepared from time to time by the Secretary of State<sup>5</sup> or otherwise adjusting them so as to avoid fractional amounts or otherwise facilitate computation<sup>6</sup>;
- 2368 (4) for requiring that the liability in respect of a payment made in a tax week<sup>7</sup>, in so far as the liability depends on any conditions as to a person's age<sup>8</sup> on retirement, must be determined as at the beginning of the week or as at the end of it<sup>9</sup>;
- 2369 (5) for securing that liability is not avoided or reduced by the payment of earnings being made in accordance with any practice which is abnormal for the employment in respect of which the earnings are paid<sup>10</sup>;
- 2370 (6) without prejudice to head (5) above, for enabling the Secretary of State, where he is satisfied as to the existence of any practice in respect of the payment of earnings whereby the incidence of minimum payments is avoided or reduced by means of irregular or unequal payments of earnings, to give directions for securing that minimum payments are payable as if that practice were not followed<sup>11</sup>;
- 2371 (7) for the intervals at which, for the purposes of minimum payments, payments of earnings are to be treated as made<sup>12</sup>; and
- 2372 (8) for the relevant statutory provisions<sup>13</sup> to have effect, in prescribed cases, as if for any reference to a tax week there were substituted a reference to a prescribed period<sup>14</sup>.

1 For the meaning of 'minimum payment' see PARA 878 note 8 ante.

2 Pension Schemes Act 1993 s 8(3)(a).

3 For the meaning of 'employer' see PARA 660 note 18 ante.

4 Pension Schemes Act 1993 s 8(3)(b). For the meaning of 'earnings' see PARA 33 ante (definition applied by s 181(1)).

5 As to the Secretary of State see PARA 1 ante.

6 Pension Schemes Act 1993 s 8(3)(c).

7 For the meaning of 'tax week' see PARA 878 note 8 ante.

8 'Age', in relation to any person, is to be construed so that (1) he is over or under a particular age if he has or, as the case may be, has not attained that age; (2) he is between two particular ages if he has attained the first but not the second: Pension Schemes Act 1993 s 181(1).

9 Ibid s 8(3)(d).

10 Ibid s 8(3)(e).

11 Ibid s 8(3)(f).

12 Ibid s 8(3)(g).

13 le the provisions of ibid s 8 (as amended): see heads (1)-(7) in the text and PARAS 878, 880 ante.

14 Ibid s 8(3)(h).

## **UPDATE**

### **881 General provisions that may be made**

TEXT AND NOTE 11--For 'Secretary of State' and 'he is' read 'Inland Revenue' and 'they are': 1993 Act s 8(3)(f), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 34.

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## **(2) REQUIREMENTS FOR CERTIFICATION**

### **(i) In general**

#### **882. Requirements for certification of schemes; in general.**

An occupational pension scheme<sup>1</sup> can be contracted-out<sup>2</sup> in relation to an earner's<sup>3</sup> employment<sup>4</sup> only if it satisfies certain conditions<sup>5</sup>. Where there are two or more occupational pension schemes in force in relation to an earner's employment, none of which can by itself be a contracted-out scheme, the Secretary of State may, if he thinks fit, treat them for contracting-out purposes as a single scheme<sup>6</sup>.

A personal pension scheme<sup>7</sup> can be an appropriate scheme only if:

- 2373 (1) certain statutory requirements<sup>8</sup> and such other requirements as may be prescribed are satisfied in its case; and
- 2374 (2) the rules of the scheme applying to protected rights are framed so as to comply with the relevant requirements<sup>9</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 741 ante.

2 For the meaning of 'contracted-out' see PARA 878 ante.

3 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

4 For the meaning of 'employment' see PARA 560 note 5 ante.

5 I.e. the conditions of the Pension Schemes Act 1993 s 9(2), (3) (as amended): see s 9(1). An occupational pension scheme satisfies s 9(2) (s 9(2), (2A)-(2C) substituted and added respectively by the Pensions Act 1995 s 136(3)), only if: (1) in relation to any earner's service before the principal appointed day (ie 6 April 1997: see PARA 880 note 13 ante), it satisfies the conditions of the Pension Schemes Act 1993 s 9(2A) (as so substituted); (2) in relation to any earner's service on or after that day, it satisfies the conditions of s 9(2B) (as so substituted): s 9(2) (as so substituted). The conditions of s 9(2A) (as so substituted) are that: (a) the scheme complies in all respects with ss 13-23 (as amended) (see PARA 890 et seq post) or, in such cases or classes of case as may be prescribed, with those sections as modified by regulations; and (b) the rules of the scheme applying to guaranteed minimum pensions are framed so as to comply with the relevant requirements: s 9(2A) (as so substituted). The conditions of s 9(2B) (as so substituted) are that the Secretary of State is satisfied that: (i) the scheme complies with s 12A (as added) (see PARA 887 post); (ii) restrictions imposed under the Pensions Act 1995 s 40 (restriction on employer-related investments) (see PARA 806 ante) apply to the scheme and the scheme complies with those restrictions; (iii) the scheme satisfies such other requirements as may be prescribed (which must include requirements as to the amount of the resources of the scheme and may include a requirement that, if the only members of the scheme were those falling within any prescribed class or description, the scheme would comply with the Pension Schemes Act 1993 s 12A (as added)); and (iv) the scheme does not fall within a prescribed class or description; and if he is satisfied that the rules of the scheme are framed so as to comply with the relevant requirements: s 9(2B) (as so substituted). Regulations may modify heads (a)-(b) supra in their application to occupational pension schemes falling within a prescribed class or description: s 9(2C) (as so substituted).

An occupational pension scheme satisfies s 9(3) (amended by the Pensions Act 1995 ss 136(4), 151, 177, Sch 5 paras 18, 24, Sch 7 Pt III) only if: (A) the requirements imposed by or by virtue of the Pension Schemes Act 1993 ss 26-32 (as amended) (see PARAS 883, 898-904 post) and such other requirements as may be prescribed are satisfied in its case; (B) the Secretary of State is satisfied that the scheme does not fall within a prescribed class or description; and (C) such other requirements as may be prescribed are satisfied in its case; and the rules of

the scheme applying to protected rights are framed so as to comply with the relevant requirements: s 9(3) (as so substituted).

A contracting-out certificate must state whether the scheme is contracted-out by virtue of s 9(2), (3) (as so substituted and amended): s 12(1). Where a scheme satisfies both sets of statutory requirements the employers, in their application for a certificate, must specify one of those subsections as the subsection by virtue of which they wish the scheme to be contracted-out: s 12(2). A scheme which has been contracted-out by virtue of s 9(2) or (3) may not become contracted-out by reason of the other except in prescribed circumstances: s 12(3).

'Relevant requirements' means the requirements of any regulations prescribing the form and content of rules of contracted-out or, as the case may be, appropriate schemes; and such other requirements as to form and content (not inconsistent with regulations) as may be imposed by the Secretary of State as a condition of contracting out or, as the case may be, of being an appropriate scheme, either generally or in relation to a particular scheme: s 9(6) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 21). As to the Secretary of State see PARA 1 ante. For the meaning of 'prescribed' see PARA 555 note 1 ante; for the meaning of 'modifications' see PARA 664 note 10 ante; for the meaning of 'regulations' see PARA 557 note 2 ante; for the meaning of 'guaranteed minimum pension' see PARA 878 ante; for the meaning of 'resources' see PARA 609 note 2 ante; for the meaning of 'protected rights' see PARA 883 post; for the meaning of 'contracting-out certificate', 'contracted-out scheme' and 'appropriate scheme' see PARA 880 ante; for the meaning of 'employer' see PARA 660 note 18 ante; and as to the power to prescribe persons who are to be regarded as members or prospective members of a pension scheme see PARA 557 note 9 ante.

6 Pension Schemes Act 1993 s 9(4) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 21).

7 For the meaning of 'personal pension scheme' see PARA 710 ante.

8 The requirements imposed by the Pension Schemes Act 1993 ss 26-32 (as amended): see PARAS 883, 898-904 post.

9 Pension Schemes Act 1993 s 9(5); and see note 5 supra.

## UPDATE

### 882 Requirements for certifications of schemes; in general

TEXT AND NOTES--Regulations about pension schemes made under the Pension Schemes Act 1993 Pt 3 Ch 1 may contain provisions framed by reference to whether or not a scheme (1) is approved under the Income and Corporation Taxes Act 1988 Pt 14 Ch 1 (retirement benefit schemes), or is a relevant statutory scheme within the meaning of that Chapter, or (2) is approved under the Income and Corporation Taxes Act 1988 Pt 14 Ch 4 (personal pension schemes): Pension Schemes Act 1993 s 9(5A) (added by Pensions Act 2004 s 283).

NOTES 5, 9--1993 Act s 9(1), (6) amended, ss 9(3), (5), 12 repealed: Pensions Act 2007 Sch 4 paras 4, 6, Sch 7 Pt 6 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

NOTE 5--1993 Act s 9(2A) amended: Pensions Act 2007 s 14(4).

In 1993 Act s 9(2B), for 'Secretary of State' read 'Inland Revenue': Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 35.

In 1993 Act s 9(3)(aa) (see head (B)), for 'Secretary of State' read 'Inland Revenue': 1999 Act Sch 1 para 35 (this amendment is repealed by Pensions Act 2007 Sch 7 Pt 6 (in force on the abolition date: see 2007 Act s 15 and PARA 880)).

TEXT AND NOTE 6--For 'Secretary of State' read 'Inland Revenue' and for 'he' read 'it' 1993 Act s 9(4), amended by 1999 Act Sch 1 para 35.

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### **883. Protected rights and money purchase benefits.**

Subject to the following provisions, the protected rights of a member<sup>1</sup> of a pension scheme are his rights to money purchase benefits<sup>2</sup> under the scheme<sup>3</sup>. If the rules of an occupational pension scheme so provide, a member's protected rights are:

- 2375 (1) his rights under the scheme which derive from the payment of minimum payments<sup>4</sup> together with any payments by the Secretary of State<sup>5</sup> to the scheme<sup>6</sup> in respect of the member<sup>7</sup>;
- 2376 (2) any rights of the member to money purchase benefits which derive from protected rights under another occupational pension scheme or under a personal pension scheme which have been the subject of a transfer payment<sup>8</sup>; and
- 2377 (3) such other rights as may be prescribed<sup>9</sup>.

If the rules of a personal pension scheme<sup>10</sup> so provide, a member's protected rights are:

- 2378 (a) his rights under the scheme which derive from any payment of minimum contributions to the scheme<sup>11</sup>; and
- 2379 (b) any rights of his to money purchase benefits which derive from protected rights under another personal pension scheme or protected rights under an occupational pension scheme which have been the subject of a transfer payment<sup>12</sup>; and
- 2380 (c) such other rights as may be prescribed<sup>13</sup>.

1 As to the power to prescribe for these purposes the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member see PARA 557 note 9 ante. For the meaning of 'prescribe' see PARA 555 note 1 ante; and for the meaning of 'occupational pension scheme' see PARA 741 ante.

2 For the meaning of 'money purchase benefits' see PARA 811 note 2 ante.

3 Pension Schemes Act 1993 s 10(1).

4 For the meaning of 'minimum payment' see PARA 878 note 8 ante.

5 As to the Secretary of State see PARA 1 ante.

6 Ie under the Social Security Act 1986 s 7 (repealed and not replaced) and the Pension Schemes Act 1993 s 42A(3) (as added): see PARA 912 post.

7 Ibid s 10(2)(a) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 25).

8 Pension Schemes Act 1993 s 10(2)(b).

9 Ibid s 10(2)(c). For the meaning of 'prescribed' see PARA 555 note 1 ante. As to the prescribed rights for the purposes of s 10(2), (3) see the Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 3 (amended by SI 1997/786).

10 For the meaning of 'personal pension scheme' see PARA 710 ante.

11 Pension Schemes Act 1993 s 10(3)(a). 'Minimum contributions' must be construed in accordance with s 43-45 (as amended) (see PARAS 913-915 post): s 181(1).

12 Ibid s 10(3)(b).

13 Ibid s 10(3)(c). Where the rules of the scheme make such provision as is mentioned in s 10(2) (as amended) or s 10(3), they must also make provision for the identification of the protected rights: s 27(1). The value of such protected rights as are mentioned in s 10(2) (as amended) or s 10(3) must be calculated in a manner no less favourable than that in which the value of any other rights of the member to money purchase benefits under the scheme is calculated: s 27(2). Subject to s 27(2), the value of protected rights must be calculated and verified in such manner as may be prescribed: s 27(3). For the prescribed manner of calculation and verification of protected rights see the Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 2. As to tax requirements see the Pension Schemes Act 1993 s 33; and PARA 898 post.

## UPDATE

### 883 Protected rights and money purchase benefits

TEXT AND NOTES--Pension Schemes Act 1993 s 10(1) now also subject to s 10(4), (5) (added by the Welfare Reform and Pension Act 1993 s 32(2)): Pension Schemes Act 1993 s 10(1) (amended by the Welfare Reform and Pensions Act 1999 s 32(2)). Where, in the case of a scheme which makes such provision as is mentioned in the Pension Schemes Act 1993 s 10(2), (3), a member's rights under the scheme become subject to a pension debit, his protected rights exclude the appropriate percentage of the rights which were his protected rights immediately before the day on which the pension debit arose: s 10(4) (as added). For the purposes of s 10(4), the appropriate percentage is (1) if the order or provision on which the pension debit depends specifies the percentage value to be transferred, that percentage; (2) if the order or provision on which the pension debit depends specifies an amount to be transferred, the percentage which the appropriate amount for the purposes of the Welfare Reform and Pensions Act 1999 s 29(1) represents of the amount mentioned in s 29(3)(b) (see PARA 961A.3): Pension Schemes Act 1993 s 10(5) (as added).

Where, in the case of a scheme which makes such provision as is mentioned in s 10(2) or (3), any liability of the scheme in respect of a member's protected rights ceases by virtue of a civil recovery order, his protected rights are extinguished or reduced accordingly: s 10(6) (added by the Proceeds of Crime Act 2002 Sch 11 para 22(2)). 'Civil recovery order' means an order under s 266 or an order under s 276 imposing the requirement mentioned in s 277(3) (consent order: pensions): Pension Schemes Act 1993 s 181(1) (definition added by the Proceeds of Crime Act 2002 Sch 11 para 22(6)).

TEXT AND NOTE 5--For 'Secretary of State' read 'Inland Revenue': 1993 Act s 10(2)(b), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 36.

TEXT AND NOTES 8, 12--For modification of reference to 'transfer payment' in 1993 Act s 10 see SI 2005/992.

NOTES 9, 13--Functions of Secretary of State under SI 1996/1537 regs 2, 3 transferred to Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

NOTE 9--SI 1996/1537 reg 3 further amended: SI 2006/744.

TEXT AND NOTE 11--1993 Act s 10(3)(a) amended: Pensions Act 2007 Sch 4 para 5 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

NOTE 13--SI 1996/1537 reg 2 substituted: SI 2008/1050.

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#### **884. Elections as to employments covered by contracting-out certificates.**

Subject to the provisions of Part III of the Pension Schemes Act 1993<sup>1</sup>, an employment<sup>2</sup> otherwise satisfying the conditions for inclusion in a contracting-out certificate<sup>3</sup> must be so included if and so long as the employer<sup>4</sup> so elects and not otherwise<sup>5</sup>. Subject as follows, an election may be so made, and an employment so included, either generally or in relation only to a particular description of earners<sup>6</sup>; but except in such cases as may be prescribed<sup>7</sup>, an employer must not, in making or abstaining from making any such election, discriminate between different earners on any grounds other than the nature of their employment<sup>8</sup>. If the Secretary of State<sup>9</sup> considers that an employer is contravening this provision in relation to any scheme, he may:

- 2381 (1) refuse to give effect to any election made by the employer in relation to that scheme<sup>10</sup>; or
- 2382 (2) cancel any contracting-out certificate held by the employer in respect of it<sup>11</sup>.

Regulations<sup>12</sup> may make provision:

- 2383 (a) for regulating the manner in which an employer is to make an election with a view to the issue, variation or surrender of a contracting-out certificate<sup>13</sup>;
- 2384 (b) for requiring an employer to give a notice of his intentions in respect of making or abstaining from making any such election in relation to any existing or proposed scheme:
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- 277. (i) to employees<sup>14</sup> in any employment to which the scheme applies or to which it is proposed that it should apply<sup>15</sup>;
- 278. (ii) to any independent trade union<sup>16</sup> recognised to any extent for the purpose of collective bargaining in relation to those employees<sup>17</sup>;
- 279. (iii) to the trustees and managers<sup>18</sup> of the scheme<sup>19</sup>; and
- 280. (iv) to such other persons as may be prescribed<sup>20</sup>;
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- 2385 (c) for requiring an employer, in connection with any such notice, to furnish such information as may be prescribed and to undertake such consultations as may be prescribed with any such independent trade union<sup>21</sup>;
- 2386 (d) for empowering the Secretary of State to refuse to give effect to an election made by an employer unless he is satisfied that he has complied with the requirements of the regulations<sup>22</sup>;
- 2387 (e) for referring to an industrial tribunal<sup>23</sup> any question:
- 210
- 281. (i) whether an organisation is such an independent trade union<sup>24</sup>; or
- 282. (ii) whether the requirements of the regulations as to consultation have been complied with<sup>25</sup>.
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<sup>1</sup> ie the Pension Schemes Act 1993 Pt III (ss 7-68), Sch 2 (as amended): see PARA 878 et seq ante, 885 et seq post.

- 2 For the meaning of 'employment' see PARA 560 note 5 ante.
- 3 For the meaning of 'contracting-out certificate' see PARA 880 ante.
- 4 For the meaning of 'employer' see PARA 660 note 18 ante.
- 5 Pension Schemes Act 1993 s 11(1). As to elections made in the period from 1 January 1977 to 5 April 1997 ('the transitional period') see the Occupational Pension Schemes (Contracting-out) Transitional Regulations 1997, SI 1997/38.
- 6 Pension Schemes Act 1993 s 11(2). For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by s 181(1)).
- 7 For the meaning of 'prescribed' see PARA 555 note 1 ante.
- 8 Pension Schemes Act 1993 s 11(3).
- 9 As to the Secretary of State see PARA 1 ante.
- 10 Pension Schemes Act 1993 s 11(4)(a) (s 11(4) amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 21).
- 11 Pension Schemes Act 1993 s 11(4)(b) (as amended: see note 10 supra).
- 12 For the meaning of 'regulations' see PARA 557 note 2 ante.
- 13 Pension Schemes Act 1993 s 11(5)(a).
- 14 For the meaning of 'employee' see PARA 598 note 5 ante.
- 15 Pension Schemes Act 1993 s 11(5)(b)(i).
- 16 For the meaning of 'independent trade union' see the Trade Union and Labour Relations (Consolidation) Act 1992 s 1; and EMPLOYMENT vol 40 (2009) PARA 859 (definition applied by the Pension Schemes Act 1993 s 181(1)).
- 17 Pension Schemes Act 1993 s 11(5)(b)(ii).
- 18 As to the power to provide who is to be treated as a manager of an occupational pension scheme for these purposes see PARA 555 note 9 ante.
- 19 Pension Schemes Act 1993 s 11(5)(b)(iii).
- 20 Ibid s 11(5)(b)(iv).
- 21 Ibid s 11(5)(c).
- 22 Ibid s 11(5)(d) (as amended: see note 10 supra).
- 23 For the meaning of 'industrial tribunal' see PARA 557 note 14 ante.
- 24 Pension Schemes Act 1993 s 11(5)(e)(i).
- 25 Ibid s 11(5)(e)(ii).

## UPDATE

### 884 Elections as to employments covered by contracting-out certificates

NOTE 5--Secretary of State's functions under SI 1997/38 transferred to Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

TEXT AND NOTES 9, 10--For 'Secretary of State' read 'Inland Revenue' and for 'he' read 'it': 1993 Act s 11(4), amended by 1999 Act Sch 1 para 37.

TEXT AND NOTE 22--For 'Secretary of State' read 'Inland Revenue' and for 'he' read 'it': 1993 Act s 11(5)(d), amended by 1999 Act Sch 1 para 37.

TEXT AND NOTE 23--Industrial tribunals now called employment tribunals: Employment Rights (Dispute Resolution) Act 1998 s 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(2) REQUIREMENTS FOR CERTIFICATION/(i) In general/885. Elections for the issue of contracting-out certificates.

### **885. Elections for the issue of contracting-out certificates.**

Subject to the provisions relating to elections for the issue, variation or surrender of certificates where the employment remains contracted-out<sup>1</sup>, an election with a view to the issue of a contracting-out certificate<sup>2</sup> may only be made after notices of intention to make such an election have been given by the employer<sup>3</sup> in the specified manner<sup>4</sup> to:

- 2388 (1) the earners in respect of whose employment the election is proposed to be made, and those (if any) in that employment in relation to whom the employer is not electing that the employment is to be treated as contracted-out;
- 2389 (2) the trustees and administrator of the scheme to which the election is to relate;
- 2390 (3) where there is a policy of insurance or annuity contract as a means of securing the protected rights<sup>5</sup>, guaranteed minimum pensions<sup>6</sup> or any benefits arising in respect of 'section 9(2B) rights'<sup>7</sup> to be payable under the scheme, the insurance company or friendly society concerned; and
- 2391 (4) all independent trade unions<sup>8</sup> recognised in relation to the earners concerned<sup>9</sup>;

and within the specified period<sup>10</sup> after the expiry of those notices<sup>11</sup>. The election must be made in writing to the Secretary of State and must include the prescribed particulars<sup>12</sup>.

In making or abstaining from making an election as to the inclusion of an employment in a contracting-out certificate, an employer may discriminate between different earners (otherwise than on the ground of the nature of their employment) in any case where such discrimination would be<sup>13</sup> lawful<sup>14</sup>.

An employer who has given a notice of the intention to make an election under these provisions must undertake consultations, if he has not already done so, about the matters covered by the notice with all independent trade unions recognised in relation to the earners concerned<sup>15</sup>. Any question whether an organisation is an independent trade union recognised in relation to earners may be referred by the employer of those earners, or by the organisation, to an industrial tribunal<sup>16</sup> and any question whether an employer has complied with these consultation requirements may also be referred by the employer, or by an independent trade union recognised in relation to the earners concerned, to an industrial tribunal<sup>17</sup>.

An employer may amend his election at any time before the issue of a contracting-out certificate if the amendment does not alter the categories or descriptions of the earners to whom the election relates<sup>18</sup>.

Subject as follows, when the Secretary of State has determined that an employment should be treated, either in relation to all earners in it or in relation to any specified category or description of earners, as contracted-out employment, he must issue and send to the employer concerned a contracting-out certificate<sup>19</sup>. The contracting-out certificate must specify:

- 2392 (a) the name and address of the employer;
- 2393 (b) the name of the scheme by reference to which that employment is to be so treated;

2394 (c) the employments to which the certificate relates or, if the contracting-out certificate does not relate to all earners in those employments, the categories or descriptions of the earners to whom it relates; and

2395 (d) the date from which the certificate is to have effect, which may, where the Secretary of State considers it appropriate, be earlier than the date on which the certificate is issued provided that the scheme satisfied any contracting-out conditions or requirements which apply to the scheme from the date from which the certificate is to have effect<sup>20</sup>.

1     Ie subject to the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 10: see PARA 906 post.

2     For the meaning of 'contracting-out certificate' see PARA 880 ante.

3     'Employer' includes a person treated as such by virtue of the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, regs 12-14 (special provisions for holding companies and subsidiaries, public service pension schemes and holders of pensionable judicial office): reg 1(2).

4     The notice must be given to any earner concerned by sending or delivering it to him, or exhibiting it conspicuously at the place of work or employment so that it may be read conveniently by him and by drawing his attention to it in writing; and to any other person, by sending or delivering it to that person: *ibid* reg 3(3). For the meaning of 'earner' see PARA 32 ante (definition applied by virtue of the Pension Schemes Act 1993 s 181(1)).

5     For the meaning of 'protected rights' see *ibid* s 10 (as amended); and PARA 883 ante.

6     For the meaning of 'guaranteed minimum pension' see PARA 878 ante.

7     'Section 9(2B) rights' are rights to the payment of pensions and accrued rights to pensions (other than rights attributable to voluntary contributions) under a scheme contracted-out by virtue of the Pension Schemes Act 1993 s 9(2B) (as added) (see PARA 882 ante), so far as attributable to an earner's service in contracted-out employment on or after the principal appointed day, and, where a transfer payment has been made to such a scheme, any rights arising under the scheme as a consequence of that payment which are derived directly or indirectly from (1) such rights under another scheme contracted-out by virtue of s 9(2B) (as added); or (2) protected rights under another occupational pension scheme or under a personal pension scheme attributable to payments or contributions in respect of contracted-out employment on or after the principal appointed day: Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 1(2) (definition substituted by SI 1997/786).

8     'Independent trade union' means a trade union recognised to any extent for the purpose of collective bargaining: Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 1(2); and see EMPLOYMENT VOL 40 (2009) PARA 859.

9     *Ibid* regs 2(1)(a)(i), 3(1). As to notices of intention see further reg 3(2), (4), (5) (amended by SI 1997/786).

10    The specified period is within three months of the date of the expiry of the notices, or such longer period as the Secretary of State may in his discretion allow, but nothing in this provision prevents an election from being made after the giving of further notices which comply with the prescribed requirements: Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 5. As to the Secretary of State see PARA 1 ante.

11    *Ibid* reg 2(1)(a)(ii).

12    *Ibid* reg 2(1)(b). For the prescribed particulars see reg 6 (amended by SI 1997/786).

13    Ie apart from the Pension Schemes Act 1993 s 11(3): see PARA 884 ante.

14    Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 2(2) (substituted by SI 1997/786).

15    Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 4(1).

16    *Ibid* reg 4(2). For the meaning of 'industrial tribunal' see PARA 557 note 14 ante.

17    *Ibid* reg 4(3).

18 Ibid reg 7.

19 Ibid reg 8(1).

20 Ibid reg 8(2).

## **UPDATE**

### **885 Elections for the issue of contracting-out certificates**

TEXT AND NOTES--Functions of the Secretary of State under SI 1996/1172 transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

NOTE 12--SI 1996/1172 reg 6 further amended: SI 2005/3377 (see also Sch 3 para 3).

TEXT AND NOTES 16, 17--Industrial tribunals now called employment tribunals: Employment Rights (Dispute Resolution) Act 1998 s 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(2) REQUIREMENTS FOR CERTIFICATION/(i) In general/886. Application for an appropriate scheme certificate.

### **886. Application for an appropriate scheme certificate.**

Every application for an appropriate scheme certificate<sup>1</sup> ('the certificate') must be made in writing to the Secretary of State<sup>2</sup> and must include:

- 2396 (1) the name of the scheme and the address where it is administered;
- 2397 (2) the names and addresses of the administrators of the scheme;
- 2398 (3) the name, address and position (in relation to the scheme) of the person making the application for the certificate;
- 2399 (4) the name and address of the person who has established the scheme or, in the case of a company, the registered office;
- 2400 (5) such evidence as the Secretary of State may reasonably require that the scheme satisfies such of the prescribed requirements<sup>3</sup> as apply to it;
- 2401 (6) which of the specified forms<sup>4</sup> the scheme is to take;
- 2402 (7) the name and address of a bank or building society which accepts payments made by automated credit transfer together with the name and account number of that bank or building society into which it is desired that minimum contributions<sup>5</sup> should be paid; and
- 2403 (8) the date from which the desired certificate is to have effect<sup>6</sup>.

Every application must be accompanied by a copy of the documents constituting the scheme and the rules of the scheme, if they are not set out in those documents or any of them, except where the Secretary of State in his discretion dispenses wholly or partly with this requirement<sup>7</sup>. Every person who has made an application must supply such other documents and information as the Secretary of State may reasonably require<sup>8</sup>.

When the Secretary of State has determined that a personal pension scheme<sup>9</sup> is, or at any time was, an appropriate scheme, he must issue an appropriate scheme certificate so stating to the person who applied for it<sup>10</sup>.

1 For the meaning of 'appropriate scheme' and 'appropriate scheme certificate' see PARA 880 ante.

2 As to the Secretary of State see PARA 1 ante.

3 I.e. the requirements of the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 3 (persons who and bodies which may establish schemes): see note 4 infra.

4 A personal pension scheme can be an appropriate scheme only if it is approved by the Inland Revenue under either the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended) (see PARA 712 et seq ante) or Pt XIV Ch I (ss 590-621) (as amended) by reference to s 591(2)(h) (see PARA 751 ante), and in either case it takes one of the forms (but not more than one) specified as follows: (1) an arrangement for the issue of insurance policies or annuity contracts; (2) a unit trust scheme of a kind mentioned in the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 2(2), Sch 1 Pt I which has been authorised under the Financial Services Act 1986 s 78(1), or by virtue of s 211(3), Sch 15 para 9; (3) an arrangement for the investment of contributions in an interest-bearing account (which expression includes shares in or deposits with a building society as defined in the Building Societies Act 1986); and for the purposes of head (3) supra, the rules of the personal pension scheme must provide that, at the minimum, there must be invested in the interest-bearing account any payments which, under the Pension Schemes Act 1993 s 10(3) (see PARA 883 ante) or the Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, 1996/1537, reg 3 (as amended) (see PARA 883 ante) are those from which are derived protected rights: Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 2(1)-(3). An arrangement such as is described in head (1) supra which is established by a friendly society can be an appropriate scheme only if

the society is authorised under the Friendly Societies Act 1992 s 32 to carry on long term business under any of the Classes specified in Sch 2 Head A (see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2096); and an arrangement such as is described in head (3) supra can be an appropriate scheme only if it is established by (a) a building society within the meaning of the Building Societies Act 1986; (b) a pension vehicle associated with a building society as described in s 18(17); (c) an institution authorised under the Banking Act 1987 Pt I (ss 1-49) (as amended); or (d) a body corporate which is a subsidiary or holding company (within the meaning of the Companies Act 1985 s 736 (as substituted) or the corresponding Northern Ireland legislation) of an institution such as is mentioned in head (c) supra or a subsidiary of the holding company of such an institution, subject to the conditions that the rules of any appropriate scheme established by such a body require that the resources of the scheme be invested with an institution such as is mentioned in head (c) supra and further provide that the rights arising from such investment, in so far as they are attributable to the contributions made by or on behalf of a member, must be held by that body on trust for that member: Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 3(1)-(4).

Furthermore, a personal pension scheme which comprises an arrangement of the kind described in head (3) supra can be an appropriate scheme only if the rules of the scheme include provision (i) that, within seven days of the day on which a person becomes a member of the scheme, he must be served, personally or by post, with a notice in writing containing the information specified in Sch 2 and a form of counter-notice; and (ii) that, if the person signs the form of counter-notice or another document to the same effect and serves it by post or otherwise, not later than the fourteenth day after the notice referred to in head (i) supra is served on him and on the person nominated, in that notice, to accept service of it, his membership of the scheme must be cancelled and the contributions (if any) paid to the scheme by him or for him must be returned, as soon as reasonably practicable, to the person who paid them: reg 18(1), (2). Where such a counter-notice is properly addressed, prepaid and served by post, it is deemed to have been duly served on the day on which it was posted: reg 18(3). The information specified in Sch 2 comprises: (A) the right of the member to cancel his membership of the scheme; (B) the provisions of the Pension Schemes Act 1993 s 160(1) (see PARA 559 ante), of the scheme rules and of the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, which govern the exercise of the right to cancel his membership; (C) the name and address of the person on whom the member's counter-notice should be served; (D) the type of account, or accounts, in which contributions to the scheme are invested; (E) the rate of interest, at the time when the notice is served, which is accruing to contributions of members of the scheme which are then invested; (F) the part of any payment or payments that are made to the scheme by or on behalf of a member, of any income arising from the investment of such payments or of the value of rights under the scheme that may be used (otherwise than as an unidentifiable element in the calculation of interest on invested contributions) to defray the administrative expenses of the scheme, to pay commission or in any other way which does not result in the provision of benefits for or in respect of members; (G) how tax relief on members' contributions is effected; (H) how the cessation of the making of contributions to the scheme by a member of it, not less than 21 days after he becomes a member of it, but before the end of the period for which he could continue making such contributions, would affect the member's rights under the scheme; and (I) the address to which inquiries about the scheme generally or about an individual's entitlement to benefit should be sent: see Sch 2.

5 For the meaning of 'minimum contributions' see PARA 883 note 11 ante.

6 Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 4(1).

7 Ibid reg 4(2).

8 Ibid reg 4(3).

9 For the meaning of 'personal pension scheme' see PARA 710 ante.

10 Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 5.

## UPDATE

### 886 Application for an appropriate scheme certificate

TEXT AND NOTES--Secretary of State's functions under SI 1997/470 transferred to Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

NOTE 4--SI 1997/470 reg 2 substituted, regs 3, 18, Sch 1 omitted: SI 2008/1979.

TEXT AND NOTE 6--SI 1997/470 reg 4(1) amended: SI 2008/1979.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(2) REQUIREMENTS FOR CERTIFICATION/(ii) New Requirements imposed by the Pensions Act 1995/887. The statutory standard.

## **(ii) New Requirements imposed by the Pensions Act 1995**

### **887. The statutory standard.**

Subject to the provisions of Part III of the Pension Schemes Act 1993<sup>1</sup>, the scheme must, in relation to the provision of pensions for earners<sup>2</sup> in employed earner's<sup>3</sup> employment<sup>4</sup>, and for their widows or widowers, satisfy the statutory standard<sup>5</sup>. Subject to regulations<sup>6</sup>, in applying these provisions regard must only be had to earners in employed earner's employment, or their widows or widowers, collectively, and the pensions to be provided for such persons must be considered as a whole<sup>7</sup>.

For the purposes of these provisions, a scheme satisfies the statutory standard if the pensions to be provided for such persons are broadly equivalent to, or better than, the pensions which would be provided for such persons under a reference scheme<sup>8</sup>.

Regulations may provide for the manner of, and criteria for, determining whether the pensions to be provided for such persons under a scheme are broadly equivalent to, or better than, the pensions which would be provided for such persons under a reference scheme<sup>9</sup>. Such regulations may provide for the determination to be made in accordance with guidance prepared from time to time by a prescribed<sup>10</sup> body and approved by the Secretary of State<sup>11</sup>. The pensions to be provided for such persons under a scheme are to be treated as broadly equivalent to or better than the pensions which would be provided for such persons under a reference scheme if and only if an actuary<sup>12</sup> so certifies<sup>13</sup>.

1    Ie the Pension Schemes Act 1993 Pt III (ss 7-68, Sch 2) (as amended): see PARA 878 et seq ante, 887 et seq post.

2    For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by ibid s 181(1)).

3    For the meaning of 'employed earner' see PARA 32 ante (definition as applied: see note 2 supra).

4    For the meaning of 'employed earner's employment' see PARA 32 ante (definition as applied: see note 2 supra). For the meaning of 'employment' generally see PARA 560 note 5 ante.

5    Pension Schemes Act 1993 s 12A(1) (s 12A added by the Pensions Act 1995 s 136(5)).

6    Ie regulations made by virtue of the Pension Schemes Act 1993 s 9(2B)(c)(ii) (as added): see PARA 882 ante. For the meaning of 'regulations' see PARA 557 note 2 ante.

7    Ibid s 12A(2) (as added: see note 5 supra).

8    Ibid s 12A(3) (as added: see note 5 supra). As to reference schemes see PARA 888 post.

9    Ibid s 12A(4) (as added: see note 5 supra).

10   For the meaning of 'prescribed' see PARA 555 note 1 ante.

11   Pension Schemes Act 1993 s 12A(5) (as added: see note 5 supra). As to the Secretary of State see PARA 1 ante.

12   Ie an actuary who, except in prescribed circumstances, must be the actuary appointed for the scheme in pursuance of the Pensions Act 1995 s 47 (see PARA 787 note 2 ante): see the Pension Schemes Act 1993 s 12A(6) (as added: see note 5 supra).

13 Ibid s 12A(6) (as added: see note 5 supra).

## **UPDATE**

### **887 The statutory standard**

TEXT AND NOTES 5, 7--Pension Schemes Act 1993 s 12A(1), (2) amended so as to extend provisions to surviving civil partners: SI 2005/2050.

TEXT AND NOTE 11--Omit the words 'and approved by the Secretary of State': 1993 Act s 12A(5) (amended by Pensions Act 2007 Sch 5 para 5, Sch 7 Pt 8).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(2) REQUIREMENTS FOR CERTIFICATION/(ii) New Requirements imposed by the Pensions Act 1995/888. Reference schemes.

### **888. Reference schemes.**

A reference scheme is an occupational pension scheme<sup>1</sup> which complies with the following provisions<sup>2</sup> and complies with any prescribed<sup>3</sup> requirements<sup>4</sup>. In relation to earners<sup>5</sup> employed<sup>6</sup> in employed earner's employment<sup>7</sup>, a reference scheme is one which provides:

- 2404 (1) for them to be entitled to a pension under the scheme commencing at a normal pension age<sup>8</sup> of 65 and continuing for life<sup>9</sup>; and
- 2405 (2) for the annual rate of the pension at that age to be one eightieth of average qualifying earnings<sup>10</sup> in the last three tax years preceding the end of service, multiplied by the number of years service, not exceeding such number as would produce an annual rate equal to half the earnings on which it is calculated<sup>11</sup>.

In relation to widows or widowers, a reference scheme is one which provides:

- 2406 (a) for the widows or widowers of earners employed in employed earner's employment (whether the earners die before or after attaining the age of 65) to be entitled, except in prescribed circumstances, to pensions under the scheme<sup>12</sup>; and
  - 2407 (b) for entitlements to those pensions to commence on the day following the death of the earners<sup>13</sup>; and
  - 2408 (c) Except in prescribed circumstances, for the annual rate of the pensions to be:
- 212
- 283. (i) if the earners die on or after their normal pension age, 50 per cent of the annual rate which a reference scheme was required to provide to the deceased earners immediately before their death; or
  - 284. (ii) if the earners die before their normal pension age, 50 per cent of the annual rate which a reference scheme would have been required to provide to the deceased earners if the date of their death had been their normal pension age<sup>14</sup>; and
- 213
- 2409 (d) if those pensions are payable in respect of earners who die otherwise than in pensionable service<sup>15</sup> under the scheme and before their own entitlements to pensions under the scheme have commenced, for those pensions to be revalued<sup>16</sup> as though they were specified benefits<sup>17</sup> payable to or in respect of a member whose pensionable service ends on or after 1 January 1986<sup>18</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 741 ante.

2 Ie the provisions of the Pension Schemes Act 1993 s 12B(3),(4) (as added and amended): see the text and notes 9-18 infra.

3 For the meaning of 'prescribed' see PARA 555 note 1 ante.

4 Pension Schemes Act 1993 s 12B(2) (s 12B added by the Pensions Act 1995 s 136(5)). The Pension Schemes Act 1993 s 12B (as so added) applies for the purposes of s 12A (as added) (see 887 ante): s 12B(1) (as so added). Regulations may modify s 12B(2)-(5) (as so added): s 12B(6) (as so added). For the meaning of 'modify' see PARA 664 note 10 ante. As to the exercise of this power see notes 13-14 infra.

5 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by ibid s 181(1)).

- 6 For the meaning of 'employed' for these purposes see PARA 32 ante (definition as applied: see note 5 supra).
- 7 For the meaning of 'employed earner's employment' see PARA 32 ante (definition as applied: see note 5 supra).
- 8 For these purposes, 'normal pension age', in relation to a scheme, means the age specified in the scheme as the earliest age at which pension becomes payable under the scheme (apart from any special provision as to early retirement on grounds of ill-health or otherwise): Pension Schemes Act 1993 s 12B(7) (as added: see note 4 supra). For the meaning of 'normal pension age' generally see PARA 896 note 6 post. As to when a person attains a particular age see PARA 881 note 2 ante.
- 9 Ibid s 12B(3)(a) (as added: see note 4 supra).
- 10 For these purposes, an earner's qualifying earnings in any tax year are 90% of the amount by which the earner's earnings exceed the qualifying earnings factor for that year, and do not exceed the upper earnings limit for that year multiplied by 53: ibid s 12B(5) (as added: see note 4 supra). For the meaning of 'tax year' see PARA 863 note 1 ante. For the meaning of 'qualifying earnings factor', in relation to a tax year, see the Social Security Contributions and Benefits Act 1992 s 122(1); and PARA 56 ante (definition applied by the Pension Schemes Act 1993 s 12B(7) (as so added)). 'Upper earnings limit', in relation to a tax year, means the amount specified for that year by regulations made by virtue of the Social Security Contributions and Benefits Act 1992 s 5(3) (see PARA 34 ante) as the upper earnings limit for Class 1 contributions: Pension Schemes Act 1993 s 12B(7) (as so added). As to Class 1 contributions see PARA 34 et seq ante.
- 11 Ibid s 12B(3)(b) (as added: see note 4 supra).
- 12 Ibid s 12B(4)(a) (as added: see note 4 supra).
- 13 Ibid s 12B(4)(b) (as added: see note 4 supra; substituted by the Occupational Pension Schemes (Reference Scheme and Miscellaneous Amendments) Regulations 1997, SI 1997/819, reg 2).
- 14 Pension Schemes Act 1993 s 12B(4)(c) (s 12B(4)(c), (d) added by the Occupational Pension Schemes (Reference Scheme and Miscellaneous Amendments) Regulations 1997, SI 1997/819, reg 2).
- 15 For the meaning of 'pensionable service' see PARA 664 note 2 ante.
- 16 Ie in accordance with the Pension Schemes Act 1993 s 84 (as amended): see PARA 941 post.
- 17 Ie such benefits as are mentioned in ibid s 83(1)(a): see PARA 941 post.
- 18 Ibid s 12B(4)(d) (as added: see note 14 supra).

## UPDATE

### 888 Reference schemes

NOTE 10--In 1993 Act s 12B(5) for 'the upper earnings limit for that year multiplied by 53' substitute 'the applicable limit': Pensions Act 2007 Sch 1 para 36(a). 'The applicable limit' means (1) in relation to a tax year before 2009-2010, the upper earnings limit for the year multiplied by 53; (2) in relation to 2009-2010 or any subsequent tax year, the upper accrual point multiplied by 53: 1993 Act s 12B(7) (amended by the 2007 Act Sch 1 para 36(b); and the National Insurance Contributions Act 2008 Sch 1 para 9).

TEXT AND NOTES 12-18--Pension Schemes Act 1993 s 12B(4) further amended so as to extend provisions to surviving civil partners: SI 2005/2050.

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### **889. Transfer, commutation, entitlement to benefit, etc.**

Regulations<sup>1</sup> may prohibit or restrict:

- 2410 (1) the transfer of any liability for the payment of pensions under a relevant scheme<sup>2</sup>, or in respect of accrued rights<sup>3</sup> to such pensions;
- 2411 (2) the discharge of any liability to provide pensions under a relevant scheme;  
or
- 2412 (3) the payment of a lump sum instead of a pension payable under a relevant scheme,

except in prescribed circumstances<sup>4</sup> or on prescribed conditions<sup>5</sup>.

Such regulations may provide that any provision of Part III of the Pension Schemes Act 1993<sup>6</sup> is to have effect subject to such modifications<sup>7</sup> as may be specified in the regulations<sup>8</sup>.

1 For the meaning of 'regulations' see PARA 557 note 2 ante.

2 'Relevant scheme' means a scheme contracted out by virtue of the Pension Schemes Act 1993 s 9(2B) (as added) (see PARA 882 ante) and references to pensions and accrued rights under the scheme are to such pensions and rights so far as attributable to an earner's service on or after the principal appointed day: s 12C(2) (ss 12C, 12D added by the Pensions Act 1995 s 136(5)). For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)). For the meaning of 'the principal appointed day' see PARA 880 note 13 ante. In the case of a scheme contracted out by virtue of s 9(2B) (as added), regulations may make provision as to the ages by reference to which benefits under the scheme are to be paid: s 12D (as so added).

3 For the meaning of 'accrued rights' see PARA 843 note 6 ante.

4 The trustees of a relevant scheme are prohibited or restricted from discharging any liability to provide pensions under a relevant scheme except in the circumstances and on the conditions prescribed in the Occupational Pension Schemes (Discharge of Liability) Regulations 1997, SI 1997/784, Pt III (regs 8-11) or where the requirements imposed by the Occupational Pension Schemes (Winding Up) Regulations 1996, SI 1996/3126 (as amended) (see PARA 843 et seq ante) or the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, Pt V (regs 41-48) (as amended) (see PARAS 879 ante, 905, 918, 920 post) apply: Occupational Pension Schemes (Discharge of Liability) Regulations 1997, SI 1997/784, reg 8. The prescribed circumstances in which the trustees of a relevant scheme may discharge any liability to provide pensions under such a scheme are where (1) the member or, if the member has died, his widow or her widower, or if there is no such widow or widower, any person who may be entitled to payment of the pension under the scheme, consents in writing to the discharge of liability and the transaction to discharge the liability is to be carried out not earlier than the time when the member's pensionable service terminates and satisfies all the conditions specified in reg 11 (see note 5 infra); or (2) the member's employment is to cease to be contracted-out under the Pension Schemes Act 1993 s 9(2B) (as added) (see PARA 882 ante) and the transaction to discharge liability satisfies all the conditions so specified; and for these purposes 'transaction' means (a) the taking out of a policy of insurance or a number of such policies; (b) the entry into an annuity contract or a number of such contracts; or (c) the transfer of pensions and accrued rights to such a policy or policies or such a contract or contracts: Occupational Pension Schemes (Discharge of Liability) Regulations 1997, SI 1997/784, regs 9, 10. For the meaning of 'prescribed' see PARA 555 note 1 ante.

5 Pension Schemes Act 1993 s 12C(1) (as added: see note 2 supra). The prescribed conditions are that (1) the policy of insurance or annuity contract must be taken out or entered into with an insurance company such as is described in s 19(4)(a) (see PARA 894 post); (2) the policy of insurance or annuity contract contains provision to the effect that, or is indorsed so as to provide that (a) except in specified circumstances, where a pension or annuity is in payment at the date of the beneficiary's death at least 50% of the annual rate attributable to pensions and accrued rights under the relevant scheme which was in payment at the date of

death is to be payable to the beneficiary's widow or widower; (b) except in the specified circumstances, where a pension or annuity is not in payment at the date of the beneficiary's death at least 50% of the accumulated value of the policy of insurance or annuity contract at the date of death attributable to pension and accrued rights under the relevant scheme is to be applied so as to provide a pension or annuity for the beneficiary's widow or widower; (c) payments to a beneficiary's widow or widower under the policy or contract which derive from a pension or accrued rights under the relevant scheme are to be subject to the same rate of an annual increase and restrictions which would have applied as a consequence of the Pensions Act 1995 s 51 (annual increase in rate of pension: see PARA 861 ante) and s 52 (restriction on increase where member is under 55: see PARA 862 ante) had the discharge of liability not taken place; (d) the benefits secured under the policy or contract must become payable with the beneficiary's consent, and the beneficiary has attained the age of 50 and is under the age of 75, or is suffering from an incapacity or serious ill-health prior to normal pension age; (e) any rights of a beneficiary to a payment under the policy or contract which derive from a pension or accrued rights under the relevant scheme are to be treated as if both ss 51, 52 and regulations made under those sections, and the Pension Schemes Act 1993 s 12C(1) (as added) and regulations made under that section, were applicable to them: Occupational Pension Schemes (Discharge of Liability) Regulations 1997, SI 1997/784, reg 11(1)-(3). The specified circumstances for the purposes of head 2(a) supra are that (i) the beneficiary marries after having received benefits under the policy or contract; (ii) the widow or widower of the beneficiary remarries or lives together as husband and wife with another person to whom he or she is not married after having received benefits under the policy or contract; (iii) the widow or widower of the beneficiary is living together as husband and wife with another person to whom he or she is not married at the time of the member's death; and the specified circumstances for the purposes of head (2)(b) supra are those set out in heads (ii)-(iii) supra: see reg 11(3)(b), (4). For these purposes, 'incapacity' means physical or mental deterioration which seriously impairs his earning capacity and 'serious ill-health' means ill-health which is such as to give rise to a life expectancy of less than one year: regs 4(4), 11(5). For the purposes of head (2)(e) supra, the provisions in the Pension Schemes Act 1993 and the Pensions Act 1995 are to be construed as if the policy of insurance or annuity contract is a relevant scheme, the insurance company is the trustee of the relevant scheme, the beneficiary is the member of the relevant scheme and the terms of the policy or contract are the rules of the relevant scheme: Occupational Pension Schemes (Discharge of Liability) Regulations 1997, SI 1997/784, reg 11(6).

6    le the Pension Schemes Act 1993 Pt III (ss 7-68), Sch 2 (as amended): see PARA 878 et seq ante, 890 et seq post.

7    For the meaning of 'modifications' see PARA 664 note 10 ante.

8    Pension Schemes Act 1993 s 12C(3) (as added: see note 2 supra).

## UPDATE

### 889 Transfer, commutation, entitlement to benefit, etc

NOTE 5--Head (2)(c) also applies to civil partners; and in head (2)(d) words 'has attained the age of 50 and' omitted: SI 1997/784 reg 11(3) (amended by SI 2005/704, SI 2005/2050, SI 2005/3164), SI 2006/744). SI 1997/784 reg 4(4) revoked: SI 2006/744.

NOTE 10--Functions of the Secretary of State under SI 1996/1172, Pt V (regs 41-48) transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

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### **(iii) Occupational Pension Schemes providing Guaranteed Minimum Pensions**

#### **890. Minimum pensions for earners.**

Subject to the provisions of Part III of the Pension Schemes Act 1993<sup>1</sup>, the scheme must:

- 2413 (1) provide<sup>2</sup> for the earner to be entitled to a pension under the scheme if he attains pensionable age<sup>3</sup>; and
- 2414 (2) contain a rule to the effect that the weekly rate of the pension will be not less than his guaranteed minimum<sup>4</sup> (if any)<sup>5</sup>.

In the case of an earner who is a married woman or widow who is liable to pay primary Class 1 contributions<sup>6</sup> at a reduced rate<sup>7</sup>, the scheme must, subject to those statutory provisions:

- 2415 (a) provide for her to be entitled to a pension under the scheme if she attains pensionable age<sup>8</sup>; and
- 2416 (b) satisfy such other conditions as may be prescribed<sup>9</sup>.

The scheme must provide for the pension to commence on the date on which the earner attains pensionable age and to continue for his life<sup>10</sup>. The scheme may provide for the commencement of the earner's guaranteed minimum pension to be postponed for any period for which he continues in employment<sup>11</sup> after attaining pensionable age<sup>12</sup>.

The scheme must provide for the earner's consent to be required:

- 2417 (i) for any such postponement by virtue of employment to which the scheme does not relate<sup>13</sup>; and
- 2418 (ii) for any such postponement after the expiration of five years from the date on which he attains pensionable age<sup>14</sup>.

Equivalent pension benefits for the purposes of the former legislation<sup>15</sup> are not to be regarded as constituting any part of the earner's guaranteed minimum pension<sup>16</sup>.

<sup>1</sup> I.e. the Pension Schemes Act 1993 Pt III (ss 7-68, Sch 2) (as amended): see PARA 878 et seq ante, 891 et seq post.

<sup>2</sup> Where the annual rate of a pension required to be provided by a scheme in accordance with *ibid* s 13 (as amended) or s 17 (as amended) (see PARA 893 post) would not exceed the prescribed amount and the circumstances are such as may be prescribed, the scheme may provide for the payment of a lump sum instead of that pension: s 21(1). Neither s 13 (as amended) nor s 17 (as amended) precludes a scheme from providing for the earner's or the earner's widow's or widower's guaranteed minimum pension to be suspended or forfeited in such circumstances as may be prescribed: s 21(2). For the meaning of 'prescribed' see PARA 555 note 1 ante. For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by s 181(1)). For the meaning of 'guaranteed minimum pension' see PARA 878 ante.

<sup>3</sup> *Ibid* s 13(1)(a). For the meaning of 'pensionable age' see PARA 562 ante.

<sup>4</sup> I.e. the guaranteed minimum under *ibid* ss 14-16 (as amended): see PARAS 891-892 post.

- 5 Ibid s 13(1)(b).
- 6 As to primary Class 1 contributions see PARA 34 et seq ante.
- 7 Ie by virtue of the Social Security Contributions Act 1992 s 19(4): see PARA 46 ante.
- 8 Pension Schemes Act 1993 s 13(2)(a) (amended by the Pensions Act 1995 ss 151, 177, Sch 5 paras 18, 26, Sch 7 Pt III).
- 9 Pension Schemes Act 1993 s 13(2)(b).
- 10 Ibid s 13(3).
- 11 For the meaning of 'employment' see PARA 560 note 5 ante.
- 12 Pension Schemes Act 1993 s 13(4).
- 13 Ibid s 13(5)(a).
- 14 Ibid s 13(5)(b).
- 15 'The former legislation' means the National Insurance Act 1965 Pt III (repealed) and the previous corresponding enactments: Pension Schemes Act 1993 s 13(8).
- 16 Ibid s 13(6). The benefits so referred to are any to which the earner may be immediately or prospectively entitled in respect of a period of employment which: (1) was for him non-participating employment under that legislation; and (2) was not on its termination the subject of any payment in lieu of contributions; but this provision excludes only so much of those benefits as had to be provided in order that the employment should for that period be treated as non-participating: s 13(7).

## UPDATE

### **890-897 Occupational Pension Schemes providing Guaranteed Minimum Pensions**

See also Gender Recognition Act 2004 Sch 5 para 14; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

As to the conversion of guaranteed minimum pensions into other benefits see PARA 897A.

### **890 Minimum pensions for earners**

NOTE 2--A scheme may, in such circumstances and subject to such restrictions and conditions as may be prescribed, provide for the payment of a lump sum instead of a pension required to be provided by the scheme in accordance with the Pension Schemes Act 1993 s 13 or 17: s 21(1) (substituted by Pensions Act 2004 s 284(1)).

Section 21(2) amended so as to extend provisions to surviving civil partners: SI 2005/2050.

TEXT AND NOTES 3, 5--But a scheme may be amended so as to omit provision of the kind specified in the Pension Schemes Act 1993 s 13(1)(a) and (b) if the conditions specified in s 24B (see PARA 897A) are satisfied: Pension Schemes Act 1993 s 13(1A) (added by Pensions Act 2007 s 14(1)).

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### **891. Earner's guaranteed minimum.**

An earner<sup>1</sup> has a guaranteed minimum in relation to the pension provided by a scheme if in any tax week<sup>2</sup> in a relevant year<sup>3</sup>, earnings in excess of the current lower earnings limit<sup>4</sup> (or the prescribed equivalent<sup>5</sup> if he is paid otherwise than weekly) have been paid to or for his benefit in respect of employment<sup>6</sup> which is contracted-out<sup>7</sup> by reference to the scheme<sup>8</sup>. The guaranteed minimum must be the weekly equivalent<sup>9</sup> of an amount equal to the appropriate percentage<sup>10</sup> of the total of the earner's earnings factors for the relevant years, so far as derived from such earnings upon which primary Class 1 contributions<sup>11</sup> have been paid or treated as paid<sup>12</sup>.

Where the amount of a person's earnings for any period is relevant for any of the above purposes and the Secretary of State<sup>13</sup> is satisfied that records of those earnings have not been maintained or retained or are otherwise unobtainable, he may for that purpose:

- 2419 (1) compute, in such manner as he thinks fit, an amount which must be regarded as the amount of those earnings<sup>14</sup>; or
- 2420 (2) take their amount to be such sum as he may specify in the particular case<sup>15</sup>.

1 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

2 For the meaning of 'tax week' see PARA 878 note 8 ante.

3 'Relevant year' means any tax year in the earner's working life (not being earlier than the tax year 1978-79 or later than the tax year ending immediately before the principal appointed day): Pension Schemes Act 1993 s 14(8) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 27). For the meaning of 'tax year' see PARA 863 note 1 ante; and for the meaning of 'working life' see PARA 565 note 9 ante. As to the principal appointed day see PARA 880 note 13 ante.

4 As to the current lower earnings limit see PARA 878 note 8 ante.

5 For the meaning of 'the prescribed equivalent' see PARA 878 note 8 ante.

6 For the meaning of 'employment' see PARA 560 note 5 ante.

7 For the meaning of 'contracted-out' and 'contracted-out employment' see PARA 878 ante.

8 Pension Schemes Act 1993 s 14(1).

9 For the purposes of *ibid* s 14(2), the weekly equivalent of the amount there mentioned must be calculated by dividing that amount by 52: s 14(7). Where an amount is required to be calculated in accordance with the provisions of s 14(7), s 15(1) (see PARA 892 post) or s 17(2), (3) or (4) (see PARA 893 post) and, apart from this provision, the amount so calculated is less than 0.5 pence, then, notwithstanding any other provision of the Pension Schemes Act 1993, that amount must be taken to be zero, and other amounts so calculated must be rounded to the nearest whole penny, taking 0.5 pence as nearest to the next whole penny above: s 18(1). Where a guaranteed minimum pension is attributable in part to earnings factors for the period before the tax year 1988-89 and in part to earnings factors for that tax year or for that tax year and subsequent tax years, the pension must be calculated by applying s 18(1) separately to the amount attributable to the period before the tax year 1988-89 and to the amount attributable to that and subsequent tax years, and aggregating the two amounts so calculated: s 18(2). For the meaning of 'guaranteed minimum pension' see PARA 878 ante. For the meaning of 'earnings factors' see PARA 56 ante (definition applied by s 181(1)).

10 'Appropriate percentage' means: (1) in respect of the earner's earnings factors for any tax year not later than the tax year 1987-88: (a) if the earner was not more than 20 years under pensionable age on 6 April 1978, 1.25%; (b) in any other case 25/N%; (2) in respect of the earner's earnings factors for the tax year 1988-89 and for subsequent tax years: (a) if the earner was not more than 20 years under pensionable age on 6 April 1978, 1%; (b) in any other case 20/N%; where N is the number of years in the earner's working life (assuming he will attain pensionable age) which fall after 5 April 1978: *ibid* s 14(5). Subject as follows, for these purposes the earner's earnings factor for any relevant year (so far as so derived) must be taken to be that factor as increased by the same percentage as that prescribed for the increase of that factor by the last order under the Social Security Pensions Act 1975 s 21 (repealed) or the Social Security Administration Act 1992 s 148 (as amended) (see PARA 56 ante) to come into force before the end of the final relevant year: Pension Schemes Act 1993 s 16(1). The scheme may provide that the earnings factors of an earner whose service in contracted-out employment by reference to the scheme is terminated before the final relevant year must be determined for these purposes by reference to the last such order to come into force before the end of the tax year in which that service ends ('the last service tax year'): s 16(2). Where a scheme provides as mentioned above the scheme must provide for the weekly equivalent to be increased by at least the prescribed percentage for each relevant year after the last service tax year; and the provisions so included may also conform with such additional requirements as may be prescribed: s 16(3) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 28(a)). Except in such cases or classes of cases as may be prescribed, the provision made by virtue of the Pension Schemes Act 1993 s 16(2), (3) must be the same for all the members of the scheme: s 16(4). For these purposes, 'final relevant year' means the last tax year in the earner's working life: s 16(5) (definition substituted by the Pensions Act 1995 Sch 5 paras 18, 28(b)). For the meaning of 'pensionable age' see PARA 562 ante.

11 As to primary Class 1 contributions see PARA 34 et seq ante.

12 Pension Schemes Act 1993 s 14(2). Section 14(2) is subject to s 15(1): see PARA 892 post. Regulations may prescribe rules as to the circumstances in which earnings factors are derived from earnings for the purposes of s 14(2): s 14(6). For the meaning of 'regulations' see PARA 557 note 2 ante.

13 As to the Secretary of State see PARA 1 ante.

14 Pension Schemes Act 1993 s 14(4)(a).

15 *Ibid* s 14(4)(b).

## UPDATE

### 890-897 Occupational Pension Schemes providing Guaranteed Minimum Pensions

See also Gender Recognition Act 2004 Sch 5 para 14; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

As to the conversion of guaranteed minimum pensions into other benefits see PARA 897A.

### 891 Earner's guaranteed minimum

TEXT AND NOTES--Where any liability of a scheme in respect of an earner's guaranteed minimum pension ceases by virtue of a civil recovery order, his guaranteed minimum in relation to the scheme is extinguished or reduced accordingly: Pension Schemes Act 1993 s 14(2A) (added by the Proceeds of Crime Act 2002 Sch 11 para 22(3)). For the meaning of 'civil recovery order', see PARA 883.

NOTE 10--For the purposes of the Pension Schemes Act 1993 s 16, 'relevant year' means any tax year in the earner's working life: s 16(5) (amended by the Welfare Reform and Pensions Act 1999 Sch 2 para 4).

TEXT AND NOTES 13-15--In 1993 Act s 14(4), for 'Secretary of State' read 'Inland Revenue' and for 'he' (in each place) read 'it': Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 38.

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**892. Increase of guaranteed minimum where commencement of guaranteed minimum pension postponed.**

Where the commencement of an earner's<sup>1</sup> guaranteed minimum pension<sup>2</sup> is postponed<sup>3</sup> for any period and there are at least seven complete weeks<sup>4</sup> in that period, his guaranteed minimum in relation to the scheme must, for each complete week in that period, be increased by one-seventh per cent:

- 2421 (1) of the amount of that minimum apart from this provision<sup>5</sup>; or
- 2422 (2) if for that week (or a period which includes that week) a pension is paid to him under the scheme at a weekly rate less than that minimum, of the difference between that pension and that minimum<sup>6</sup>.

Where an earner's guaranteed minimum is so increased, the increase of that part of it which is attributable to earnings factors<sup>7</sup> for the tax year<sup>8</sup> 1987-88 and earlier tax years must be calculated separately from the increase of the rest<sup>9</sup>. Where one or more orders has or have come into force providing for an annual increase of guaranteed minimum pensions<sup>10</sup> during the period for which the commencement of a guaranteed minimum pension is postponed, the amount of the guaranteed minimum for any week in that period must be determined as if the order or orders had come into force before the beginning of the period<sup>11</sup>.

1 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

2 For the meaning of 'guaranteed minimum pension' see PARA 878 ante.

3 Ie in accordance with the Pension Schemes Act 1993 s 13(4): see PARA 890 ante.

4 For these purposes, 'week' means any period of seven consecutive days: *ibid* s 15(2).

5 *Ibid* s 15(1)(a).

6 *Ibid* s 15(1)(b). As to the treatment of insignificant amounts see s 18; and PARA 891 note 9 ante.

7 For the meaning of 'earnings factors' see PARA 56 ante (definition applied by *ibid* s 181(1)).

8 For the meaning of 'tax year' see PARA 863 note 1 ante.

9 Pension Schemes Act 1993 s 15(3).

10 Ie one or more orders under *ibid* s 109 (as amended): see PARA 926 post.

11 *Ibid* s 15(4). Where any increment under s 15(1) is increased in any tax year by an order under s 109 (as amended) and in that tax year also falls to be increased by an order under the Social Security Administration Act 1992 s 150 (as amended) (see PARA 17 ante), the increase is the amount that would otherwise have been specified in the order less the amount of the increase under the Pension Schemes Act 1993 s 109 (as amended): Social Security Administration Act 1992 s 151(4) (amended by the Pension Schemes Act 1993 s 190, Sch 8 para 29). Where sums are payable to a person by virtue of the Pension Schemes Act 1993 s 15(1), including such sums payable by virtue of s 17(2) (see PARA 893 post) during a period ending with the date on which he became entitled to a Category A or Category B retirement pension, then, for the purpose of determining the amount of his Category A or Category B retirement pension, orders made under the Social Security Administration Act 1992 s 150 (as amended) during that period must be deemed to have come into

force (consecutively in the order in which they were made) on the date on which he became entitled to that pension: s 151(5) (as so amended). As to Category A and Category B retirement pensions see PARA 568 et seq ante.

## **UPDATE**

### **890-897 Occupational Pension Schemes providing Guaranteed Minimum Pensions**

See also Gender Recognition Act 2004 Sch 5 para 14; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

As to the conversion of guaranteed minimum pensions into other benefits see PARA 897A.

### **892 Increase of guaranteed minimum where commencement of guaranteed minimum pension postponed**

NOTES 5, 6--In relation to amounts payable by virtue of the 1993 Act s 15(1), see further the Social Security Benefits Up-rating Order 2008, SI 2008/632, arts 5, 6.

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### **892A. Reduction of guaranteed minimum in consequence of pension debt.**

Where (1) an earner<sup>1</sup> has a guaranteed minimum<sup>2</sup> in relation to the pension provided by a scheme; and (2) his right to the pension becomes subject to a pension debit<sup>3</sup>, his guaranteed minimum in relation to the scheme is<sup>4</sup>, reduced by the appropriate percentage<sup>5</sup>. Where the earner is in pensionable service<sup>6</sup> under the scheme on the day on which the order or provision on which the pension debit depends takes effect, his guaranteed minimum in relation to the scheme is reduced by an amount equal to the appropriate percentage of the corresponding qualifying benefit<sup>7</sup>.

1 For the meaning of 'earner' and 'earnings' see PARAS 32, 33 (definitions applied by the Pension Schemes Act 1993 s 181(1)).

2 As to the 'guaranteed minimum' see PARA 891.

3 'Pension debit' means a debit under the Welfare Reform and Pensions Act 1999 s 29(1)(a) (see PARA 961A.3): Pension Schemes Act 1993 s 181(1) (amended by the Welfare Reform and Pension Act 1999 s 32(1), (5)).

4 Ie subject to the Pension Schemes Act 1993 s 15A(2) (s 15A added by the Welfare Reform and Pensions Act 1999 s 32(1), (3)): see TEXT AND NOTES 6, 7.

5 Pension Schemes Act 1993 s 15A(1). The appropriate percentage is (1) if the order or provision on which the pension debit depends specifies the percentage value to be transferred, that percentage; (2) if the order or provision on which the pension debit depends specifies an amount to be transferred, the percentage which the appropriate amount for the purposes of the Welfare Reform and Pensions Act 1999 s 29(1) represents of the amount mentioned in s 29(3)(b) (see PARA 961A.3): Pension Schemes Act 1993 s 15A(4).

6 For the meaning of 'pensionable service' see PARA 664 NOTE 2.

7 Pension Schemes Act 1993 s 15A(2). For the purposes of s 15A(2), the corresponding qualifying benefit is the guaranteed minimum taken for the purpose of calculating the cash equivalent by reference to which the amount of the pension debit is determined: s 15A(3).

### **UPDATE**

### **890-897 Occupational Pension Schemes providing Guaranteed Minimum Pensions**

See also Gender Recognition Act 2004 Sch 5 para 14; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

As to the conversion of guaranteed minimum pensions into other benefits see PARA 897A.

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### **893. Minimum pensions for widows and widowers.**

Subject to the provisions of Part III of the Pension Schemes Act 1993<sup>1</sup>, the scheme must provide<sup>2</sup> that if the earner<sup>3</sup> dies leaving a widow or widower (whether before or after attaining pensionable age<sup>4</sup>), the widow or widower will be entitled to a guaranteed minimum pension<sup>5</sup> under the scheme<sup>6</sup>. The scheme must contain a rule to the effect that:

- 2423 (1) if the earner is a man who has a guaranteed minimum<sup>7</sup>, the weekly rate of the widow's pension will be not less than the widow's guaranteed minimum<sup>8</sup>;
- 2424 (2) if the earner is a woman who has such a guaranteed minimum, the weekly rate of the widower's pension will be not less than the widower's guaranteed minimum<sup>9</sup>.

The scheme must provide for the widower's pension to be payable to him in the prescribed<sup>10</sup> circumstances and for the prescribed period<sup>11</sup>. The trustees or managers<sup>12</sup> of the scheme must supply to the Secretary of State<sup>13</sup> any such information as he may require relating to the payment of pensions under the scheme to widowers or widows<sup>14</sup>.

1    le the Pension Schemes Act 1993 Pt III (ss 7-68), Sch 2 (as amended): see PARA 878 et seq ante, 894 et seq post.

2    As to the payment of a lump sum instead of a pension see ibid s 21; and PARA 890 note 2 ante.

3    For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by ibid s 181(1)).

4    For the meaning of 'pensionable age' see PARA 562 ante.

5    For the meaning of 'guaranteed minimum pension' see PARA 878 ante.

6    Pension Schemes Act 1993 s 17(1). The scheme must provide for the widow's pension to be payable to her for any period for which a Category B retirement pension (see PARA 571 et seq ante), widowed mother's allowance (see PARA 85 ante) or widow's pension (see PARA 86 ante) is payable to her by virtue of the earner's contributions or for which a Category B retirement pension would be so payable but for the Social Security Contributions and Benefits Act 1992 s 43(1) (persons entitled to more than one retirement pension) (see PARA 567 ante): Pension Schemes Act 1993 s 17(5). 'Category B retirement pension' means the retirement pensions of that description payable under the Social Security Contributions and Benefits Act 1992 Pt II (ss 20-62) (as amended) (see PARA 571 et seq ante): Pension Schemes Act 1993 s 181(1).

7    le under ibid s 14 (as amended): see PARA 891 ante.

8    Ibid s 17(2)(a). The widow's guaranteed minimum must be half that of the earner: s 17(3).

9    Ibid s 17(2)(b). The widower's guaranteed minimum must be one-half of that part of the earner's guaranteed minimum which is attributable to earnings factors for the tax year 1988-89 and subsequent tax years: s 17(4). For the meaning of 'earnings factors' see PARA 56 ante (definition applied by the Pension Schemes Act 1993 s 181(1)). For the meaning of 'tax year' see PARA 863 note 1 ante. As to the treatment of insignificant amounts see s 18; and PARA 891 note 9 ante.

10   For the meaning of 'prescribed' see PARA 555 note 1 ante.

11   Pension Schemes Act 1993 s 17(6).

12   For the meaning of 'manager' see PARA 555 note 9 ante.

13 As to the Secretary of State see PARA 1 ante.

14 Pension Schemes Act 1993 s 17(7).

## UPDATE

### **890-897 Occupational Pension Schemes providing Guaranteed Minimum Pensions**

See also Gender Recognition Act 2004 Sch 5 para 14; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

As to the conversion of guaranteed minimum pensions into other benefits see PARA 897A.

### **893 Minimum pensions for widows and widowers**

TEXT AND NOTES--Subject to the Pension Schemes Act 1993 s 17(4B) the scheme must provide for the widow's, widower's or surviving civil partner's pension to be payable to the widow, widower or surviving civil partner (1) for any period for which a Category B retirement pension is payable to the widow, widower or surviving civil partner by virtue of the earner's contributions or would be so payable but for the Social Security Contributions and Benefits Act 1992 s 43(1) (see PARA 567); (2) for any period for which widowed parent's allowance or bereavement allowance is payable to the widow, widower or surviving civil partner by virtue of the earner's contributions; and (3) in the case of a widow, widower or surviving civil partner whose entitlement by virtue of the earner's contributions to a widowed parent's allowance or bereavement allowance has come to an end at a time after the widow, widower or surviving civil partner attained the age of 45, for so much of the period beginning with the time when the entitlement came to an end as neither (a) comprises a period during which the widow, widower or surviving civil partner and (i) a person of the opposite sex are living together as husband and wife; or (ii) a person of the same sex are living together as if they were civil partners; nor (b) falls after the time of any (A) marriage; or (B) formation of a civil partnership, by the widow or widower or surviving civil partner which takes place after the earner's death: Pension Schemes Act 1993 s 17(4A) (added by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 1(1); amended by SI 2005/2050). Heads (ii) and (B) do not apply where the earner dies before 5 December 2005: Pension Schemes Act 1993 s 17(4B) (added by SI 2005/2050). For the purposes of the Pension Schemes Act 1993 s 17(4A), two people of the same sex are to be regarded as living together as if they were civil partners if, but only if, they would be regarded as living together as husband and wife were they instead two people of the opposite sex: s 17(9) (added by SI 2005/2050).

Where (1) a lump sum is paid to an earner under provisions included in a scheme by virtue of the Pension Schemes Act 1993 s 21(1) (see PARA 890), and (2) those provisions are of a prescribed description, the earner must be treated for the purposes of s 17 as having any guaranteed minimum under s 14 that he would have had but for that payment: s 17(8) (added by Pensions Act 2004 s 284(2)) (all in force by 6 April 2006: SI 2005/1720).

TEXT AND NOTES 6, 8, 9, 11, 14--Pension Schemes Act 1993 s 17(1), (2), (4), (6), (7) amended so as to extend provisions to surviving civil partners: SI 2005/2050.

TEXT AND NOTE 6--But a scheme may be amended so as to omit provision of the kind specified in the Pension Schemes Act 1993 s 17(1) if the conditions specified in s 24B

(see PARA 897A) are satisfied: Pension Schemes Act 1993 s 17(1A) (added by Pensions Act 2007 s 14(2)).

NOTE 6--For 'must provide' read ' must also make provision'; omit 'a Category B retirement pension' (first place) and 'or for which ... (see PARA 567)': Pension Schemes Act 1993 s 17(5) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 1(2), Sch 9 para 4).

TEXT AND NOTES 10, 11--For 'must provide' read ' must also make provision': Pension Schemes Act 1993 s 17(6) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 1(3)).

TEXT AND NOTES 12-14--For 'Secretary of State' and 'he' read 'Inland Revenue': 1993 Act s 17(7) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 39).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(2) REQUIREMENTS FOR CERTIFICATION/(iii) Occupational Pension Schemes providing Guaranteed Minimum Pensions/894. Discharge of liability where guaranteed minimum pensions secured by insurance policies or annuity contracts.

**894. Discharge of liability where guaranteed minimum pensions secured by insurance policies or annuity contracts.**

A transaction which comprises:

- 2425 (1) the taking out of a policy of insurance or a number of such policies<sup>1</sup>;
- 2426 (2) the entry into an annuity contract or a number of such contracts<sup>2</sup>;
- 2427 (3) the transfer of the benefit of such a policy or policies or such a contract or contracts<sup>3</sup>,

discharges the trustees or managers<sup>4</sup> of an occupational pension scheme<sup>5</sup> from their liability to provide for or in respect of any person guaranteed minimum pensions<sup>6</sup>:

- 2428 (a) if it is carried out not earlier than the time when that person's pensionable service<sup>7</sup> terminates<sup>8</sup>; and
- 2429 (b) if and to the extent that it results in guaranteed minimum pensions for or in respect of that person being appropriately secured<sup>9</sup>; and
- 2430 (c) if and to the extent that the requirements set out in head (i), head (ii) or head (iii) below are satisfied<sup>10</sup>.

The requirements referred to are that:

- 2431 (i) the arrangement for securing the amount by means of the policy or contract was made at the written request of the earner<sup>11</sup> or, if the earner has died, of the earner's widow or widower, or with the consent of the earner or the widow or widower given in writing in a prescribed form<sup>12</sup>;
- 2432 (ii) the case is one in which the trustees or managers of the scheme are able or willing to accept a transfer payment only in limited circumstances<sup>13</sup> and the policy or contract only secures guaranteed minimum pensions<sup>14</sup>;
- 2433 (iii) the case is not such a case as is mentioned in head (ii) above and such conditions as may be prescribed are satisfied<sup>15</sup>.

<sup>1</sup> Pension Schemes Act 1993 s 19(2)(a).

<sup>2</sup> Ibid s 19(2)(b).

<sup>3</sup> Ibid s 19(2)(c).

<sup>4</sup> For the meaning of 'manager' see PARA 555 note 9 ante.

<sup>5</sup> For the meaning of 'occupational pension scheme' see PARA 741 ante.

<sup>6</sup> Pension Schemes Act 1993 s 19(1). For the meaning of 'guaranteed minimum pension' see PARA 878 ante.

<sup>7</sup> For the meaning of 'pensionable service' see PARA 664 note 2 ante.

<sup>8</sup> Pension Schemes Act 1993 s 19(1)(a).

9 Ibid s 19(1)(b). 'Appropriately secured' means secured by an appropriate policy of insurance or an appropriate annuity contract, or by more than one such policy or contract: s 19(3). A policy of insurance or annuity contract is appropriate for the purposes of s 19 if: (1) the insurance company with which it is or was taken out or entered into is, or was at the relevant time, carrying on ordinary long-term insurance business in the United Kingdom or any other member state, and satisfies, or at the relevant time satisfied, prescribed requirements; and (2) it may not be assigned or surrendered except on conditions which satisfy such requirements as may be prescribed; and (3) it contains or is indorsed with terms whose effect is that the amount secured by it may not be commuted except on conditions which satisfy such requirements as may be prescribed; and (4) it satisfies such other requirements as may be prescribed: s 19(4). For the meaning of 'insurance company' see the Insurance Companies Act 1982 s 96(1) (definition applied by the Pension Schemes Act 1993 s 181(1)). 'The relevant time' means the time when the policy of insurance was taken out or the annuity contract was entered into or, as the case may be, when the benefit of the policy or contract was transferred: s 19(6). For the meaning of 'ordinary long-term insurance business' see the Insurance Companies Act 1982 s 96(1) (definition applied by the Pension Schemes Act 1993 s 19(7)). For the meaning of 'prescribed' see PARA 555 note 1 ante.

The requirements referred to in head (1) supra are that the insurance policy is taken out or the annuity contract is entered into with an insurance company which is either authorised under the Insurance Companies Act 1982 s 3 or 4 or, in the case of a friendly society, authorised under the Friendly Societies Act 1992 s 32 to carry out long-term business under any of the Classes specified in Sch 2 Head A, or an EC company as defined in the Insurance Companies Act 1982 s 2 (as amended) and which either carries on ordinary long-term insurance business in the United Kingdom through a branch in respect of which such of the requirements of the Insurance Companies Act 1982 Sch 2F Pt I (as added) as are applicable have been complied with or provides ordinary long-term insurance in the United Kingdom and such of those requirements as are applicable have been complied with in respect of the insurance: Occupational Pension Schemes (Discharge of Liability) Regulations 1997, SI 1997/784, reg 2(1), (2).

The conditions referred to in head (2) supra are that the written consent of the earner or, if the earner has died, the earner's widow or widower to the assignment or surrender is obtained; and that in consideration of the assignment or surrender the benefits previously secured by the policy of insurance or annuity contract become secured, or are replaced by benefits which are secured, by one or more of the following means: (a) another policy of insurance or annuity contract which is appropriate within the meaning of the Pension Schemes Act 1993 s 19(4); (b) subject to the Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, regs 3, 5, 6 in the case of benefits which include guaranteed minimum pensions, the award of supplementary credits under an occupational pension scheme which applies to the employment of the earner at the time of the assignment or surrender or the granting of rights to money purchase benefits under a personal pension scheme; or (c) in the case only of benefits which are not, and do not include guaranteed minimum pensions, the award of rights to money purchase benefits under a self-employed pension arrangement within the meaning of the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 12(6) (a) or the Personal Pension Schemes (Transfer Values) Regulations 1987, SI 1987/1112, reg 2A (as added): Occupational Pension Schemes (Discharge of Liability) Regulations 1997, SI 1997/784, reg 3.

The conditions referred to in head (3) supra are that (i) the benefits secured by the policy of insurance or annuity contract have become payable, and the aggregate of those benefits and all other benefits currently payable or prospectively payable to the earner or, as the case may be, to his widow or her widower under all occupational pension schemes relating to employment with the same employer as the employment in respect of which the benefits secured by the policy of insurance or annuity contract are payable, does not exceed £260 per annum, an actuary certifies that the methods and assumptions to be used to calculate any benefit in a lump sum form will result in the benefit being broadly equivalent to the annual amount of benefits which would have been payable in pension, and all of the earner's interest under the policy of insurance or annuity contract is discharged upon payment of a lump sum; or (ii) the benefits secured by the policy of insurance or annuity contract have become payable and the earner requests or consents to the commutation, and the earner has attained the age of 50, or is suffering from an incapacity or serious ill-health prior to normal pension age; but the commutation referred to does not apply to that part of the benefits which consist of the earner's and the earner's widow or widower's guaranteed minimum pensions: reg 4(1), (2). For the purposes of head (i) supra, any benefit in a lump sum is to be treated as an annual amount of benefit in pension, any benefit secured by means of another policy of insurance or annuity contract which is appropriate for the purposes of the Pension Schemes Act 1993 s 19(4) is to be treated as payable or prospectively payable under the occupational pension scheme which was liable to provide it before it was so secured and any guaranteed minimum pension which is prospectively payable must be reckoned as having the value that it will have (in accordance with the provisions of the occupational pension scheme in question) when the earner reaches pensionable age: Occupational Pension Schemes (Discharge of Liability) Regulations 1997, SI 1997/784, reg 4(3). For the purposes of head (ii) supra, 'incapacity' means physical or mental deterioration which seriously impairs his earning capacity and 'serious ill-health' means ill-health which is such as to give rise to a life expectancy of less than one year: reg 4(4).

The requirements referred to in head (4) supra are: (A) that the insurance company with which the policy is taken out or the contract entered into assumes an obligation to the earner in question or to trustees of a trust for the benefit of the earner and, if appropriate, dependants of his, to pay the benefits secured by the policy or contract to him or, as the case may be, to dependants of his, or to the trustees of such a trust; (B) that the

policy or contract contains, or is indorsed with, terms so as to provide for any increase, which would have been applicable as a consequence of the Pensions Act 1995 s 51 (annual increase in rate of pension: see PARA 861 ante) and s 52 (restriction on increase where member is under 55: see PARA 862 ante) had the discharge of liability not taken place, to apply to the benefits which have become secured or been replaced by that policy or contract; (C) that, if any guaranteed minimum pension is due or prospectively due to the earner in question, the policy or contract contains, or is indorsed with, terms so as to provide that the annuity to be paid thereunder to or for his benefit will be at least equal to the guaranteed minimum pension due to him, or, as the case may be, prospectively due to him, at pensionable age, subject to the Pension Schemes Act 1993 s 15 (increase of guaranteed minimum pension: see PARA 892 ante) or s 16 (as amended) (revaluation of earnings factors: see PARA 891 ante), and in the case where the earner dies leaving a widow or widower, that the annuity payable for the widow's or widower's benefit will be at least equal to the guaranteed minimum pension due or prospectively due to the widow or widower, and in each case previously mentioned in this head, that any increase of guaranteed minimum pension under ss 109-110 (as amended) (see PARA 926 post) results in a similar increase in the annuity: Occupational Pension Schemes (Discharge of Liability) Regulations 1997, SI 1997/784, reg 5.

10 Pension Schemes Act 1993 s 19(1)(c).

11 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by ibid s 181(1)).

12 Ibid s 19(5)(a). For the prescribed form of consent see the Occupational Pension Schemes (Discharge of Liability) Regulations 1997, SI 1997/784, reg 7, Sch 1.

13 In a case such as is mentioned in the Pension Schemes Act 1993 s 96(2): see PARA 955 post.

14 Ibid s 19(5)(b).

15 Ibid s 19(5)(c). The further conditions on which liability may be discharged are that the requirements of one or more of the following heads are satisfied, ie: (1) the earner is dead and benefit is payable to a person other than his widow or her widower and the arrangement for securing the benefit by means of the policy or contract was made at the written request of the person entitled to it, or with the consent of that person given in writing in the prescribed form (see note 12 supra); (2) the benefit is provided as an alternative to short service benefit by virtue of a provision that conforms with the requirements of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 9(4) (as amended) (bought out benefits without consent: see PARA 934 post); (3) in a case where an occupational pension scheme is being wound up and the Pensions Act 1995 ss 73 and 74 (see PARAS 845, 847 ante) and regulations made under those sections do not apply, the earner is able to assign or surrender the policy of insurance or annuity contract and the conditions specified in the Occupational Pension Schemes (Discharge of Liability) Regulations 1997, SI 1997/784, reg 3 (see note 9 supra) are satisfied; (4) the benefit concerned includes a guaranteed minimum pension that is payable to the earner's widow or widower and the trustees give the widow or widower at least 30 days' written notice ('the notice') of their intention to take out the insurance policy or enter into the annuity contract, and send the notice to the widow or widower at her or his last known address or deliver the notice to the widow or widower personally: see reg 6(1)-(5).

A transaction to which the Pension Schemes Act 1993 s 19 applies discharges the trustees or managers of an occupational pension scheme from their liability to provide for or in respect of any person short service benefit or any alternative to short service benefit if the statutory conditions are satisfied: see s 81; and PARA 938 post. 'Short service benefit' is the benefit to which a member is entitled under s 71(1): see s 71(2); and PARA 932 post. As to the power to prescribe for these purposes the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member see PARA 557 note 9 ante. For the meaning of 'prescribe' see PARA 555 note 1 ante; and for the meaning of 'occupational pension scheme' see PARA 741 ante.

## UPDATE

### **890-897 Occupational Pension Schemes providing Guaranteed Minimum Pensions**

See also Gender Recognition Act 2004 Sch 5 para 14; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

As to the conversion of guaranteed minimum pensions into other benefits see PARA 897A.

# **894 Discharge of liability where guaranteed minimum pensions secured by insurance policies or annuity contracts**

NOTE 9--Pension Schemes Act 1993 s 19(4) amended, s 19(7) repealed: SI 2001/3649. SI 1997/784 reg 2(1) amended, reg 2(2) substituted: SI 2001/3649.

Insurance Companies Act 1982 and definition of 'insurance company' in 1993 Act s 181(1) repealed: SI 2001/3649.

SI 1996/1847 reg 12(6)(a) omitted: SI 2006/744.

The conditions referred to in head (3) are now that (i) the amount secured by the policy of assurance or annuity contract does not exceed the amount for the time being permitted for a lump sum payment by (A) the lump sum rule in the Finance Act 2004 s 166 (see PARA 873B.5) and qualifies as a trivial commutation lump sum for the purposes of Sch 29 para 7 (see PARA 873B.7); or (B) the lump sum death benefit rule in s 168 (see PARA 873B.8) and qualifies as a trivial lump sum death benefit for the purposes of Sch 19 Pt 2 para 20 (see PARA 873B.8); or (ii) the earner requests or consents to the amount secured by the policy or contract being paid as a lump sum and that payment does not exceed the amount for the time being permitted for a lump sum payment by the lump sum rule in 2004 Act s 166 and qualifies as a serious ill-health lump sum for the purposes of Sch 29 para 4 (see PARA 873B.1) (but the commutation referred to does not apply to that part of the amount which consists of the earner's widow or widower's guaranteed minimum pensions: SI 1997/784 reg 4(1), (2) (amended by SI 2006/744). SI 1997/784 reg 4(3) amended accordingly, reg 4(4) revoked: SI 2006/744.

SI 1997/784 reg 5 applies to civil partners: reg 5 (amended by SI 2005/704, SI 2005/3164).

TEXT AND NOTE 12--1993 Act s 19(5)(a) now applies to surviving civil partners: SI 2005/2050.

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### **895. Transfer of accrued rights.**

Regulations<sup>1</sup> may prescribe<sup>2</sup> circumstances in which and conditions subject to which a transfer of, or a transfer payment in respect of:

- 2434 (1) an earner's<sup>3</sup> accrued rights to guaranteed minimum pensions<sup>4</sup> under a contracted-out scheme<sup>5</sup>;
- 2435 (2) an earner's accrued rights to pensions under an occupational pension scheme<sup>6</sup> which is not contracted-out, to the extent that those rights derive from his accrued rights to guaranteed minimum pensions under a contracted-out scheme;
- or
- 2436 (3) the liability for the payment of guaranteed minimum pensions to or in respect of any person who has become entitled to them,

may be made by an occupational pension scheme to another such scheme or to a personal pension scheme<sup>7</sup>; and may also prescribe circumstances in which and conditions subject to which a transfer of, or a transfer payment in respect of, an earner's accrued rights to guaranteed minimum pensions which are appropriately secured<sup>8</sup> may be made to an occupational pension scheme or a personal pension scheme<sup>9</sup>.

Any such regulations may be made so as to apply to earners who are not in employment<sup>10</sup> at the time of the transfer<sup>11</sup>. Such regulations must have effect in relation to transfers whenever made unless they provide that they are only to have effect in relation to transfers which take place after they come into force<sup>12</sup>.

A transfer or transfer payment from an occupational pension scheme of or in respect of the accrued rights of an earner<sup>13</sup> to guaranteed minimum pensions may be made in accordance with whichever of the regulations relating to:

- 2437 (a) transfers of guaranteed minimum pensions to salary-related contracted-out schemes<sup>14</sup>;
- 2438 (b) connected employer transfers<sup>15</sup> of guaranteed minimum pensions<sup>16</sup>;
- 2439 (c) transfer payments in respect of guaranteed minimum pensions to money purchase contracted-out schemes<sup>17</sup> and appropriate personal pension schemes<sup>18</sup>;
- and
- 2440 (d) transfer payments in respect of guaranteed minimum pensions to overseas schemes<sup>19</sup>,

is applicable and no such transfer or transfer payment may otherwise be made from such a scheme<sup>20</sup>. A transfer or transfer payment from an appropriate policy<sup>21</sup> of or in respect of the accrued rights of an earner to guaranteed minimum pensions which are appropriately secured<sup>22</sup> may be made in accordance with whichever of head (a), head (c) or head (d) above is applicable and no such transfer or transfer payment may otherwise be made from such a policy<sup>23</sup>; and a transfer of liability for the payment of guaranteed minimum pensions to or in respect of any person who has become entitled to them may be made from an occupational pension scheme in accordance with whichever of head (a) or head (b) above is applicable and no such transfer may be made otherwise<sup>24</sup>.

Provision is also made for the transfer of liability in respect of:

- 2441 (i) rights to the payment of pensions and accrued rights to pensions (other than rights attributable to voluntary contributions) under certain contracted-out schemes<sup>25</sup> so far as attributable to an earner's service in contracted-out employment on or after the principal appointed day; and
- 2442 (ii) where a transfer payment has been made to such a scheme, any rights arising under the scheme as a consequence of that payment which are derived directly or indirectly from such rights as are referred to in head (i) above under another such contracted-out scheme or protected rights under another occupational pension scheme or under a personal pension scheme attributable to payments or contributions in respect of contracted-out employment on or after the principal appointed day<sup>26</sup>.

1 For the meaning of 'regulations' see PARA 557 note 2 ante.

2 For the meaning of 'prescribe' see PARA 555 note 1 ante.

3 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

4 For the meaning of 'guaranteed minimum pension' see PARA 878 ante.

5 As to contracted-out schemes see PARA 880 ante.

6 For the meaning of 'occupational pension scheme' see PARA 741 ante.

7 Pension Schemes Act 1993 s 20(1)(a).

8 Ie for the purposes of *ibid* s 19: see PARA 894 ante.

9 *Ibid* s 20(1). For the meaning of 'personal pension scheme' see PARA 710 ante. The power conferred by s 20(1) is without prejudice to the generality of s 182(2) (see PARA 977 post): s 20(5). Regulations under s 20(1) may provide that any provision of Pt III (ss 7-68) (as amended) (see PARA 878 et seq ante, 896 et seq post) (other than s 18 (see PARA 891 ante), s 19 (see PARA 894 ante), ss 43-45 (as amended) (see PARAS 913-915 post), and ss 26-33 (as amended) (see PARAS 883 ante, 898 et seq post) so far as they apply to personal pension schemes) or of Pt IV Ch III (ss 87-92) (as amended) (see PARAS 947-950 post) or of Pt V Ch II (ss 109-110) (as amended) (see PARA 926 post) must have effect, where there has been a transfer to which that provision applies, subject to such modifications as may be specified in the regulations: s 20(3). For the meaning of 'modifications' see PARA 664 note 10 ante. In the provisions mentioned in s 20(3) 'accrued rights', in relation to an earner, means the rights conferring prospective entitlement under the scheme in question to the pensions to be provided for the earner and the earner's widow or widower in accordance with s 13 (as amended) (see PARA 890 ante) and s 17 (as amended) (see PARA 893 ante), and references to an earner's accrued rights to guaranteed minimum pensions must be construed accordingly: s 20(6). For the prescribed modifications made to Pt III (as amended) on transfers of and transfer payments in respect of guaranteed minimum pensions from occupational pension schemes see the Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, reg 12 (amended by SI 1997/786); and for the prescribed modifications thereto on transfer from policies of insurance or annuity contracts see the Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, regs 13, 13A (respectively amended and added by SI 1997/786).

10 For the meaning of 'employment' see PARA 560 note 5 ante.

11 Pension Schemes Act 1993 s 20(2).

12 *Ibid* s 20(4).

13 For these purposes, 'earner' includes an earner who is not in employment at the time of the transfer or transfer payment: Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, reg 1(2).

14 Ie in accordance with *ibid* reg 3. A transfer may be made to a salary-related contracted-out scheme if: (1) the earner or person concerned consents in writing; (2) in the case of a transfer of the accrued rights of an earner (a) the earner is employed by an employer who is a contributor to the receiving scheme; or (b) the earner has previously been a member of the receiving scheme; (3) in the case of a transfer of the accrued rights of an earner who is not in employment which is contracted-out by reference to the receiving scheme, the

conditions specified in reg 3(1), Sch 1 paras 1-4 (amended by SI 1997/786) are satisfied, unless the transfer is from an appropriate policy in which case the condition set out in the Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, Sch 1 para 5 must be satisfied; (4) in the case of a transfer of the accrued rights of an earner from an appropriate policy, the receiving scheme does not make provision under the Pension Schemes Act 1993 s 16(2), (3) (as amended) (revaluation of earnings factors for purposes of s 14: early leavers etc: see PARA 891 ante), or any analogous provision, in relation to the rights transferred where the effect would be to increase them at a different rate from that at which they would have been increased had the transfer not taken place; and (5) in the case of a transfer of liability for the payment of guaranteed minimum pensions to or in respect of a person who has become entitled to them, the transfer is from a scheme and the conditions set out in the Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, Sch 1 para 6 (substituted by SI 1997/786) are satisfied: Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, reg 3. 'Salary-related contracted-out scheme' means an occupational pension scheme which is contracted-out by virtue of satisfying the Pension Schemes Act 1993 s 9(2) (as substituted) (see PARA 882 ante): Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, reg 1(2).

15 'Connected employer transfer' and 'connected employer transfer payment' mean respectively a transfer of guaranteed minimum pensions from a salary-related contracted-out scheme to a salary-related contracted-out scheme and a transfer payment in respect of 'section 9(2B) rights' from a salary-related contracted-out scheme to a salary-related contracted-out scheme where either (1) the transferring scheme and the receiving scheme apply to employment with the same employer; or (2) the transferring scheme and the receiving scheme apply to employment with different employers, the earner or person concerned is one of a group of persons in respect of whom transfers or transfer payments are being made from the transferring scheme to the receiving scheme and either (a) the transfer or transfer payment is a consequence of a financial transaction between the employers; (b) each of the employers is one of a group of companies consisting of a holding company and one or more subsidiaries within the meaning of the Companies Act 1985 s 736 (as substituted) (see COMPANIES vol 14 (2009) PARA 25); or (c) the employers are associated employers within the meaning of the Income and Corporation Taxes Act 1988 s 590A(3), (4) (as added) (see PARA 749 ante): Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, reg 1(2). 'Section 9(2B) rights' are: (i) rights to the payment of pensions and accrued rights to pensions (other than rights attributable to voluntary contributions) under a scheme contracted-out by virtue of the Pension Schemes Act 1993 s 9(2B) (as added), so far as attributable to an earner's service in contracted-out employment on or after the principal appointed day; and (ii) where a transfer payment has been made to such a scheme, any rights arising under the scheme as a consequence of that payment which are derived directly or indirectly from such rights as are referred to in head (i) supra under another scheme contracted-out by virtue of s 9(2B) (as added) or protected rights under another occupational pension scheme or under a personal pension scheme attributable to payments or contributions in respect of contracted-out employment on or after the principal appointed day (within the meaning of s 7(2B) (as added) (see PARA 880 note 13 ante): Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, reg 1(2) (definition substituted by SI 1997/786).

16 In accordance with the Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, reg 4. A connected employer transfer may be made to a salary-related contracted-out scheme subject to the conditions set out in reg 3(c) and (e) (see note 14 heads (3), (5) supra): reg 4.

17 'Money purchase contracted-out scheme' means an occupational pension scheme which is contracted-out by virtue of satisfying the Pension Schemes Act 1993 s 9(3) (as amended) (see PARA 882 ante): Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, reg 1(2).

18 In accordance with *ibid* reg 5. A transfer payment may be made to a money purchase contracted-out scheme or an appropriate personal pension scheme if (1) the earner consents in writing; (2) the earner, if the transfer payment is to a money purchase contracted-out scheme, is employed by an employer who is a contributor to the receiving scheme, or the earner has previously been a member of the receiving scheme; (3) the transfer payment is applied so as to provide money purchase benefits under the receiving scheme for or in respect of the earner; and (4) the transfer payment (whether or not it forms part of a larger payment in respect of both guaranteed minimum pensions and other rights) is of an amount at least equal to the cash equivalent of the earner's accrued rights to guaranteed minimum pensions, as calculated and verified in a manner consistent with regulations made under the Pension Schemes Act 1993 s 97 (as amended) (calculation of cash equivalents: see PARA 956 post): Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462 reg 5. 'Appropriate personal pension scheme' is to be construed in accordance with the Pension Schemes Act 1993 s 7 (as amended) (see PARA 880 ante): Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, reg 1(2).

19 In accordance with *ibid* reg 6 (amended by SI 1997/786). A transfer payment may be made to an overseas scheme if (1) the earner consents in writing; (2) the trustees of the transferring scheme have taken reasonable steps to satisfy themselves (or, if the transfer payment is from an appropriate policy, the transferring insurance company has taken reasonable steps to satisfy itself) that the earner has emigrated on a permanent basis and is in employment to which the receiving scheme applies; (3) the transfer payment (whether or not it forms part of a larger payment in respect of both guaranteed minimum pensions and other rights) is of an amount at least equal to the cash equivalent of the earner's accrued rights to guaranteed

minimum pensions, as calculated and verified in a manner consistent with regulations made under the Pension Schemes Act 1993 s 97 (as amended); (4) the earner has acknowledged in writing that he accepts that the scheme to which the transfer payment is to be made may not be regulated in any way by the law of the United Kingdom and that as a consequence there may be no obligation under that law on the receiving scheme or its trustees or administrators to provide any particular value or benefit in return for the transfer payment; and (5) the trustees of the transferring scheme have taken reasonable steps to satisfy themselves (or, if the transfer payment is from an appropriate policy, the transferring insurance company has taken reasonable steps to satisfy itself) that the earner has received a statement from the receiving scheme showing the benefits to be awarded in respect of the transfer payment and the conditions (if any) on which these could be forfeited or withheld: Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, reg 6 (as so amended). 'Overseas scheme' means an occupational pension scheme which is administered wholly or primarily outside the United Kingdom but does not include one which is a salary-related contracted-out scheme nor one in respect of which the Pension Schemes Act 1993 s 53 (as amended) applies: Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, reg 1(2) (definition as so amended).

20 Ibid reg 2(1).

21 'Appropriate policy' means a policy of insurance or an annuity contract such as is described in the Pension Schemes Act 1993 s 19(4) (see PARA 894 ante): Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, reg 1(2).

22 'Appropriately secured' has the meaning given to that expression in the Pension Schemes Act 1993 s 19(3) (see PARA 894 ante): Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, reg 1(2).

23 Ibid reg 2(2).

24 Ibid reg 2(4).

25 ie schemes contracted-out by virtue of the Pension Schemes Act 1993 s 9(2B) (as added): see PARA 882 ante.

26 See the Contracting-out (Transfer and Transfer Payment) Regulations 1996, SI 1996/1462, Pt III (regs 7-11) (amended by SI 1997/786). The rights referred to in heads (i)-(ii) in the text are 'section 9(2B) rights': see note 15 supra. As to the principal appointed day see note 15 supra.

## UPDATE

### **890-897 Occupational Pension Schemes providing Guaranteed Minimum Pensions**

See also Gender Recognition Act 2004 Sch 5 para 14; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

As to the conversion of guaranteed minimum pensions into other benefits see PARA 897A.

### **895 Transfer of accrued rights**

NOTE 9--For 'Ibid s 20(1)' read 'Ibid s 20(1)(b)'.

The references to a personal pension scheme are now to a personal pension scheme or an overseas arrangement: Pension Schemes Act 1993 s 20(1), (a), (b) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 2(1)). 'Overseas arrangement' means a scheme or arrangement which (1) has effect, or is capable of having effect, so as to provide benefits on termination of employment or on death or retirement to or in respect of earners; (2) is administered wholly or primarily outside Great Britain; (3) is not an appropriate scheme; and (4) is not an occupational pension scheme: 1993 Act s 181(1) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 2(3)).

1993 Act s 20(3) amended: Pensions Act 2007 Sch 4 para 7 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

1993 Act s 20(6) now extends to surviving civil partners: SI 2005/2050.

NOTE 14--SI 1996/1462 Sch 1 para 6 amended: SI 2005/2050.

NOTE 15--Head (c) omitted: SI 1996/1462 reg 1(2) (amended by SI 2006/744). Definition of 'connected employer transfer' and 'connected employer transfer payment' further amended: SI 2009/615. In definition of 'section 9(2B) rights' head (ii) for 'contracted-out employment' read 'employment': SI 1996/1462 reg 1(2) (amended by SI 1999/3198).

NOTE 19--Now refers to an overseas scheme or overseas arrangement: SI 1996/1462 reg 6 (amended by SI 2005/555). In head (2) for 'the earner has emigrated on a permanent basis and' read ', where the receiving scheme is an occupational pension scheme, the earner': SI 1996/1462 reg 6 (as so amended). Head (4) now refers to the scheme or arrangement and to the receiving scheme or arrangement: reg 6 (as so amended); and head (5) now refers to receiving scheme or arrangement: reg 6 (as so amended). 'Overseas arrangement' means a scheme or arrangement, other than an occupational pension scheme, which (a) has effect, or is capable of having effect, so as to provide benefits on termination of employment or on death or retirement to or in respect of earners; (b) is not an appropriate personal pension scheme; and (c) is administered wholly or primarily outside the United Kingdom: reg 1(2). 'Overseas scheme' means (1) an occupational pension scheme which has its main administration outside the member states; or (2) a European pensions institution as defined in the Pensions Act 2004 s 293(8) (see PARA 969A.7) (functions of Regulator in relation to institutions administered in other member states), but does not include a salary-related contracted-out scheme nor one in respect of which the Pension Schemes Act 1993 s 53 (see PARA 920) applies by virtue of s 52(1) (see PARA 920): SI 1996/1462 reg 1(2) (definition substituted by SI 2007/814).

NOTE 26--SI 1996/1462 reg 11 amended: SI 2005/555.

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### **896. Securing of benefits.**

Subject to the following provisions, the scheme must contain a rule by which any liabilities of the scheme in respect of:

- 2443 (1) guaranteed minimum pensions<sup>1</sup> and accrued rights<sup>2</sup> to guaranteed minimum pensions;
- 2444 (2) any such benefits as are excluded<sup>3</sup> from earners<sup>4</sup> guaranteed minimum pensions;
- 2445 (3) pensions and other benefits (whether or not within head (1) or head (2) above) in respect of which entitlement to payment has already arisen; and
- 2446 (4) state scheme premiums (now replaced by contributions equivalent premiums),

are accorded priority on a winding up which is begun before 6 April 1997 over other liabilities under the scheme in respect of benefits attributable to any period of service after the rule has taken effect<sup>5</sup>.

The rule may also accord priority, on a winding up occurring before that date and after an earner has attained normal pension age<sup>6</sup>, to liabilities of the scheme in respect of pensions and other benefits to which:

- 2447 (a) he will be entitled on ceasing to be in employment<sup>7</sup>; or
- 2448 (b) the earner's widow or widower or any dependant of the earner's will be entitled on the earner's death<sup>8</sup>.

The above provisions do not apply to public service pension schemes<sup>9</sup> or to schemes falling within any category or description prescribed as being exempt from their requirements<sup>10</sup>; nor do they apply where the winding up is begun on or after 6 April 1997<sup>11</sup>. If the scheme provides for the payment out of any sum representing the surrender value of a policy of insurance taken out for the purposes of the scheme, it must make provision so that there may be no payment out in relation to guaranteed minimum pensions except in such circumstances as may be prescribed<sup>12</sup>.

1 For the meaning of 'guaranteed minimum pension' see PARA 878 ante.

2 For the meaning of 'accrued rights' for these purposes see PARA 895 note 9 ante.

3 Ie by the Pension Schemes Act 1993 s 13(6): see PARA 890 ante.

4 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by ibid s 181(1)).

5 Ibid s 23(2); Pensions Act 1995 s 151, Sch 5 paras 18, 31.

6 'Normal pension age', in relation to a scheme and a member's pensionable service under it, means: (1) in a case where the scheme provides for the member only a guaranteed minimum pension, the earliest age at which the member is entitled to receive the guaranteed minimum pension on retirement from any employment to which the scheme applies; and (2) in any other case, the earliest age at which the member is entitled to receive benefits (other than a guaranteed minimum pension) on his retirement from such employment: Pension Schemes Act 1993 s 180(1). For the purposes of s 180(1), any scheme rule making special provision as to early

retirement on grounds of ill-health or otherwise is to be disregarded: s 180(2). As to the power to prescribe for these purposes the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member see PARA 557 note 9 ante. For the meaning of 'prescribe' see PARA 555 note 1 ante; and for the meaning of 'occupational pension scheme' see PARA 741 ante. For the meaning of 'pensionable service' see PARA 664 note 2 ante; as to when a person attains a particular age see PARA 881 note 2 ante; and for the meaning of 'employment' see PARA 560 note 5 ante.

7 Ibid s 23(3)(a).

8 Ibid s 23(3)(b); Pensions Act 1995 Sch 5 paras 18, 31.

9 Pension Schemes Act 1993 s 23(4) (amended by the Pensions Act 1995 Sch 5 paras 18, 31). For the meaning of 'public service pension scheme' see PARA 874 ante.

10 Pension Schemes Act 1993 s 23(6).

11 Pensions Act 1995 Sch 5 paras 18, 31. For transitional arrangements and savings for salary-related schemes which have begun before that date see the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 73.

12 Pension Schemes Act 1993 s 23(7).

## **UPDATE**

### **890-897 Occupational Pension Schemes providing Guaranteed Minimum Pensions**

See also Gender Recognition Act 2004 Sch 5 para 14; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

As to the conversion of guaranteed minimum pensions into other benefits see PARA 897A.

### **896 Securing of benefits**

TEXT AND NOTE 8--Pension Schemes Act 1993 s 23(3)(b) further amended so as to extend provisions to surviving civil partners: SI 2005/2050.

NOTE 11--Functions of the Secretary of State under SI 1996/1172, reg 73 transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2. SI 1996/1172 reg 73 amended: SI 2000/2975, SI 2009/598.

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**897. Transitional arrangements whereby Secretary of State may impose conditions as to investments and resources.**

A salary-related contracted-out scheme<sup>1</sup> must, in relation to any earner's<sup>2</sup> service before the principal appointed day<sup>3</sup>, comply with any requirements prescribed<sup>4</sup> for the purpose of securing that:

- 2449 (1) the Secretary of State<sup>5</sup> is kept informed about any matters affecting the security of the minimum pensions guaranteed<sup>6</sup> under the scheme'; and  
 2450 (2) the resources<sup>8</sup> of the scheme are brought to and are maintained at a level satisfactory to the Secretary of State<sup>9</sup>.

1 For the meaning of 'contracted-out scheme' see PARA 880 ante.

2 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

3 For the meaning of 'the principal appointed day' see PARA 880 note 13 ante.

4 For the meaning of 'prescribed' see PARA 555 note 1 ante.

5 As to the Secretary of State see PARA 1 ante.

6 As to minimum guaranteed pensions see PARA 878 ante.

7 Pension Schemes Act 1993 s 25(2)(a) (s 25(2) substituted by the Pensions Act 1995 s 151, Sch 5 paras 18, 33(b)).

8 For the meaning of 'resources' see PARA 609 note 2 ante.

9 Pension Schemes Act 1993 s 25(2)(b) (as substituted: see note 7 supra). For the prescribed requirements see the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 72 (amended by SI 1997/786).

**UPDATE**

**890-897 Occupational Pension Schemes providing Guaranteed Minimum Pensions**

See also Gender Recognition Act 2004 Sch 5 para 14; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

As to the conversion of guaranteed minimum pensions into other benefits see PARA 897A.

**897 Transitional arrangements whereby [Inland Revenue] may impose conditions as to investments and resources**

TEXT AND NOTES 5-9--References to Secretary of State now to Inland Revenue: 1993 Act s 25(2) (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 40).

NOTE 9--Functions of Secretary of State under SI 1996/1172 reg 72 transferred to Commissioners of Inland Revenue: 1999 Act s 1(2), Sch 2.

SI 1996/1172 reg 72 further amended: SI 2005/706, SI 2005/3377 (see also Sch 3 para 3).

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### **897A. Conversion of guaranteed minimum pensions.**

The Pension Schemes Act 1993 ss 24A-24H (added by the Pensions Act 2007 s 14(3)) make provision with respect to the conversion of guaranteed minimum pensions into other benefits.

The Pension Schemes Act 1993 s 24A sets out definitions of terms used in ss 24B-24H. The conditions which a converting scheme must satisfy are specified, namely actuarial equivalence of the value of members' conversion benefits with those they possessed pre-conversion; no reduction of pensions in payment; conversion benefits not to include money purchase benefits; survivors' benefits to be provided; and specified procedural requirements to be met: see s 24B. Regulations may make provision for determining actuarial equivalence: see s 24C. As to regulations made under ss 24B, 24C see Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, regs 69A, 69B (added by SI 2009/846). Detailed provision is made with respect to survivors' benefits: see s 24D. Procedural requirements are set out: see s 24E. Regulations may prescribe (1) restrictions on the transfer of the earner's accrued rights under a guaranteed minimum pension-converted scheme; (2) conditions which must be complied with on the transfer of the earner's accrued rights under a guaranteed minimum pension-converted scheme: see s 24F. Powers are provided for trustees to amend schemes to facilitate guaranteed minimum pension conversion: see s 24G. Powers are provided for the Pensions Regulator in respect of enforcing the conditions for guaranteed minimum pension conversion: see s 24H.

See further Pensions Act 2007 s 14(8)-(11).

### **UPDATE**

### **890-897 Occupational Pension Schemes providing Guaranteed Minimum Pensions**

See also Gender Recognition Act 2004 Sch 5 para 14; and CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 121A.

As to the conversion of guaranteed minimum pensions into other benefits see PARA 897A.

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## **(iv) Occupational and Personal Money Purchase Schemes**

### **898. Persons who may establish scheme.**

The Secretary of State<sup>1</sup> may prescribe<sup>2</sup> descriptions of persons by whom or bodies by which the occupational or personal pension scheme<sup>3</sup> may be established and, if he does so, the scheme may only be established by a person or body of a prescribed description<sup>4</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 For the meaning of 'prescribe' see PARA 555 note 1 ante.

3 For the meaning of 'occupational pension scheme' and 'personal pension scheme' see PARAS 741, 710 respectively ante.

4 Pension Schemes Act 1993 s 26. Nothing in ss 26-32 (as amended) (see PARAS 883 ante, 899 et seq post) must be taken to prejudice any requirements with which a scheme must comply if it is to qualify for tax exemption or tax approval: s 33. 'Tax exemption' and 'tax approval' mean respectively exemption from tax and approval of the Inland Revenue, in either case under any such provision of the Income Tax Acts as may be prescribed: Pension Schemes Act 1993 s 181(1). For the meaning of 'the Income Tax Acts' see PARA 684 note 4 ante. The prescribed provisions are the Income and Corporation Taxes Act 1988 Pt XIV Ch 1 (ss 590-612) (as amended) or Ch IV (ss 630-655) (as amended) (see PARA 747 et seq, 711 et seq respectively ante): Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 17.

For the prescribed bodies and persons with respect to a personal pension scheme see PARA 886 note 4 ante.

### **UPDATE**

### **898 Persons who may establish scheme**

TEXT AND NOTES--For requirements for schemes with members with protected rights see PARA 898A.

NOTE 4--Pension Schemes Act 1993 s 33 amended: Taxation of Pension Schemes (Consequential Amendments) Order 2006, SI 2006/745.

As from the abolition date (see Pensions Act 2007 s 15 and PARA 880), 1993 Act s 33 further amended: 2007 Act Sch 4 para 13. For savings see Sch 4 Pt 3.

The prescribed provision is now Finance Act 2004 s 153 (see PARA 873B.1): SI 1996/1537 reg 17 (substituted by SI 2006/744).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(2) REQUIREMENTS FOR CERTIFICATION/(iv) Occupational and Personal Money Purchase Schemes/898A. Requirements for schemes with members with protected rights.

### **898A. Requirements for schemes with members with protected rights.**

The following provisions come into force on the abolition date: see Pensions Act 2007 s 15 and PARA 880. For savings see 2007 Act Sch 4 Pt 3.

The following provisions<sup>1</sup> apply to (1) an occupational pension scheme which ceased to be a money purchase contracted-out scheme<sup>2</sup>, (2) a personal pension scheme which ceased to be an appropriate scheme<sup>3</sup>, or (3) a registered pension scheme<sup>4</sup> (a) which is not a scheme falling within head (1) or (2) above, and (b) to which the rights of a person who was at any time a member of a scheme mentioned in either of those heads have been transferred<sup>5</sup>. For so long as there are persons who have protected rights under a scheme to which these provisions apply, or who are entitled to any benefit giving effect to such rights under it, the scheme must satisfy specified requirements<sup>6</sup>.

1    Ie the Pension Schemes Act 1993 s 25A.

2    By virtue of the Pensions Act 2007 s 15(1) (see PARA 880).

3    By virtue of *ibid* s 15(1).

4    Under the Finance Act 2004 s 153.

5    1993 Act s 25A(1) (added by Pensions Act 2007 Sch 4 para 9).

6    Ie the requirements in the 1993 Act s 25A(3) s 25A(2) (as added: see NOTE 5). Those requirements are (1) the requirements imposed by or by virtue of ss 26-32; and (2) such other requirements as may be prescribed: s 25A(3) (as added). Regulations made under head (2) may contain provision framed by reference to whether or not a scheme is a registered pension scheme under the Finance Act 2004 s 153: 1993 Act s 25A(4) (as added).

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### **899. Ways of giving effect to protected rights.**

Provision is made for the rules of the scheme to identify and calculate the value of protected rights<sup>1</sup> in certain circumstances<sup>2</sup>.

The rules of the scheme must provide for effect to be given to the protected rights of a member<sup>3</sup>:

- 2451 (1) by the purchase of an annuity<sup>4</sup>; and
- 2452 (2) by the making of certain payments<sup>5</sup>; and
- 2453 (3) in any other case, in such of the ways permitted by the following provisions as the rules may specify,

and they must not provide for any part of a member's protected rights to be discharged otherwise than in accordance with those provisions<sup>6</sup>.

In the case of a personal pension scheme<sup>7</sup>, where the member so elects, effect must be given to his protected rights:

- 2454 (a) during the interim period<sup>8</sup>, by the making of payments under an interim arrangement which complies with the statutory requirements for such arrangements<sup>9</sup> and satisfies such conditions as may be prescribed<sup>10</sup>; and
- 2455 (b) at the end of the interim period, in such of the ways permitted by the following provisions as the rules of the scheme may specify<sup>11</sup>.

Effect may be given to protected rights by the provision by the scheme of a pension which complies with the pension requirements<sup>12</sup> and satisfies such conditions as may be prescribed, or, in such circumstances and subject to such conditions as may be prescribed, by the making of a transfer payment:

- 2456 (i) in the case of an occupational pension scheme<sup>13</sup>, to another occupational pension scheme or to a personal pension scheme; and
- 2457 (ii) in the case of a personal pension scheme, to another personal pension scheme or to an occupational pension scheme,

where the scheme to which the payment is made satisfies such requirements as may be prescribed<sup>14</sup>.

If the rules of the scheme do not provide for a pension or if the member or, where applicable<sup>15</sup>, the member's widow or widower so elects, then, except to the extent that effect is given to protected rights in accordance with head (a) above or by the provision of a lump sum<sup>16</sup>, effect must be given to them by the purchase by the scheme of an annuity which complies with the annuity requirements<sup>17</sup> and satisfies such conditions as may be prescribed<sup>18</sup>. Effect may be given to protected rights by the provision of a lump sum if the lump sum is payable on a date which is:

- 2458 (A) in the case of an occupational pension scheme, a date not earlier than that on which the member attains the age<sup>19</sup> of 60 nor later than that on which he attains the age of 65 or such later date as has been agreed by him; or
- 2459 (B) in the case of a personal pension scheme, where the member has elected to receive payments under an interim arrangement, the date by reference to which the member elects to terminate that arrangement, and otherwise such date as has been agreed by him and is not earlier than his sixtieth birthday nor later than his seventy-fifth birthday<sup>20</sup>,

and if the annual rate of such a pension or such an annuity giving effect to the protected rights and commencing on the date on which the lump sum is payable would not exceed the prescribed amount<sup>21</sup>, the circumstances are such as may be prescribed<sup>22</sup> and the amount of the lump sum is calculated in the prescribed manner by reference to the amount of the pension or annuity<sup>23</sup>.

If the member has died without effect being given to protected rights under the above provisions, effect may be given to them in such manner as may be prescribed<sup>24</sup>. No transaction is to be taken to give effect to protected rights unless it falls within these provisions<sup>25</sup>.

Without prejudice to any other requirements, a personal pension scheme can be an appropriate scheme and an occupational pension scheme can be a money purchase contracted-out scheme only if the provision it makes for giving effect to the protected rights of a member who has died is such that any widow, widower or other person who is entitled to any payment giving effect to those rights is able to enforce that entitlement<sup>26</sup>. A scheme which offers pensions with a view to giving effect<sup>27</sup> to protected rights by means of those pensions can be (in the case of a personal pension scheme) an appropriate scheme or (in the case of an occupational pension scheme) a money purchase contracted-out scheme only if it offers those pensions without having regard to the sex or, except to the extent allowed<sup>28</sup>, to the marital status of the persons to whom it offers them, both in making those offers and in determining the rates at which those pensions are paid<sup>29</sup>.

A money purchase contracted-out scheme or an appropriate personal pension scheme (or a scheme which was formerly a money purchase contracted-out scheme or an appropriate personal pension scheme) may give effect to the protected rights of a member by the making of a transfer payment to an appropriate personal pension scheme or to an occupational pension scheme in accordance with the prescribed provisions<sup>30</sup>.

1 For the meaning of 'protected rights' see the Pension Schemes Act 1993 s 10 (as amended); and PARA 883 ante.

2 See *ibid* s 27; and PARA 883 ante.

3 The Pension Schemes Act 1993 s 181(4) (as amended) (power to prescribe persons who are to be regarded as members or prospective members of a pension scheme) does not apply for these purposes: see PARA 557 note 9 ante.

4 *Ie* in any case where the Pension Schemes Act 1993 s 28(3) (as amended) so requires and as is mentioned therein: see the text and note 18 *infra*.

5 *Ie* in any case where *ibid* s 28(1A) (added by the Pensions Act 1995 s 142) so requires and as is mentioned in the Pension Schemes Act 1993 s 28(1A) (as so added): see the text and note 11 *infra*.

6 *Ibid* s 28(1) (amended by the Pensions Act 1995 s 142). The Pension Schemes Act 1993 s 28 (as amended) is subject to s 32A (as added) (see PARA 849 ante): s 28(9) (added by the Pensions Act 1995 s 146). As to tax requirements see the Pension Schemes Act 1993 s 33; and PARA 898 ante.

7 For the meaning of 'personal pension scheme' see PARA 710 ante.

8 'The interim period' means the period beginning with the starting date in relation to the member in question and ending with the termination date: Pension Schemes Act 1993 s 28(8) (added by the Pensions Act 1995 s 142). 'The starting date' means the date, which must not be earlier than the member's sixtieth birthday, by reference to which the member elects to begin to receive payments under the interim arrangement: Pension Schemes Act 1993 s 28(8) (as so added). 'The termination date' means the date by reference to which the member (or, where s 28(2) (see the text and note 14 *infra*) applies, the member's widow or widower) elects to terminate the interim arrangement, and that date must be not later than the member's seventy-fifth birthday, or where s 28A(2) (as added) (see PARA 901 post) applies, the earlier of the member's widow or widower's seventy-fifth birthday and the seventy-fifth anniversary of the member's birth: s 28(8) (as so added).

9 le the requirements of *ibid* s 28A (as added): see PARA 901 post.

10 For the meaning of 'prescribed' see PARA 555 note 1 *ante*.

11 Pension Schemes Act 1993 s 28(1A) (as added: see note 5 *supra*). For the prescribed conditions in respect of interim arrangements see the Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 6.

12 le within the meaning of the Pension Schemes Act 1993 s 29(1) (as amended): see PARA 902 post.

13 For the meaning of 'occupational pension scheme' see PARA 741 *ante*.

14 Pension Schemes Act 1993 s 28(2). For the prescribed conditions for the purposes of s 28(2), (3) (as amended) see the Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 4. As to transfer payments see the text and note 30 *infra*.

15 le where the Pension Schemes Act 1993 s 28A(2) (as added) (see PARA 901 post) applies: see s 28(3)(b) (amended by the Pensions Act 1995 s 142).

16 le in accordance with the Pension Schemes Act 1993 s 28(4) (as amended) (see the text and notes 19-23 *infra*): see s 28(3) (amended by the Pensions Act 1995 s 142).

17 le within the meaning of the Pension Schemes Act 1993 s 29(3) (as amended): see PARA 902 post.

18 *Ibid* s 28(3) (as amended: see note 16 *supra*). Section s 28(3) (as so amended) is subject to s 28(5): see the text and note 24 *infra*. See also note 14 *supra*.

19 As to when a person attains a particular age see PARA 881 note 2 *ante*.

20 Pension Schemes Act 1993 s 28(4)(a) (amended by the Pensions Act 1995 s 142).

21 Pension Schemes Act 1993 s 28(4)(b). The prescribed amount is £260: Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 8(1).

22 Pension Schemes Act 1993 s 28(4)(c). The prescribed circumstances are that (1) effect is given to all the member's protected rights by the provision of a lump sum; and (2) either the member has no rights under the scheme other than his protected rights or effect is given to all those of his rights under the scheme which are not protected rights by the provision of a lump sum: Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 8(2).

23 Pension Schemes Act 1993 s 28(4)(d) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 34(a)).

24 Pensions Act 1995 s 28(5). For the prescribed manner of giving effect to those rights see the Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, regs 12, 13.

25 Pension Schemes Act 1993 s 28(6).

26 Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 14.

27 le under the Pension Schemes Act 1993 s 28(2)(a): see the text and notes 12, 14 *supra*.

28 le by the Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 4(2)(b) (prescribed conditions for the purposes of the Pension Schemes Act 1993 s 28(2)(a), (3) (as amended)).

29 Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 15.

30 See the Protected Rights (Transfer Payment) Regulations 1996, SI 1996/1461, reg 2. A transfer payment may be made to a money purchase contracted-out scheme or an appropriate personal pension scheme if (1) the member consents in writing; (2) the transfer payment (or, if it forms part of a larger payment giving effect to both protected and other rights, that part of it which gives effect to protected rights) is of an amount at least equal to the cash equivalent of the protected rights to which effect is being given, as calculated and verified in a manner consistent with regulations made under the Pension Schemes Act 1993 s 97 (as amended) (calculation of cash equivalents: see PARA 956 post); (3) in the case of a transfer payment to a money purchase contracted-out scheme, the member is employed by an employer who is a contributor to the receiving scheme, or has previously been a member of the receiving scheme; and (4) the transfer payment is applied so as to provide money purchase benefits under the receiving scheme for or in respect of the member: Protected Rights (Transfer Payment) Regulations 1996, SI 1996/1461, reg 3.

A transfer payment may be made to a salary-related contracted-out scheme if (a) the member consents in writing; (b) the transfer payment (or, if it forms part of a larger payment giving effect to both protected and other rights, that part of it which gives effect to protected rights) is of an amount at least equal to the cash equivalent of the protected rights to which effect is being given, as calculated and verified in a manner consistent with regulations made under the Pension Schemes Act 1993 s 97 (as amended); (c) the member is employed by an employer who is a contributor to the receiving scheme or has previously been a member of the receiving scheme; (d) where the transfer payment or any part of it gives effect to pre-97 protected rights, the receiving scheme, in consequence of that payment (or, where only part of it gives effect to such rights, of that part) provides for the member and the member's widow or widower to be entitled, without prejudice to any other rights which the member receives under that scheme, to guaranteed minimum pensions equal to those to which they would have been treated as entitled by virtue of s 47(2) or (5) (further provisions concerning entitlement to guaranteed minimum pensions for the purposes of s 46 (as amended): see PARA 916 post) or s 48(2) (repealed with savings) (reduced benefits where minimum payments or minimum contributions paid), had the transfer payment not been made, except that the receiving scheme may make provision that any earnings factor of the member is to be revalued in accordance with s 16(2) (see PARA 891 ante) as modified by the Protected Rights (Transfer Payment) Regulations 1996, SI 1996/1461, reg 6; and (e) where the transfer payment or any part of it gives effect to post-97 protected rights, the transfer payment (or, where only part of it gives effect to post-97 protected rights, that part) is applied to provide rights for the member which, had they accrued in the receiving scheme, would be provided in accordance with the rules of the receiving scheme relating to earners who are in employment which is contracted-out in relation to the receiving scheme or have been in employment which was so contracted-out: reg 4.

A transfer payment may be made to an overseas scheme if (i) the member consents in writing; (ii) the trustees of the transferring scheme have taken reasonable steps to satisfy themselves that the member has emigrated on a permanent basis and has entered employment to which the receiving scheme applies; (iii) the transfer payment (or, if it forms part of a larger payment giving effect to both protected and other rights, that part which gives effect to protected rights) is of an amount at least equal to the cash equivalent of the protected rights to which effect is being given, as calculated and verified in a manner consistent with regulations made under the Pension Schemes Act 1993 s 97 (as amended); (iv) the member has acknowledged in writing that he accepts that the scheme to which the transfer payment is to be made may not be regulated in any way by the law of the United Kingdom and that as a consequence there may be no obligation under that law on the receiving scheme or its trustees to provide any particular value or benefit in return for the transfer payment; and (v) the trustees of the transferring scheme have taken reasonable steps to satisfy themselves that the member has received a statement from the receiving scheme showing the benefits to be awarded in respect of the transfer payment and the conditions (if any) on which these could be forfeited or withheld: Protected Rights (Transfer Payment) Regulations 1996, SI 1996/1461, reg 5. Where transfer payments are made to salary-related contracted-out schemes, the Pension Schemes Act 1993 Pt III (ss 7-68) (as amended) is modified by the Protected Rights (Transfer Payment) Regulations 1996, SI 1996/1461, reg 6.

## UPDATE

### **899-902 Ways of giving effect to protected rights ... The pension and annuity requirements**

Functions of the Secretary of State under SI 1996/1537 (except reg 4(3)) transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

### **899 Ways of giving effect to protected rights**

TEXT AND NOTES--1993 Act s 28 (as amended) omitted: Pensions Act 2007 Sch 4 para 11, Sch 7 Pt 6 (in force on the abolition date: see s 15 and PARA 880). For savings see 2007

Act Sch 4 Pt 3. For requirements in relation to giving effect to protected rights see PARA 899A.

TEXT AND NOTES 5, 6--Head (2) omitted; and in head (3) for 'permitted' read 'provided for': Pensions Schemes Act 1993 s 28(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 2 para 5(1), (2), Sch 13 Pt I).

TEXT AND NOTES 7-11--Replaced. Where the scheme is a personal pension scheme which provides for the member to elect to receive payments in accordance with the 1993 Act s 28(1A), and the member so elects, effect must be given to his protected rights during the interim period by the making of payments under an interim arrangement which (1) complies with s 28A (see PARA 901); and (2) satisfies such conditions as may be prescribed; and in such a case s 28(2)-(4) accordingly applies as regards giving effect to his protected rights as from the end of that period: s 28(1A) (substituted by the 1999 Act Sch 2 para 5(1), (3)).

NOTE 8--In definition of 'the starting date' words 'which must not be earlier than the member's sixtieth birthday' omitted: 1993 Act s 28(8) (amended by the Pensions Act 2004 s 284(6), Sch 13 Pt 1). 'The termination date' now means the date by reference to which the member (or, where the 1993 Act s 28A(2) applies, the member's widow, widower or surviving civil partner) elects to terminate the interim arrangement: s 28(8) (amended by SI 2005/2050, SI 2006/745).

NOTE 11--SI 1996/1537 reg 6 amended: SI 2005/2050.

TEXT AND NOTES 12-14--In head (i) for 'or to a personal pension scheme' read 'to a personal pension scheme or to an overseas arrangement'; and in head (ii), for 'or to an occupational pension scheme' read 'to an occupational pension scheme or to an overseas arrangement': 1993 Act s 28(2) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 2(2)). For the meaning of 'overseas arrangement' see PARA 895.

NOTE 14--SI 1996/1537 reg 4 amended: SI 2005/704, SI 2005/2050.

See the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.1.

TEXT AND NOTE 16--Now refers to the member's widow, widower or surviving civil partner: 1993 Act s 28(3) (amended by SI 2005/2050).

NOTE 16--Reference to 'head (a) above' is now to the 1993 Act s 28(1A) (see TEXT AND NOTES 7-11): s 28(3) (amended by the 1999 Act Sch 2 para 5(1), (4)). 1993 Act s 28(3) further amended: Pensions Act 2004 s 284(5).

TEXT AND NOTES 19-23--For 'and the amount of the lump sum ... pension or annuity' read 'and the amount of the lump sum is equal to the value on that date of the protected rights to which effect is being given': 1993 Act s 28(4)(d) (substituted by the 2000 Act Sch 5 para 3(1), (2)). 1993 Act s 28(4) further amended: Pensions Act 2004 s 284(3), (4), Sch 13 Pt 1.

NOTE 21--SI 1996/1537 reg 8 (1) now reg 8(1)-(1F) (substituted by SI 2006/744; and amended by SI 2009/2930).

NOTE 22--SI 1996/1537 reg 8(2) revoked: SI 2007/814.

NOTE 24--Reference to the Pensions Act 1995 s 28(5) should be to the Pension Schemes Act 1993 s 28(5). 1993 Act s 28(5) amended: Pensions Act 2004 s 284(5). SI 1996/1537 reg 12 amended: SI 2005/704, SI 2005/2050, SI 2005/3164, SI 2008/1979. SI 1996/1537 reg 13 amended: SI 2005/704, SI 2005/2050, SI 2006/745.

NOTE 26--SI 1996/1537 reg 14 amended: SI 2005/2050, SI 2006/744.

NOTE 28--SI 1996/1537 reg 4(2)(b) amended: SI 2005/2050.

NOTE 29--SI 1996/1537 reg 15 amended: SI 2005/2050.

TEXT AND NOTE 30--Now refers to an appropriate personal pension scheme or the money purchase part of a mixed benefit contracted-out scheme: SI 1996/1461 reg 2 (substituted by SI 2005/2906).

NOTE 30--Now, head (1) the member consents in writing or SI 1996/1461 reg 3A applies: SI 1996/1461 reg 3 (amended by SI 2000/1403). SI 1996/1461 reg 3A applies where (1) a transfer payment is made to a scheme, which is registered as a stakeholder pension scheme under the 1999 Act s 2 from a scheme which is or was so registered and which has commenced winding-up; and (2) the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, reg 6 is complied with: SI 2000/1461 reg 3A (added by SI 2000/1403).

Transfer payments may also be made to the money purchase part of a mixed benefit contracted-out scheme, either with or without the member's consent: see SI 1996/1461 regs 3, 3B, 3C (reg 3 substituted, regs 3B, 3C added, by SI 2005/2906).

Head (d). SI 1996/1461 reg 4 extends to surviving civil partners: reg 4 (amended by SI 2005/2050).

Now head (ii) the trustees of the transferring scheme have taken reasonable steps to satisfy themselves that, where the receiving scheme is an occupational pension scheme, the member is in employment to which the receiving scheme applies: SI 1996/1461 reg 5 (amended by SI 2005/555).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(2) REQUIREMENTS FOR CERTIFICATION/(iv) Occupational and Personal Money Purchase Schemes/899A. Requirements in relation to giving effect to protected rights.

### **899A. Requirements in relation to giving effect to protected rights.**

The following provisions come into force on the abolition date: see Pensions Act 2007 s 15 and PARA 880. For savings see 2007 Act Sch 4 Pt 3.

The rules of the scheme must provide that if, in the case of a member who is married or who has a civil partner, effect is to be given to the protected rights of the member by (1) the provision by the scheme of a pension, or (2) the purchase by the scheme of an annuity, the requirement set out below<sup>1</sup> must be satisfied in relation to the pension or annuity<sup>2</sup>. The requirement is that, in a case where (a) the member dies while the pension or annuity is payable to him or her, and (b) the member is survived by a widow, widower or surviving civil partner ('the survivor'), the pension or annuity is payable to the survivor in prescribed circumstances and for the prescribed period at an annual rate which at any given time is one-half of the rate at which it would have been payable to the member if the member had been living at that time<sup>3</sup>. The rules of the scheme must provide that, if effect is to be given to a member's protected rights by the provision of a lump sum, the prescribed conditions must be satisfied<sup>4</sup>. The rules of the scheme must provide that, if (i) a member has died without effect being given to his or her protected rights, and (ii) the member is survived by a widow, widower or surviving civil partner, effect is to be given to the protected rights in such manner as may be prescribed<sup>5</sup>.

1    Ie the requirement set out in the Pension Schemes Act 1993 s 27A(2).

2    Ibid s 27A(1) (added by Pensions Act 2007 Sch 4 para 10).

3    1993 Act s 27A(2).

4    Ibid s 27A(3).

5    Ibid s 27A(4).

### **UPDATE**

#### **899-902 Ways of giving effect to protected rights ... The pension and annuity requirements**

Functions of the Secretary of State under SI 1996/1537 (except reg 4(3)) transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(2) REQUIREMENTS FOR CERTIFICATION/(iv) Occupational and Personal Money Purchase Schemes/900. Notifications to the Secretary of State in the case of personal pension schemes.

### **900. Notifications to the Secretary of State in the case of personal pension schemes.**

Within five weeks after effect has been given to the protected rights<sup>1</sup> of a member of a personal pension scheme<sup>2</sup>, the trustees or managers of that scheme must notify the Secretary of State<sup>3</sup> in writing that effect has been given to those rights, giving such particulars as the Secretary of State may require to enable him:

- 2460 (1) to identify the means by which effect has been given to them;
- 2461 (2) where effect has been given to them by means of a pension, annuity or by the making of payments under an interim arrangement or lump sum, to identify the recipient of it;
- 2462 (3) where effect has been given to them by means of an annuity, to identify the insurance company responsible for paying the annuity;
- 2463 (4) where effect has been given to them by means of a transfer payment<sup>4</sup>, to identify the personal or occupational pension scheme to which the transfer payment was made; and
- 2464 (5) where effect has been given to them by means of a payment under an interim arrangement, to identify the appropriate personal pension scheme<sup>5</sup> in respect of the interim arrangement and the starting date<sup>6</sup>.

The trustees or managers of a personal pension scheme which is or has been an appropriate scheme must, if required to do so by the Secretary of State, in such manner and at such times as he may require, furnish to him such information relating to members of the scheme as he may require in order to know for what, if any, protected rights the scheme is responsible, and from what minimum contributions<sup>7</sup>, minimum payments<sup>8</sup> or transfer payments they derive<sup>9</sup>.

1 As to protected rights see the Pension Schemes Act 1993 s 10 (as amended); and PARA 883 ante. As to ways of giving effect to protected rights see PARA 899 ante.

2 For the meaning of 'personal pension scheme' see PARA 710 ante.

3 As to the Secretary of State see PARA 1 ante.

4 As to transfer payments see PARA 899 note 30 ante.

5 For the meaning of 'appropriate personal pension scheme' see PARA 880 ante.

6 Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 16(1).

7 For the meaning of 'minimum contributions' see PARA 883 note 11 ante.

8 For the meaning of 'minimum payment' see PARA 878 note 8 ante.

9 Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 16(2).

## **UPDATE**

### **899-902 Ways of giving effect to protected rights ... The pension and annuity requirements**

Functions of the Secretary of State under SI 1996/1537 (except reg 4(3)) transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(2) REQUIREMENTS FOR CERTIFICATION/(iv) Occupational and Personal Money Purchase Schemes/901. Requirements for, and information about, interim arrangements.

### **901. Requirements for, and information about, interim arrangements.**

An interim arrangement<sup>1</sup> must provide for interim payments to be made to the member<sup>2</sup>, and to the member's widow or widower<sup>3</sup>, throughout the interim period<sup>4</sup>, at intervals not exceeding 12 months<sup>5</sup>. This provision applies where the member dies during the interim period and is survived by a widow or widower who at the date of the member's death has not yet attained the age<sup>6</sup> of 75 years<sup>7</sup>.

The aggregate amount of payments made to a person under an interim arrangement in each successive period of 12 months must not be:

- 2465 (1) greater than the annual amount of the annuity<sup>8</sup> which would have been purchasable by him on the relevant reference date<sup>9</sup>; or
- 2466 (2) less than the prescribed percentage<sup>10</sup> of that amount<sup>11</sup>;

and the percentage so prescribed may be zero<sup>12</sup>.

The trustees or managers of a personal pension scheme<sup>13</sup> must, if required to do so by the Secretary of State<sup>14</sup>, produce any document<sup>15</sup> relevant to:

- 2467 (a) the level of payments made under any interim arrangement; or
- 2468 (b) the value of protected rights to which such an arrangement gives effect,

or otherwise connected with the making of payments under such an arrangement<sup>16</sup>.

1 As to these arrangements see the Pension Schemes Act 1993 s 28(1A)(a), (4)(a)(ii) (as respectively added and amended); and PARA 899 ante.

2 As to the power to prescribe for these purposes the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member see PARA 557 note 9 ante. For the meaning of 'prescribe' see PARA 555 note 1 ante; and for the meaning of 'occupational pension scheme' see PARA 741 ante.

3 Ie where the Pension Schemes Act 1993 s 28A(2) (s 28A added by the Pensions Act 1995 s 143) applies: see the Pension Schemes Act 1993 s 28A(1) (as so added).

4 For the meaning of 'the interim period' see PARA 899 note 8 ante.

5 Pension Schemes Act 1993 s 28A(1) (as added: see note 3 supra). As to tax requirements see s 33; and PARA 898 ante.

6 As to when a person attains a particular age see PARA 881 note 2 ante.

7 Pension Schemes Act 1993 s 28A(2) (as added: see note 3 supra).

8 'The annual amount of the annuity' which would have been purchasable by a person on any date must be calculated in the prescribed manner by reference to: (1) the value on that date, determined by or on behalf of the trustees or managers of the scheme, of the person's protected rights; and (2) the current published tables of rates of annuities prepared in the prescribed manner by the Government Actuary for the purposes of ibid s 28A (as added: see note 3 supra): s 28A(5) (as so added). For the prescribed manner for the purposes of head (1) supra see the Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI

1996/1537, reg 7(2); and for the prescribed manner for the purposes of head (2) supra see reg 7(3). For the meaning of 'prescribed' see PARA 555 note 1 ante. For the meaning of 'protected rights' see PARA 883 ante.

9 Pension Schemes Act 1993 s 28A(3)(a) (as added: see note 3 supra). 'The relevant reference date' is: (1) in relation to payments made to the member during the three years beginning with the member's starting date, that date, and in relation to such payments made during each succeeding period of three years, the first day of the period of three years in question; or (b) where s 28A(2) (as so added) applies, in relation to payments made to the member's widow or widower during the three years beginning with the date of the member's death, that date, and in relation to such payments made during each succeeding period of three years, the first day of the period of three years in question: s 28A(5)(b) (as so added).

10 The prescribed percentage is 35%: see the Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 7(1).

11 Pension Schemes Act 1993 s 28A(3)(b) (as added: see note 3 supra).

12 Ibid s 28A(4) (as added: see note 3 supra). See, however, note 10 supra.

13 For the meaning of 'personal pension scheme' see PARA 710 ante.

14 As to the Secretary of State see PARA 1 ante.

15 'Document' includes information recorded in any form, and the reference to the production of a document, in relation to information recorded otherwise than in legible form, is a reference to producing a copy of the information in legible form: Pension Schemes Act 1993 s 28B(2) (s 28B added by the Pensions Act 1995 s 143).

16 Pension Schemes Act 1993 s 28B(1) (as added: see note 15 supra).

## UPDATE

### **899-902 Ways of giving effect to protected rights ... The pension and annuity requirements**

Functions of the Secretary of State under SI 1996/1537 (except reg 4(3)) transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

### **901 Requirements for, and information about, interim arrangements**

TEXT AND NOTES--1993 Act ss 28A, 28B omitted: Pensions Act 2007 Sch 4 para 11, Sch 7 Pt 6 (in force on the abolition date: see s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

TEXT AND NOTES 1-7--References to widow or widower are now to widow, widower or surviving civil partner; the member, widow, widower or surviving civil partner may forbear to receive such payments: Pension Schemes Act 1993 s 28A(1), (2) (amended by SI 2005/2050 and SI 2006/745).

TEXT AND NOTES 6, 7--Reference to the attainment of the age of 75 years omitted: s 28A(2) (amended by SI 2006/745).

TEXT AND NOTES 8-12--Replaced. The aggregate amount of payments made to a person under an interim arrangement in each successive period of 12 months ('the aggregate payment') must not be greater than (1) the amount specified by the Finance Act 2004 s 165(1) Pension rule 5 (see PARA 873B.5) for the unsecured pension year which ends in that period of 12 months, where the member has not reached the age of 75; (2) the amount specified by s 165(1) pension rule 7 for the alternatively secured pension year which ends in that period of 12 months, where the member has reached the age of 75; (3) the amount specified by s 167(1) Pension death benefit rule 4 (see PARA 873B.6) for the unsecured pension year which ends in that period of 12 months, where the 1993

Act s 28A(2) applies and the member's widow, widower or surviving civil partner has not reached the age of 75; or (4) the amount specified by the 2004 Act s 167(1) Pension death benefit rule 6 for the alternatively secured pension year, where the 1993 Act s 28A(2) applies and the member's widow, widower or surviving civil partner has reached the age of 75: s 28A(2) (amended by SI 2006/745).

NOTES 8, 10--SI 1996/1537 reg 7 revoked: SI 2006/745.

NOTE 9--Reference to widow or widower is now to widow, widower or surviving civil partner: s 28A(5)(b) (amended by SI 2005/2050).

TEXT AND NOTE 14--For 'Secretary of State' read 'Inland Revenue': 1993 Act s 28B(1), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 41. 1999 Act Sch 1 para 41 repealed: Pensions Act 2007 Sch 7 Pt 6 (in force on the abolition date: see s 15 and PARA 880).

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## **902. The pension and annuity requirements.**

For the purposes of giving effect to protected rights<sup>1</sup>, a pension complies with the pension requirements if:

- 2469 (1) in the case of an occupational pension scheme<sup>2</sup> it commences on a date:
  - 214 285. (a) not earlier than the member's<sup>3</sup> sixtieth birthday; and
  - 286. (b) not later than his sixty-fifth birthday,
  - 215 2470 or on such later date as has been agreed by him, and continues until the date of his death<sup>4</sup>; or
  - 2471 (2) in the case of a personal pension scheme<sup>5</sup>:
    - 216 287. (a) where the member has elected<sup>6</sup> to receive payments under an interim arrangement, it commences on the termination date<sup>7</sup>, and continues until the date of the member's death or until the death of the member's widow or widower<sup>8</sup>; or
    - 288. (b) otherwise, it commences on such a date as has been agreed by the member and is not earlier than his sixtieth birthday nor later than his seventy-fifth birthday, and continues until the date of his death<sup>9</sup>;
    - 217 2472 (3) in a case where the member dies while the pension is payable to him and is survived by a widow or widower:
      - 218 289. (a) it is payable to the widow or widower in prescribed<sup>10</sup> circumstances and for the prescribed period at an annual rate which at any given time is one-half<sup>11</sup> of the rate at which it would have been payable to the member if the member had been living at that time; or
      - 290. (b) where that annual rate would not exceed a prescribed amount and the circumstances are such as may be prescribed, a lump sum calculated in the prescribed manner is provided in lieu of it<sup>12</sup>.
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For the purposes of giving effect to protected rights<sup>13</sup>, an annuity complies with the annuity requirements if:

- 2473 (i) it satisfies the above requirements (taking the references there to pensions as references to annuities)<sup>14</sup>; and
- 2474 (ii) it is provided by an insurance company<sup>15</sup> which:
  - 220 291. (A) satisfies prescribed conditions<sup>16</sup>;
  - 292. (B) complies with such conditions as may be prescribed as to the calculation of annuities provided by it and as to the description of persons by or for whom they may be purchased; and
  - 293. (C) has been chosen by the member or, in certain circumstances<sup>17</sup>, the member's widow or widower<sup>18</sup>.
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A member or a member's widow or widower is only to be taken to have chosen an insurance company if he gives notice of his choice to the trustees or managers of the scheme within the prescribed period and in such manner and form as may be prescribed<sup>19</sup>, and with any such supporting evidence as may be prescribed; and, if he does not do so, the trustees or managers may themselves choose the insurance company instead<sup>20</sup>.

1 For the meaning of 'protected rights' see PARA 883 ante.

2 For the meaning of 'occupational pension scheme' see PARA 741 ante.

3 The Pension Schemes Act 1993 s 181(4) (as amended) (power to prescribe persons who are to be regarded as members or prospective members of a pension scheme) does not apply for these purposes: see PARA 557 note 9 ante.

4 Ibid s 29(1)(a) (substituted by the Pensions Act 1995 s 144). As to tax requirements see the Pension Schemes Act 1993 s 33; and PARA 898 ante.

5 For the meaning of 'personal pension scheme' see PARA 710 ante.

6 Ie under the Pension Schemes Act 1993 s 28(1A) (as added): see PARA 899 ante.

7 For the meaning of 'the termination date' see PARA 899 note 8 ante.

8 Ie where the Pensions Act 1993 s 28A(2) (as added) applies: see PARA 899 ante.

9 Ibid s 29(1)(aa) (added by the Pensions Act 1995 s 144).

10 For the meaning of 'prescribed' see PARA 555 note 1 ante. For the prescribed circumstances and the prescribed period see the Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 5.

11 As respects the period of five years beginning with the commencement of the pension referred to in the Pension Schemes Act 1993 s 29(1) (as amended), s 29(1) (as amended) has effect in relation to that pension as if the words 'at least' were inserted immediately before the words 'one-half' in head (3)(a) in the text: s 29(2).

12 Ibid s 29(1)(b) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 35).

13 Ie the purposes of the Pension Schemes Act 1993 s 28 (as amended): see PARA 899 ante.

14 Ibid s 29(3)(a).

15 For the meaning of 'insurance company' see the Insurance Companies Act 1982 s 96(1) (definition applied by the Pension Schemes Act 1993 s 181(1)); and INCOME TAXATION VOL 23(2) (Reissue) PARA 1352.

16 For the prescribed conditions see the Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 11.

17 Ie where the Pension Schemes Act 1993 s 28A(2) (as added) (see PARA 899 ante) applies: see s 29(3)(b) (iii) (amended by the Pensions Act 1995 s 144).

18 Pension Schemes Act 1993 s 29(3)(b) (as amended: see note 17 supra).

19 The prescribed manner is in writing, and the prescribed period is (1) where the trustees or managers of the scheme know of no reason to suppose that the pension or annuity will not commence on the date on which the member will attain (a) in the case of a money purchase contracted-out scheme the normal pension age if that age is not less than 60 years; or (b) in the case of a personal pension, the agreed age at which he is entitled to receive benefits under the scheme if that age is not less than 60 years, a period of five months (or such longer period as the rules of the scheme may allow) beginning on the date which is six months earlier than that on which he will attain that age; and (2) in any other case (a) if the date of the agreement in respect of when the pension or annuity is to commence ('the date of agreement') is more than one month before the agreed date for commencement of payment ('the agreed date'), a period beginning on the date of agreement and ending one month before the agreed date; and (b) if the date of agreement is not more than one month before the agreed date, a period consisting only of the date of agreement, or such longer period as the rules of

the scheme may allow: Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 10.

20 Pension Schemes Act 1993 s 29(4) (amended by the Pensions Act 1995 s 144).

## **UPDATE**

### **899-902 Ways of giving effect to protected rights ... The pension and annuity requirements**

Functions of the Secretary of State under SI 1996/1537 (except reg 4(3)) transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

### **902 The pension and annuity requirements**

TEXT AND NOTES--1993 Act s 29 (as amended) omitted: Pensions Act 2007 Sch 4 para 11, Sch 7 Pt 6 (in force on the abolition date: see s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

TEXT AND NOTES 4, 9--Pension Schemes Act 1993 s 29(1)(a), (aa) amended: Pensions Act 2004 s 284(7), Sch 13 Pt 1 (all in force by 6 April 2006: SI 2005/1720).

NOTE 10--SI 1996/1537 reg 5 amended: SI 2005/2050.

TEXT AND NOTE 12--Pension Schemes Act 1993 s 29(1)(b) further amended so as to extend provisions to surviving civil partners: SI 2005/2050.

NOTE 15--Insurance Companies Act 1982 and definition of 'insurance company' in Pension Schemes Act 1993 s 181(1) repealed: Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649.

NOTE 16--SI 1996/1537 reg 11 amended: SI 2001/3649, SI 2005/2050.

TEXT AND NOTES 18, 20--Pension Schemes Act 1993 s 29(3)(b), (4) further amended: SI 2001/3649, SI 2005/2050.

NOTE 19--In head (1)(a), (b) words 'if that age is not less than 60 years' omitted: SI 1996/1537 reg 10 (amended by SI 2006/744).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(2) REQUIREMENTS FOR CERTIFICATION/(iv) Occupational and Personal Money Purchase Schemes/903. Securing of liability for protected rights.

### **903. Securing of liability for protected rights.**

The Secretary of State<sup>1</sup> must be satisfied that the scheme complies with any such requirements as may be prescribed<sup>2</sup> for meeting the whole or a prescribed part of any liability in respect of protected rights<sup>3</sup> under the scheme which the scheme is unable to meet from its own resources<sup>4</sup>:

- 2475 (1) by reason of the commission by any person of a criminal offence<sup>5</sup>;
- 2476 (2) in such other circumstances as may be prescribed<sup>6</sup>.

This provision does not apply to a public service pension scheme<sup>7</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 For the meaning of 'prescribed' see PARA 555 note 1 ante. As to the prescribed requirements see the Personal Pension Schemes (Compensation) Regulations 1988, SI 1988/2238, reg 3 (amended by SI 1994/1062).

3 As to protected rights see PARA 883 ante.

4 For the meaning of 'resources' see PARA 609 note 2 ante.

5 Pension Schemes Act 1993 s 30(1)(a) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 21). As to tax requirements see the Pension Schemes Act 1993 s 33; and PARA 898 ante.

6 Ibid s 30(1)(b) (as amended: see note 5 supra).

7 Ibid s 30(2). For the meaning of 'public service pension scheme' see PARA 874 ante.

### **UPDATE**

### **903 Securing of liability for protected rights**

TEXT AND NOTE 1--For 'Secretary of State' read 'Inland Revenue': 1993 Act s 30(1), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 42.

NOTE 2--SI 1988/2238 reg 3 further amended: SI 2001/3649 and SI 2002/1555.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(2) REQUIREMENTS FOR CERTIFICATION/(iv) Occupational and Personal Money Purchase Schemes/904. Investment of schemes; suspension or forfeiture.

#### **904. Investment of schemes; suspension or forfeiture.**

The scheme must comply with such requirements as may be prescribed<sup>1</sup> as regards the part:

- 2477 (1) of any payment that is made to the scheme by or on behalf of a member<sup>2</sup> of the scheme;
- 2478 (2) of any income or capital gain arising from the investment of such a payment; or
- 2479 (3) of the value of rights under the scheme,

that may be used to defray the administrative expenses of the scheme, to pay commission, or in any other way which does not result in the provision of benefits for or in respect of members<sup>3</sup>.

Subject to certain exceptions<sup>4</sup>:

- 2480 (a) in the case of an occupational pension scheme<sup>5</sup>, all minimum payments<sup>6</sup> and any specified payments<sup>7</sup> made by the Secretary of State<sup>8</sup>; and
- 2481 (b) in the case of a personal pension scheme<sup>9</sup>, all minimum contributions<sup>10</sup>,

which are paid to a scheme in respect of one of its members must be applied so as to provide money purchase benefits<sup>11</sup> for or in respect of that member, except so far as they are used to defray the administrative expenses of the scheme or to pay commission<sup>12</sup>.

If regulations<sup>13</sup> are made for the purposes of heads (1) to (3) above, the payments mentioned in head (a) above and the contributions mentioned in head (b) above may be used in any way which the regulations permit, but not in any way not so permitted except to provide money purchase benefits for or in respect of the member<sup>14</sup>. Any minimum contributions required by reason of these provisions to be applied so as to provide money purchase benefits for or in respect of a member of a scheme must be so applied in the prescribed manner and within the prescribed period<sup>15</sup>.

Except in such circumstances as may be prescribed<sup>16</sup>, the rules of the scheme must not permit the suspension or forfeiture of a member's protected rights<sup>17</sup> or of payments giving effect to them<sup>18</sup>.

1 For the meaning of 'prescribed' see PARA 555 note 1 ante.

2 The Pension Schemes Act 1993 s 181(4) (as amended) (power to prescribe persons who are to be regarded as members or prospective members of a pension scheme) does not apply for these purposes: see PARA 557 note 9 ante.

3 Ibid s 31(2). As to tax requirements see s 33; and PARA 898 ante.

4 Ie subject to ibid s 31(4): see the text and note 14 infra.

5 For the meaning of 'occupational pension scheme' see PARA 741 ante.

6 For the meaning of 'minimum payment' see PARA 878 note 8 ante.

7 The payments under the Social Security Act 1986 s 7 (repealed) or the Pension Schemes Act 1993 s 42A(3) (as added): see PARA 912 post.

8 As to the Secretary of State see PARA 1 ante.

9 For the meaning of 'personal pension scheme' see PARA 710 ante.

10 For the meaning of 'minimum contributions' see PARA 883 note 11 ante.

11 For the meaning of 'money purchase benefits' see PARA 811 note 2 ante.

12 Pension Schemes Act 1993 s 31(3) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 36).

13 For the meaning of 'regulations' see PARA 557 note 2 ante.

14 Pension Schemes Act 1993 s 31(4).

15 Ibid s 31(5) (added by the Pensions Act 1995 Sch 5 paras 18, 36).

16 The circumstances in which the rules of a scheme may provide for payments giving effect to a member's protected rights to be suspended are (1) that the person who is entitled to payments giving effect to those rights is, in the opinion of the trustees or managers of the scheme, unable to act by reason of mental disorder or otherwise, so however that there is provision in the scheme for equivalent sums to be paid or applied, while that person is so unable, for the maintenance of that person or, at the discretion of the trustees or managers, of that person together with his dependants or of his dependants only, and, to the extent that they are not so applied, to be held for that person until he is again able to act or, as the case may be, for his estate; (2) that that person is undergoing a period of imprisonment or detention in legal custody, so however that there is provision in the scheme for equivalent sums to be paid or applied during such a period for the maintenance of such one or more of that person's dependants as the trustees or managers of the scheme may in their discretion determine: Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537, reg 9(1). The circumstances in which the rules of a scheme may provide for a payment giving effect to a member's protected rights to be forfeited are (a) that the trustees or managers of the scheme do not know the address of the person to whom the payment should be made; and (b) that a period of at least six years has elapsed from the date on which that payment became due: reg 9(2).

17 As to protected rights see PARA 883 ante.

18 Pension Schemes Act 1993 s 32. As to tax requirements see s 33; and PARA 898 ante.

## **UPDATE**

### **904 Investment of schemes; suspension of forfeiture**

NOTE 7--1986 Act s 7 (which is repealed subject to savings made by Pension Schemes Act 1993 Sch 6 para 22) amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 1.

TEXT AND NOTE 8--For 'Secretary of State' read 'Inland Revenue': 1993 Act s 31(3)(a), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 43.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(3) CANCELLATION, VARIATION, SURRENDER AND REFUSAL OF CERTIFICATES/905. In general.

### **(3) CANCELLATION, VARIATION, SURRENDER AND REFUSAL OF CERTIFICATES**

#### **905. In general.**

Regulations<sup>1</sup> must provide for the cancellation, variation or surrender of any contracting-out certificate<sup>2</sup> or appropriate scheme certificate<sup>3</sup>, or the issue of an amended certificate:

- 2482 (1) in the case of a contracting-out certificate:
  - 222
  - 294. (a) on any change of circumstances affecting the treatment of an employment<sup>4</sup> as contracted-out employment<sup>5</sup>; or
  - 295. (b) where the scheme is a salary-related contracted-out scheme<sup>6</sup> and the certificate was issued on or after the principal appointed day<sup>7</sup>, if any employer<sup>8</sup> of persons in the description or category of employment to which the scheme in question relates, or the actuary of the scheme, fails to provide the Secretary of State<sup>9</sup> at prescribed intervals<sup>10</sup> with such documents as may be prescribed for the purpose of verifying that certain conditions<sup>11</sup> are satisfied<sup>12</sup>;
  - 223
- 2483 (2) in the case of an appropriate scheme certificate, on any relevant change of circumstances<sup>13</sup>.

Regulations may also enable the Secretary of State to cancel or vary a contracting-out certificate where he has reason to suppose that any employment to which it relates ought not to be treated as contracted-out employment in accordance with the certificate and the employer does not show that it ought to be so treated<sup>14</sup>.

Where:

- 2484 (i) by or by virtue of any provision of Part III of the Pension Schemes Act 1993<sup>15</sup>, the contracting out<sup>16</sup> of a scheme in relation to an employment depends on the satisfaction of a particular condition; or
- 2485 (ii) by or by virtue of any provision regarding the requirements for certification<sup>17</sup>, a scheme's being an appropriate scheme depends on the satisfaction of a particular condition,

the continued contracting out of the scheme or, as the case may be, the scheme's continuing to be an appropriate scheme is dependent on continued satisfaction of the condition; and if the condition ceases to be satisfied, that is a ground (without prejudice to any other) for the cancellation or variation of the contracting-out certificate or appropriate scheme certificate<sup>18</sup>.

A contracting-out certificate in respect of any employment may be withheld or cancelled by the Secretary of State if he considers that there are circumstances which make it inexpedient that the employment should be or, as the case may be, continue to be, contracted-out employment by reference to the scheme, notwithstanding that the relevant scheme is one that he would otherwise treat as proper to be contracted-out in relation to all earners<sup>19</sup> in that employment<sup>20</sup>. An appropriate scheme certificate may be withheld or cancelled by the Secretary of State if he considers that there are circumstances which make it inexpedient that the scheme should be

or continue to be an appropriate scheme, notwithstanding that he would otherwise issue such a certificate or not cancel such a certificate<sup>21</sup>.

Without prejudice to the above provisions, failure of a scheme to comply with any prescribed requirements<sup>22</sup> is a ground on which the Secretary of State may, in respect of any employment to which the scheme relates, cancel a contracting-out certificate<sup>23</sup>. Except in prescribed circumstances, no cancellation, variation or surrender of a contracting-out certificate or appropriate scheme certificate has effect from a date earlier than that on which the cancellation, variation or surrender is made<sup>24</sup>.

1 For the meaning of 'regulations' see PARA 557 note 2 ante.

2 For the meaning of 'contracting-out certificate' see PARA 880 ante.

3 For the meaning of 'appropriate scheme certificate' see PARA 880 ante.

4 For the meaning of 'employment' generally see PARA 560 note 5 ante.

5 For the meaning of 'contracted-out employment' see PARA 878 ante.

6 For the meaning of 'contracted-out scheme' see PARA 880 ante.

7 For the meaning of 'the principal appointed day' see PARA 880 note 13 ante.

8 For the meaning of 'employer' see PARA 660 note 18 ante.

9 As to the Secretary of State see PARA 1 ante.

10 For the meaning of 'prescribed' see PARA 555 note 1 ante.

11 I.e. the conditions of the Pension Schemes Act 1993 s 9(2B) (as added): see PARA 882 ante.

12 Ibid s 34(1)(a) (substituted by the Pensions Act 1995 s 151, Sch 5 paras 18, 37).

13 Pension Schemes Act 1993 s 34(1)(b). An appropriate scheme certificate may be cancelled, varied or surrendered where there is any change in respect of the information which was provided by virtue of the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, regs 4, 6 (see PARA 886 ante): reg 7. Every application for the variation of, or to surrender, an appropriate scheme certificate: (1) must be made in writing to the Secretary of State by the administrators of the scheme; (2) must be made only after notices of intention to make that application have been given by the administrators in accordance with reg 8(2) except where (in the case of an application for the variation of an appropriate scheme certificate) the Secretary of State dispenses with this requirement; and (3) must include a statement that all notices so required to be given in relation to that application have been duly given: reg 8(1). Notice of intention to make such an application must be given in writing, by sending it to the last known address of: (a) any member of the scheme who has protected rights under it; and (b) any earner who, jointly with the trustees or managers of the scheme, has given in relation to the scheme a notice under the Pension Schemes Act 1993 s 44(1) (as amended) (see PARA 914 post) which has not been cancelled: Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 8(2). Notices of intention so given must specify: (i) the name of the scheme and the address where it is administered; (ii) the date from which it is desired that the variation or surrender is to have effect; and (iii) where the application is to surrender an appropriate scheme certificate, any arrangements made or proposed for the preservation or transfer of protected rights under the scheme: reg 8(3). Every person who makes an application under this regulation must supply such other documents and information as the Secretary of State may reasonably require: reg 8(4). For the meaning of 'protected rights' see PARA 883 ante.

14 Pension Schemes Act 1993 s 34(2) (amended by the Pensions Act 1995 Sch 5 paras 18, 21); and see the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 47(1). The Secretary of State must cancel or vary the certificate with effect, subject as follows, from such date as he may specify and he must notify the employer in writing of his determination, the reasons for it and of his powers to review that determination: reg 47(1). The date from which the cancellation or variation is to have effect may not be earlier than the date of the cancellation or variation, as the case may be, except (1) in a case of a salary-related contracted-out scheme (as to which see PARAS 643 note 8, 897 ante) where the Secretary of State considers that the resources of the scheme have not been maintained at a sufficient level for maintaining all claims in respect of guaranteed minimum pensions and 'section 9(2B) rights' so far as falling to be met out of those resources, the date may be the latest date on which in the opinion of the Secretary of State those resources were maintained at such a sufficient level; or (2) in a case of a salary-related contracted-out scheme where the

earners in employments to which the contracting-out certificate applies have ceased to qualify for guaranteed minimum pensions or benefits arising from 'section 9(2B) rights' under the scheme, the date may be a date not earlier than the date on which, in the opinion of the Secretary of State, that cessation occurred; or (3) in a case where the Secretary of State discovers that the scheme did not satisfy the requirements for being a contracted-out scheme at the date the contracting-out certificate was issued, the date may be the date from which the certificate had effect or any later date; or (4) in a case where the Secretary of State considers that the scheme has ceased to satisfy the requirements for being a contracted-out scheme, the date may be any date not earlier than when, in the Secretary of State's opinion, the scheme ceased to satisfy those requirements: reg 47(2). In any case where the Secretary of State has cancelled or varied a certificate under these provisions, he may require the employer to give notice of the cancellation or variation, in the manner specified in reg 3(3) (notices of election: see PARA 885 ante), to (a) the earners in relation to whom the employment was contracted-out by virtue of the certificate immediately before its cancellation or variation; (b) the trustees (if any) and administrator of the scheme by reference to which the employment was contracted-out immediately before the cancellation or variation of the certificate; and (c) the persons specified in reg 3(1)(c) and reg 3(1)(d), and he may require any such notice to include such particulars (including particulars of the consequences of the cancellation or variation) as he considers appropriate: reg 47(3). For the meaning of 'guaranteed minimum pensions' see PARA 878 ante; and for the meaning of 'section 9(2B) rights' see PARA 885 note 7 ante.

15    Ie the Pension Schemes Act 1993 Pt III (ss 7-68), Sch 2 (as amended): see PARA 878 et seq ante, 906 et seq post.

16    As to contracting out generally see PARA 877 et seq ante.

17    Ie any provision of the Pension Schemes Act 1993 ss 26-32 (as amended): see PARAS 883, 898-901 ante.

18    Ibid s 34(3).

19    For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by ibid s 181(1)).

20    Ibid s 34(4) (as amended: see note 14 supra).

21    Ibid s 34(5) (as amended: see note 14 supra).

22    Ie prescribed by virtue of ibid s 25(2) (as substituted): see PARA 897 ante.

23    Ibid s 34(7) (as substituted: see note 12 supra).

24    Ibid s 34(8). For these purposes, the prescribed circumstance in relation to an appropriate scheme certificate is where the Secretary of State considers that the scheme has failed to satisfy the requirements for continuing to be an appropriate scheme before the date cancellation is made; and in such a case the date of effect of the cancellation must not be a date other than 6 April in any year and must not be earlier than 6 April in the tax year in which the Secretary of State considers that the scheme first failed to satisfy those requirements: Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 9. For the meaning of 'tax year' see PARA 863 note 1 ante.

See further the Pension Schemes Act 1993 ss 35, 36 (repealed, subject to transitional modifications, by the Pensions Act 1995 s 177, Sch 5 paras 18, 38, Sch 7 Pt III; modified by the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 75).

## UPDATE

### 905 In general

TEXT AND NOTES--Functions of Secretary of State under 1993 Act s 34 transferred to the Commissioners of Inland Revenue: s 34, amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 45.

TEXT AND NOTES 12, 13--The following provisions come into force on the abolition date: see Pensions Act 2007 s 15 and PARA 880. For savings see 2007 Act Sch 4 Pt 3. Regulations must provide for the cancellation, variation or surrender of a contracting-out certificate, or the issue of a new certificate (1) on any change of circumstances affecting the treatment of an employment as contracted-out employment; or (2) where the certificate was issued on or after the principal appointed day, if any employer of persons in the description of employment to which the scheme in question relates, or the actuary of the scheme, fails to provide HMRC, at prescribed intervals, with such

documents as may be prescribed for the purpose of verifying that the conditions of the 1993 Act s 9(2B) are satisfied: s 34(1) (substituted by Pensions Act 2007 Sch 4 para 15(2)) A reference in the 1993 Act s 34 to a contracting-out certificate does not include a reference to a contracting-out certificate issued in respect of a money purchase contracted-out scheme: s 34(9) (added by 2007 Act Sch 4 para 15(6)).

TEXT AND NOTE 12--The words 'or category' in head (b) in the text are repealed: Pensions Act 2004 Sch 13 Pt 1 (not yet in force).

NOTES 13, 14, 24--The functions of Secretary of State under SI 1996/1172, regs 47, 75 and SI 1997/470 are transferred to the Commissioners of Inland Revenue: 1999 Act s 1(2), Sch 2.

NOTE 13--SI 1997/470 reg 8(2) further amended: SI 2009/598.

TEXT AND NOTES 18, 21, 24--1993 Act s 34(3), (8) amended, s 34(5) repealed: Pensions Act 2007 Sch 4 para 15(3)-(5), Sch 7 Pt 6 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(3) CANCELLATION, VARIATION, SURRENDER AND REFUSAL OF CERTIFICATES/906. Elections for the variation or surrender of contracting-out certificates.

### **906. Elections for the variation or surrender of contracting-out certificates.**

An election with a view to the variation or surrender of a contracting-out certificate<sup>1</sup> may only be made after notices of intention to make such an election have been given by the employer<sup>2</sup> in accordance with the prescribed requirements and within the specified period<sup>3</sup> after the expiry of those notices<sup>4</sup>. The election must be made in writing to the Secretary of State<sup>5</sup>. Where, however, a proposed variation is a change in the name of the employer, in the address of the employer or in the name of the scheme, an election with a view to the variation of a certificate must be made in writing to the Secretary of State within three months of the event to which the election relates or such longer period as the Secretary of State may in his discretion allow and may be made without compliance with the other prescribed requirements<sup>6</sup>. In addition, in such cases as the Secretary of State may approve, where a proposed variation would not alter:

- 2486 (1) the categories or descriptions of the earners<sup>7</sup> affected by the certificate; or
- 2487 (2) in the case of a money purchase contracted-out scheme<sup>8</sup> the protected rights<sup>9</sup> under, or in the case of any other scheme the benefits provided by, the scheme; or
- 2488 (3) the contributions (if any) payable by those earners to the scheme,

an election with a view to the variation of a certificate must be made in writing to the Secretary of State within three months of the event to which the election relates or such longer period as the Secretary of State may in his discretion allow and may be made without compliance with the other prescribed requirements<sup>10</sup>.

Notices of intention to make an election with a view to the variation or surrender of a contracting-out certificate must be given within three months of the event to which the election relates, or such longer period as the Secretary of State may in his discretion allow, to the specified persons<sup>11</sup> and in the prescribed manner<sup>12</sup>. An employer who has given such a notice must undertake consultations, if he has not already done so, about the matters covered by the notice with all independent trade unions<sup>13</sup> recognised in relation to the earners concerned and any question whether an employer has complied with this requirement may be referred to an industrial tribunal<sup>14</sup>.

An employer may amend his election at any time before the variation or surrender of the certificate if the amendment does not alter the categories or descriptions of the earners affected by the certificate<sup>15</sup>.

Special provisions apply with regard to elections for the issue, variation or surrender of certificates where the employment remains contracted-out<sup>16</sup>.

1 For the meaning of 'contracting-out certificate' see PARA 880 ante.

2 For the meaning of 'employer' for these purposes see PARA 885 note 3 ante.

3 The specified period is within three months of the date of expiry of the notices, or such longer period as the Secretary of State may in his discretion allow, so however that nothing in this provision prevents an election from being made after the giving of further notices which comply with these requirements: Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 9(7). As to the Secretary of State see PARA 1 ante.

- 4 Ibid reg 9(1)(a), (b).
- 5 Ibid reg 9(1).
- 6 Ibid reg 9(2).
- 7 For the meaning of 'earner' see PARA 32 ante (definition applied by the Pension Schemes Act 1993 s 181(1)).
- 8 For the meaning of 'money purchase contracted-out scheme' see PARA 895 note 17 ante.
- 9 As to protected rights see PARA 883 ante.
- 10 Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 9(3).
- 11 Ie the persons specified in ibid reg 3(1)(a)-(d): see PARA 885 ante.
- 12 Ibid reg 9(4). For the prescribed manner see reg 3(3); and PARA 885 ante.
- 13 For the meaning of 'independent trade union' see PARA 885 note 8 ante.
- 14 Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 9(6). For the meaning of 'industrial tribunal' see PARA 557 note 14 ante.
- 15 Ibid reg 9(8).
- 16 See ibid reg 10.

## **UPDATE**

### **906 Elections for the variation or surrender of contracting-out certificates**

TEXT AND NOTES--Functions of Secretary of State under SI 1996/1172 transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

TEXT AND NOTES 13, 14--SI 1996/1172 reg 9(6) amended: SI 2009/615.

TEXT AND NOTE 14--Industrial tribunals now called employment tribunals: Employment Rights (Dispute Resolution) Act 1998 s 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(4) ALTERATION OF SCHEME RULES AFTER CERTIFICATION/907. Alteration of rules of contracted-out schemes.

## **(4) ALTERATION OF SCHEME RULES AFTER CERTIFICATION**

### **907. Alteration of rules of contracted-out schemes.**

Except in prescribed<sup>1</sup> circumstances, the rules of a contracted-out scheme<sup>2</sup> cannot be altered unless the alteration is of a prescribed description<sup>3</sup>. The prescribed alterations are any alterations which are not prohibited<sup>4</sup> by the relevant regulations<sup>5</sup>.

1 For the meaning of 'prescribed' see PARA 555 note 1 ante.

2 For the meaning of 'contracted-out scheme' see PARA 880 ante. References in the Pension Schemes Act 1993 s 37 (substituted by the Pensions Act 1995 s 151, Sch 5 paras 18, 39) to a contracted-out scheme include a scheme which has ceased to be contracted-out so long as any person is entitled to receive, or has accrued rights to, any benefits under the scheme attributable to a period when the scheme was contracted-out: Pension Schemes Act 1993 s 37(3) (as so substituted). The reference in s 37(3) (as so substituted) to a person entitled to receive benefits under a scheme includes a person so entitled by virtue of being the widower of an earner only in such cases as may be prescribed: s 37(4) (as so substituted). For the meaning of 'accrued rights' see PARA 895 note 9 ante. For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by s 181(1)).

3 Ibid s 37(1) (as substituted: see note 2 supra). Regulations made by virtue of s 37(1) (as so substituted) may operate so as to validate with retrospective effect any alteration of the rules which would otherwise be void under s 37 (as so substituted): s 37(2) (as so substituted). For the meaning of 'regulations' see PARA 557 note 2 ante.

4 The prohibited alterations are set out in the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 8(2), (2A), (2B) (reg 8(2) substituted, and reg 8(2A), (2B) added, by SI 1997/786): Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 8(1) (substituted by SI 1997/786). The rules of a salary-related contracted-out scheme (as to which see PARAS 643 note 8, 897 ante) cannot be altered in relation to any 'section 9(2B) rights' under the scheme unless: (1) the trustees of the scheme have informed the actuary in writing of the proposed alteration; (2) the actuary has considered the proposed alteration and has confirmed to the trustees in writing that he is satisfied that the scheme would continue to satisfy the statutory standard in accordance with the Pension Schemes Act 1993 s 12A (as added) (see PARA 887 ante) if the alteration were made; and (3) the alteration does not otherwise prevent the scheme from satisfying the conditions of s 9(2B) (as added) (see PARA 882 ante): Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 8(2) (as so substituted). The rules of a scheme contracted-out under the Pension Schemes Act 1993 s 9(3) (as amended) (a money purchase contracted-out scheme: see PARA 882 ante) cannot be altered in relation to protected rights if the alteration would (a) affect any of the matters dealt with in Pt III (ss 7-68) (as amended) or any regulations made under Pt III (as amended) which relate to protected rights in a manner which would or might adversely affect any entitlement or accrued rights of any member of the scheme acquired before the alteration takes effect; or (b) otherwise prevent the scheme from satisfying the conditions of s 9 (as amended): Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 8(2A) (as so added). The rules of a contracted-out scheme cannot be altered in relation to any guaranteed minimum pensions under the scheme if the alteration would: (i) affect any of the matters dealt with in the Pension Schemes Act 1993 Pt III (as amended) or any regulations made under Pt III (as amended) which relate to guaranteed minimum pensions in a manner which would or might adversely affect any entitlement or accrued rights of any member of the scheme acquired before the alteration takes effect; (ii) affect any of the matters dealt with in ss 87-92 (protection of increases in guaranteed minimum pensions: see PARAS 947-949 post) and ss 109, 110 (as amended) (annual increases of guaranteed minimum pensions: see PARA 926 post) or in any regulations made under those provisions which relate to guaranteed minimum pensions; or (iii) otherwise prevent the scheme from satisfying, in the case of a salary-related contracted-out scheme, s 9(2) (as substituted) or, in the case of a scheme contracted-out under s 9(3) (as amended), s 9 (as amended): Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 8(2B) (as so added). For the meaning of 'section 9(2B) rights' see PARA 885 note 7 ante. For the meaning of 'guaranteed minimum pension' see PARA 878 ante; and for the meaning of 'principal appointed day' see PARA 880 note 13 ante.

5 Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 8(1) (as substituted: see note 4 *supra*). Where the provisions of the Pension Schemes Act 1993 s 37 (as substituted) continue to apply after a scheme has ceased to be contracted-out, the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 8 (as amended) continues to apply so long as the circumstances provided for in the Pension Schemes Act 1993 s 37(3), (4) (as substituted) continue to apply: Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 8(3).

## **UPDATE**

### **907 Alteration of rules of contracted-out schemes**

TEXT AND NOTES--Functions of Secretary of State under SI 1996/1172 transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

NOTE 2--Pension Schemes Act 1993 s 37(4) amended so as to extend provisions to surviving civil partners: SI 2005/2050.

NOTE 3--Section 37(2), as modified by Occupational Pension Schemes (Modification of the Pension Schemes Act 1993) Regulations 1998, SI 1998/1466, enables regulations to be made to provide for the validation with retrospective effect of alterations made prior to 6 April 1997 to the rules of contracted-out occupational pension schemes. See Occupational Pension Schemes (Validation of Rule Alterations) Regulations 1998, SI 1998/1846, which provide for such retrospective validation.

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### **908. Alteration of rules of appropriate schemes.**

Where an appropriate scheme certificate<sup>1</sup> has been issued, no alteration of the rules of the relevant scheme may be made so as:

- 2489 (1) to affect any of the matters regarding the requirements for certification<sup>2</sup>; or
- 2490 (2) to cause the scheme to take a different permitted form<sup>3</sup> from that previously taken<sup>4</sup>,

and, subject to the following exception, any such alteration is void<sup>5</sup>. Regulations<sup>6</sup> may, however, operate so as to validate with retrospective effect any alteration of the rules which would otherwise be void under this provision<sup>7</sup>.

1 For the meaning of 'appropriate scheme' and 'appropriate scheme certificate' see PARA 880 ante.

2 I.e. the matters dealt with in the Pension Schemes Act 1993 ss 26-33 (as amended) (see PARAS 883, 898-901 ante): s 38(1)(a).

3 The reference in *ibid* s 38(1)(b) to a permitted form is to one of the following forms, namely: (1) an arrangement for the issue of insurance policies or annuity contracts; (2) a unit trust scheme of a kind mentioned in the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 2(2)(b), Sch 1 Pt I which has been authorised under the Financial Services Act 1986 s 78(1) or by virtue of s 211(3), Sch 15; (3) an arrangement for the investment of contributions in an interest-bearing account (including shares in or deposits with a building society (within the meaning of the Building Societies Act 1986: see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1856)); (4) an investment company with variable capital within the meaning of the Open-ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827: see the Pension Schemes Act 1993 s 38(6) (amended by the Open-ended Investment Companies (Investment Companies with Variable Capital) Regulations 1996, SI 1996/2827, reg 75, Sch 8 Pt I).

4 Pension Schemes Act 1993 s 38(1) (amended by the Pensions Act 1995 ss 151, 177, Sch 5 paras 18, 40, Sch 7). The Pension Schemes Act 1993 s 38(1) (as so amended) does not apply to an alteration of a prescribed description: s 38(2).

5 *Ibid* s 38(3) (as amended: see note 4 *supra*).

6 I.e. made by virtue of *ibid* s 38(2). For the meaning of 'regulations' see PARA 557 note 2 ante.

7 *Ibid* s 38(4) (as amended: see note 4 *supra*). Section 38 (as so amended) continues in force in relation to a scheme after it has ceased to be an appropriate scheme so long as any person has protected rights under the scheme: s 38(5).

### **UPDATE**

### **908 Alteration of rules of appropriate schemes**

NOTE 3--In head (2) for 'has ... Sch 15' read 'is an authorised unit trust scheme': Pension Schemes Act 1993 s 38(6) (amended by Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649). For the meaning of 'authorised unit trust scheme' see 1993 Act s 38(6A) (s 38(6A) added by SI 2001/3649). SI 1997/470 reg 2 substituted, Sch 1 omitted: SI 2008/1979.

Now, head (4) an open-ended investment company within the meaning of the Open-Ended Investment Companies Regulations 2001, SI 2001/1228: Pension Schemes Act 1993 s 38(6) (amended by SI 2001/1228).

TEXT AND NOTES 4, 7--1993 Act s 38(1), (5) substituted: Pensions Act 2007 Sch 4 para 16 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

NOTE 4--Pension Schemes Act 1993 s 38(2) amended: SI 2005/2050.

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## **(5) REDUCTION IN STATE SCHEME CONTRIBUTIONS AND SOCIAL SECURITY BENEFITS FOR MEMBERS OF CERTIFIED SCHEMES**

### **(i) In general**

#### **909. Introduction.**

Provision has been made for the purpose:

- 2491 (1) of reducing the rates at which certain national insurance contributions are payable by or in respect of earners<sup>1</sup> whose employment<sup>2</sup> is contracted-out<sup>3</sup> by reference to contracted-out occupational pension schemes<sup>4</sup>;
- 2492 (2) of providing for contributions to be paid by the Secretary of State<sup>5</sup> in respect of earners who are members<sup>6</sup> of money purchase contracted-out schemes<sup>7</sup> and members of appropriate personal pension schemes<sup>8</sup>; and
- 2493 (3) of making provision concerning the payment of certain social security benefits payable in respect of members and former members of such schemes<sup>9</sup>.

1 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

2 For the meaning of 'employment' generally see PARA 560 note 5 ante.

3 For the meaning of 'contracted-out employment' see PARA 878 ante.

4 Pension Schemes Act 1993 s 40(1)(a). For the meaning of 'occupational pension scheme' see PARA 741 ante.

5 As to the Secretary of State see PARA 1 ante.

6 As to the power to prescribe for these purposes the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member see PARA 557 note 9 ante. For the meaning of 'prescribe' see PARA 555 note 1 ante.

7 For the meaning of 'contracted-out scheme' see PARA 880 ante.

8 Pension Schemes Act 1993 s 40(1)(b) (amended by the Pensions Act 1995 s 137(1)). For the meaning of 'personal pension scheme' see PARA 710 ante.

9 Pension Schemes Act 1993 s 40(1)(c). The Secretary of State may make regulations modifying in such manner as he thinks proper Ch II (ss 40-49) (as amended) (see PARA 910 et seq post), in its application to women born on or after 6 April 1950; and ss 41, 42 (as amended) (see PARAS 911-912 post), s 46(1) (as amended) (see PARA 916 post), s 47(2), (5) (see PARA 916 post) and s 48 (repealed with savings) in their application to women who are or have been married: s 49 (substituted by the Pensions Act 1995 s 126(c), Sch 4 Pt II para 16). For the meaning of 'regulations' see PARA 557 note 2 ante; and for the meaning of 'modifying' see PARA 664 note 10 ante. The Social Security (Contributions) Regulations 1979, SI 1979/591 (as amended); and the Social Security (Benefit) (Married Women and Widows Special Provisions) Regulations 1974, SI 1974/2010 (as amended) partly have effect as if so made.

### **UPDATE**

#### **909 Introduction**

TEXT AND NOTE 5--For 'Secretary of State' read 'Inland Revenue': Pensions Schemes Act 1993 s 40(b) (amended by the Welfare Reform and Pensions Act 1999 Sch 11 para 21).

NOTE 9--1979 Regulations consolidated in the Social Security (Contributions) Regulations 2001, SI 2001/1004 (see PARA 33).

SI 1974/2010 further amended: SI 2005/2877, SI 2008/1554.

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### **910. Money purchase and personal pension schemes; verification of ages.**

Regulations<sup>1</sup> may make provision for the manner in which an earner's<sup>2</sup> age<sup>3</sup> is to be verified in determining the appropriate age-related percentages<sup>4</sup> for specified purposes<sup>5</sup>. Information held by the Secretary of State<sup>6</sup> as to the age of any individual may, whether or not it was obtained in pursuance of such regulations, be disclosed by the Secretary of State:

- 2494 (1) to the trustees or managers of a money purchase contracted-out scheme<sup>7</sup> or an appropriate personal pension scheme<sup>8</sup>; and  
 2495 (2) to such other persons as may be prescribed<sup>9</sup>,

in connection with the making of specified payments<sup>10</sup> or the payment of minimum contributions<sup>11</sup>.

1 For the meaning of 'regulations' see PARA 557 note 2 ante.

2 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

3 As to when a person attains a particular age see PARA 881 note 2 ante.

4 I.e. for the purposes of the Pension Schemes Act 1993 s 42A (as added) (see PARA 912 post); s 45(1) (as substituted) (see PARA 915 post): see s 45B(1) (as added: see note 5 infra). For the purpose of determining that percentage in respect of an earner for the purposes of s 42A (as added), the Secretary of State (see note 6 infra) may require that earner to send him documentary evidence of his date of birth: Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 36(1).

5 Pension Schemes Act 1993 s 45B(1) (s 45B added by the Pensions Act 1995 s 139).

6 As to the Secretary of State see PARA 1 ante.

7 For the meaning of 'money purchase contracted-out scheme' see PARA 895 note 17 ante.

8 For the meaning of 'appropriate personal pension scheme' see PARA 880 ante; and for the meaning of 'personal pension scheme' see PARA 710 ante.

9 For the meaning of 'prescribed' see PARA 555 note 1 ante. In relation to a money purchase contracted-out occupational pension scheme, and to an appropriate personal pension scheme, the prescribed person is the person who is responsible for administering the scheme: see the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 36(2); and the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 16(2).

10 I.e. under the Pension Schemes Act 1993 s 42A(3): see PARA 912 post.

11 Ibid s 45B(2) (as added: see note 5 supra). For the meaning of 'minimum contributions' see PARA 883 note 11 ante.

## **UPDATE**

### **910 Money purchase and personal pension schemes; verification of ages**

TEXT AND NOTES 6-11--Now refers to the Secretary of State or the Inland Revenue: s 45B(2) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 50).

NOTE 9--Functions of Secretary of State under SI 1996/1172 (except those under regs 23, 61), SI 1997/470 transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

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## **(ii) Reduced Rates for Members of Occupational Pension Schemes**

### **911. Reduced rates of Class 1 contributions for members of salary-related contracted-out schemes.**

Where (1) the earnings paid to or for the benefit of an earner<sup>1</sup> in any tax week<sup>2</sup> are in respect of an employment<sup>3</sup> which is contracted-out employment<sup>4</sup> at the time of the payment; and (2) the earner's service in the employment is service which qualifies him for a pension provided by a salary-related contracted-out scheme<sup>5</sup>, the amount of a Class 1 contribution<sup>6</sup> in respect of so much of the earnings paid in that week as exceeds the current lower earnings limit<sup>7</sup> but not the current upper earnings limit<sup>8</sup> for that week (or the prescribed equivalents<sup>9</sup> if he is paid otherwise than weekly) must be reduced by the following amount<sup>10</sup>:

2496 (a) in the case of a primary Class 1 contribution<sup>11</sup>, an amount equal to 1.6 per cent of that part of those earnings; and

2497 (b) in the case of a secondary Class 1 contribution<sup>12</sup>, an amount equal to three per cent of that part of those earnings<sup>13</sup>.

Where an earner has ceased to be employed<sup>14</sup> in an employment and earnings are paid to him or for his benefit within the period of six weeks, or such other period as may be prescribed<sup>15</sup>, from the day on which he so ceased, that employment must be treated for the above purposes as contracted-out employment at the time when the earnings are paid if it was contracted-out employment in relation to the earner when he was last employed in it<sup>16</sup>.

The Secretary of State may from time to time, and must when required to do so<sup>17</sup>, lay before each House of Parliament:

2498 (i) a report<sup>18</sup> by the Government Actuary or the Deputy Government Actuary on the specified percentages for the time being applying under heads (1) and (2) above and any changes since the preparation of the last such report in the factors in his opinion affecting the cost of providing benefits of an actuarial value equivalent to that of the benefits which are foregone<sup>19</sup> by or in respect of members of salary-related contracted-out schemes<sup>20</sup>; and

2499 (ii) a report by the Secretary of State stating whether he considers that, in view of the report of the Government Actuary or the Deputy Government Actuary, there should be an alteration in either or both of those percentages and, if so, what alteration is in his opinion required<sup>21</sup>.

The Secretary of State must lay such reports at intervals of not more than five years<sup>22</sup>. If in a report under head (ii) above the Secretary of State states that he considers that there should be an alteration in either or both of the specified percentages, he must prepare and lay before each House of Parliament with the report the draft of an order making that alteration; and if the draft is approved by resolution of each House the Secretary of State must make the order in the form of the draft<sup>23</sup>. Such an order has effect from the beginning of such tax year<sup>24</sup> as may be specified in the order, but not a tax year earlier than the second after that in which the order is

made<sup>25</sup>. No alteration of those percentages may introduce any distinction on grounds of age or sex<sup>26</sup>.

1 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

2 For the meaning of 'tax week' see PARA 878 note 8 ante.

3 For the meaning of 'employment' generally see PARA 560 note 5 ante.

4 For the meaning of 'contracted-out employment' see PARA 878 ante.

5 For the meaning of 'salary-related scheme' see PARA 643 note 8 ante; and for the meaning of 'contracted-out scheme' see PARA 880 ante.

6 As to Class 1 contributions see PARA 34 et seq ante.

7 For the meaning of 'current lower earnings limit' see PARA 878 note 8 ante.

8 For the meaning of 'current upper earnings limit' see PARA 878 note 8 ante.

9 For the meaning of 'the prescribed equivalents' see PARA 878 note 8 ante.

10 Pension Schemes Act 1993 s 41(1) (substituted by the Pensions Act 1995 s 137(2)).

11 As to primary Class 1 contributions see PARA 36 ante.

12 As to secondary Class 1 contributions see PARA 37 ante.

13 Pension Schemes Act 1993 s 41(1A) (added by the Pensions Act 1995 s 137(2); and amended by the Social Security (Reduced Rates of Class 1 Contributions) (Salary Related Contracted-out Schemes) Order 1996, SI 1996/1054, art 2).

14 For the meaning of 'employed' see PARA 560 note 5 ante.

15 For the meaning of 'prescribed' see PARA 555 note 1 ante.

16 Pension Schemes Act 1993 s 41(2). Section 41 (as amended) does not affect the amount of any primary Class 1 contribution which is payable at a reduced rate by virtue of regulations under the Social Security Contributions and Benefits Act 1992 s 19(4) (reduced rates for certain married women and widows) (see PARA 46 ante); Pension Schemes Act 1993 s 41(3). For the meaning of 'regulations' see PARA 557 note 2 ante.

17 Ie by *ibid* s 42(2): see the text and note 22 *infra*. As to the Secretary of State see PARA 1 ante.

18 In relation to the first report under *ibid* s 42(1)(a) (as substituted: see note 20 *infra*) laid after the passing of the Pensions Act 1995 on 19 July 1995, the Pension Schemes Act 1993 s 42 has effect subject to modifications: see the Pensions Act 1995 s 137(4). For the meaning of 'modifications' see PARA 664 note 10 ante.

19 Ie under the Pension Schemes Act 1993 s 48A (as added): see PARA 917 post.

20 *Ibid* s 42(1)(a) (substituted by the Pensions Act 1995 s 137(3)).

21 Pension Schemes Act 1993 s 42(1)(b). See eg *Occupational and Personal Pension Schemes* (Cm 3221) (1996).

22 Pension Schemes Act 1993 s 42(2).

23 *Ibid* s 42(3) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 41).

24 For the meaning of 'tax year' see PARA 863 note 1 ante.

25 Pension Schemes Act 1993 s 42(4).

26 *Ibid* s 42(5). A draft of an order making alterations in either or both of those percentages may contain consequential provisions altering any percentage for the time being specified in s 128, Sch 4 para 2(3) (see PARA 859 ante) as that percentage applies in relation to earnings paid or payable on or after the day as from which

the order is to have effect: s 42(6). For an example of the exercise of this power see the Social Security (Reduced Rates of Class 1 Contributions) (Salary Related Contracted-out Schemes) Order 1996, SI 1996/1054, art 3.

## UPDATE

### **911 Reduced rates of Class 1 contributions for members of salary-related contracted-out schemes**

TEXT AND NOTES--See the Occupational Pension Schemes (Contracting-out) (Payment and Recovery of Remaining Balances) Regulations 2000, SI 2000/750.

TEXT AND NOTES 1-13--Replaced. Pension Schemes Act 1993 s 41(1) substituted by the Social Security Act 1998 Sch 7 para 127; and amended by the Welfare Reform and Pensions Act 1999 Sch 9 para 6(2); the Pensions Act 2007 Sch 1 para 37(a); and the National Insurance Contributions Act 2008 Sch 1 para 10(2). 1993 Act s 41(1A) substituted by the 1999 Act Sch 9 para 6(3). 1993 Act s 41(1B), (1C) added by the 1998 Act Sch 7 para 127; and substituted by the 1999 Act Sch 9 para 6(3); 1993 Act s 41(1B) amended by SI 2001/1356 and SI 2006/1009. 1993 Act s 41(1D), (1E) added by the 1999 Act Sch 9 para 6(3).

The 1993 Act s 41(1A)-(1E) applies where (1) the earnings paid to or for the benefit of an earner in any tax week are in respect of an employment which is contracted-out employment at the time of the payment; and (2) the earner's service in the employment is service which qualifies him for a pension provided by a salary related contracted-out scheme: s 41(1) (as amended). The amount of any primary Class 1 contribution attributable to the Social Security Contributions and Benefits Act 1992 s 8(1)(a) (see PARA 36) in respect of the earnings is reduced by an amount equal to 1·6 per cent of the relevant part of the earnings ('Amount R1'): s 41(1A) (as substituted; amended by the National Insurance Contributions Act 2002 Sch 1 para 36, with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2)). The amount of any secondary Class 1 contribution in respect of the earnings is reduced by an amount equal to 3·7 per cent of the relevant part of the earnings ('Amount R2'): 1993 Act s 41(1B) (as amended). In s 41(1A), (1B), 'the relevant part', in relation to those earnings, means so much of those earnings as exceeds the current lower earnings limit but not the upper accrual point for that week (or the prescribed equivalents if the earner is paid otherwise than weekly): s 41(1), as further substituted and amended. For the meaning of 'the applicable limit' and 'prescribed' for these purposes see 1993 Act s 41(1ZA) (added by Pensions Act 2007 Sch 1 para 37(b); and repealed in relation to the tax year 2009-2010 and subsequent tax years by the National Insurance Contributions Act 2008 Sch 1 para 10(3), (4)). The aggregate of Amounts R1 and R2 must be set off (a) first against the aggregate amount which the secondary contributor is liable to pay in respect of the contributions mentioned in the 1993 Act s 41 (1A), (1B); and (b) then, as to any balance, against any amount which the secondary contributor is liable to pay in respect of any primary or secondary Class 1 contribution in respect of earnings (i) paid to or for the benefit of any other employed earner, whether in contracted-out employment or not; and (ii) in relation to which the secondary contributor is such a contributor; and, for these purposes, any reference to a liability to pay an amount in respect of a primary Class 1 contribution is a reference to such a liability under the Social Security Contributions and Benefits Act 1992 Sch 1 para 3: 1993 Act s 41(1C) (as added and substituted). If any balance remains, and the secondary contributor makes an application for the purpose to the Inland Revenue, the Inland Revenue must, in such manner and at such time, or within such period, as may be prescribed, pay to the secondary contributor an amount equal to the remaining balance; but regulations may make provision for the adjustment of an amount that would otherwise be payable under this provision so as to avoid the payment of trivial

or fractional amounts: s 41(1D) (as added). For provision under s 41(1D), (1E) see the Occupational Pension Schemes (Contracting Out) (Payment and Recovery of Remaining Balances) Regulations 2000, SI 2000/750. If the Inland Revenue pays any amount under the 1993 Act s 41(1D) which it is not required to pay, it may recover that amount from the secondary contributor in such manner and at such time, or within such period, as may be prescribed: s 41(1E) (as added).

TEXT AND NOTES 17-23--Now refers to the specified percentages for the time being applying under the 1993 Act s 41(1A), (1B) (see TEXT AND NOTES 1-13): s 42(1)(a), (3) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 4).

TEXT AND NOTE 19--Now refers to benefits (or parts of benefits) which, in accordance with the 1993 Act s 48A and the Social Security Contributions and Benefits Act 1992 Schs 4A and 4B (as added: see PARA 569) are foregone: 1993 Act s 42(1)(a) (amended by the 2000 Act s 34; and the Pensions Act 2007 Sch 2 para 12).

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**912. Reduced rates of contributions, and rebates, for members of money purchase contracted-out schemes.**

The following provisions apply where:

- 2500 (1) the earnings paid to or for the benefit of an earner<sup>1</sup> in any tax week<sup>2</sup> are in respect of an employment<sup>3</sup> which is contracted-out employment<sup>4</sup> at the time of the payment; and
- 2501 (2) the earner's service in the employment is service which qualifies him for a pension provided by a money purchase contracted-out scheme<sup>5</sup>.

The amount of a Class 1 contribution<sup>6</sup> in respect of so much of the earnings paid in that week<sup>7</sup> in respect of that employment as exceeds the current lower earnings limit<sup>8</sup> but not the current upper earnings limit<sup>9</sup> for that week (or the prescribed equivalents<sup>10</sup> if he is paid otherwise than weekly) must be reduced by an amount equal to the appropriate flat rate percentage<sup>11</sup> of that part of those earnings<sup>12</sup>.

The Secretary of State<sup>13</sup> must except in prescribed circumstances or in respect of prescribed periods<sup>14</sup> pay in respect of that earner and that tax week to the trustees or managers of the scheme or, in prescribed circumstances, to a prescribed person the amount by which the appropriate age-related percentage of that part of those earnings exceeds the appropriate flat-rate percentage of that part of those earnings<sup>15</sup>. Regulations<sup>16</sup> may make provision:

- 2502 (a) as to the manner in which and time at which or period within which such payments are to be made<sup>17</sup>;
- 2503 (b) for the adjustment of the amount which would otherwise be so payable so as to avoid the payment of trivial or fractional amounts<sup>18</sup>;
- 2504 (c) for earnings to be calculated or estimated in such manner and on such basis as may be prescribed for the purpose of determining whether any, and if so what, payments are to be made<sup>19</sup>.

If the Secretary of State pays such an amount which he is not required to pay or is not required to pay to the person to whom, or in respect of whom, he pays it, he may recover it from any person to whom, or in respect of whom, he paid it<sup>20</sup>. Where an earner has ceased to be employed<sup>21</sup> in an employment, and earnings are paid to him or for his benefit within the period of six weeks, or such other period as may be prescribed, from the day on which he so ceased, that employment must be treated for the above purposes as contracted-out employment at the time when the earnings are paid if it was contracted-out employment in relation to the earner when he was last employed in it<sup>22</sup>.

The Secretary of State must at intervals of not more than five years lay before each House of Parliament:

- 2505 (i) a report by the Government Actuary or the Deputy Government Actuary on the percentages which, in his opinion, are required to be specified in an order so as to reflect the cost of providing benefits of an actuarial value equivalent to that of

- the benefits which are foregone<sup>23</sup> by or in respect of members<sup>24</sup> of money purchase contracted-out schemes;
- 2506 (ii) a report by the Secretary of State stating what, in view of such a report, he considers those percentages should be; and
- 2507 (iii) a draft of such an order<sup>25</sup>.

If the draft of such an order is approved by resolution of each House of Parliament, the Secretary of State must make the order in the form of the draft<sup>26</sup>. Such an order has effect from the beginning of such tax year as may be specified in the order, not being a tax year earlier than the second after that in which the order is made<sup>27</sup>.

1 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

2 For the meaning of 'tax week' see PARA 878 note 8 ante.

3 For the meaning of 'employment' generally see PARA 560 note 5 ante.

4 For the meaning of 'contracted-out employment' see PARA 878 ante.

5 Pension Schemes Act 1993 s 42A(1) (ss 42A, 42B added by the Pensions Act 1995 s 137(5)). For the meaning of 'money purchase scheme' see PARA 811 note 2 ante; and for the meaning of 'contracted-out scheme' see PARA 880 ante.

6 As to Class 1 contributions see PARA 34 et seq ante.

7 Ie in that tax week: see note 2 supra.

8 For the meaning of 'current lower earnings limit' see PARA 878 note 8 ante.

9 For the meaning of 'current upper earnings limit' see PARA 878 note 8 ante.

10 For the meaning of 'the prescribed equivalents' see PARA 878 note 8 ante.

11 An order under the Pension Schemes Act 1993 s 42B(2) (as added: see note 5 supra) has effect in relation to a period of tax years (not exceeding five) and may: (1) specify different percentages for primary and secondary Class 1 contributions; and (2) for each of the tax years for which it has effect (a) specify a percentage in respect of all earners which is 'the appropriate flat-rate percentage' for the purposes of s 42A (as added: see note 5 supra); and (b) specify different percentages (not being less than the percentage specified by virtue of s 42B(2)(b)(i) (as so added)) in respect of earners by reference to their ages on the last day of the preceding year (the percentage for each group of earners being 'the appropriate age-related percentage' in respect of earners in that group for the purposes of s 42A (as so added)): s 42B(2) (as so added). Section 42B(2) (as so added) is without prejudice to the generality of s 182 (see PARA 977 post): s 42B(5) (as so added). As to primary and secondary Class 1 contributions see PARAS 36-37 ante. For the meaning of 'tax year' see PARA 863 note 1 ante.

12 Ibid s 42A(2) (as added: see note 5 supra).

13 As to the Secretary of State see PARA 1 ante.

14 For the prescribed periods and circumstances in which the age-related payments are not to be paid see the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 37; and the Occupational Pension Schemes (Age-related Payments) Regulations 1997, SI 1997/946, regs 2-7. For the meaning of 'prescribed' see PARA 555 note 1 ante. If an earner is to move from one contracted-out scheme to another, or a prospective member is to be admitted to a contracted-out scheme, in circumstances under which an age-related payment might not become payable or be paid, the trustees or managers of the scheme concerned or from which the move is to be made must inform the earner or prospective member accordingly: see regs 8, 9. If any person fails without reasonable excuse to comply with any such information requirement the Occupational Pensions Regulatory Authority (as to which see PARA 598 ante) may require that person to pay within 28 days a penalty not exceeding £1,000 in the case of an individual or £10,000 in any other case: reg 10.

15 Pension Schemes Act 1993 s 42A(3) (as added: see note 5 supra).

16 For the meaning of 'regulations' see PARA 557 note 2 ante.

17 Pension Schemes Act 1993 s 42A(4)(a) (as added: see note 5 supra). The Secretary of State must make the age-related payment by automated credit transfer into a bank or building society account relating to the relevant scheme and which accepts payments made by automated credit transfer, or in such other manner as the Secretary of State may in his discretion approve: Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 35.

18 Pension Schemes Act 1993 s 42A(4)(b) (as added: see note 5 supra). Where the amount of the age-related payment payable in respect of an earner would otherwise not be a whole number of pence, it must be adjusted to the nearest whole number of pence, and any amount of half a penny or less must be disregarded: Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 38.

19 Pension Schemes Act 1993 s 42A(4)(c) (as added: see note 5 supra). Where the Secretary of State cannot readily ascertain the amount of earnings in any tax week or is satisfied that records of earnings in any tax week have not been maintained or retained or are otherwise unobtainable, he may compute, in such manner as he thinks fit, an amount which must be regarded as the amount of earnings, or take their amount to be such as he may specify in the particular case: Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 34.

20 Pension Schemes Act 1993 s 42A(5) (as added: see note 5 supra).

21 For the meaning of 'employed' see PARA 560 note 5 ante.

22 Pension Schemes Act 1993 s 42A(6) (as added: see note 5 supra). Section 41(3) (see PARA 911 ante) applies for the purposes of s 42A (as so added) as it applies for the purposes of s 41 (as amended): s 42A(7) (as so added).

23 *Ie* under *ibid* s 48A (as added): see PARA 917 post.

24 As to the power to prescribe for these purposes the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member see PARA 557 note 9 ante.

25 See the Pension Schemes Act 1993 s 42B(1) (as added: see note 5 supra). As to the effect and authority of such an order see s 42B(2) (as so added); and note 11 supra. See eg *Occupational and Personal Pensions Schemes* (Cm 3221) (1996).

26 Pension Schemes Act 1993 s 42B(3) (as added: see note 5 supra).

27 *Ibid* s 42B(4) (as added: see note 5 supra). For an example of the exercise of the power to make orders under s 42B (as so added) see the Social Security (Reduced Rates of Class 1 Contributions and Rebates) (Money Purchase Contracted-out Schemes) Order 1996, SI 1996/1055, art 2, which fixes the appropriate flat-rate and age-related percentages for the tax years 1997-98 to 2001-02.

## UPDATE

### **912 Reduced rates of contributions, and rebates, for members of money purchase contracted-out schemes**

TEXT AND NOTES--See the Occupational Pension Schemes (Contracting-out) (Payment and Recovery of Remaining Balances) Regulations 2000, SI 2000/750.

TEXT AND NOTES 5, 11, 25-27--1993 Act s 42B repealed: Pensions Act 2007 Sch 4 para 18, Sch 7 Pt 6 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

NOTE 5--Pension Schemes Act 1993 s 42A(1) amended: Welfare Reform and Pensions Act 1999 Sch 9 para 7(2); National Insurance Contributions Act 2008 Sch 1 para 11.

TEXT AND NOTES 6-12--Replaced. 1993 Act s 42A(2) substituted by the Welfare Reform and Pensions Act 1999 Sch 9 para 7(3). 1993 Act s 42A(2A), (2B) added by the Social Security Act 1998 Sch 7 para 128; and substituted by the Welfare Reform and Pensions Act 1999 Sch 9 para 7(3). 1993 Act s 42A(2C), (2D) added by the Welfare Reform and Pensions Act 1999 Sch 9 para 7(3). The amount of any primary Class 1 contribution

attributable to the Social Security Contributions and Benefits Act 1992 s 8(1)(a) (see PARA 36) in respect of the earnings must be reduced by an amount equal to the appropriate flat-rate percentage of the relevant part of the earnings ('Amount R1'): 1993 Act s 42A(2) (as substituted; amended by the National Insurance Contributions Act 2002 Sch 1 para 37, with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2)). For the purposes of the 1993 Act s 42A(2) the appropriate flat-rate percentage for each of the tax years starting in 2007, 2008, 2009, 2010 and 2011 is 1.6 per cent: SI 2006/1009, art 3(2). The amount of any secondary Class 1 contribution in respect of the earnings must be reduced by an amount equal to the appropriate flat-rate percentage of the relevant part of the earnings ('Amount R2'): 1993 Act s 42A(2A) (as added and substituted). For the purposes of the 1993 Act s 42A(2A) the appropriate flat-rate percentage for each of the tax years starting in 2007, 2008, 2009, 2010 and 2011 is 1.4 per cent: SI 2006/1009, art 3(3). The aggregate of Amounts R1 and R2 must be set off (1) first against the aggregate amount which the secondary contributor is liable to pay in respect of the contributions mentioned in the 1993 Act s 42A(2), (2A); and (2) then, as to any balance, against any amount which the secondary contributor is liable to pay in respect of a primary or secondary Class 1 contribution in respect of earnings (a) paid to or for the benefit of any other employed earner, whether in contracted-out employment or not; and (b) in relation to which the secondary contributor is such a contributor; and, for these purposes, any reference to a liability to pay an amount in respect of a primary Class 1 contribution is a reference to such a liability under the Social Security Contributions and Benefits Act 1992 Sch 1 para 3 (see PARA 35): 1993 Act s 42A(2B) (as added and substituted). If any balance remains and the secondary contributor makes an application for the purpose to the Inland Revenue, the Inland Revenue must, in such manner and at such time, or within such period, as may be prescribed, pay to the secondary contributor an amount equal to the remaining balance; however, regulations may make provision for the adjustment of an amount that would otherwise be payable under this rule so as to avoid the payment of trivial or fractional amounts: s 42A(2C), as inserted. If the Inland Revenue pays any amount under s 42A(2C) which it is not required to pay, it may recover that amount from the secondary contributor in such manner and at such time, or within such period, as may be prescribed: s 42A(2D) (as added). For provision under s 42A(2C), (2D) see the Occupational Pension Schemes (Contracting Out) (Payment and Recovery of Remaining Balances) Regulations 2000, SI 2000/750.

TEXT AND NOTE 13--For 'Secretary of State' read 'Inland Revenue': 1993 Act s 42A(3), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 46.

NOTES 14, 17, 19--Functions of Secretary of State under SI 1996/1172 (except those under regs 23, 61) transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

NOTE 14--SI 1996/1172 reg 37 amended: SI 2005/2050. SI 1997/946 regs 4, 7 amended: SI 1997/3038. SI 1997/946 reg 10 amended: SI 2009/615.

TEXT AND NOTE 15--For the purposes of the 1993 Act s 42A 'the appropriate age-related percentage' and 'the appropriate flat-rate percentage', in relation to a tax year beginning before the abolition date, are the percentages specified as such for that tax year in an order made under s 42B (as it had effect prior to that date): s 42A(8) (added by Pensions Act 2007 Sch 4 para 17) (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

NOTE 15--As to the appropriate age-related percentage for the tax years starting in 2007, 2008, 2009, 2010 and 2011, see the Social Security (Reduced Rates of Class 1 Contributions, Rebates and Minimum Contributions) Order 2006, SI 2006/1009, art 3(4), Sch 1.

TEXT AND NOTE 20--For 'Secretary of State' read 'Inland Revenue': 1993 Act s 42A(5), amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 46.

NOTES 23-27--See the Social Security (Reduced Rates of Class 1 Contributions, and Rebates) (Money Purchase Contracted-out Schemes) Order 2001, SI 2001/1355.

TEXT AND NOTES 23-25--Subject to the 1993 Act s 182 (see PARA 977), an order under s 42B(2) (as added) may specify different percentages in respect of earners by reference to whether the money purchase contracted-out scheme of which the earner is a member is or is not for the time being registered as a stakeholder pension scheme under the Welfare Reform and Pensions Act 1999 s 2: s 7(1), (3). As to stakeholder pension schemes see PARA 873A. As from the abolition date (see PARA 880) 1999 Act s 7 repealed: Pensions Act 2007 Sch 4 para 39, Sch 7 Pt 6. For savings see Sch 4 Pt 3.

TEXT AND NOTE 23--Now refers to benefits (or parts of benefits) which, in accordance with the 1993 Act s 48A and the Social Security Contributions and Benefits Act 1992 Sch 4A (see PARA 569) are foregone: 1993 Act s 42B(1) (amended by the Child Support, Pensions and Social Security Act 2000 s 34).

NOTE 27--SI 1996/1055 applies to the tax years 1997-98 to 1998-99: art 2; SI 1998/945. For the appropriate flat-rate and age-related percentages for the tax years 1999-2000 to 2001-2002, see the Social Security (Reduced Rates of Class 1 Contributions and Rebates) (Money Purchase Contracted-out Schemes) Order 1998, SI 1998/945, art 2.

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### **(iii) Minimum Contributions in respect of Members of Appropriate Personal Pension Schemes**

#### **913. Payment of minimum contributions to personal pension schemes.**

Subject to the relevant statutory provisions<sup>1</sup>, the Secretary of State<sup>2</sup> must, except in such circumstances or in respect of such periods as may be prescribed<sup>3</sup>, pay minimum contributions<sup>4</sup> in respect of an employed earner<sup>5</sup> for any period during which the earner:

- 2508 (1) is over the age<sup>6</sup> of 16 but has not attained pensionable age<sup>7</sup>;
- 2509 (2) is not a married woman or widow who has made an election which is still operative that her liability in respect of primary Class 1 contributions<sup>8</sup> is to be a liability to contribute at a reduced rate; and
- 2510 (3) is a member of an appropriate personal pension scheme<sup>9</sup> which is for the time being the earner's chosen scheme<sup>10</sup>.

Subject as follows, minimum contributions in respect of an earner must be paid to the trustees or managers of the earner's chosen scheme<sup>11</sup>. In such circumstances as may be prescribed minimum contributions must be paid to a prescribed person<sup>12</sup>.

Where the condition mentioned in head (1) or head (3) above ceases to be satisfied in the case of an earner in respect of whom the Secretary of State is required to pay minimum contributions, the duty of the Secretary of State to pay them ceases as from a date determined in accordance with regulations<sup>13</sup>. If the Secretary of State pays an amount by way of minimum contributions which he is not required to pay, he may recover it from the person to whom he paid it<sup>14</sup>, or from any person in respect of whom he paid it<sup>15</sup>; and if the Secretary of State pays in respect of an earner an amount by way of minimum contributions which he is required to pay, but does not pay it to the trustees or managers of the earner's chosen scheme, he may recover it from the person to whom he paid it or from the earner<sup>16</sup>.

1    In the Pension Schemes Act 1993 Pt III (ss 7-68) Sch 2 (as amended): see PARA 878 et seq ante, 914 et seq post.

2    As to the Secretary of State see PARA 1 ante.

3    For the meaning of 'prescribed' see PARA 555 note 1 ante. The prescribed circumstances are as follows: (1) minimum contributions must not be paid in respect of an earner for the tax year or any part of the tax year in which that earner reaches pensionable age or dies and in which he would have reached pensionable age; (2) where effect has been given to the earner's protected rights under the Pension Schemes Act 1993 s 28 (as amended) (see PARA 899 ante), minimum contributions must not, except as provided by the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 12(3)-(9) (see note 12 infra), be paid in respect of the period during which the scheme was the earner's chosen scheme: reg 12(1), (2).

4    For the meaning of 'minimum contributions' see PARA 883 note 11 ante.

5    For the meaning of 'employed earner' see PARA 32 ante (definition applied by the Pension Schemes Act 1993 s 181(1)). For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions as so applied).

6    As to when a person attains a particular age see PARA 881 note 2 ante.

7 For the meaning of 'pensionable age' see PARA 562 ante.

8 As to primary Class 1 contributions see PARA 36 ante.

9 For the meaning of 'personal pension scheme' see PARA 710 ante; and for the meaning of 'appropriate personal pension scheme' see PARA 880 ante.

10 Pension Schemes Act 1993 s 43(1) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 42).

11 Pension Schemes Act 1993 s 43(2).

12 Ibid s 43(3). The prescribed circumstances are as follows: (1) where effect has been given to the earner's protected rights by the making of a transfer payment to another appropriate scheme which has become the earner's chosen scheme or a money purchase contracted-out scheme, the minimum contributions must be paid to the trustees or managers of that scheme; (2) where effect has been given to the earner's protected rights by the making of a transfer payment to a salary-related scheme or an overseas scheme and the Secretary of State becomes aware, as a consequence of evidence in respect of the earner's age being brought to his attention, that an additional amount of minimum contributions would have been payable had he been aware of that evidence, that additional amount of minimum contributions must be paid to the trustees or managers of that scheme; (3) where effect has been given to the earner's protected rights by the purchase of an annuity or by the provision by the scheme of a pension, and the amount of the minimum contributions in question is at least ten times as great as the lower earnings limit for the tax year in which the Secretary of State becomes aware that minimum contributions are payable or would be payable, but for the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 12(2) (see note 3 head (2) supra), those minimum contributions must be paid (in the case of an annuity) to the insurance company from which the annuity has been purchased or (in the case of a pension) to the trustees or managers of the scheme; (4) where effect has been given to the earner's protected rights by the purchase of an annuity or by the provision by the scheme of a pension and (a) the circumstances in head (3) supra do not exist; and (b) minimum contributions are payable for the tax year or part of the tax year in which the earner died, those minimum contributions must be paid to the earner's widow or widower, or if the earner died unmarried, they may at the Secretary of State's discretion be paid to any person; (5) where effect has been given to the earner's protected rights by the purchase of an annuity or by provision by the scheme of a pension and (a) the circumstances in head (3) supra do not exist; and (b) the Secretary of State becomes aware, as a consequence of evidence in respect of the earner's age being brought to his attention, that an additional amount of minimum contributions would have been payable had he been aware of that evidence, that additional amount of minimum contributions must be payable (for any tax year or part of a tax year before effect has been given to protected rights) to the earner or the earner's widow or widower, or if the earner died unmarried, they may at the Secretary of State's discretion be paid to any person; (6) where effect has been given to the earner's protected rights by the provision of a lump sum, minimum contributions must be payable to the earner or the earner's widow or widower, or if the earner died unmarried, they may at the Secretary of State's discretion be paid to any person; (7) where effect has been given to the earner's protected rights by the making of payments under an interim arrangement, minimum contributions must continue to be payable to the trustees or managers of the earner's chosen scheme: reg 12(3)-(9). Minimum contributions must be paid by automated credit transfer into a bank or building society account which relates to the relevant scheme and which accepts payments made by automated credit transfer or in such other manner as the Secretary of State may in his discretion approve: reg 13. A personal pension scheme can be an appropriate scheme only if the rules of the scheme provide that any minimum contributions falling to be applied so as to provide benefits in respect of a member are to be so applied from the date on which payment is made by the Secretary of State in accordance with reg 13 and that such minimum contributions are to be allocated to that member's account within three months of that date: reg 14.

13 Pension Schemes Act 1993 s 43(4). For the meaning of 'regulations' see PARA 557 note 2 ante.

14 Ibid s 43(5)(a).

15 Ibid s 43(5)(b).

16 Ibid s 43(6).

## UPDATE

### 913 Payment of minimum contributions to personal pension schemes

TEXT AND NOTES--Functions of the Secretary of State under 1993 Act s 43 transferred to the Commissioners of Inland Revenue: s 43 (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 47).

Where, under the Pension Schemes Act 1993 s 43 or corresponding Northern Ireland legislation the Board of Inland Revenue pays minimum contributions for the purposes of a registered pension scheme, the amount of those contributions is to be increased by the difference between the amount of the employee's share of those contributions and the grossed-up equivalent of that amount: Finance Act 2004 s 202(1), (2). The amount of the employee's share of the minimum contributions is the amount that would be the amount of the minimum contributions if (1) for the reference to the age-related percentage in the 1993 Act s 45(1) there were substituted a reference to the percentage mentioned in s 41(1A); and the 'grossed-up equivalent of that amount' is the sum which, after deduction of income tax at the basic rate in force for the tax year for which the minimum contributions are paid, is equal to that amount: 2004 Act s 202(3), (4). For the meaning of 'registered pension scheme' see PARA 873B.1; and for the meaning of 'Board of Inland Revenue' see PARA 873B.2 NOTE 1. As to the basic rate see INCOME TAXATION vol 23(1) (Reissue) PARA 4.

The Board of Inland Revenue may by regulations prescribe circumstances in which s 202 does not apply, or may make provision supplementing s 202: s 202(5). The Board of Inland Revenue must (a) pay into the National Insurance Fund out of money provided by Parliament the amount of any increase attributable to s 202 in the sums paid out of that Fund under the 1993 Act: 2004 Act s 202(6). As to the making of such regulations see PARA 873B.1 NOTE 2. The regulations so far made are the Registered Pension Schemes (Minimum Contributions) Regulations 2005, SI 2005/3450.

TEXT AND NOTE 8--In head (2) for 'her liability ... contributions' read 'so much of her liability in respect of primary Class 1 contributions as is attributable to the Social Security Contributions and Benefits Act 1992 s 8(1)(a) (see PARA 36)': 1993 Act s 43(1) (amended by the National Insurance Contributions Act 2002 Sch 1 para 38, with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2))).

TEXT AND NOTE 10--In the 1993 Act s 43 'the earner's chosen scheme' means the scheme which was immediately before the abolition date the earner's chosen scheme in accordance with s 44 (as it had effect prior to that date): s 43(7) (added by Pensions Act 2007 Sch 4 para 19) (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

NOTE 12--Heads (4)-(6) also apply in relation to civil partners: SI 1997/470 reg 12(6)-(8) (amended by SI 2005/2050, SI 2005/3164).

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#### **914. Earner's chosen scheme.**

Where an earner<sup>1</sup> and the trustees or managers of an appropriate personal pension scheme<sup>2</sup> have jointly given notice to the Secretary of State<sup>3</sup> in such manner and form and with such supporting evidence as may be prescribed<sup>4</sup>:

- 2511 (1) that the earner is, or intends to become, a member of the scheme and wishes minimum contributions in respect of him to be paid to the scheme<sup>5</sup>;
- 2512 (2) that the trustees or managers have agreed to accept him as a member of the scheme and to receive such minimum contributions in respect of him,

then, unless the Secretary of State rejects the notice on either or both of specified grounds<sup>6</sup>, that scheme is the earner's chosen scheme<sup>7</sup> as from a date determined in accordance with regulations<sup>8</sup> and specified in the notice, unless at that date some other appropriate scheme is the earner's chosen scheme for those purposes<sup>9</sup>.

Either an earner or the trustees or managers of the scheme may cancel such a notice by giving notice to that effect to the Secretary of State at such time and in such manner and form as may be prescribed<sup>10</sup>. When such a notice is given, the scheme ceases to be the earner's chosen scheme as from a date determined in accordance with regulations and specified in the notice<sup>11</sup>.

1 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

2 For the meaning of 'personal pension scheme' see PARA 710 ante; and for the meaning of 'appropriate personal pension scheme' see PARA 880 ante.

3 As to the Secretary of State see PARA 1 ante.

4 For the meaning of 'prescribed' see PARA 555 note 1 ante. The notice must be given in writing in such form as the Secretary of State may in his discretion accept: Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 10(1).

5 Ie under the Pension Schemes Act 1993 s 43 (as amended): see PARA 913 ante.

6 The grounds referred to in ibid s 44(1) are that the Secretary of State is of the opinion that s 31(5) (as added) (see PARA 904 ante) is not being complied with in respect of any members of the scheme, and that, having regard to any other provisions of ss 26-32 (as amended) (see PARAS 883, 898-904 ante) and ss 43-45 (as amended) (see PARAS 913 ante, 915 post), it is inexpedient to allow the scheme to be the chosen scheme of any further earners: s 44(1A) (added by the Pensions Act 1995 s 164).

7 Ie for the purposes of the Pension Schemes Act 1993 s 43 (as amended): see PARA 913 ante.

8 For the meaning of 'regulations' see PARA 557 note 2 ante. Subject as follows, the date specified in the notice as the date from which the scheme is to be the earner's chosen scheme must be 6 April in the year notice is given or 6 April in the next tax year, but where a notice is given by 17 May in a tax year it may specify 6 April in the preceding tax year: Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 10(2), (3). In a case where a scheme ('the first scheme') was an earner's chosen scheme on the date with effect from which the first scheme ceased to be an appropriate scheme, the date specified in the notice as the date from which another scheme ('the second scheme') is to be the earner's chosen scheme may be the date with effect from which the first scheme ceased to be an appropriate scheme (whether or not that date is 6 April), if that date is not earlier than whichever is the earlier of (1) the date six months earlier than

that on which the Secretary of State receives the notice; and (2) 6 April in the tax year in which the Secretary of State receives the notice: reg 10(4).

9 Pension Schemes Act 1993 s 44(1) (amended by the Pensions Act 1995 s 164).

10 Pension Schemes Act 1993 s 44(2). The notice must be given in writing and in such form as the Secretary of State may in his discretion accept: Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 11(1).

11 Pension Schemes Act 1993 s 44(3). The date specified in the notice must be 6 April in the tax year in which the Secretary of State receives the notice or 6 April in the next tax year; but where notice is given by the earner and not by the trustees or managers of the scheme the date must be at least a year later than the date specified in the notice given under s 44(1): Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 11(2), (3).

## **UPDATE**

### **914 Earner's chosen scheme**

TEXT AND NOTES--1993 Act s 44 repealed: Pensions Act 2007 Sch 4 para 20, Sch 7 Pt 6 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

Functions of the Secretary of State under 1993 Act s 44 transferred to the Commissioners of Inland Revenue: s 44, amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 48. 1999 Act Sch 1 para 48 repealed: Pensions Act 2007 Sch 7 Pt 6 (in force on the abolition date: see s 15 and PARA 880).

NOTE 8--In the Personal Pension Schemes (Appropriate Schemes) Regulations 1997 reg 10(2); SI 1997/3038, for 'the year notice is given' read 'the tax year notice is given'.

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### **915. Amount of minimum contributions.**

In relation to any tax week<sup>1</sup> falling within a period for which the Secretary of State<sup>2</sup> is required to pay minimum contributions<sup>3</sup> in respect of an earner<sup>4</sup>, the amount of those contributions must be an amount equal to the appropriate age-related percentage<sup>5</sup> of so much of the earnings paid in that week (other than earnings in respect of contracted-out employment<sup>6</sup>) as exceeds the current lower earnings limit but not the current upper earnings limit<sup>7</sup> for that week (or the prescribed equivalents<sup>8</sup> if he is paid otherwise than weekly)<sup>9</sup>. Regulations<sup>10</sup> may make provision:

- 2513 (1) for earnings to be calculated or estimated in such manner and on such basis as may be prescribed<sup>11</sup> for the purpose of determining whether any, and if so what, minimum contributions are payable in respect of them<sup>12</sup>;
- 2514 (2) for the adjustment of the amount which would otherwise be payable by way of minimum contributions so as to avoid the payment of trivial or fractional amounts<sup>13</sup>;
- 2515 (3) for the intervals at which, for the purposes of minimum contributions, payments of earnings are to be treated as made<sup>14</sup>;
- 2516 (4) for these provisions to have effect in prescribed cases as if for any reference to a tax week there were substituted a reference to a prescribed period<sup>15</sup>;
- 2517 (5) as to the manner in which and time at which or period within which minimum contributions are to be made<sup>16</sup>.

The Secretary of State must at intervals of not more than five years lay before each House of Parliament:

- 2518 (a) a report by the Government Actuary or the Deputy Government Actuary on the percentages which, in his opinion, are required to be specified in an order under these provisions so as to reflect the cost of providing benefits of an actuarial value equivalent to that of the benefits which are foregone<sup>17</sup> by or in respect of members<sup>18</sup> of appropriate personal pension schemes<sup>19</sup>;
- 2519 (b) a report by the Secretary of State stating what, in view of the report under head (a) above, he considers those percentages should be<sup>20</sup>; and
- 2520 (c) a draft of such an order<sup>21</sup>.

Such an order has effect in relation to a period of tax years<sup>22</sup> (not exceeding five), and may, for each of the tax years for which it has effect, specify different percentages<sup>23</sup> in respect of earners by reference to their ages on the last day of the preceding year<sup>24</sup>. If the draft of such an order is approved by resolution of each House of Parliament, the Secretary of State must make the order in the form of the draft<sup>25</sup>. Such an order must have effect from the beginning of such tax year as may be specified in the order, not being a tax year earlier than the second after that in which the order is made<sup>26</sup>.

1 For the meaning of 'tax week' see PARA 878 note 8 ante.

2 As to the Secretary of State see PARA 1 ante.

- 3 For the meaning of 'minimum contributions' see PARA 883 note 11 ante.
- 4 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).
- 5 As to the appropriate age-related percentage see note 23 infra. For the purposes of determining that percentage, the Secretary of State may require an earner to send documentary evidence of his date of birth: see the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 16(1).
- 6 For the meaning of 'contracted-out employment' see PARA 878 ante.
- 7 For the meaning of 'current lower earnings limit' and 'current upper earnings limit' see PARA 878 note 8 ante.
- 8 For the meaning of 'the prescribed equivalent' see PARA 878 note 8 ante.
- 9 Pension Schemes Act 1993 s 45(1) (substituted by the Pensions Act 1995 s 138(1), (2)).
- 10 For the meaning of 'regulations' see PARA 557 note 2 ante.
- 11 For the meaning of 'prescribed' see PARA 555 note 1 ante.
- 12 Pension Schemes Act 1993 s 45(3)(a). As to the calculation or estimation of earnings for these purposes, see the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, regs 15, 19.
- 13 Pension Schemes Act 1993 s 45(3)(b); and see the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470, reg 17.
- 14 Pension Schemes Act 1993 s 45(3)(c).
- 15 Ibid s 45(3)(e) (amended by the Pensions Act 1995 ss 138(4), 177, Sch 7 Pt III).
- 16 Pension Schemes Act 1993 s 45(3)(f).
- 17 Ie under ibid s 48A (as amended): see PARA 917 post.
- 18 As to the power to prescribe for these purposes the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member see PARA 557 note 9 ante. For the meaning of 'occupational pension scheme' see PARA 741 ante.
- 19 Pension Schemes Act 1993 s 45A(1) (s 45A added by the Pensions Act 1995 s 138(5)). For the meaning of 'appropriate personal pension scheme' see PARA 880 ante; and for the meaning of 'personal pension scheme' see PARA 710 ante.
- 20 Pension Schemes Act 1993 s 45A(1)(b) (as added: see note 19 supra); and see *Occupational and Personal Pension Schemes* (Cm 3221) (1996).
- 21 Pension Schemes Act 1993 s 45A(1)(c) (as added: see note 19 supra).
- 22 For the meaning of 'tax year' see PARA 863 note 1 ante.
- 23 The percentage for each group of earners is 'the appropriate age-related percentage' in respect of earners in that group for the purposes of the Pension Schemes Act 1993 s 45 (as amended): s 45A(2)(b) (as added: see note 19 supra).
- 24 Ibid s 45A(2) (as added: see note 19 supra). Section 45A(2) (as so added) is without prejudice to the generality of s 182 (as amended) (see PARA 977 post): s 45A(5) (as so added).
- 25 Ibid s 45A(3) (as added: see note 19 supra).
- 26 Ibid s 45A(4) (as added: see note 19 supra). For an example of the exercise of this power see the Social Security (Minimum Contributions to Appropriate Personal Pension Schemes) Order 1996, SI 1996/1056, art 2, Table, specifying the appropriate age-related percentages in respect of earners in the tax years 1997-98 to 2001-02.

## UPDATE

## 915 Amount of minimum contributions

TEXT AND NOTE 2--For 'Secretary of State' read 'Inland Revenue': 1993 Act s 45(1) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 49).

NOTES 5-13--Functions of Secretary of State under SI 1997/470 transferred to the Commissioners of Inland Revenue: 1999 Act s 1(2), Sch 2.

TEXT AND NOTE 7--For 'the current upper earnings limit for that week' read 'the upper accrual point': 1993 Act s 45(1) (further amended, in relation to 2009-10 and subsequent tax years, by the National Insurance Contributions Act 2008 Sch 1 para 12).

TEXT AND NOTES 17-26--1993 Act s 45A (as added) repealed: Pensions Act 2007 Sch 4 para 22, Sch 7 Pt 6 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

TEXT AND NOTE 17--For 'benefits which are foregone' read 'benefits (or parts of benefits) which, in accordance with the Pension Schemes Act 1993 s 48A and the Social Security Contributions and Benefits Act 1992 Sch 4A (see PARA 569) are foregone': 1993 Act s 45A(1)(a) (amended by the Child Support, Pensions and Social Security Act 2000 s 34).

NOTE 19--Reference to Pension Schemes Act 1993 s 45A(1) should be to s 45A(1)(a): see TEXT AND NOTE 17.

TEXT AND NOTES 22-24--Subject to the Pension Schemes Act 1993 s 182 (see PARA 977), an order under s 45A(2) (as added) may (1) specify different percentages in respect of earners by reference to whether the appropriate personal pension scheme of which the earner is a member is or is not for the time being registered as a stakeholder pension scheme under the Welfare Reform and Pensions Act 1999 s 2; and (2) specify different percentages in respect of earners by reference to the time when the earner first became a member of the scheme: s 7(2), (3). As to stakeholder pension schemes see PARA 873A. As from the abolition date (see PARA 880) 1999 Act s 7 repealed: Pensions Act 2007 Sch 4 para 39, Sch 7 Pt 6. For savings see Sch 4 Pt 3.

NOTE 26--The 1996 Order applies to the tax years 1997-98 to 1998-99: art 2; SI 1998/944. For the appropriate age-related percentages in respect of earners for the tax years 1999-2000 to 2001-2002, see the Social Security (Minimum Contributions to Appropriate Personal Pension Schemes) Order 1998, SI 1998/944, art 2, Table. For the appropriate age-related percentages in respect of earners for the tax years 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, see the Social Security (Minimum Contributions to Appropriate Personal Pension Schemes) Order 2001, SI 2001/1354, art 2, Schs 1-5. For the appropriate age-related percentages in respect of earners for the tax years 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, see the Social Security (Reduced Rates of Class 1 Contributions, Rebates and Minimum Contributions) Order 2006, SI 2006/1009, art 4, Schs 2-6 (art 4, Sch 5 amended by SI 2009/3094).

For the purposes of the 1993 Act s 45 'the appropriate age-related percentage', in relation to a tax year beginning before the abolition date, is the percentage (or percentages) specified as such for that tax year in an order made under s 45A (as it had effect prior to that date): s 45(4) (added by Pensions Act 2007 Sch 4 para 21) (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

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#### **(iv) Effect on Social Security Benefits**

##### **916. Effect of entitlement to guaranteed minimum pensions on payment of social security benefits.**

Where for any period a person is entitled both:

2521 (1) to a Category A or Category B retirement pension<sup>1</sup>, a widowed mother's allowance<sup>2</sup> or a widow's pension<sup>3</sup> under the Social Security Contributions and Benefits Act 1992; and

2522 (2) to one or more guaranteed minimum pensions<sup>4</sup>,

the weekly rate of the benefit mentioned in head (1) above is for that period to be reduced by an amount equal to that part of its additional pension which is attributable to earnings factors<sup>5</sup> for any tax years<sup>6</sup> ending before the principal appointed day<sup>7</sup> or to the weekly rate of the pension mentioned in head (2) above, or, if there is more than one such pension, their aggregate weekly rates, whichever is the less<sup>8</sup>.

Where for any period a person is entitled to one or more guaranteed minimum pensions and he is also entitled to long-term incapacity benefit<sup>9</sup>, for that period an amount equal to the weekly rate or aggregate weekly rates of the guaranteed minimum pension or pensions is to be deducted from any increase payable<sup>10</sup> and he is entitled to such an increase only if there is a balance after the deduction and, if there is such a balance, at a weekly rate equal to it<sup>11</sup>.

Where for any period a person is entitled to one or more guaranteed minimum pensions and he is also entitled to a Category A retirement pension<sup>12</sup> and the weekly rate of his pension includes an additional pension<sup>13</sup>, then for that period the provisions relating to increases for invalidity<sup>14</sup> have effect subject to modification<sup>15</sup>. Where, however, he is so entitled but the weekly rate of his Category A retirement pension does not include such an additional pension, then for that period the relevant amount<sup>16</sup> must be deducted from the amount that would otherwise be the increase for invalidity and the pensioner is entitled to such an increase only if there is a balance remaining after that deduction and, if there is such a balance, of an amount equal to it<sup>17</sup>.

Where for any period a person is entitled to one or more guaranteed minimum pensions and he is also entitled to a Category A retirement pension or to a Category B retirement pension<sup>18</sup>, and the weekly rate of the pension includes an additional pension<sup>19</sup>, then for that period the statutory provisions relating to increased unemployability supplement to industrial injuries benefit<sup>20</sup> have effect subject to modification<sup>21</sup>. Where, however, he is so entitled but the weekly rate of the pension does not include an additional pension, then for that period the relevant amount is to be deducted from the amount that would otherwise be the increase for unemployability and the beneficiary is entitled to an increase only if there is a balance after that deduction and, if there is such a balance, only to an amount equal to it<sup>22</sup>.

1 As to Category A and Category B retirement pensions see PARA 568 et seq ante.

2 As to widowed mother's allowance see PARA 85 ante.

3 As to widow's pension see PARA 86 ante.

4 For the meaning of 'guaranteed minimum pension' see PARA 878 ante. This reference to a person entitled to a guaranteed minimum pension is to be construed as including a reference to a person so entitled by virtue of being the widower of an earner only if (1) at the time of the earner's death she and her husband had both attained pensionable age; or (2) he is also entitled to a Category A retirement pension by virtue of the Social Security Contributions and Benefits Act 1992 s 41(7) (as amended) (see PARA 89 ante): Pension Schemes Act 1993 s 47(1) (amended by the Social Security (Incapacity for Work) Act 1994 s 11, Sch 1 para 57, Sch 2). For the purposes of the Pension Schemes Act 1993 s 46 (as amended) generally (see the text and notes 5-22 infra), a person is to be treated as entitled to any guaranteed minimum pension to which he would have been entitled (a) if its commencement had not been postponed, as mentioned in s 13(4) (see PARA 890 ante); or (b) if there had not been made a transfer payment or transfer under regulations made by virtue of s 20 (see PARA 895 ante) as a result of which he is no longer entitled to guaranteed minimum pensions under the scheme by which the transfer payment or transfer was made and he has not become entitled to guaranteed minimum pensions under the scheme to which the transfer payment or transfer was made: s 47(2). Where (i) guaranteed minimum pensions provided for a member or the member's widow or widower under a contracted-out scheme have been wholly or partly secured as mentioned in s 19(3) (see PARA 894 ante); and (ii) either (A) the transaction wholly or partly securing them was carried out before 1 January 1986 and discharged the trustees or managers of the scheme as mentioned in s 19(1); or (B) it was carried out on or after that date without any of the requirements specified in s 19(5)(a)-(c) being satisfied in relation to it and the scheme has been wound up; and (iii) any company with which any relevant policy of insurance or annuity contract was taken out or entered into is unable to meet the liabilities under policies issued or securities given by it; and (iv) the combined proceeds of any relevant policies and annuity contracts and any cash sums paid or alternative arrangements made under the Policyholders Protection Act 1975 are inadequate to provide the whole of the amount secured, then the member and the member's widow or widower are to be treated for the purposes of the Pension Schemes Act 1993 s 46 (as amended) as only entitled to such part (if any) of the member's or, as the case may be, the member's widow's or widower's guaranteed minimum pension as is provided by the proceeds mentioned in head (iv) supra: s 47(3). A policy or annuity is relevant for these purposes if taking it out or entering into it constituted the transaction to which s 19 applies: s 47(4).

For the purposes of s 46 (as amended) a person is also to be treated as entitled to any guaranteed minimum pension to which he would have been entitled if a lump sum had not been paid instead of that pension under provisions included in a scheme by virtue of s 21(1) (see PARA 890 ante) or if that pension had not been forfeited under provisions included in a scheme by virtue of s 21(2): s 47(5).

5 For the meaning of 'earnings factors' see PARA 56 ante (definition applied by *ibid* s 181(1)).

6 For the meaning of 'tax year' see PARA 863 note 1 ante.

7 For the meaning of 'principal appointed day' see PARA 880 note 13 ante.

8 Pension Schemes Act 1993 s 46(1) (amended by the Social Security (Incapacity for Work) Act 1994 Sch 1 para 56; and by the Pensions Act 1995 s 151, Sch 5 paras 18, 44). For these purposes, references to the weekly rate of a guaranteed minimum pension are references to that rate without any increase under the Pension Schemes Act 1993 s 15(1) (see PARA 892 ante): s 46(8).

9 *Ie* under the Social Security Contributions and Benefits Act 1992 s 30A (as added): see PARA 60 ante.

10 *Ie* under regulations under *ibid* s 30B(7) (as added): see PARA 62 ante.

11 Pension Schemes Act 1993 s 46(3) (substituted by the Social Security (Incapacity for Work) Act 1994 Sch 1 para 56).

12 *Ie* under the Social Security Contributions and Benefits Act 1992 s 44 (as amended): see PARAS 568-569 ante.

13 *Ie* such as is mentioned in *ibid* s 44(3)(b): see PARA 569 ante.

14 *Ie* *ibid* s 47 (as amended): see PARA 569 note 9 ante.

15 Pension Schemes Act 1993 s 46(4). The modification is that the Social Security Contributions and Benefits Act 1992 s 47(3) is substituted so that in s 47(2) 'the relevant amount' means an amount equal to the aggregate of (1) the additional pension; and (2) the weekly rate or aggregate weekly rates of the guaranteed minimum pension or pensions, reduced by the amount of any reduction in the weekly rate of the Category A retirement pension made by virtue of the Pension Schemes Act 1993 s 46(1): see s 46(4).

16 'The relevant amount' means an amount equal to the weekly rate or aggregate weekly rates of the guaranteed minimum pension or pensions reduced, in this case, by the amount of any reduction in the weekly

rate of the Category A retirement pension made by virtue of *ibid* s 46(1) (as amended): s 46(8) (amended by the Social Security (Incapacity for Work) Act 1994 Sch 1 para 56).

17 Pension Schemes Act 1993 s 46(5).

18 *Ie* under the Social Security Contributions and Benefits Act 1992 s 48A or s 48B (both as added): see PARAS 572-575 *ante*.

19 *Ie* such as is mentioned in *ibid* s 44(3)(b): see PARA 569 *ante*.

20 *Ie* *ibid* s 106, Sch 7 para 3 (as amended): see PARAS 162, 167 *ante*.

21 Pension Schemes Act 1993 s 46(6) (amended by the Social Security (Incapacity for Work) Act 1994 Sch 1 para 56; and by the Pensions Act 1995 s 126(c), Sch 4 para 22). The modification is that the Social Security Contributions and Benefits Act 1992 Sch 7 para 3(3) is substituted so that 'the relevant amount' means an amount equal to the aggregate of (1) the additional pension; and (2) the weekly rate or aggregate weekly rates of the guaranteed minimum pension or pensions, reduced by the amount of any reduction in the weekly rate of the pension made by virtue of the Pension Schemes Act 1993 s 46(1): see s 46(6).

22 *Ibid* s 46(7).

## UPDATE

### **916 Effect of entitlement to guaranteed minimum pensions on payment of social security benefits**

TEXT AND NOTES--For the purposes of the Pension Schemes Act 1993 s 46, a person is to be treated as entitled to a guaranteed minimum pension to which he would have been entitled but for the fact that the trustees or managers were discharged from their liability to provide that pension on the Board of the Pension Protection Fund assuming responsibility for the scheme: s 47(8) (added by Pensions Act 2004 s 165(3)).

For the purposes of the Pension Schemes Act 1993 s 46, a person is to be treated as entitled to a guaranteed minimum pension to which, in the opinion of the Commissioners for Her Majesty's Revenue and Customs, he would have been entitled but for the amendment of a scheme so that it no longer contains the guaranteed minimum pension rules: Pension Schemes Act 1993 s 47(9) (s 47(9)-(11) added by Pensions Act 2007 s 14(5)). Where the earner's accrued rights have been transferred after the amendment of the scheme, in making the calculation under the Pension Schemes Act 1993 s 47(9) the Commissioners must assume the application of s 16(1) after the transfer: s 47(10). In making the calculation under s 47(9) the Commissioners must ignore any effect of the scheme being wound up: s 47(11).

See also Pension Schemes Act 1993 s 46A (added by Pensions Act 2008 s 103(3)) (partly in force: SI 2010/1221) which provides for a reduction in the amount of retirement pension or widowed parent's allowance where a person is also entitled to a guaranteed minimum pension, where that person retires after 5 April 2020.

TEXT AND NOTE 2--Head (1) refers also to a widowed parent's allowance: Pension Schemes Act 1993 s 46(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 8 para 18(1), (2)).

NOTE 4--After 'widower of an earner' read 'in any case where he is entitled to a benefit other than a widowed parent's allowance': 1993 Act s 47(1) (amended by the State Pension Credit Act 2002 s 18). Now, head (1) he is also entitled to a Category B retirement pension by virtue of the earner's contributions, or would be so entitled but for the Social Security Contributions and Benefits Act 1992 s 43(1): 1993 Act s 47(1)(a) (substituted by the State Pension Credit Act 2002 s 18). In head (2) reference to s 41(7) is now to s 41(5): 1993 Act s 47(1)(b) (amended by the State Pension Credit Act 2002 s 18).

For the purposes of the Pension Schemes Act 1993 s 46, a person is to be treated as entitled to any guaranteed minimum pension to which he would have been entitled but for s 14(2A) (see PARA 891) and any reduction under s 15A (see PARA 892A): s 47(6) (added by the Welfare Reform and Pensions Act 1999 s 32(4); and amended by the Proceeds of Crime Act 2002 Sch 11 para 22(4)).

In the Pensions Schemes Act 1993 s 47(3) (as amended by SI 2001/3649) the reference to the Policyholders Protection Act 1975 is now to the Financial Services Compensation Scheme.

Pension Schemes Act 1993 s 47(1), (3) further amended so as to extend provisions to surviving civil partners: SI 2005/2050.

NOTE 18--Now under the 1992 Act s 48A, 48B or 48BB (see PARA 575A): Pension Schemes Act 1993 s 46(6) (amended by the Welfare Reform and Pensions Act 1999 Sch 8 para 18(3)).

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**917. Effect of reduced contributions and rebates on social security benefits; additional pension and other benefits.**

In relation to any tax week<sup>1</sup> where (1) the amount of a Class 1 contribution<sup>2</sup> in respect of the earnings<sup>3</sup> paid to or for the benefit of an earner<sup>4</sup> in that week is reduced<sup>5</sup>; or (2) an amount is paid<sup>6</sup> in respect of the earnings paid to or for the benefit of an earner, the provisions of the Social Security Contributions and Benefits Act 1992 relating to earnings factors for additional pension<sup>7</sup> have effect, except in prescribed circumstances<sup>8</sup>, as if no primary Class 1 contributions<sup>9</sup> had been paid or treated as paid upon those earnings for that week and the increase for family credit or disability working allowance<sup>10</sup> did not, if it otherwise would, apply<sup>11</sup>. Where, however, the whole or part of a contributions equivalent premium<sup>12</sup> has been paid or treated as paid in respect of the earner, the Secretary of State<sup>13</sup> may make a determination reducing or eliminating the application of these provisions<sup>14</sup> and they are also subject to, and may be disapplied by, regulations in certain circumstances<sup>15</sup>.

1 For the meaning of 'tax week' see PARA 878 note 8 ante.

2 As to Class 1 contributions see PARA 34 et seq ante.

3 For the meaning of 'earnings' see PARA 33 ante (definition applied by the Pension Schemes Act 1993 s 181(1)).

4 For the meaning of 'earner' see PARA 32 ante (definition as applied: see note 3 supra).

5 Ie under the Pension Schemes Act 1993 s 41 (as amended) (see PARA 911 ante) or s 42A (as added) (see PARA 912 ante); see s 48A(1) (s 48A added by the Pensions Act 1995 s 140(1)).

6 Ie under the Pension Schemes Act 1993 s 45(1) (as substituted): see PARA 915 ante.

7 Ie the Social Security Contributions and Benefits Act 1992 s 44(6) (as amended): see PARA 569 ante.

8 For the meaning of 'prescribed' see PARA 555 note 1 ante.

9 As to primary Class 1 contributions see PARA 36 ante.

10 Ie the Social Security Contributions and Benefits Act 1992 s 45A (as added): see PARA 569 ante. As to family credit see PARA 202 et seq ante; and as to disability working allowance see PARA 218 et seq ante.

11 Pension Schemes Act 1993 s 48A(1) (as added: see note 5 supra).

12 For the meaning of 'contributions equivalent premium' see PARA 922 post.

13 As to the Secretary of State see PARA 1 ante.

14 Pension Schemes Act 1993 s 48A(2) (as added: see note 5 supra).

15 Ibid s 48A(1) (as added: see note 5 supra) is subject to regulations under s 39, Sch 2 para 5(3A)-(3E) (as added) (see PARA 879 ante); s 48A(3) (as so added). Regulations may, so far as is required for the purpose of providing entitlement to additional pension (such as is mentioned in the Social Security Contributions and Benefits Act 1992 s 44(3)(b): see PARA 569 ante) but to the extent only that the amount of additional pension is attributable to provision made by regulations under s 45(5), disapply the Pension Schemes Act 1993 s 48A(1) (as so added); s 48A(4) (as so added). In relation to earners where, by virtue of s 48A(1) (as so added), the Social Security Contributions and Benefits Act 1992 s 44(6) has effect, in any tax year, as mentioned in the

Pension Schemes Act 1993 s 48A(1) (as so added) in relation to some but not all of their earnings, regulations may modify the application of the Social Security Contributions and Benefits Act 1992 s 44(5): Pension Schemes Act 1993 s 48A(5) (as so added). For an example of the exercise of this power see the Social Security (Contracting-out and Qualifying Earnings Factor) Regulations 1996, SI 1996/2477, reg 2.

## **UPDATE**

### **917 Effect of reduced contributions and rebates on social security benefits; additional pension and other benefits**

TEXT AND NOTE 2--Head (1) now refers to a Class 1 contribution attributable to the Social Security Contributions and Benefits Act 1992 s 8(1)(a) (see PARA 36): Pension Schemes Act 1993 s 48A(1) (amended by the National Insurance Contributions Act 2002 Sch 1 para 39(a), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2))).

TEXT AND NOTE 9--For 'no primary Class 1 contributions' read 'no such primary Class 1 contributions': Pension Schemes Act 1993 s 48A(1) (amended by the National Insurance Contributions Act 2002 Sch 1 para 39(b), with effect in relation to the tax year 2003-04 and subsequent tax years (s 8(2))).

TEXT AND NOTE 10--Social Security Contributions and Benefits Act 1992 s 45A (as amended) repealed: Tax Credits Act 2002 Sch 6.

TEXT AND NOTE 11--1993 Act s 48A(1) further amended: Pensions Act 2007 Sch 4 para 23 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

NOTE 15--Pension Schemes Act 1993 s 48A(5) (as amended by the Child Support, Pensions and Social Security Act 2000 s 38(1) (subject to conditions: see s 38(2)-(7)) now refers to the application of the Social Security Contributions and Benefits Act 1992 s 44(5) or (5A). See also the Social Security (Contracting-out and Qualifying Earnings Factor and Revision of Relevant Pensions) Regulations 2000, SI 2000/2736.

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## **(6) TERMINATION OF CONTRACTED-OUT OR APPROPRIATE SCHEME STATUS**

### **918. Powers of Secretary of State to approve arrangements for scheme ceasing to be certified.**

In the case of an occupational pension scheme<sup>1</sup> or a personal pension scheme<sup>2</sup> which is or has been certified as a contracted-out<sup>3</sup> or, as the case may be, an appropriate scheme<sup>4</sup>, the Secretary of State<sup>5</sup> may, for the event of, or in connection with, its ceasing to be such a scheme, approve any arrangements<sup>6</sup> made or to be made in relation to the scheme, or for its purposes, for the preservation or transfer:

- 2523 (1) in the case of an occupational pension scheme other than a money purchase contracted-out scheme<sup>7</sup>, of earners<sup>8</sup> accrued rights to guaranteed minimum pensions<sup>9</sup> under the scheme or accrued rights to pensions under the scheme attributable to their service on or after the principal appointed day<sup>10</sup>, and of the liability for the payment of such pensions in respect of persons who have then become entitled to receive them<sup>11</sup>;
- 2524 (2) in the case of a money purchase contracted-out scheme or a personal pension scheme, of protected rights<sup>12</sup> under the scheme<sup>13</sup>.

The power of the Secretary of State to approve such arrangements includes power to approve arrangements subject to conditions, and may be exercised either generally or in relation to a particular scheme<sup>14</sup>. Arrangements may not be approved under these provisions unless any prescribed<sup>15</sup> conditions are met<sup>16</sup>.

If the scheme ceases to be a contracted-out scheme or an appropriate scheme (whether by being wound up or otherwise) and the Secretary of State has either withdrawn his approval of previously approved arrangements relating to it, or has declined to approve arrangements relating to it, he may issue a certificate to that effect<sup>17</sup>. A certificate so issued must be cancelled by the Secretary of State if he subsequently approves the arrangements<sup>18</sup>.

An approval of arrangements relating to an occupational pension scheme which is not a money purchase contracted-out scheme may be withdrawn at any time, notwithstanding that the scheme has been wound up<sup>19</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 741 ante.

2 For the meaning of 'personal pension scheme' see PARA 710 ante.

3 For the meaning of 'contracted-out scheme' see PARA 880 ante.

4 For the meaning of 'appropriate scheme' see PARA 880 ante.

5 As to the Secretary of State see PARA 1 ante.

6 Regulations may provide that where the Secretary of State has approved arrangements under the Pension Schemes Act 1993 s 50(1) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 21, 45) in respect of an occupational pension scheme (other than a money purchase scheme), any provision of the Pension Schemes

Act 1993 Pt III (ss 7-68), Sch 2 (as amended): see PARA 878 et seq ante, 919 et seq post) (other than s 18 (see PARA 891 ante), s 19 (see PARA 894 ante), ss 26-33 (as amended) (see PARAS 849, 883, 898-904 ante) and ss 43-45 (as amended) (see PARAS 913-915 ante)) or Pt IV Ch III (ss 87-92: see PARAS 947-949 post) or Pt V Ch II (ss 109, 110 (as amended): see PARA 926 post) are to have effect subject to such modifications as may be specified in the regulations: s 50(4) (amended by the Pensions Act 1995 Sch 5 paras 18, 21). For the meaning of 'regulations' see PARA 557 note 2 ante. Any such regulations have effect in relation to arrangements whenever approved, unless they provide that they are only to have effect in relation to arrangements approved after they come into force: Pension Schemes Act 1993 s 50(5). For the meaning of 'money purchase scheme' see PARA 811 note 2 ante; and for the meaning of 'modifications' see PARA 664 note 10 ante.

7 For the meaning of 'contracted-out scheme' see PARA 880 ante.

8 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

9 For the meaning of 'accrued rights' for these purposes see PARA 895 note 9 ante; and for the meaning of 'guaranteed minimum pension' see PARA 878 ante.

10 For the meaning of 'the principal appointed day' see PARA 880 note 13 ante.

11 Pension Schemes Act 1993 s 50(1)(a) (as amended: see note 6 supra).

12 For the meaning of 'protected rights' see PARA 883 ante.

13 Pension Schemes Act 1993 s 50(1)(b).

14 Ibid s 50(1A) (added by the Pensions Act 1995 Sch 5 paras 18, 45).

15 For the meaning of 'prescribed' see PARA 555 note 1 ante.

16 Pension Schemes Act 1993 s 50(1B) (as added: see note 14 supra). For the prescribed conditions see the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 45 (amended by SI 1997/819).

17 Pension Schemes Act 1993 s 50(2) (amended by the Pensions Act 1995 Sch 5 paras 18, 21).

18 Pension Schemes Act 1993 s 50(3) (as amended: see note 17 supra).

19 Ibid s 50(6).

## UPDATE

### **918 Power of [Inland Revenue] to approve arrangements for scheme ceasing to be certified**

TEXT AND NOTES--Functions of the Secretary of State under 1993 Act s 50 transferred to the Commissioners of Inland Revenue: s 50, amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 51.

1993 Act s 50 further amended: Pensions Act 2007 Sch 4 para 24 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

NOTE 6--1993 Act s 50(1) further amended: Pensions Act 2008 Sch 11 Pt 2.

NOTE 16--Functions of Secretary of State under SI 1996/1172, reg 45 transferred to the Commissioners of Inland Revenue: 1999 Act s 1(2), Sch 2. SI 1996/1172 reg 45 further amended: SI 2005/2050.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(6) TERMINATION OF CONTRACTED-OUT OR APPROPRIATE SCHEME STATUS/919. Calculation of guaranteed minimum pensions preserved under approved arrangements.

### **919. Calculation of guaranteed minimum pensions preserved under approved arrangements.**

The statutory provisions relating to the revaluation of earnings factors in order to arrive at an earner's guaranteed minimum pension<sup>1</sup> are modified, except in prescribed circumstances<sup>2</sup>, where:

- 2525 (1) an earner's guaranteed minimum pension rights or accrued rights to guaranteed minimum pensions<sup>3</sup> under a scheme satisfy prescribed conditions<sup>4</sup>; and
- 2526 (2) one or more of the five tax years<sup>5</sup> ending with the tax year in which the scheme ceases to be contracted-out<sup>6</sup> is a relevant year<sup>7</sup> in relation to the earner<sup>8</sup>.

Regulations<sup>9</sup> may provide that heads (1) and (2) above are to have effect with prescribed modifications<sup>10</sup> in relation to a scheme which, immediately before it ceased to be contracted-out, contained certain authorised provisions<sup>11</sup>.

1    In the Pension Schemes Act 1993 s 16(1); see PARA 891 ante. For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by s 181(1)); and for the meaning of 'guaranteed minimum pension' see PARA 878 ante.

2    For the meaning of 'prescribed' see PARA 555 note 1 ante. The prescribed circumstances are where an earner's accrued rights to guaranteed minimum pensions under the scheme which is ceasing to be contracted-out are transferred to another contracted-out scheme in accordance with arrangements approved by the Secretary of State, and the same employer is the earner's employer in relation to both the first and second schemes or the employers in relation to those schemes are connected employers; and 'connected employers' means employers are or were (1) a holding company and a subsidiary; (2) subsidiaries of the same holding company; or (3) partnerships each having the same persons as at least half of its partners: see the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 69.

3    For the meaning of 'accrued rights' for these purposes see PARA 895 note 9 ante.

4    Pension Schemes Act 1993 s 51(1)(a) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 46).

5    For the meaning of 'tax year' see PARA 863 note 1 ante.

6    For the meaning of 'contracted-out scheme' see PARA 880 ante.

7    For the meaning of 'relevant year' see the Pension Schemes Act 1993 ss 14(8), 16(5); and PARA 891 note 3 ante (definition applied by s 51(5)).

8    Ibid s 51(1)(b). Where s 51 (as amended: see note 4 supra) applies then, except in such circumstances as may be prescribed, s 16(1) (see PARA 891 ante) has effect subject to the following provisions: (1) any earnings factor must be taken to be that factor as increased by the last order under the Social Security Pensions Act 1975 s 21 (repealed) or the Social Security Administration Act 1992 s 148 (as amended) (see PARA 56 ante) to come into force before those five tax years; and (2) any relevant earnings factors derived from contributions or earnings in respect of any year ('the relevant contributions year') must be treated as increased by 12% compound for each of those five tax years, other than any of those years which: (a) constitutes or begins before the relevant contributions year; or (b) begins after the final relevant year in relation to the earner: Pension Schemes Act 1993 s 51(2). For the meaning of 'earnings factors' see PARA 56 ante (definition applied by s 181(1)). For the meaning of 'the final relevant year' see s 16(5) (as amended); and PARA 891 note 10 ante (definition applied by s 51(5)). Section 51(2) does not apply in any case where its application would result in the amount of the guaranteed minimum being greater than it would have been apart from that provision: s 51(3).

9 For the meaning of 'regulations' see PARA 557 note 2 ante.

10 For the meaning of 'modifications' see PARA 664 note 10 ante.

11 Pension Schemes Act 1993 s 51(4). The provisions referred to are those authorised by s 16(2): see PARA 891 ante. Section 51(1)-(3) (as amended) is modified in relation to revaluation and schemes which have ceased to be contracted-out: see the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 67.

## **UPDATE**

### **919 Calculation of guaranteed minimum pensions preserved under approve**

NOTES 2, 11--Functions of Secretary of State under SI 1996/1172, reg 45 transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(6) TERMINATION OF CONTRACTED-OUT OR APPROPRIATE SCHEME STATUS/920. Supervision of schemes which have ceased to be certified; former contracted-out schemes.

**920. Supervision of schemes which have ceased to be certified; former contracted-out schemes.**

The provisions relating to the supervision of former contracted-out schemes<sup>1</sup> apply for the purpose of making provision for securing the continued supervision of occupational pension schemes<sup>2</sup>, other than public service pension schemes<sup>3</sup>, where the scheme has ceased to be a contracted-out scheme and any persons remain who fall within any of the following categories<sup>4</sup>:

- 2527 (1) any persons entitled to receive, or having accrued rights to, guaranteed minimum pensions<sup>5</sup>, or pensions under the scheme attributable to service on or after the principal appointed day<sup>6</sup> but before the scheme ceased to be contracted-out<sup>7</sup>;
- 2528 (2) any persons who have protected rights<sup>8</sup> under the scheme or are entitled to any benefit giving effect to protected rights under it<sup>9</sup>.

The Secretary of State may direct the trustees or managers of the scheme, or the employer<sup>10</sup>, to take or refrain from taking such steps as the Secretary of State may specify in writing; and such a direction is final and binding on the person directed and any person claiming under him<sup>11</sup>. An appeal on a point of law lies to the High Court from such a direction at the instance of the trustees or managers or the employer, or any person claiming under them<sup>12</sup>. Such a direction is enforceable in England and Wales in a county court as if it were an order of that court<sup>13</sup>.

1 The provisions of the Pension Schemes Act 1993 s 53 (as amended): see the text and notes 10-13 infra. For the meaning of 'contracted-out scheme' see PARA 880 ante.

2 For the meaning of 'occupational pension scheme' see PARA 741 ante.

3 For the meaning of 'public service pension scheme' see PARA 874 ante.

4 Pension Schemes Act 1993 s 52(1), (2) (s 52(2) amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 47).

5 For the meaning of 'accrued rights' for these purposes see PARA 895 note 9 ante; and for the meaning of 'guaranteed minimum pensions' see 878 ante.

6 For the meaning of 'the principal appointed day' see PARA 880 note 13 ante.

7 Pension Schemes Act 1993 s 52(2A)(a) (added by the Pensions Act 1995 Sch 5 paras 18, 47).

8 As to protected rights see PARA 883 ante.

9 Pension Schemes Act 1993 s 52(2A)(b) (as added: see note 7 supra). If a certificate has been issued under s 50(2) (as amended) (see PARA 918 ante) and has not been cancelled under s 50(3) (as amended), any liabilities in respect of such entitlement or rights as are referred to in s 52(2A)(a) or s 52(2A)(b) (as so added) must, except in prescribed circumstances, be discharged (subject to any directions under s 53(1) (as substituted): see the text and notes 10-11 infra) in a prescribed manner and within a prescribed period or such longer period as the Secretary of State may allow: s 53(3) (amended by the Pensions Act 1995 Sch 5 paras 18, 47). For the prescribed time and manner see the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 46 (amended by SI 1997/819). For the meaning of 'prescribed' see PARA 555 note 1 ante. As to the Secretary of State see PARA 1 ante.

- 10 For the meaning of 'employer' see PARA 660 note 18 ante.
- 11 Pension Schemes Act 1993 s 53(1) (substituted by the Pensions Act 1995 Sch 5 paras 18, 48).
- 12 Pension Schemes Act 1993 s 53(1A) (added by the Pensions Act 1995 Sch 5 paras 18, 48).
- 13 Pension Schemes Act 1993 s 53(1B) (as added: see note 12 supra).

## **UPDATE**

### **920 Supervision of schemes which have ceased to be certified; former contracted out schemes**

TEXT AND NOTES--Functions of the Secretary of State under 1993 Act s 53 transferred to the Commissioners of Inland Revenue: s 53, amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 52.

TEXT AND NOTES 4-9--1993 Act s 52 further amended: Pensions Act 2008 Sch 11 Pt 2.

TEXT AND NOTE 4--1993 Act s 52(2) further amended: Pensions Act 2007 Sch 4 para 25(2) (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

NOTE 9--Functions of the Secretary of State under SI 1996/1172 (except those under regs 23, 61) transferred to the Commissioners of Inland Revenue: 1999 Act s 1(2), Sch 2.

TEXT AND NOTES 11-13--See further Pension Schemes Act 1993 s 53(1C) (added by Pensions Act 2004 Sch 12 para 10).

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**921. Supervision of schemes which have ceased to be certified; former appropriate personal pension schemes.**

The provisions regarding the supervision of former appropriate personal pension schemes<sup>1</sup> apply in relation to any personal pension scheme where:

- 2529 (1) the scheme has ceased to be an appropriate scheme<sup>2</sup>; and
- 2530 (2) any persons remain who have protected rights<sup>3</sup> under the scheme or are entitled to any benefit giving effect to protected rights under it<sup>4</sup>.

The Secretary of State may direct the trustees or managers of the scheme to take or refrain from taking such steps as the Secretary of State may specify in writing; and such a direction is final and binding on the person directed and any person claiming under him<sup>5</sup>. An appeal on a point of law lies to the High Court from such a direction at the instance of the trustees or managers or the employer<sup>6</sup>, or any person claiming under them<sup>7</sup>. Such a direction is enforceable in England and Wales in a county court as if it were an order of that court<sup>8</sup>.

1 The provisions of the Pension Schemes Act 1993 s 54 (as amended): see the text and notes 5-8 infra. For the meaning of 'personal pension scheme' see PARA 710 ante.

2 For the meaning of 'appropriate scheme' see PARA 880 ante.

3 As to protected rights see PARA 883 ante.

4 See the Pension Schemes Act 1993 s 52(1), (3) (s 52(3) amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 47). If a certificate has been issued under the Pension Schemes Act 1993 s 50(2) (as amended) (see PARA 920 ante) and has not been cancelled under s 50(3) (as amended) (see PARA 920 ante), any liabilities in respect of such entitlement or rights as are referred to in s 52(3)(b) (as substituted) must, except in prescribed circumstances, be discharged (subject to any directions under s 54(1) (as substituted): see the text and note 5 infra) in a prescribed manner and within a prescribed period or such longer period as the Secretary of State may allow: s 54(2) (s 54(1), (2) substituted by the Pensions Act 1995 Sch 5 paras 18, 49). For the meaning of 'prescribed' see PARA 555 note 1 ante. As to the Secretary of State see PARA 1 ante.

5 Pension Schemes Act 1993 s 54(1) (as substituted: see note 4 supra).

6 For the meaning of 'employer' see PARA 660 note 18 ante.

7 Pension Schemes Act 1993 s 54(1A) (added by the Pensions Act 1995 Sch 5 paras 18, 49).

8 Pension Schemes Act 1993 s 54(1B) (as added: see note 7 supra).

**UPDATE**

**921 Supervision of schemes which have ceased to be certified; former appropriate personal pension schemes**

TEXT AND NOTES--Functions of the Secretary of State under 1993 Act s 54 transferred to the Commissioners of Inland Revenue: s 53, amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 53.

TEXT AND NOTE 4--1993 Act s 52(3) further amended: Pensions Act 2007 Sch 4 para 25(3) (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

1993 Act s 52(3) further amended: Pensions Act 2008 Sch 11 Pt 2.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(6) TERMINATION OF CONTRACTED-OUT OR APPROPRIATE SCHEME STATUS/922. Payment of contributions equivalent premiums on termination of certified status.

**922. Payment of contributions equivalent premiums on termination of certified status.**

The former provision for payment of state scheme premiums on the termination of a scheme's certified status has been replaced, under the Pensions Act 1995, by provision for the payment of contributions equivalent premiums<sup>1</sup>. Where:

- 2531 (1) an earner<sup>2</sup> is serving in employment which is contracted-out employment<sup>3</sup> by reference to an occupational pension scheme<sup>4</sup> (other than a money purchase contracted-out scheme<sup>5</sup>);
- 2532 (2) head (1) above ceases to apply, by reason of any of the circumstances in heads (a) to (e) below, before the earner attains the scheme's normal pension age<sup>6</sup> or (if earlier) the end of the tax year<sup>7</sup> preceding that in which the earner attains pensionable age<sup>8</sup>; and
- 2533 (3) the earner has served for less than two years in the employment,

the prescribed person<sup>9</sup> may elect to pay a premium under this provision (a 'contributions equivalent premium')<sup>10</sup>.

The circumstances so referred to are that:

- 2534 (a) the earner's service in the employment ceases otherwise than on the earner's death;
- 2535 (b) the earner ceases to be a member of the scheme otherwise than on the earner's death;
- 2536 (c) the earner's service in the employment ceases on the earner's death and the earner dies leaving a widow or widower;
- 2537 (d) the scheme is wound up;
- 2538 (e) the scheme ceases to be a contracted-out occupational pension scheme<sup>11</sup>,

but heads (a), (b), (d) and (e) above do not apply if the earner has an accrued right to short service benefit<sup>12</sup>.

Such a premium must be paid by the prescribed person to the Secretary of State<sup>13</sup> within the prescribed period<sup>14</sup> and an election to make such a payment must be made within the prescribed period and in the prescribed manner<sup>15</sup>. Except in such cases as may be prescribed, the prescribed person must not, in making or abstaining from making such elections, discriminate between different earners on any grounds other than their respective lengths of relevant service<sup>16</sup>. If the Secretary of State considers that the prescribed person is contravening this condition, he may cancel any contracting-out certificate<sup>17</sup> held by the earner's employer in respect of the scheme in question<sup>18</sup>.

The amount of a contributions equivalent premium must be the difference between:

- 2539 (i) the amount of the Class 1 contributions<sup>19</sup> payable in respect of the earner's employment in employment which was contracted-out by reference to the scheme; and

2540 (ii) the amount of those contributions which would have been payable if the employment had not been contracted-out<sup>20</sup>.

1 See the text and notes 2-20 infra. The Pension Schemes Act 1993 s 55 (as originally enacted) provided for the payment of state scheme premiums and is now amended by the Pensions Act 1995 ss 141(1), 151, 177, Sch 5 paras 18, 50, Sch 7 Pt III.

2 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

3 For the meaning of 'contracted-out employment' see PARA 878 ante.

4 For the meaning of 'occupational pension scheme' see PARA 741 ante.

5 For the meaning of 'money purchase scheme' see PARA 811 note 2 ante; and for the meaning of 'contracted-out scheme' see PARA 880 ante.

6 For the meaning of 'normal pension age' see PARA 896 note 6 ante.

7 For the meaning of 'tax year' see PARA 863 note 1 ante.

8 For the meaning of 'pensionable age' see PARA 562 ante.

9 For the meaning of 'prescribed' see PARA 555 note 1 ante. The prescribed person is [sic] the trustees of the scheme: Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 51(1).

10 Pension Schemes Act 1993 s 55(2) (substituted by the Pensions Act 1995 s 141(1)). An election to pay a contributions equivalent premium must be notified to the Secretary of State in writing in such form as he may reasonably require and within the prescribed time: see the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 51(3). As to the time of payment see reg 52. Where, under the rules of the scheme, transfer credits have been allowed in respect of the earner's accrued rights under another scheme, the reference in the Pension Schemes Act 1993 s 55(2) (as so substituted) to employment which is contracted-out by reference to the scheme includes references to employment in any period of linked qualifying service which was contracted-out employment by reference to the other scheme: s 56(4). Subject to s 179(2)-(4), for the purposes of the Pension Schemes Act 1993 any period of an earner's service in an employment is linked qualifying service in relation to a later period of service (whether in the same or another employment) if: (1) under the rules of a scheme applying to him in the earlier period of service: (a) there was made a transfer of his accrued rights under that scheme (including any transfer credits allowed under the scheme) to another scheme applying to him in the later period of service; or (b) those rights were secured by a policy of insurance or an annuity contract and were subsequently transferred to another scheme applying to him in the later period of service; and (2) in consequence of the transfer of his accrued rights to the second scheme, there are (or were) allowed to him transfer credits under the rules of that other scheme: s 179(1). For any service to be taken into account as linked qualifying service, it must be actual service and no regard may be had to any scheme rule which provides for service to be treated for any purposes of benefit or otherwise as longer or shorter than it actually was: s 179(2). Only so much of the earlier period as is a period of service in respect of which there accrued under the first scheme any of the rights transferred to the second scheme may be linked qualifying service in relation to the later period of service: s 179(3). For the purposes of Pt IV Ch I (ss 69-82) (see PARA 931 et seq post), as respects any case where the rules of the scheme provide that an earner is not entitled to become a member unless he satisfies specified conditions, but that, if he becomes a member, rights are to accrue to him in respect of periods of service before he satisfied any such conditions, regulations may provide for any such periods to be treated, in such cases and to such extent as may be prescribed, as linked qualifying service with later periods of service: s 179(4).

11 As to contracted-out occupational pension schemes see PARA 880 ante.

12 Pension Schemes Act 1993 s 55(2A) (added by the Pensions Act 1995 s 141(1)). The references in the Pension Schemes Act 1993 s 55(2A) (as so added) to an accrued right to short service benefit include an accrued right to any provision which, under the preservation requirements, is permitted as an alternative to short service benefit (other than provision for return of contributions or for benefit in the form of a lump sum): s 56(5) (substituted by the Pensions Act 1995 Sch 5 paras 18, 51). Subject to regulations under the Pension Schemes Act 1993 s 39, Sch 2 para 1 (as amended) (see PARA 879 ante), service in any employment which ceases with the death of the employer must be treated for the purposes of s 55(2A) (as so added) as ceasing immediately before the death: s 56(6) (substituted by the Pensions Act 1995 Sch 5 paras 18, 51). For the meaning of 'employer' see PARA 660 note 18 ante. For the meaning of 'short service benefit' see the Pension Schemes Act 1993 s 71(1), (2); and PARA 932 post; and for the meaning of 'the preservation requirements' see PARA 931 post.

- 13 As to the Secretary of State see PARA 1 ante.
- 14 Pension Schemes Act 1993 s 56(2) (amended by the Pensions Act 1995 Sch 5 paras 18, 51, Sch 7 Pt III).
- 15 Pension Schemes Act 1993 s 57(1).
- 16 Ibid s 57(2). 'Relevant service' means service in contracted-out employment by reference to the scheme, together with any service in contracted-out employment which in relation to service in that employment is linked qualifying service (see note 10 supra): s 57(3).
- 17 For the meaning of 'contracting-out certificate' see PARA 880 ante.
- 18 Pension Schemes Act 1993 s 57(4) (amended by the Pensions Act 1995 Sch 5 paras 18, 21).
- 19 As to Class 1 contributions see PARA 34 et seq ante.
- 20 Pension Schemes Act 1993 s 58(4). The amount of the difference mentioned in s 58(4) must be certified by the Secretary of State: s 63(1)(b) (amended by the Pensions Act 1995 Sch 5 paras 18, 57). If the Secretary of State is satisfied that records of earnings relevant for determining the amount mentioned in the Pension Schemes Act 1993 s 58(4) have not been maintained or retained or are otherwise unobtainable, then he may for that purpose: (1) compute, in such manner as he thinks fit, an amount which must be regarded as the amount of those earnings; or (2) take their amount to be such sum as he may specify in the particular case, and he may certify the costs referred to in s 58(4) accordingly: s 63(3) (amended by the Pensions Act 1995 Sch 5 paras 18, 57, Sch 7 Pt III). The Secretary of State may make such adjustments as he thinks necessary for avoiding fractional amounts: Pension Schemes Act 1993 s 63(5).

## UPDATE

### **922 Payment of contributions equivalent premiums on termination of certified status**

TEXT AND NOTES 1-12--Except in prescribed circumstances, the Pension Schemes Act 1993 s 55(2B) applies in any case where the earner has no accrued right to any benefit under the scheme: s 55(2B) (s 55(2B), (2C) added by the Welfare Reform and Pensions Act 1999 Sch 2 para 7(1)(c)). Where a contributions equivalent premium is required to be paid in respect of an earner by virtue of the Pension Schemes Act 1993 s 55(2), the prescribed person must notify the Inland Revenue of that fact within the prescribed period and in the prescribed manner: s 55(2C) (as added).

NOTES 9, 10--Functions of Secretary of State under SI 1996/1172 (except those under regs 23, 61) transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2. SI 1996/1172 reg 51 amended: SI 2006/778, SI 2007/834.

NOTE 10--SI 1996/1172 reg 52 amended: SI 2007/834.

TEXT AND NOTE 10--Head (1) in the text. The words '(other than a money purchase contracted-out scheme)' omitted: Pensions Act 2007 Sch 4 para 26, Sch 7 Pt 6 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

For 'may elect' read 'must, if the Pension Schemes Act 1993 s 55(2B) (see TEXT AND NOTES 1-12) applies, pay and otherwise may elect': s 55(2) (amended by the Welfare Reform and Pensions Act 1999 Sch 2 para 7(1)(a)).

NOTE 10--Pension Schemes Act 1993 ss 56(4), 179(1) amended: Pensions Act 2004 Sch 12 paras 11(2), 30. See also Pension Schemes Act 1993 s 56(7), (8) (added by Pensions Act 2004 Sch 12 para 11(3)); and Pension Protection Fund (Contributions Equivalent Premium) Regulations 2007, SI 2007/834. For modification of the 1993 Act ss 56, 179 see SI 2005/992.

TEXT AND NOTE 12--Words 'but heads ... short service benefit' omitted: Pension Schemes Act 1993 s 55(2A) (amended by the Welfare Reform and Pensions Act 1999 Sch 2 para 7(1)(b), Sch 13 Pt I).

Pension Schemes Act 1993 s 55(2A) further amended so as to extend provisions to surviving civil partners: SI 2005/2050.

TEXT AND NOTE 13--For 'Secretary of State' read 'Inland Revenue': Pension Schemes Act 1993 s 56(2) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 54).

TEXT AND NOTE 17--For 'Secretary of State' read 'Inland Revenue': Pension Schemes Act 1993 s 57(4) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 55).

TEXT AND NOTES 19, 20--Replaced. Subject to the Pension Schemes Act 1993 s 58(4A), the amount of the contributions equivalent premium is equal to the sum of the following amounts: (1) the amount of every reduction made under s 41 (see PARA 911) as from time to time in force in the amount of Class 1 contributions payable in respect of the earner's employment in employment which was contracted-out by reference to the scheme; and (2) the total amount by which the reductions falling within head (1) would have been larger if the amount of the contributions falling to be reduced had in each case been at least equal to the amount of the reduction of those contributions provided for by s 41: s 58(4) (substituted by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 5(1)). The amounts brought into account in accordance with head (2) does not include any amount which, by virtue of regulations made under the Pension Schemes Act 1993 s 41(1D) so as to avoid the payment of trivial or fractional amounts, is an amount that was not payable by the Inland Revenue to the secondary contributor: s 58(4A) (added by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 5(1)). Schedule 5 para 5 has effect, and is deemed to have had effect, in relation to any contributions equivalent premium payable on or after 6 April 1999: Sch 5 para 5(4).

NOTE 20--For 'the amount of the difference mentioned in s 58(4)' read 'the sum of the amounts specified in s 58(4)': Pension Schemes Act 1993 s 63(1)(b) (substituted by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 5(3)). See also Sch 5 para 5(4); and TEXT AND NOTES 19, 20. Functions of the Secretary of State under the Pension Schemes Act 1993 s 63 transferred to the Commissioners of Inland Revenue: s 63 (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 56).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(6) TERMINATION OF CONTRACTED-OUT OR APPROPRIATE SCHEME STATUS/923. Effect of payment of premiums on rights.

### **923. Effect of payment of premiums on rights.**

Payment of a contributions equivalent premium<sup>1</sup> in certain circumstances<sup>2</sup> extinguishes the earner's<sup>3</sup> accrued rights<sup>4</sup> to guaranteed minimum pensions<sup>5</sup> under the relevant scheme or (in relation to service on or after the principal appointed day<sup>6</sup>) rights to pensions under the scheme so far as attributable to the amount of the premium<sup>7</sup>. Payment of a contributions equivalent premium in other specified circumstances<sup>8</sup> extinguishes any such accrued rights in respect of the earner's widow or widower<sup>9</sup>.

1 For the meaning of 'contributions equivalent premium' see PARA 922 ante.

2 Ie those mentioned in the Pension Schemes Act 1993 s 55(2A)(a), (b), (d), (e) (as added): see PARA 922 ante.

3 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by ibid s 181(1)).

4 For the meaning of 'accrued rights' for these purposes see PARA 895 note 9 ante.

5 For the meaning of 'guaranteed minimum pension' see PARA 878 ante.

6 For the meaning of 'the principal appointed day' see PARA 880 note 13 ante.

7 Pension Schemes Act 1993 s 60(4) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 54).

8 Ie those mentioned in the Pension Schemes Act 1993 s 55(2A)(c) (as added): see PARA 922 ante.

9 Ibid s 60(5) (as amended: see note 7 supra).

### **UPDATE**

### **923 Effect of payment of premiums on rights**

TEXT AND NOTE 9--In Pension Schemes Act 1993 s 60(5) for 'widow or widower' read 'widow, widower or surviving civil partner': SI 2005/2050.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(6) TERMINATION OF CONTRACTED-OUT OR APPROPRIATE SCHEME STATUS/924. Deduction of contributions equivalent premium from refund of scheme contributions.

**924. Deduction of contributions equivalent premium from refund of scheme contributions.**

The following provisions apply where:

- 2541 (1) an earner's<sup>1</sup> service in contracted-out employment<sup>2</sup> ceases or his employment<sup>3</sup> ceases to be contracted-out employment<sup>4</sup>; and
- 2542 (2) he (or, by virtue of a connection with him, any other person) is entitled to a refund of any payments made by or in respect of him towards the provision of benefits, under the scheme by reference to which that employment was contracted-out<sup>5</sup>; and
- 2543 (3) a contributions equivalent premium<sup>6</sup> falls to be paid by any person in respect of him<sup>7</sup>.

In those circumstances, and subject as follows, the person by whom the premium falls to be paid is entitled, on paying it, to recover an amount equal to so much of the premium as is attributable to primary Class 1 contributions<sup>8</sup> (and on paying any part of it to recover a proportionate part of that amount) from the person liable for the refund<sup>9</sup>. The amount so recoverable must not exceed the amount of the refund or so much of it as has not been made<sup>10</sup>. Where the period taken into account in arriving at such an amount does not coincide with that in respect of which the refund is to be made, the sum recoverable must be determined by reference to so much of that amount and of the refund as are referable to the same period<sup>11</sup>.

Where the refund:

- 2544 (a) is made in respect of more than one period of service, and one or more of those periods is a period of previous linked qualifying service<sup>12</sup>; and
- 2545 (b) includes any amount paid under a contracted-out scheme<sup>13</sup> in relation to that service on or in connection with a transfer of accrued rights<sup>14</sup> to another scheme,

the amount which may be so recovered must be increased by such amount as may be prescribed<sup>15</sup>.

Where the person liable for the premium is himself liable for the refund, he is entitled to retain out of the refund the amount which he could so recover from another person liable for the refund<sup>16</sup>. The amount of the refund must be reduced by the amount so recovered or retained; and provision must be made by regulations<sup>17</sup> for requiring the making of refunds to be delayed for the purpose of enabling any right of recovery or retainer so conferred to be exercised, notwithstanding anything in any enactment relating to the making of the refund<sup>18</sup>. Where:

- 2546 (i) an earner's service in contracted-out employment ceases or his employment ceases to be contracted-out employment; and
- 2547 (ii) he (or, by virtue of a connection with him, any other person) is entitled to a refund of any payments made by or in respect of him under the scheme by reference to which that employment was contracted-out in relation to any previous

- contracted-out employment of his, being payments towards the provision of benefits under that scheme; and
- 2548 (iii) a contributions equivalent premium falls to be paid in respect of him; and
- 2549 (iv) the period taken into account in arriving at the amount which may be recovered includes the period of the previous contracted-out employment,

then the person liable for that premium has the like right of recovery from that refund (so far as the premium is not recoverable or retainable out of a refund in respect of a later employment) as a person has where the refund relates to service in the employment on the cessation of which the premium falls to be paid<sup>19</sup>.

These provisions apply in relation to such a refund as is referred to in head (2) above which becomes payable after the cessation of an earner's service in contracted-out employment as they apply to such a refund becoming payable on the cessation of an earner's service in such employment<sup>20</sup>; and where the earner (or, by virtue of a connection with him, any other person) becomes entitled to any payment in lieu of benefit<sup>21</sup>, the above provisions apply in relation to the payment as if it were such a refund as is referred to in head (2) above<sup>22</sup>.

Notwithstanding any contract to the contrary, a person is not entitled:

- 2550 (A) to recover any part of a contributions equivalent premium from any earner in respect of whom it is payable<sup>23</sup>; or
- 2551 (B) Except in accordance with the above provisions, to recover or retain any part of such a premium out of any money payable to or for the benefit of the earner or any other person<sup>24</sup>.

1 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

2 For the meaning of 'contracted-out employment' see PARA 878 ante.

3 For the meaning of 'employment' generally see PARA 560 note 5 ante.

4 Pension Schemes Act 1993 s 61(1)(a) (substituted by the Pensions Act 1995 s 151, Sch 5 paras 18, 55).

5 Pension Schemes Act 1993 s 61(1)(b).

6 For the meaning of 'contributions equivalent premium' see PARA 922 ante.

7 Pension Schemes Act 1993 s 61(1)(c).

8 As to primary Class 1 contributions see PARA 36 ante.

9 Pension Schemes Act 1993 s 61(2). The amount mentioned in s 61(2) must be certified by the Secretary of State: s 63(1)(d). The Secretary of State may make such adjustments as he thinks necessary for avoiding fractional amounts: s 63(5). As to the Secretary of State see PARA 1 ante.

10 Ibid s 61(3).

11 Ibid s 61(4).

12 For the meaning of 'linked qualifying service' see PARA 922 note 10 ante.

13 For the meaning of 'contracted-out scheme' see PARA 880 ante.

14 For the meaning of 'accrued rights' for these purposes see PARA 895 note 9 ante.

15 Pension Schemes Act 1993 s 61(5). For the meaning of 'prescribed' see PARA 555 note 1 ante.

16 Ibid s 61(6).

17 For the meaning of 'regulations' see PARA 557 note 2 ante.

18 Pension Schemes Act 1993 s 61(7).

19 Ibid s 61(8) (amended by the Pensions Act 1995 Sch 5 paras 18, 55). The Pension Schemes Act 1993 s 61(7) applies accordingly: s 61(8).

20 Ibid s 61(9) (as amended: see note 19 supra).

21 For these purposes, a payment in lieu of benefit is any payment falling to be made to or for the benefit of, or in respect of, a person by virtue of his being or having been a member of an occupational pension scheme, being a payment which either: (1) is made or to be made otherwise than out of the resources of the scheme; or (2) is made or to be made out of those resources but by way of distribution on a winding up; or (3) falls within such other description of payments as may be prescribed: *ibid* s 61(11). As to the power to prescribe for these purposes the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member see PARA 557 note 9 ante; for the meaning of 'occupational pension scheme' see PARA 741 ante; and for the meaning of 'resources' see PARA 609 note 2 ante.

22 Ibid s 61(10).

23 Ibid s 62(1)(a) (amended by the Pensions Act 1995 Sch 5 paras 18, 56).

24 Pension Schemes Act 1993 s 62(1)(b).

## UPDATE

### **924 Deduction of contributions equivalent premium from refund of scheme contributions**

TEXT AND NOTES 8, 9--After 'attributable to' insert 'any actual reductions of': Pension Schemes Act 1993 s 61(2) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 5(2)). See also Sch 5 para 5(4); and PARA 922.

TEXT AND NOTE 20--See further Pension Schemes Act 1993 s 61(9A) (added by Pensions Act 2004 Sch 12 para 12).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(6) TERMINATION OF CONTRACTED-OUT OR APPROPRIATE SCHEME STATUS/925. Non-payment of contributions equivalent premium.

## **925. Non-payment of contributions equivalent premium.**

If a person fails to pay any contributions equivalent premium<sup>1</sup> which is payable by him at or within the time prescribed<sup>2</sup> for the purpose, he is liable on summary conviction to a fine of not more than level 3 on the standard scale<sup>3</sup>. Where a person is convicted of the offence of failing to pay a premium, and the premium remains unpaid at the date of the conviction, he is liable to pay to the Secretary of State<sup>4</sup> a sum equal to the amount which he failed to pay<sup>5</sup>.

Subject as follows, where a person is convicted of such an offence, evidence may be given of any previous failure by him to pay contributions equivalent premium within the time prescribed for the purpose<sup>6</sup>. Such evidence may be given only if notice of intention to give it is served with the summons or warrant or, in Scotland, the complaint on which the person appeared before the court which convicted him<sup>7</sup>.

Contributions equivalent premium recovered by the Secretary of State under these provisions<sup>8</sup> must be treated for all purposes as premiums paid to the Secretary of State in respect of the person in respect of whom they were originally payable<sup>9</sup>.

1 For the meaning of 'contributions equivalent premium' see PARA 922 ante.

2 For the meaning of 'prescribed' see PARA 555 note 1 ante.

3 Pension Schemes Act 1993 s 67(1) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 61). As to the standard scale see PARA 172 note 3 ante.

4 As to the Secretary of State see PARA 1 ante.

5 Pension Schemes Act 1993 s 67(2). Where in England and Wales a person charged with an offence to which s 67(2) applies is convicted of that offence in his absence under the Magistrates' Courts Act 1980 s 12(2) (as substituted) (see MAGISTRATES), then if: (1) it is proved to the satisfaction of the court, on oath or in the manner prescribed by rules under s 144 (as amended) (see MAGISTRATES), that notice under the Pension Schemes Act 1993 s 67(4) (see the text and 7 infra) has been duly served specifying the other premiums in respect of which the prosecutor intends to give evidence; and (2) the clerk of the court has received a statement in writing purporting to be made by the accused or by a solicitor acting on his behalf to the effect that if the accused is convicted in his absence of the offence charged he desires to admit failing to pay the other premiums so specified or any of them, s 67(3), (4) have effect as if the evidence had been given and the failure so admitted had been proved, and the court must proceed accordingly: s 68(1). In England and Wales where a person is convicted of an offence to which s 67(2) applies, and an order is made under the Powers of Criminal Courts Act 1973 Pt I (ss 1-46) (as amended) placing the offender on probation or discharging him absolutely or conditionally, the Pension Schemes Act 1993 s 68(1) and s 67(2)-(4) apply as if it were a conviction for all purposes: s 68(2). In England or Wales any sum which a person is liable to pay under s 68(1) or s 67(2)-(4) is recoverable from him as a penalty: s 68(4).

6 Ibid s 67(3).

7 Ibid s 67(4).

8 Ie under ibid s 67(2)-(4), s 68(1): see s 68(5) (amended by the Pensions Act 1995 Sch 5 paras 18, 61).

9 Pension Schemes Act 1993 s 68(5) (as amended: see note 8 supra).

## **UPDATE**

## **925 Non-payment of contributions equivalent premium**

TEXT AND NOTE 4--Reference to Secretary of State is now to Inland Revenue: Pension Schemes Act 1993 s 67(2) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 57).

NOTE 5--Reference to 1980 Act s 12(2) now to s 12(5): 1993 Act s 68(1) (amended by the Magistrates' Courts (Procedure) Act 1998 s 4(2)(b)).

In head (2) for 'clerk of the court' read 'justices' chief executive for the court': 1993 Act s 68(1) (amended by the Access to Justice Act 1999 Sch 13 para 171).

Reference to the Powers of Criminal Courts Act 1973 Pt I is now to the Powers of Criminal Courts (Sentencing) Act 2000 s 12: 1993 Act s 68(2) (amended by the 2000 Act Sch 9 para 157).

TEXT AND NOTES 8, 9--References to Secretary of State are now to Inland Revenue: 1993 Act s 68(5) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 58).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(7) ANNUAL INCREASES AND MISCELLANEOUS PROVISIONS/926. Annual increase of guaranteed minimum pensions.

## **(7) ANNUAL INCREASES AND MISCELLANEOUS PROVISIONS**

### **926. Annual increase of guaranteed minimum pensions.**

The Secretary of State<sup>1</sup> must in each tax year<sup>2</sup> review the general level of prices in Great Britain for the period of 12 months commencing at the end of the period last reviewed under this provision<sup>3</sup>.

Where it appears to the Secretary of State that that level has increased at the end of the period under review, he must lay before Parliament the draft of an order specifying a percentage by which there is to be an increase of the rate of that part of guaranteed minimum pensions<sup>4</sup> which is attributable to earnings factors<sup>5</sup> for the tax years in the relevant period<sup>6</sup> for:

- 2552 (1) Earners<sup>7</sup> who have attained pensionable age<sup>8</sup>; and
- 2553 (2) widows and widowers<sup>9</sup>.

The percentage must be the percentage by which that level has increased at the end of the period under review, or three per cent, whichever is less<sup>10</sup>. If a draft order laid before Parliament in pursuance of this provision is approved by a resolution of each House, the Secretary of State must make the order in the form of the draft<sup>11</sup>. Such an order must be so framed as to bring the alterations to which it relates into force on the first day of the next tax year after that in which the order is made<sup>12</sup>.

Except as permitted<sup>13</sup>, the trustees or managers<sup>14</sup> of a scheme may not make an increase in a person's pension which is required by virtue of the above provisions out of money which would otherwise fall to be used for the payment of benefits under the scheme to or in respect of that person unless:

- 2554 (a) the payment is to an earner in respect of the tax year in which he attains pensionable age and the increase is the one required to be made in the next tax year<sup>15</sup>; or
- 2555 (b) the payment is to a person as the widow or widower of an earner who died before attaining pensionable age and is in respect of the tax year in which the person became a widow or widower, and the increase is the one required to be made in the next tax year<sup>16</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 For the meaning of 'tax year' see PARA 863 note 1 ante.

3 Pension Schemes Act 1993 s 109(1).

4 For the meaning of 'guaranteed minimum pension' see PARA 878 ante.

5 For the meaning of 'earnings factors' see PARA 56 ante (definition applied by the Pension Schemes Act 1993 s 181(1)).

6 'The relevant period' is the period beginning with the tax year 1988-89, and ending with the last tax year that begins before the principal appointed day for the purposes of the Pensions Act 1995 Pt III (ss 135-151) (as

amended) (ie 6 April 1997: see PARA 880 note 13 ante): Pension Schemes Act 1993 s 109(3A) (added by the Pensions Act 1995 s 55).

7 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

8 For the meaning of 'pensionable age' see PARA 562 ante.

9 Pension Schemes Act 1993 s 109(2) (amended by the Pensions Act 1995 s 55).

10 Pension Schemes Act 1993 s 109(3). At the date at which this volume states the law, the prescribed percentage was 2.1%: see the Guaranteed Minimum Pensions Increase Order 1997, SI 1997/457, art 2.

11 Pension Schemes Act 1993 s 109(4).

12 Ibid s 109(5). Where the benefits mentioned in s 46(1)-(7) (as amended) (see PARA 916 ante) are not increased on the day on which an order under s 109 (as amended) takes effect, the order must be treated for the purposes of s 109 (as amended) as not taking effect until the day on which those benefits are next increased: s 109(6).

13 Ie by the Pensions Act 1995 s 53: see PARA 863 ante.

14 As to the power to provide who is to be treated as a manager of an occupational pension scheme for these purposes see PARA 555 note 9 ante.

15 Pension Schemes Act 1993 s 110(1)(a) (amended by the Pensions Act 1995 s 53(4)).

16 Pension Schemes Act 1993 s 110(1)(b) (as amended: see note 15 supra).

## **UPDATE**

### **926 Annual increase of guaranteed minimum pensions**

TEXT AND NOTES 9, 16--Pension Schemes Act 1993 ss 109(2), 110(1)(b) further amended so as to extend provisions to surviving civil partners: SI 2005/2050.

NOTE 10--Prescribed percentage now 3 per cent: Guaranteed Minimum Pensions Increase Order 2009, SI 2009/477, art 2.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(7) ANNUAL INCREASES AND MISCELLANEOUS PROVISIONS/927. Information as to guaranteed minimum pensions.

## **927. Information as to guaranteed minimum pensions.**

The Secretary of State<sup>1</sup> may give:

- 2556 (1) the trustees or managers<sup>2</sup> of an occupational pension scheme<sup>3</sup> which is not a money purchase contracted-out scheme<sup>4</sup>; and
- 2557 (2) such other persons as may be prescribed<sup>5</sup>,

information as to the amount of the guaranteed minimum pension to which it appears to him that any person is immediately or prospectively entitled under the scheme or as to any other matter required for calculating that amount<sup>6</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme see PARA 555 note 9 ante.

3 For the meaning of 'occupational pension scheme' see PARA 741 ante.

4 For the meaning of 'money purchase scheme' see PARA 811 note 2 ante; and for the meaning of 'contracted-out scheme' see PARA 880 ante.

5 For the meaning of 'prescribed' see PARA 555 note 1 ante. The prescribed persons are, in addition to those mentioned in head (1) in the text, (1) the earner or widow or widower to whom the information relates; (2) the employer in relation to the contracted-out employment of an earner to whom the information relates; (3) any independent trade union recognised in relation to those earners who are members of a contracted-out scheme; and (4) any person who is, or who in the opinion of the Secretary of State is likely to become, the responsible paying authority: Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 63(1). Head (3) supra has effect subject to the condition that the information to be furnished is either (a) as to the total amount of the guaranteed minimum pensions to which it appears to the Secretary of State that all persons immediately or prospectively entitled under the scheme are so entitled; or (b) to be furnished with the written consent of the earner or widow or widower to whom the information relates: reg 63(2). For the meaning of 'earner' see PARA 32 ante; for the meaning of 'employer' see PARA 660 note 18 ante; for the meaning of 'independent trade union' see PARA 885 note 8 ante; and for the meaning of 'guaranteed minimum pension' see PARA 878 ante.

6 Pension Schemes Act 1993 s 156.

## **UPDATE**

### **927 Information as to guaranteed minimum pensions**

TEXT AND NOTES--Replaced. The Secretary of State or the Inland Revenue may give to the trustees or managers of an occupational pension scheme or appropriate scheme such information as appears to the Secretary of State or Inland Revenue appropriate to give to them for the purpose of enabling them to comply with their obligations under the Pension Schemes Act 1993 Pt III (ss 7-68): s 156(1) (s 156 substituted by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 9). The Secretary of State or Inland Revenue may also give to such persons as may be prescribed any information that they could give under the Pension Schemes Act 1993 s 156(1) to trustees or managers of a scheme: s 156(2) (as substituted).

1993 Act s 156(1) amended so as to substitute for the words 'or appropriate scheme' the words 'or personal pension scheme': Pensions Act 2007 Sch 4 para 30 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

NOTE 5--SI 1996/1172 reg 63 amended: SI 2005/2050, SI 2009/598.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(7) ANNUAL INCREASES AND MISCELLANEOUS PROVISIONS/928. Inalienability of guaranteed minimum pension and protected rights payments.

## **928. Inalienability of guaranteed minimum pension and protected rights payments.**

Where: (1) a person is entitled or prospectively entitled to a guaranteed minimum pension<sup>1</sup> under an occupational pension scheme<sup>2</sup> or to payments giving effect to protected rights<sup>3</sup> under such a scheme; and (2) his entitlement is in respect of his or another person's service in employment<sup>4</sup> which was contracted-out<sup>5</sup> by reference to that scheme, then every assignment of or charge on that pension or those payments, and every agreement to assign or charge that pension or those payments, is void<sup>6</sup>. These provisions have effect whether or not the assignment, charge or agreement was made at a time when the employment was contracted-out employment or the scheme was a contracted-out scheme<sup>7</sup> in relation to the employment<sup>8</sup>.

Every assignment of or charge on, and every agreement to assign or charge protected rights under, a personal pension scheme<sup>9</sup> or payments giving effect to such protected rights is also void<sup>10</sup>.

On the bankruptcy of a person who is entitled or prospectively entitled as is mentioned in heads (1) and (2) above, or is entitled to protected rights or to a payment giving effect to protected rights under a personal pension scheme, nothing passes to any trustee or other person acting on behalf of his creditors the assignment of which is or would be made void by these provisions<sup>11</sup>. Furthermore, where a person has any such entitlement, no order may be made by any court the effect of which would be that he would be restrained from receiving anything the assignment of which is or would be made void by these provisions<sup>12</sup>; but this does not prevent the making of an attachment of earnings order<sup>13</sup> and is subject to the court's powers to recover excessive pension contributions on the bankruptcy of an individual<sup>14</sup> and to take pensions into account when making financial provision on divorce<sup>15</sup>.

1 For the meaning of 'guaranteed minimum pension' see PARA 878 ante.

2 For the meaning of 'occupational pension scheme' see PARA 741 ante.

3 For the meaning of 'protected rights' see PARA 883 ante.

4 For the meaning of 'employment' generally see PARA 560 note 5 ante.

5 For the meaning of 'contracted-out employment' see PARA 878 ante.

6 Pension Schemes Act 1993 s 159(1). The references to assignments of and agreements to assign a guaranteed minimum pension do not include references to any assignment of or agreement to assign a policy of insurance or annuity contract in accordance with conditions prescribed by regulations under s 19(4)(b) (see PARA 894 ante); s 159(2). For the meaning of 'prescribed' see PARA 555 note 1 ante; and for the meaning of 'regulations' see PARA 557 note 2 ante.

7 For the meaning of 'contracted-out scheme' see PARA 880 ante.

8 Pension Schemes Act 1993 s 159(3).

9 For the meaning of 'personal pension scheme' see PARA 710 ante.

10 See the Pension Schemes Act 1993 s 159(4).

11 Ibid s 159(5).

12 Ibid s 159(4A) (added by the Pensions Act 1995 s 122, Sch 3 paras 22, 41).

13 The Pension Schemes Act 1993 s 159(4A) (as added: see note 12 supra) does not prevent the making of an attachment of earnings order under the Attachment of Earnings Act 1971: Pension Schemes Act 1993 s 159(4B) (as so added).

14 See PARA 868 ante.

15 See PARAS 961-963 post.

## **UPDATE**

### **928 Inalienability of guaranteed minimum pension and protected rights payments**

TEXT AND NOTES 10, 12--The restrictions in the Pension Schemes Act 1993 s 159(4), (4A) are disapplied when pension sharing rights are activated under certain types of order: see further PARA 961A.2.

TEXT AND NOTE 11--Pension Schemes Act 1993 s 159(5) repealed: Welfare Reform and Pensions Act 1999 Sch 13 Pt I.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(7) ANNUAL INCREASES AND MISCELLANEOUS PROVISIONS/929. Determination of questions by the Secretary of State; appeals and reviews.

## **929. Determination of questions by the Secretary of State; appeals and reviews.**

The questions for determination by the Secretary of State<sup>1</sup> under the Social Security Administration Act 1992<sup>2</sup> include:

- 2558 (1) any question as to the amount of a person's guaranteed minimum for the purposes of the statutory provisions relating to earner's and widows' or widowers' minimum pensions<sup>3</sup>;
- 2559 (2) any question (a) whether a contributions equivalent premium<sup>4</sup> is payable or has been paid in any case or as to the amount of any such premium; or (b) otherwise arising in connection with any contributions equivalent premium;
- 2560 (3) any question whether, for the purposes of the Pension Schemes Act 1993, a cash sum paid or an alternative arrangement made under the Policyholders Protection Act 1975 provides the whole or any part of the guaranteed minimum pension<sup>5</sup> to which an earner or an earner's widow or widower was entitled under a contracted-out scheme<sup>6</sup>;
- 2561 (4) any question arising in connection with minimum contributions or payments under certain repealed legislation<sup>7</sup>; and
- 2562 (5) any question whether the employment<sup>8</sup> is, or is to be treated, for the purposes of the Pension Schemes Act 1993 as contracted-out employment<sup>9</sup> or as to the persons in relation to whom, or the period for which, an employment is, or is to be treated, for those purposes as such employment<sup>10</sup>.

The Secretary of State may make any determination required by head (3) above on such basis as he considers appropriate<sup>11</sup>.

Where, in any proceedings for an offence under the Pension Schemes Act 1993 or involving any question as to the payment of a contributions equivalent premium, any such question arises as is mentioned head (1), head (2)(a) or head (3) above, the decision of the Secretary of State is conclusive for the purpose of the proceedings<sup>12</sup> except where:

- 2563 (i) an appeal<sup>13</sup> is pending; or
- 2564 (ii) the time for appealing has not expired; or
- 2565 (iii) a question has been raised with a view to a review of the Secretary of State's decision<sup>14</sup>,

in which case the court dealing with the case must adjourn the proceedings until such time as a final decision on the question has been obtained<sup>15</sup>.

If a decision on any such question is necessary for the determination of the proceedings and the decision of the Secretary of State has not been obtained or a question has been raised with a view to a review of the decision obtained, then subject to heads (i) to (iii) above the question must be referred to the Secretary of State for determination or review in accordance (subject to any necessary modifications) with the relevant provisions<sup>16</sup> of the Social Security Administration Act 1992<sup>17</sup>. The provisions of that Act concerning appeals and reviews<sup>18</sup> have effect as if the questions to be determined by the Secretary of State<sup>19</sup> included (A) any question arising in connection with the issue, cancellation or variation of contracting-out certificates<sup>20</sup> or appropriate scheme certificates<sup>21</sup>, not being a question mentioned in head (5) above; and (B)

any other question arising under the Pension Schemes Act 1993 which falls to be determined by him and is not a question mentioned in heads (1) to (5) above<sup>22</sup>. Regulations may make provision with respect to the procedure to be adopted on any application for a review<sup>23</sup> made by virtue of this provision and generally with respect to such applications and reviews<sup>24</sup>, but may not prevent such a review being entered upon without an application being made<sup>25</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 Ie under the Social Security Administration Act 1992 s 17(1) (as amended): see PARA 357 ante.

3 Ie for the purposes of the Pension Schemes Act 1993 s 13 (as amended) (see PARA 890 ante) or s 17 (as amended) (see PARA 893 ante): s 170(1)(a).

4 For the meaning of 'contributions equivalent premium' see PARA 922 ante.

5 For the meaning of 'guaranteed minimum pension' see PARA 878 ante.

6 For the meaning of 'contracted-out scheme' see PARA 880 ante.

7 Ie under the Social Security Act 1986 s 7 (repealed and not re-enacted).

8 For the meaning of 'employment' generally see PARA 560 note 5 ante.

9 For the meaning of 'contracted-out employment' see PARA 878 ante.

10 Pension Schemes Act 1993 s 170(1)(a)-(e) (amended by the Pensions Act 1995 ss 151, 177, Sch 5 paras 18, 70, Sch 7 Pt III).

11 Pension Schemes Act 1993 s 170(2).

12 Ibid s 171(1) (amended by the Pensions Act 1995 Sch 5 paras 18, 71).

13 Ie under the Social Security Administration Act 1992 s 18: see PARA 358 ante.

14 Ie under ibid s 19: see PARA 358 ante.

15 Pension Schemes Act 1993 s 171(3).

16 Ie the Social Security Administration Act 1992 ss 17-19 (as amended): see PARAS 357-358 ante.

17 Pension Schemes Act 1993 s 171(2).

18 Ie the Social Security Administration Act 1992 ss 18, 19: see PARA 358 ante.

19 Ie the questions mentioned in ibid s 17(1) (as amended): see PARA 357 ante.

20 For the meaning of 'contracting-out certificate' see PARA 880 ante.

21 For the meaning of 'appropriate scheme certificate' see PARA 880 ante.

22 Pension Schemes Act 1993 s 170(7) (s 170(7), (8) added by the Pensions Act 1995 Sch 5 paras 18, 70).

23 Ie under the Social Security Administration Act 1992 s 19: see PARA 358 ante. An application to the Secretary of State for the review of a determination must be made in writing and must state: (1) the name and address of the applicant; (2) the names and addresses of the trustees or managers of the scheme; (3) particulars of the determination in respect of which a review is sought; (4) the reason why the applicant claims that he is a person interested in that determination; and (5) the grounds on which review of the determination is sought, but the Secretary of State may allow an application to be treated as properly made even if these requirements are not met: Occupational and Personal Pension Schemes (Contracting-out etc: Review of Determinations) Regulations 1997, SI 1997/358, reg 3(1), (2). If, on receipt of an application for a review of a determination, the Secretary of State decides to refuse to review that determination he must send written notice to the applicant of that refusal, of the reasons for it and of the right of appeal to the court on a point of law: reg 3(3). If, on receipt of an application for a review of a determination, the Secretary of State decides to review that determination he must send written notice of the application and of his intention to review that determination to the applicant, to the trustees or managers of the scheme and to any other person (including a person who is an employer of persons in service in an employment to which the scheme applies) who in the

opinion of the Secretary of State should be given such notice; and the notice must state that any person to whom it is given may request a formal hearing of the review and may make representations in connection with the review to the Secretary of State within 21 days of receipt of the notice: reg 3(4).

24 If an applicant for a review of a determination or any person to whom notice of the application has been given under *ibid* reg 3(4) requests a formal hearing of the application, the Secretary of State must grant the request unless, after considering the grounds of the application and any reasons given for the request, he is satisfied that the review of the determination can properly be made without such a hearing; and if he is satisfied that the review can properly be made without a formal hearing, he must inform the person making the request of its refusal and of the reason for that refusal and may proceed to review the determination without such a hearing, but he may not proceed to make his review of the determination until he has allowed the person making the request at least 21 days to make any written submissions in connection with the review: reg 4(1), (2). If, in accordance with the provisions of reg 4(1), a request for a formal hearing has been granted, or if no request has been made but the Secretary of State is otherwise satisfied that a formal hearing is desirable, reasonable notice (being at least 21 days or such lesser period as the Secretary of State, with the agreement of all persons to whom notice of the hearing has been given, may think fit) of the time and place of the hearing must be given to every person to whom notice of the application has been given under reg 3(4): reg 4(3). In any case in which a formal hearing of a review is held, that hearing must be in public except where the Secretary of State is satisfied that, by reason of the confidential or sensitive nature of matters raised, it is just and reasonable for the hearing or any part of it to be in private; and a member of the Council on Tribunals or the Scottish Committee of the Council, in that capacity, is entitled to attend a formal hearing whether it is in public or in private: reg 4(4), (5). As to the Council on Tribunals see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARAS 55-57. Any person to whom notice of the hearing has been given under reg 4(3) is entitled to be heard at the hearing and may give evidence and call witnesses and must be given an opportunity of putting questions directly to any witness called at the hearing; and a person who has the right to be heard is entitled to be represented by another person whether legally qualified or not: reg 4(6), (7). The Secretary of State may, if he thinks fit, require any person to attend a hearing to give evidence or to produce documents reasonably required for determining the issue before him and may take evidence on oath and for that purpose administer oaths: reg 4(8). If any person to whom notice of the hearing has been given under reg 4(3) fails to appear either in person or by a representative at the hearing, the Secretary of State may proceed with the hearing notwithstanding the absence of any such person or representative: reg 4(9).

The Secretary of State must allow a period of at least 21 days to elapse after the sending of the notices required by reg 4(3) and he must then proceed to review the determination as soon as practicable with a view to confirming, varying or revoking it, having regard to any representations that he has received; but he may allow a period of less than 21 days to elapse before proceeding to review the determination with the agreement of all persons to whom notice of the application has been given: reg 5(1), (2). If it appears to the Secretary of State that any review involves a question of special difficulty, he may take the advice and assistance of an assessor or assessors having the relevant professional qualifications: reg 5(3). When the Secretary of State has made a determination on a review he must record that determination in writing and as soon as practicable must send notice in writing of the determination, of the reasons for it and of the right to appeal to the court on a point of law, to every person to whom notice was sent under reg 3(4): reg 5(4).

25 Pension Schemes Act 1993 s 170(8) (as added: see note 22 *supra*). In any case where the Secretary of State enters upon a review of a determination without an application for review being made, the provisions of the Occupational and Personal Pension Schemes (Contracting-out etc: Review of Determinations) Regulations 1997, SI 1997/358, regs 3(4), 4, 5 (see notes 23-24 *supra*) apply as if the review were being entered upon consequent upon an application being made, save that the notice referred to under reg 3(4) does not refer to any such application and any reference to the applicant is to be disregarded: reg 6.

## UPDATE

### 929 Determination of questions by the Secretary of State; appeals and reviews

TEXT AND NOTES--The Inland Revenue must prepare, either annually or at such times or intervals as may be prescribed, a report on the standards achieved by its officers in the making of decisions against which, by virtue of the Pension Schemes Act 1993 s 170(6), an appeal lies to the First-tier Tribunal: s 171A(1) (s 171A added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 20; amended by SI 2008/2833). Any report so made may be included in any annual report by the Inland Revenue of which a copy is laid before each House of Parliament, or may be annexed to any report of the Secretary of State under the Social Security Act 1998 s 81: Pension Schemes Act 1993 s 171A(2) (s 171A as added). A copy of every report must be laid

before each House of Parliament, unless the report is included in, or annexed to, a report of which a copy is so laid: s 171A(3) (s 171A as added).

NOTE 10--The function of determining the questions referred to in the Pension Schemes Act 1993 s 170(1), as that section has effect before the commencement of the Social Security Act 1998 Sch 7 para 131, is transferred to the Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 16(1).

Pension Schemes Act 1993 s 170(1)(c) amended: SI 2001/3649, SI 2005/2050.

TEXT AND NOTE 11--Pension Schemes Act 1993 s 170(2) substituted by the Social Security Act 1998 Sch 7 para 131, and the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 16(2) so as to transfer functions to Inland Revenue.

NOTE 12--Pension Schemes Act 1993 s 171(1) now relates to decision of Inland Revenue: s 171(1) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 19(2)).

TEXT AND NOTE 15--TEXT heads (i)-(iii) replaced. Now (i) an appeal has been brought but not determined; or (ii) an application for leave to appeal has been made but not determined; or (iii) an appeal has not been brought (or, as the case may be, an application for leave to appeal has not been made) but the time for doing so has not yet expired; or (iv) an application has been made under the Social Security Act 1998 ss 9, 10: s 171(3) (substituted by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 19(3)). In a case falling within heads (i)-(iv) the court must adjourn the proceedings until such time as the final decision is known and that decision is to be conclusive for the purposes of the proceedings: Pension Schemes Act 1993 s 171(4) (added by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 19(3)).

TEXT AND NOTE 17--Replaced. Now if any such decision is necessary for the determination of the proceedings, and the decision of the Inland Revenue has not been obtained or an application with respect to the decision has been made under of the Social Security Act 1998 ss 9, 10, the decision must be referred to the Inland Revenue to be made in accordance (subject to any necessary modifications) with the 1998 Act Pt I Ch II: Pension Schemes Act 1993 s 171(2) (substituted by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 7 para 19(3)).

NOTES 23-25--Secretary of State's functions under SI 1997/358 transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

NOTE 25--SI 1997/358 reg 4 amended: SI 2008/2683.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/20. CONTRACTING OUT/(7) ANNUAL INCREASES AND MISCELLANEOUS PROVISIONS/930. Hybrid occupational pension schemes.

### **930. Hybrid occupational pension schemes.**

The Secretary of State<sup>1</sup> may by regulations<sup>2</sup> provide, where the pensions provided by an occupational pension scheme<sup>3</sup> include both (1) such pensions that, if the scheme provided only those pensions, it would satisfy certain certification requirements<sup>4</sup>; and (2) such other pensions that, if the scheme provided only those pensions it would satisfy other certification requirements<sup>5</sup>, for Part III of the Pension Schemes Act 1993<sup>6</sup> to have effect as if the scheme were two separate schemes providing, respectively, the pensions referred to above<sup>7</sup>.

A scheme may change its mode of contracting out only in prescribed circumstances<sup>8</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 For the meaning of 'regulations' see PARA 557 note 2 ante.

3 For the meaning of 'occupational pension scheme' see PARA 741 ante (definition applied by the Pensions Act 1995 s 176). See also PARA 598 note 7 ante.

4 Ie the requirements of the Pension Schemes Act 1993 s 9(2) (as substituted): see PARA 882 ante.

5 Ie the requirements of ibid s 9(3) (as amended): see PARA 882 ante.

6 Ie ibid Pt III (ss 7-68) (as amended): see PARA 878 et seq ante.

7 See the Pensions Act 1995 s 149(1). Section 149(1) applies in spite of anything in the Pension Schemes Act 1993 ss 9, 12 (as amended) (see PARA 882 ante): see the Pensions Act 1995 s 149(1). Regulations made by the Secretary of State may, in connection with any provision made by virtue of s 149(1), make such modifications of the specified Acts (ie the Social Security Contributions and Benefits Act 1992; the Pension Schemes Act 1993; and the Pensions Act 1995 Pt I (ss 1-125)) and the instruments made or having effect as if made under them, as appear to the Secretary of State desirable: s 149(2). For the meaning of 'modifications' see PARA 664 note 10 ante (definition applied by s 124(5)). As to the exercise of this power see the Occupational Pension Schemes (Mixed Benefit Contracted-out Schemes) Regulations 1996, SI 1996/1977, which (1) provide for parts of a relevant scheme to be treated as separate schemes for contracting-out purposes (see reg 2); (2) modify the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172 (as amended) (see the Occupational Pension Schemes (Mixed Benefit Contracted-out Schemes) Regulations 1996, SI 1996/1977, reg 3); (3) provide for the transfer of guaranteed minimum pensions, 'section 9(2B) rights' and protected rights between parts of a relevant scheme (see reg 4); and (4) make transitional arrangements for the certification of relevant schemes which were formerly contracted-out money purchase schemes (see reg 5). A relevant scheme is a scheme to which the Pensions Act 1995 s 149(1) applies; and 'section 9(2B) rights' has the same meaning as in the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172 (as amended) (see PARA 885 note 7 ante): Occupational Pension Schemes (Mixed Benefit Contracted-out Schemes) Regulations 1996, SI 1996/1977, reg 1(1), (2).

8 See the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 39 (amended by SI 1997/819).

## **UPDATE**

### **930 Hybrid occupational pension schemes**

NOTES 7, 8--Functions of Secretary of State under SI 1996/1172 (except those under regs 23, 61) and SI 1996/1977, reg 3 transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

TEXT AND NOTE 7--1993 Act s 149(1) amended: Pensions Act 2007 Sch 4 para 36 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

NOTE 7--SI 1996/1977 reg 4 amended: SI 2000/2975, SI 2009/598. SI 1997/1172 further amended: SI 1997/3038, SI 1998/1397, SI 1999/3198, SI 2000/2975, SI 2001/943.

NOTE 8--SI 1996/1172 reg 39 further amended: SI 2000/2975, SI 2009/598.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/21. PROTECTION FOR EARLY LEAVERS/(1) PRESERVATION OF BENEFIT UNDER OCCUPATIONAL SCHEMES/931. Circumstances in which the preservation requirements apply.

## **21. PROTECTION FOR EARLY LEAVERS**

### **(1) PRESERVATION OF BENEFIT UNDER OCCUPATIONAL SCHEMES**

#### **931. Circumstances in which the preservation requirements apply.**

Provision has been made for the preservation of benefit under occupational pension schemes<sup>1</sup> whose resources<sup>2</sup> are derived in whole or in part from:

- 2566 (1) payments made or to be made by one or more employers<sup>3</sup> of earners<sup>4</sup> to whom the scheme<sup>5</sup> applies, being payments either:
- 224
- 296. (a) under an actual or contingent legal obligation; or
- 297. (b) in the exercise of a power conferred, or the discharge of a duty imposed, on a Minister of the Crown, government department or any other person, being a power or duty which extends to the disbursement or allocation of public money<sup>6</sup>; or
- 225
- 2567 (2) such other payments by the earner or his employer, or both, as may be prescribed<sup>7</sup> for different categories of scheme<sup>8</sup>.

The requirements specified in or under the relevant statutory provisions are referred to as 'the preservation requirements'<sup>9</sup>.

Regulations may provide that a scheme is not to be treated as conforming with the preservation requirements unless it contains express rules to the effect (but not necessarily in the words) of any specified statutory provision<sup>10</sup> and may make provision as to the circumstances in which, for the statutory purposes<sup>11</sup>, a period of a person's service in two or more different employments is to be treated as a period of service in one or more of those employments; or a person's service in any employment is to be treated as terminated or not terminated<sup>12</sup>.

A scheme that is constituted or amended by an interim trust deed or other interim instrument or agreement is to be treated as satisfying the preservation requirements if both the following conditions are satisfied, namely:

- 2568 (i) the instrument or agreement constituting or amending the scheme requires the trustees or managers of the scheme to operate it in accordance with the preservation requirements; and
- 2569 (ii) members and prospective members have been notified of the general effect of the definitive provisions of the scheme that will give effect to the specified statutory provisions<sup>13</sup>.

Regulations may modify the provisions relating to the preservation of benefit in relation to schemes with any overseas element, that is to say, schemes established, or relating to employment, or with parties domiciled, resident or carrying on business, in any part of the world outside the United Kingdom<sup>14</sup>, or otherwise not confined in their operation to the United Kingdom<sup>15</sup>. Regulations may also modify those provisions:

- 2570 (A) in their application to cases where an earner is for the time being, or has been, employed in pensionable service under, or in contracted-out employment by reference to, different schemes applying to the same employment<sup>16</sup>;
- 2571 (B) in such manner as the Secretary of State thinks fit for securing that the preservation requirements include requirements for provision to be made in a scheme as to the preservation of a member's benefit in the event of the scheme being wound up;
- 2572 (C) without prejudice to head (A) or head (B) above, so that the preservation requirements apply with such modifications and exceptions as the Secretary of State considers to be necessary for particular cases or classes of case<sup>17</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 741 ante.

2 For the meaning of 'resources' see PARA 609 note 2 ante.

3 For these purposes, in relation to an employed earner, 'employer' means the secondary contributor in relation to any payment of earnings in respect of the employment concerned; and in relation to a self-employed earner, 'employer' means any other person, government department, public authority or body of persons who has made, or is to make, payments to the scheme in respect of the earner; and 'employed earner', 'self-employed earner' and 'secondary contributor' have the same meanings as in the Social Security Contributions and Benefits Act 1992 (see PARAS 32, 35 ante): Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 2 (amended by SI 1994/1062).

4 For the meaning of 'earner' and 'earnings' generally see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)); and see note 3 supra.

5 'Scheme' means an occupational pension scheme to which *ibid* Pt III Ch IV (ss 69-82) (as amended) (see PARA 932 et seq post) applies: s 70(1).

6 *Ibid* s 69(1), (3)(a).

7 For the meaning of 'prescribed' see PARA 555 note 1 ante.

8 Pension Schemes Act 1993 s 69(1), (3)(b).

9 See *ibid* s 69(2).

10 *Ie* any specified provision contained in *ibid* ss 71-76: see PARA 932 et seq post. The specified provisions are: s 71(1) (members who must be entitled to short service benefit: see PARA 932 post); s 71(3), (4) (age or time at which short service benefit must be made payable: see PARA 932 post); s 74 (computation of benefit: see PARA 935 post); s 75 (supplementary credits to be included in short service benefit: see PARA 936 post); and s 76 (pension increases: see PARA 937 post): Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 27(1) (amended by SI 1994/2062).

11 *Ie* for the purpose of the Pension Schemes Act 1993 ss 70-76: see PARA 932 et seq post.

12 See *ibid* s 82(1), (2).

13 See the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 27(2) (amended by SI 1994/1062; SI 1996/2131). As to the specified statutory provisions see note 10 supra.

14 For these purposes, references to the United Kingdom include references to the territorial waters of the United Kingdom: Pension Schemes Act 1993 s 181(5)(a). For the meaning of 'United Kingdom' generally see PARA 15 note 4 ante. As to territorial waters see WATER AND WATERWAYS vol 100 (2009) PARA 31.

15 *Ibid* s 165(6).

16 Regulations under head (A) in the text may relate to service under or, as the case may be, by reference to, different schemes at the same time or at different times: *ibid* s 153(2).

17 See *ibid* s 153(2).

## UPDATE

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

#### **931 Circumstances in which the preservation requirements apply**

NOTE 8--The preservation of benefit provided for under s 69 applies only to schemes where employee contributions have been made: *Royal Masonic Hospital v Pensions Ombudsman* [2001] 3 All ER 408.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/21. PROTECTION FOR EARLY LEAVERS/(1) PRESERVATION OF BENEFIT UNDER OCCUPATIONAL SCHEMES/932. Basic principle as to short service benefit.

### **932. Basic principle as to short service benefit.**

A scheme<sup>1</sup> must make such provision that where a member's<sup>2</sup> pensionable service is terminated before normal pension age<sup>3</sup> and:

- 2573 (1) he has at least two years' qualifying service<sup>4</sup>; or
- 2574 (2) a transfer payment in respect of his rights under a personal pension scheme<sup>5</sup> has been made to the scheme,

he is entitled to benefit<sup>6</sup> consisting of or comprising benefit of any description which would have been payable under the scheme as long service benefit<sup>7</sup>, whether for himself or others, and calculated in accordance with specified provisions<sup>8</sup>.

Subject as follows, short service benefit must be made payable as from normal pension age or, if in the member's case that age is earlier than 60, then from the age of 60<sup>9</sup>. Short service benefit payable on or in respect of the member's death after normal pension age must be made payable as from his death or within such time after it as long service benefit payable on or in respect of his death would be payable<sup>10</sup>.

In applying the above provisions, no regard is to be had to the operation of any scheme rule, taking effect at any time after termination of the member's pensionable service, as to what is normal pension age under the scheme<sup>11</sup>. A scheme must not provide for payment of short service benefit in the form of a lump sum at any time before normal pension age, except in such circumstances as may be prescribed<sup>12</sup>.

A period of service previously terminated is not to count towards the two years' qualifying service unless it counts towards qualification for long service benefit, and need then count only to the same extent and in the same way<sup>13</sup>. In the case of a member whose pensionable service has been broken<sup>14</sup>, the preservation requirements are modified<sup>15</sup>. If one or more of the following conditions is or are satisfied:

- 2575 (a) the break does not exceed one month;
- 2576 (b) the break corresponds to the member's absence from work wholly or partly because of pregnancy or confinement, the member returns to work after the break in exercise of a statutory right to return and the member returns to pensionable service no later than one month after returning to work;
- 2577 (c) the break corresponds to the member's absence from work in furtherance of a trade dispute,

and the member's pensionable service is again terminated before normal pension age, the period of pensionable service previously terminated and any linked qualifying service in relation to that period count towards the two years' qualifying service whether or not they count towards qualification for long service benefit<sup>16</sup>. If the member became entitled to short service benefit when his pensionable service previously terminated, and the member's pensionable service is again terminated before normal pension age, the scheme must provide for the member to be entitled to short service benefit in respect of pensionable service after the break whether or not the conditions described in heads (1) and (2) above are satisfied, but this does not apply if all the member's accrued rights in respect of the period before the break

have been transferred to another scheme<sup>17</sup>, appropriately secured by a specified type of transaction<sup>18</sup> or extinguished by payment of a state scheme premium (now replaced by contributions equivalent premium)<sup>19</sup> or by payment of a lump sum<sup>20</sup>.

A scheme may provide that, when the member returns to pensionable service under the scheme, the member's pensionable service before and after the break is to be treated as continuous so that the whole period qualifies the member for long service benefit under the scheme. The scheme will not then be required to provide short service benefit in respect of the period before the break<sup>21</sup>.

Schemes that provide long service benefit payable to a person other than the member only if that person is married to, or dependent on, the member when the member reaches normal pension age are required to provide short service benefit payable to the person concerned only if that person was also married to, or (as the case may be) dependent on, the member when the member's pensionable service terminated<sup>22</sup>.

1 For the meaning of 'scheme' for these purposes see PARA 931 note 5 ante.

2 For these purposes, there are to be regarded as members of an occupational pension scheme any persons who (1) are in pensionable service under the scheme; (2) have rights under the scheme by virtue of such pensionable service; or (3) have rights under the scheme by virtue of having been allowed transfer credits under the scheme; and there are to be regarded as prospective members of an occupational pension scheme (a) any persons who are able, at their own option, to become members of the scheme; and (b) any persons who under the terms of their contracts of service and the scheme rules will become so able, if they continue in the same employment for a sufficiently long period: Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 3(1)-(3) (amended by SI 1992/1531; SI 1994/1062). As to the power to prescribe for these purposes the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member see PARA 557 note 9 ante. For the meaning of 'prescribe' see PARA 555 note 1 ante; for the meaning of 'occupational pension scheme' see PARA 741 ante; and for the meaning of 'pensionable service' see PARA 664 note 2 ante.

3 For the meaning of 'normal pension age' see PARA 896 note 6 ante.

4 'Two years' qualifying service' means two years (whether a single period of that duration or two or more periods, continuous or discontinuous, totalling two years) in which the member was at all times employed either: (1) in pensionable service under the scheme; or (2) in service in employment which was contracted-out by reference to the scheme (as to which see PARA 878 ante); or (c) in linked qualifying service under another scheme: Pension Schemes Act 1993 s 71(7). For the meaning of 'employment' see PARA 560 note 5 ante; and for the meaning of 'linked qualifying service' see PARA 922 note 10 ante. For the purposes of s 71(7), no regard is to be had to whether or not the service was of the same description in the whole of the two years: s 71(8).

5 For the meaning of 'personal pension scheme' see PARA 710 ante.

6 The benefit to which a member is entitled under the Pension Schemes Act 1993 s 71(1) is referred to as 'short service benefit': s 71(2).

7 'Long service benefit', in relation to a scheme, means the benefits which will be payable under the scheme, in accordance with legal obligation, to or in respect of a member of the scheme on the assumption: (1) that he remains in relevant employment; and (2) that he continues to render service which qualifies him for benefits, until he attains normal pension age; and for these purposes 'benefits' means: (a) retirement benefit for the member himself at normal pension age; or (b) benefit for the member's wife or husband, widow or widower, or dependants, or others, on his attaining that age or his later death; or (c) both such descriptions of benefit: *ibid* s 70(1). 'Relevant employment', in relation to a scheme, means any employment to which the scheme applies: s 70(1). As to when a person attains a particular age see PARA 881 note 2 ante.

8 *Ibid* s 71(1). The specified provisions are those of Pt III Ch IV (ss 69-82) (as amended): see PARA 933 et seq post.

9 Pension Schemes Act 1993 s 71(3).

10 *Ibid* s 71(4).

11 *Ibid* s 71(5).

12 Ibid s 71(6). For the purposes of s 71(6), the prescribed circumstances are that: (1) the member's earning capacity is destroyed or seriously impaired by physical or mental infirmity; (2) the member has become incapable of following his normal employment because of physical or mental infirmity; or (3) the member has attained age 50 or is within 10 years of normal pension age: Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 5 (amended by SI 1994/1062; SI 1996/2131).

13 Pension Schemes Act 1993 s 71(9).

14 For this purpose, a member's pensionable service is broken if, after it terminates, the member returns to pensionable service under the same scheme: Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 21(1).

15 See *ibid* reg 21 (amended by SI 1994/1062; SI 1995/3067).

16 See *ibid* regs 21(2), (3) (as amended: see note 15 *supra*).

17 *Ie* as described in the Pension Schemes Act 1993 s 73(2): see PARA 934 *post*.

18 *Ie* a transaction to which *ibid* s 19 applies: see PARA 894 *ante*. 'Appropriately secured' means the same as in s 19 except that a policy of insurance or annuity contract which is taken out or entered into with an authorised friendly society (as defined for the purposes of the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 6: see PARA 934 note 6 *post*), but which otherwise satisfies the conditions for being 'appropriate' for the purposes of the Pension Schemes Act 1993 s 19, is to be treated as if it were appropriate for those purposes: Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 21(7) (as amended: see note 15 *supra*).

19 See PARA 922 *et seq ante*.

20 See the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 21(4), (5) (as amended: see note 15 *supra*).

21 *Ibid* reg 21(6).

22 *Ibid* reg 19.

## UPDATE

### 931-960 Protection for Early Leavers

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### 932 Basic principle as to short service benefit

TEXT AND NOTE 5--Reference to 'transfer payment' in 1993 Act s 71 modified: SI 2005/992.

NOTE 7--Definition of 'long service benefit' in Pension Schemes Act 1993 s 70(1) amended: SI 2005/2053.

TEXT AND NOTE 9--Subject to the Pension Schemes Act 1993 s 71(4), short service benefit must be made payable as from an age which is no greater than (1) the age of 65, or (2) if in the member's case normal pension age is greater than 65, normal pension age: s 71(3) (substituted by Pensions Act 2004 s 263(1)).

NOTE 12--SI 1991/167 reg 5 substituted: SI 2009/2930.

TEXT AND NOTE 22--SI 1991/167 reg 19 amended: SI 2005/2877.

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### **933. General prohibition on discrimination between short service and long service beneficiaries.**

A scheme<sup>1</sup> must not contain any rule which results, or can result, in a member<sup>2</sup> being treated less favourably for any purpose relating to short service benefit<sup>3</sup> than he is, or is entitled to be, treated for the corresponding purpose relating to long service benefit<sup>4</sup>; but this does not apply to any rule in its application to members whose pensionable service<sup>5</sup> terminated before the rule came into force, unless the rule:

- 2578 (1) was made after the termination of a member's pensionable service; and  
 2579 (2) results, or is capable of resulting, in any treatment less favourable for him than that to which he would have been entitled but for the rule<sup>6</sup>.

Nor does it apply to a rule which merely confers discretion on the scheme's trustees<sup>7</sup> or managers<sup>8</sup>, or others, so long as it is not a rule requiring the discretion to be exercised in any discriminatory manner against members in respect of their short service benefit<sup>9</sup>.

1 For the meaning of 'scheme' for these purposes see PARA 931 note 5 ante.

2 For the meaning of 'member' for these purposes see PARA 932 note 2 ante.

3 For the meaning of 'short service benefit' see PARA 932 note 6 ante.

4 Pension Schemes Act 1993 s 72(1). For the meaning of 'long service benefit' see PARA 932 note 7 ante.

5 For the meaning of 'pensionable service' see PARA 664 note 2 ante.

6 Pension Schemes Act 1993 s 72(2).

7 The Secretary of State may by regulations provide who is to be treated as a trustee of a scheme for the purposes of *ibid* Pt IV Ch I (ss 69-82) (as amended) (see PARAS 931-932 ante, 934 et seq post); Pt VIII (ss 129-132) (as amended) (see PARA 972 post) so far as it applies for the purposes of Pt IV Ch I (as amended); s 153(2) (see PARA 931 post); s 158(1)-(5) (as amended) (see PARA 964 post); s 162 (see PARA 966 post); s 163 (see PARA 560 ante); and s 176 (see PARA 975 post): s 178(b) (amended by the Pensions Act 1995 ss 151, 177, Sch 5 paras 18, 76, Sch 7 Pts III, IV). As to the Secretary of State see PARA 1 ante. For the meaning of 'regulations' see PARA 557 note 2 ante.

8 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme for these purposes see PARA 555 note 9 ante.

9 Pension Schemes Act 1993 s 72(3).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

**933 General prohibition on discrimination between short service and long service beneficiaries**

TEXT AND NOTES--The Pension Schemes Act 1993 s 72 is subject to s 71(3) and (6) (age at which short service benefit is to be payable: see PARA 932): s 72(4) (added by Pensions Act 2004 s 263(2)).

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### **934. Form of short service benefit and its alternatives.**

Subject to certain exceptions<sup>1</sup>, a member's<sup>2</sup> short service benefit<sup>3</sup> must be payable directly out of the resources<sup>4</sup> of the scheme<sup>5</sup> or assured to him by such means as may be prescribed<sup>6</sup>. A scheme may, instead of providing short service benefit, provide:

- 2580 (1) for the member's accrued rights<sup>7</sup> (including any transfer credits allowed under the scheme):
- 226
- 298. (a) to be transferred to another occupational pension scheme<sup>8</sup> with a view to acquiring transfer credits for the member under the other scheme; or
- 299. (b) to be transferred to a personal pension scheme<sup>9</sup> or a self-employed pension arrangement<sup>10</sup> with a view to acquiring rights for the member under the rules of the scheme or arrangement<sup>11</sup>; or
- 227
- 2581 (2) for such alternatives to short service benefit as may be prescribed<sup>12</sup>.

The alternatives specified in heads (1) and (2) above may only be by way of complete or partial substitute for short service benefit if the member consents or in such other cases as may be prescribed<sup>13</sup>. An alternative prescribed under head (2) above may only include payment by way of return of contributions:

- 2582 (i) if they relate to a period of service before 6 April 1975<sup>14</sup>; or
- 2583 (ii) if there has been such a payment relating to a period of service before that date and the contributions relate to a period of service of less than five years after that date<sup>15</sup>.

1 ie those of the Pension Schemes Act 1993 s 73(2) (see the text and notes 12-13 infra) and s 81 (see PARA 938 post): s 73(1).

2 For the meaning of 'member' for these purposes see PARA 932 note 2 ante.

3 For the meaning of 'short service benefit' see PARA 932 note 6 ante.

4 For the meaning of 'resources' see PARA 609 note 2 ante.

5 For the meaning of 'scheme' see PARA 931 note 5 ante.

6 Pension Schemes Act 1993 s 73(1). For the meaning of 'prescribed' see PARA 555 note 1 ante. Short service benefit that is not payable directly out of the resources of the scheme may be assured to the member by means of a transaction to which s 19 (extinguishment of liability of scheme for pensions secured by insurance policies or annuity contracts: see PARA 894 ante) applies, and which satisfies the following requirements, ie that (1) it results in the member's short service benefit being secured by one or more policies of insurance or annuity contracts that are appropriate for the purposes of s 19; and (2) the member will be able to assign or surrender the insurance policies or annuity contracts on the conditions set out in the Occupational Pension Schemes (Discharge of Liability) Regulations 1997, SI 1997/784, reg 3 (conditions on which policies of insurance and annuity contracts may be assigned or surrendered: see PARA 894 ante): Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 6(1), (2) (amended by SI 1994/0162; SI 1995/3067; SI 1997/786). For these purposes, a policy of insurance or annuity contract which is taken out or entered into with an authorised friendly society, but which otherwise satisfies the conditions for being 'appropriate' for the purposes of the Pension Schemes Act 1993 s 19, is to be treated as if it were appropriate for the purposes of s 19 provided the terms of such policy or contract are not capable of being amended, revoked or rescinded; and

'friendly society' has the same meaning as in the Friendly Societies Act 1992 (including any society which by virtue of s 96(2) is to be treated as a registered friendly society within the meaning of that Act); and 'authorised friendly society' means a friendly society which is authorised under the Friendly Societies Act 1992 s 32 to carry on long term business under any of the Classes specified in ss 5, 7, Sch 2, Head A: Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 6(3), (4) (amended by SI 1994/1062; SI 1995/35). See further FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2081.

7 'Rights', in relation to accrued rights (within the meaning of the Pension Schemes Act 1993 s 73 or s 179 (see PARA 922 note 10 ante)) or transfer credits, includes rights to benefit and also options to have benefits paid in a particular form or at a particular time: s 181(1). For the meaning of 'transfer credits' see PARA 612 note 5 ante.

8 For the meaning of 'occupational pension scheme' see PARA 741 ante.

9 For the meaning of 'personal pension scheme' see PARA 710 ante.

10 'Self-employed pension arrangement' means an approved personal pension scheme within the meaning of the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended) (see PARA 711 et seq ante) being neither (1) a contract or scheme approved under Pt XIV Ch III (ss 618-629) (as amended) (see PARA 677 et seq ante); nor (2) a personal pension scheme within the meaning of the Pension Schemes Act 1993 (see PARA 710 ante): s 181(1).

11 Ibid s 73(2)(a). The option conferred by s 73(2)(a) is additional to any obligation imposed by Pt III Ch IV (ss 69-82) (as amended) (see PARAS 931-933 ante, 935 et seq post): s 73(3).

12 Ibid s 73(2)(b). Alternatives have been prescribed in relation to early or deferred retirement, bought out benefits and money purchase benefits. Those alternatives (described in the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, regs 8-10 (as amended)) may be provided by way of complete or partial substitute for short service benefit, but (except in the cases specifically referred to) only with the member's consent: see reg 7(1), (2) (amended by SI 1994/1062). The scheme may provide benefits that are different from those required to constitute short service benefit as regards amount, recipient and the time at which they are payable. The benefits must, however, include a benefit that is payable to the member, and the member's benefit must not be payable before normal pension age except in the circumstances referred to in the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 5 (as amended) (see PARA 932 ante): see reg (8)(1), (2). Benefits consisting of, or including, a benefit that becomes payable to the member before normal pension age may be provided without the member's consent where (1) the member's earning capacity is destroyed or seriously impaired by physical or mental infirmity; and (2) in the opinion of the trustees or managers of the scheme, the member is incapable of deciding whether it is in his interests to consent: reg 8(3). Any scheme rule that allows the alternative described in reg 8 must require the trustees or managers of the scheme to be reasonably satisfied that, when the member's benefit becomes payable, the total value of the benefits to be provided under reg 8 is at least equal to the value of the amount described in reg 11 (as amended) (ie an amount equal to the value of the benefits (or, where the alternative is provided by way of partial substitute for short service benefit, the relevant part of the benefits) that have accrued to or in respect of the member under the applicable rules within the meaning of the Pension Schemes Act 1993 s 94(2) (see PARA 953 post)): Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 8(4).

The scheme may provide for benefits different from those required to constitute short service benefit to be appropriately secured by a transaction to which the Pension Schemes Act 1993 s 19 applies (extinguishment of liability of scheme for pensions secured by insurance policies or annuity contracts: see PARA 894 ante) but any scheme rule that allows this alternative must require the trustees or managers of the scheme to be reasonably satisfied that, except where the member is requiring the trustees or managers to provide the alternative by exercising a right to a cash equivalent, the payment made to the insurance company is at least equal to the amount described in the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 11 (as amended): see reg 9(1)-(3) (amended by SI 1994/1062; SI 1995/3067). A scheme may allow this alternative to be provided without the member's consent where (a) the member will be able to assign or surrender the insurance policy or annuity contract on the conditions set out in the Occupational Pension Schemes (Discharge of Liability) Regulations 1997, SI 1997/784, reg 3 (conditions on which policies of insurance and annuity contracts may be assigned or surrendered: see PARA 894 ante); and the following requirements are satisfied, ie that the scheme is being wound up or that the member has less than five years' qualifying service in certain circumstances or that the trustees or managers of the scheme consider that, in the circumstances, it is reasonable for the scheme to provide the alternative without the member's consent and the additional requirements are satisfied: see the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 9(4), (5) (amended by SI 1994/1062; SI 1996/2131; SI 1997/786). The additional requirements are that all the following conditions are satisfied, ie that the member's rights under the scheme do not include protected rights as defined in the Pension Schemes Act 1993 s 181(1) (see PARA 878 ante), that the insurance policy is taken out or the annuity contract entered into more than 12 months after the member's pensionable service terminates, that the trustees or managers of the scheme give the member at least 30 days' written notice of their intention to take out the insurance policy or enter into the annuity contracts unless the member

exercises a right to a cash equivalent (the notice being sent to the member at his last known address or delivered to the member personally) and that when the trustees or managers of the scheme agree with the insurance company to take out the insurance policy or enter into the annuity contract, there is no outstanding application by the member for a cash equivalent: see the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 9(6) (reg 9(6), (7) amended by SI 1994/1062). For these purposes, 'appropriately secured' means the same as in the Pension Schemes Act 1993 s 19 except that a policy of insurance or annuity contract which is taken out or entered into with an authorised friendly society, but which otherwise satisfies the conditions for being 'appropriate' for the purposes of s 19, is to be treated as if it were appropriate for those purposes: Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 9(7) (as so amended).

The scheme may provide money purchase benefits instead of all or any of the benefits that constitute short service benefit but any scheme rule that allows this alternative must require the trustees or managers of the scheme to be reasonably satisfied that the amount allocated to provide money purchase benefits in respect of the member is at least equal to the amount described in reg 11 (as amended): reg 10(1), (2). The scheme rule must also require the trustees or managers of the scheme to calculate the money purchase benefits, when they become payable, either on the basis of actuarial advice or in accordance with the terms of an insurance policy or annuity contract in which the amount allocated to provide the benefits is invested: reg 10(2).

A scheme may also, instead of providing short service benefit, provide for the member's accrued rights to be transferred, if the member consents, to an overseas arrangement (ie a scheme or arrangement, other than an occupational pension scheme, which has effect, or is capable of having effect, so as to provide benefits on termination of employment or on death or retirement to or in respect of earners, which is not an appropriate scheme for contracting-out purposes (as to which see PARA 880 ante) and which is administered wholly or primarily outside the United Kingdom: reg 11A (added by SI 1996/2131). For the meaning of 'United Kingdom' see PARA 15 note 4 ante.

13 Pension Schemes Act 1993 s 73(4). For these purposes, a scheme may provide for the member's accrued rights to be transferred to another occupational pension scheme (as described in s 73(2)(a)(i) (see head (1)(a) in the text) without the member's consent where the following conditions are satisfied, ie (1) that the rights of a member are being transferred from the transferring scheme to the receiving scheme and either (a) the transferring scheme and the receiving scheme apply to employment with the same employer; or (b) the transferring scheme and the receiving scheme apply to employment with different employers, the member concerned is one of a group in respect of whom transfers are being made from the transferring scheme to the receiving scheme, and either (i) the transfer is a consequence of a financial transaction between the employers; or (ii) the employers are companies or partnerships bearing a relationship to each other such as is described in the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172, reg 64(2) (meaning of expression 'connected employer'); (2) that an actuary certifies to the trustees or managers of the transferring scheme that (a) the transfer credits to be acquired for each member under the receiving scheme are, broadly, no less favourable and, if that scheme were wound up immediately after transfer, would not be likely to be materially less secure than they would be if the transferring scheme were wound up immediately before the transfer, than the rights to be transferred; and (b) no beneficiary or contingent beneficiary under the transferring scheme will receive materially inferior benefits in the receiving scheme; and (c) where it is the established custom for discretionary benefits or increases in benefits to be awarded under the transferring scheme, there is good cause to believe that the award of discretionary benefits or increases in benefits under the receiving scheme will (making allowance for any amount by which transfer credits under the receiving scheme are more favourable than the rights to be transferred) be broadly no less favourable: Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 12(1)-(3) (variously amended and substituted by SI 1992/1531; SI 1993/1822; 1994/1062; SI 1995/3067; SI 1996/2131; SI 1997/786). For the purposes of head (2)(a) supra, where long service benefit in the transferring scheme is related to a member's earnings at, or in a specified period before, the time when he attains normal pension age then, in the case of a member in pensionable service at the date of transfer, the value of the rights to be transferred must be based on pensionable service (including any transfer credits) in the transferring scheme up to that date and projected final pensionable earnings; and for the purposes of head (2)(c) supra, the actuary must, in considering whether there is good cause, have regard to all the circumstances of the case and in particular to any established custom of the receiving scheme with regard to the provision of discretionary benefits or increases in benefits and to any announcements made with regard to the provision of such benefits under the receiving scheme: Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 12(4), (4A) (respectively substituted and added by SI 1993/1822). Where it is proposed that a member's accrued rights are to be transferred in accordance with this provision, information about the proposed transfer and details of the value of the rights to be transferred (including rights in respect of death in service benefits and survivors' benefits) must be furnished to the member not less than one month before the proposed transfer is due to take place: Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 12(4B) (added by SI 1996/2131). For these purposes, 'actuary' means a Fellow of the Institute of Actuaries, a Fellow of the Faculty of Actuaries, or a person with other actuarial qualifications who is approved by the Secretary of State, at the request of the trustees or managers of the scheme, as being a proper person to act for these purposes in connection with the scheme: Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 12(5) (amended by SI 1993/1822). See also note 12 supra. As to the Secretary of State see PARA 1 ante.

14 Pension Schemes Act 1993 s 73(5)(a).

15 Ibid s 73(5)(b).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **934 Form of short service benefit and its alternatives**

NOTES 6, 12--SI 1997/784 reg 3 amended: SI 2005/2050.

NOTE 7--For modification of reference to 'transfer credits' see SI 2005/992.

TEXT AND NOTES 9-11--In TEXT head (1)(b), omit 'or a self-employed pension arrangement' and 'or arrangement': Pension Schemes Act 1993 s 73(2)(a) (amended by the Welfare Reform and Pensions Act 1999 Sch 2 para 3(2)(a), Sch 13 Pt I).

NOTE 10--Omit definition of 'self-employed pension arrangement': Pension Schemes Act 1993 s 181(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 2 para 3(2)(c), Sch 13 Pt I).

NOTE 12--SI 1991/167 reg 8(2) substituted: SI 2007/814.

NOTE 13--Now head (2)(a) omit the words from 'and, if that scheme' to 'before the transfer', and head 2(b) omitted: SI 1991/167 reg 12(3), amended by SI 1999/2543. For 'an actuary' read 'the relevant actuary': SI 1991/167 reg 12(3), (4A) as so amended. The definition of 'actuary' is applied to 'relevant actuary' and also includes, where the transferring scheme is a scheme for which an actuary is required under the Pensions Act 1995 s 47 (see PARA 825) to be appointed, the individual for the time being appointed in accordance with s 47(1) as actuary for that scheme: SI 1991/167 reg 12(5), as so amended. See also the Stakeholder Pension Schemes Regulations 2000, SI 2000/1403, PARA 873A.1. For the purposes of the Pension Schemes Act 1993 s 73(4), a scheme may provide for a transfer payment to be made to another occupational or personal pension scheme, as described in s 73(2)(a)(i), without the member's consent where the conditions set out in SI 1991/167 reg 12(6) are satisfied: reg 12(1A) (added by SI 2000/1403). The conditions are that (1) the transferring scheme is or has been a stakeholder pension scheme, within the meaning the Welfare Reform and Pensions Act 1999 s 1, and the receiving scheme is such a scheme; (2) the transferring scheme has commenced winding-up; and (3) the transfer payment is of an amount at least equal to the cash equivalent of the member's rights under the scheme, as calculated and verified in a manner consistent with regulations made under the 1993 Act s 97 (see PARA 956): SI 1991/167 reg 12(6) (added by SI 2000/1403).

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### **935. Computation of short service benefit.**

Subject as follows, a scheme<sup>1</sup> must provide for short service benefit<sup>2</sup> to be computed on the same basis as long service benefit<sup>3</sup> and for that purpose, no account is to be taken of any rule making it (directly or indirectly) a condition of entitlement to benefit that pensionable service<sup>4</sup> must have been of any minimum duration<sup>5</sup>. This computation requirement does not, however, apply to so much of any benefit as accrues at a higher rate, or otherwise more favourably, in the case:

- 2584 (1) of members<sup>6</sup> with a period of pensionable service of some specified minimum length<sup>7</sup>; or
- 2585 (2) of members remaining in pensionable service up to some specified minimum age<sup>8</sup>,

nor does it apply to so much of any benefit as is of an amount or at a rate unrelated to length of pensionable service or to the number or amount of contributions paid by or for the member<sup>9</sup>; and regulations<sup>10</sup> may provide that it is not to apply to any category of schemes or members or to any description of benefit<sup>11</sup>. So far as any short service benefit is not required to be computed in accordance with the above provisions, it must be computed on the basis of uniform accrual, so that at the time when pensionable service is terminated, it bears the same proportion to long service benefit as the period of that service bears to the period from the beginning of that service to the time when the member would attain normal pension age or such lower age as may be prescribed<sup>12</sup>.

Where long service benefit is related to a member's earnings<sup>13</sup> at, or in a specified period before, the time when he attains normal pension age<sup>14</sup>, short service benefit must be related in a corresponding manner to his earnings at, or in the same period before, the time when his pensionable service is terminated<sup>15</sup>. A scheme must comply with any regulations relating to the basis of computation of short service benefit, including regulations providing for the avoidance of fractional amounts and otherwise to facilitate computation<sup>16</sup>.

Where a scheme provides that, in computing the amount of long service benefit payable to any person, a deduction will be made, either to take account of benefits payable to that person under the Social Security Contributions and Benefits Act 1992 or otherwise, the scheme may provide for a corresponding deduction from short service benefit<sup>17</sup>.

1 For the meaning of 'scheme' for these purposes see PARA 931 note 5 ante.

2 For the meaning of 'short service benefit' see PARA 932 note 6 ante.

3 Pension Schemes Act 1993 s 74(1). For the meaning of 'long service benefit' see PARA 932 note 7 ante.

4 For the meaning of 'pensionable service' see PARA 664 note 2 ante.

5 Pension Schemes Act 1993 s 74(2).

6 For the meaning of 'member' for these purposes see PARA 932 note 2 ante.

7 Pension Schemes Act 1993 s 74(3)(a).

8 Ibid s 74(3)(b). As to when a person attains a particular age see PARA 881 note 2 ante.

9 Ibid s 74(4).

10 For the meaning of 'regulations' see PARA 557 note 2 ante.

11 Pension Schemes Act 1993 s 74(5).

12 Ibid s 74(6). Where an earner in relevant employment is required to complete a period of service ('waiting period') before joining the scheme and if the earner joins the scheme, a specific part of long service benefit will be attributable to the waiting period, the preservation requirements are modified so that (1) the waiting period is treated as pensionable service; (2) the earner is treated as a member during that period; and (3) the part of long service benefit that will be attributable to the waiting period is treated as accruing at such a rate as to accrue in full over the whole of the waiting period: Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 13(1), (2) (reg 13 amended by SI 1996/2131). Where the rate at which long service benefit is treated as accruing during the waiting period is lower than the rate at which the rest of long service benefit accrues, then short service benefit must be computed on the basis of uniform accrual (in accordance with the Pension Schemes Act 1993 s 74(6)) except that the scheme may provide for short service benefit to be computed on the same basis as long service benefit (in accordance with s 74(1)) where the waiting period does not exceed two years: Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 13(3) (as so amended; also amended by SI 1994/1062).

13 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

14 For the meaning of 'normal pension age' see PARA 896 note 6 ante.

15 Pension Schemes Act 1993 s 74(7). Where long service benefit is related to a member's earnings during a specified period and the member's pensionable service is less than that period, the scheme must provide for short service benefit to be correspondingly related to the member's earnings during the whole of the member's pensionable service: Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 15.

16 Pension Schemes Act 1993 s 74(8). As to computation of money purchase benefits see the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 14 (as amended); as to the circumstances in which uniform accrual does not apply in relation to money purchase benefits see reg 14A (as added); and as to computation of benefits where uniform accrual applies see regs 16, 17 (as amended).

17 See *ibid* reg 20 (amended by SI 1996/2131). As to pensions under the Social Security Contributions and Benefits Act 1992 see PARA 561 *et seq* ante.

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

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### 936. Credits.

Subject to the following provisions, if a scheme<sup>1</sup> provides for long service benefit<sup>2</sup> to include supplementary credits<sup>3</sup>, it must:

- 2586 (1) provide for such credits to be included in short service benefit<sup>4</sup>; and
- 2587 (2) provide for all credits to be so included<sup>5</sup>.

Where purchased credits<sup>6</sup> have not been paid for in full at or before termination of pensionable service, the short service benefit must include the appropriate proportion of the credits<sup>7</sup>.

If the benefit includes bonus credits<sup>8</sup>, or credits for which payment is to be made by deduction from that or another benefit, the credits to be included in the benefit and (where applicable) the amount of the deduction must be computed on the assumption:

- 2588 (a) that the credits accrue in full only to a member remaining in pensionable service until normal pension age<sup>9</sup>; and
- 2589 (b) that the amount of any such credit, and also of any relevant deduction, accrues at a uniform rate from the time when the credit was awarded up to the time of his attaining that age<sup>10</sup>.

Where any such deduction is a percentage of benefit, the percentage must be the same for short service as for long service benefit<sup>11</sup>. A scheme must comply with any regulations<sup>12</sup> made with respect to the manner in which supplementary credits are to be included in short service benefit, including regulations providing for the avoidance of fractional amounts and otherwise to facilitate computation<sup>13</sup>.

1 For the meaning of 'scheme' see PARA 931 note 5 ante.

2 For the meaning of 'long service benefit' see PARA 932 note 7 ante.

3 'Supplementary credits', in relation to a scheme and a member's entitlement to its benefits, means any increase of benefit or additional benefit to which the member may become entitled: (1) in consequence of any provision made by or under the scheme after he becomes a member of it (to the extent that it applies to any previous pensionable service of his); or (2) by reference to previous service of his (whether or not pensionable service); or (3) in such other circumstances as may be prescribed, including under head (2) supra any transfer credits: Pension Schemes Act 1993 s 75(1). In circumstances where a member becomes entitled to the increase of benefit or additional benefit in consequence of a provision made by or under the scheme after he becomes a member of it and before his pensionable service terminates, 'supplementary credits' include any increase of benefit or additional benefit that is of an amount, or at a rate, unrelated to length of pensionable service or to the number or amount of contributions paid by or for the member: Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 4(1), (2) (amended by SI 1994/1062).

For the meaning of 'member' for these purposes see PARA 931 note 2 ante; for the meaning of 'pensionable service' see PARA 664 note 2 ante; for the meaning of 'prescribed' see PARA 555 note 1 ante; and for the meaning of 'transfer credits' see PARA 612 note 5 ante.

4 Pension Schemes Act 1993 s 75(2)(a). For the meaning of 'short service benefit' see PARA 932 note 6 ante.

5 Ibid s 75(2)(b).

6 'Purchased credits' means supplementary credits for which, under the rules of the scheme, a member may or must make a payment in whole or in part (whether by means of additional contributions, or of deduction from benefit, or otherwise, and whether separately for each credit or by one or more payments for one or more credits): *ibid* s 75(1).

7 *Ibid* s 75(3). In s 75(3) 'the appropriate proportion of the credits' means: (1) if they were to be paid for by a fixed amount, the same proportion as the amount paid bears to the full amount payable; and (2) otherwise, the same proportion as the period between the time when the first payment became due and the termination of the member's pensionable service bears to the whole period over which payment was to be made: s 75(4). As to calculating this proportion see the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 17(2)-(5) (amended by SI 1994/1062).

8 'Bonus credits' means supplementary credits other than purchased credits or transfer credits: Pension Schemes Act 1993 s 75(1).

9 *Ibid* s 75(5)(a). For the meaning of 'normal pension age' see PARA 896 note 6 ante.

10 *Ibid* s 75(5)(b).

11 *Ibid* s 75(6).

12 For the meaning of 'regulations' see PARA 557 note 2 ante.

13 Pension Schemes Act 1993 s 75(7).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **936 Credits**

NOTE 3--For modification of reference to 'transfer credits' see SI 2005/992.

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### **937. Pension increases.**

A scheme<sup>1</sup> which by its rules provides for increases of long service benefit<sup>2</sup> from time to time (whether by way of upwards revaluation or otherwise) must provide for corresponding increases of short service benefit<sup>3</sup> in the case of members<sup>4</sup> whose pensionable service<sup>5</sup> terminates at any time after the coming into force of any such rule<sup>6</sup>. Where the provision for increasing long service benefit involves the exercise of a discretion, a corresponding discretion must be conferred in relation to short service benefit<sup>7</sup>. If an increase of long service benefit is to take effect at a specified time after termination of service, the corresponding increase of short service benefit must take effect at the same time after the time when short service benefit becomes payable<sup>8</sup>. Where provision is made for increase of long service benefit otherwise than at a fixed rate, short service benefit may nevertheless be subject to increase at a fixed rate, if the rate is at least 3 per cent a year compound<sup>9</sup>.

1 For the meaning of 'scheme' for these purposes see PARA 931 note 5 ante.

2 For the meaning of 'long service benefit' see PARA 932 note 7 ante.

3 For the meaning of 'short service benefit' see PARA 932 note 6 ante.

4 For the meaning of 'member' for these purposes see PARA 932 note 2 ante.

5 For the meaning of 'pensionable service' see PARA 664 note 2 ante.

6 Pension Schemes Act 1993 s 76(1).

7 Ibid s 76(2).

8 Ibid s 76(3).

9 Ibid s 76(4).

### **UPDATE**

#### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

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### **938. Discharge of liability where short service or alternative benefits secured.**

A transaction which constitutes (1) the taking out of a policy of insurance or a number of such policies; (2) the entry into an annuity contract or a number of such contracts; or (3) the transfer of the benefit of such a policy or policies or such a contract or contracts, and which fulfils the statutory requirements<sup>1</sup> discharges the trustees or managers<sup>2</sup> of an occupational pension scheme<sup>3</sup> from their liability to provide for or in respect of any person short service benefit<sup>4</sup> or any alternative to short service benefit:

2590 (a) if it is carried out not earlier than the time when that person's pensionable service<sup>5</sup> terminates; and

2591 (b) if and to the extent that it results in short service benefit or any alternative to short service benefit for or in respect of that person being appropriately secured<sup>6</sup>; and

2592 (c) if and to the extent that the statutory requirements<sup>7</sup> are satisfied<sup>8</sup>.

1    Ie a transaction to which the Pension Schemes Act 1993 s 19 applies: see PARA 894 ante.

2    As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme for these purposes see PARA 555 note 9 ante; and as to trustees see PARA 933 note 7 ante.

3    For the meaning of 'occupational pension scheme' see PARA 741 ante.

4    For the meaning of 'short service benefit' see PARA 732 note 6 ante.

5    For the meaning of 'pensionable service' see PARA 664 note 2 ante.

6    Ie within the meaning of the Pension Schemes Act 1993 s 19: see PARA 894 ante.

7    Ie the requirements set out in *ibid* s 19(5)(a) or (c): see PARA 894 ante.

8    *Ibid* s 81.

### **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

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### **939. Special cases.**

The preservation requirements<sup>1</sup> are modified in relation to the following particular cases:

- 2593 (1) where a scheme<sup>2</sup> provides for payment of long service benefit<sup>3</sup> to be postponed, or suspended, for any period after normal pension age<sup>4</sup> during which the member<sup>5</sup> is in service in relevant employment<sup>6</sup> (whether or not that service qualifies the member for additional benefits under the scheme) and a member continues in, or returns to, service in relevant employment after becoming entitled to short service benefit<sup>7</sup> under the scheme<sup>8</sup>;
- 2594 (2) where a scheme provides for the payment by members of voluntary contributions, in which case the scheme may be treated as conforming with the preservation requirements even though the statutory provisions<sup>9</sup> for the return of surplus additional voluntary contributions to members apply to the scheme, and if those provisions would not otherwise apply to the scheme<sup>10</sup>;
- 2595 (3) in the case of a member of a scheme funded by level annual premiums whose pensionable service<sup>11</sup> began before 6 April 1975<sup>12</sup>;
- 2596 (4) in the case of schemes with an overseas element<sup>13</sup>.

1 For the meaning of 'the preservation requirements' see PARA 931 ante.

2 For the meaning of 'scheme' for these purposes see PARA 931 note 5 ante.

3 For the meaning of 'long service benefit' see PARA 932 note 7 ante.

4 For the meaning of 'normal pension age' see PARA 896 note 6 ante.

5 For the meaning of 'member' for these purposes see PARA 932 note 2 ante.

6 For the meaning of 'relevant employment' see PARA 932 note 7 ante.

7 For the meaning of 'short service benefit' see PARA 932 note 6 ante.

8 See the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 22 (amended by SI 1994/1062).

9 See the Finance Act 1989 s 75, Sch 6 Pt III (additional voluntary contributions).

10 See the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 23.

11 For the meaning of 'pensionable service' see PARA 664 note 2 ante.

12 See the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 24 (amended by SI 1996/2131).

13 See the Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 25 (amended by SI 1994/1062; SI 1996/2131).

### **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **939 Special cases**

TEXT AND NOTES 9, 10--Head (2) omitted: SI 2006/744.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/21. PROTECTION FOR EARLY LEAVERS/(1) PRESERVATION OF BENEFIT UNDER OCCUPATIONAL SCHEMES/940. Information and penalties.

#### **940. Information and penalties.**

The trustees or managers<sup>1</sup> of any scheme<sup>2</sup> must furnish in writing:

2597 (1) as of course to any person as soon as practicable and, in any event, within two months after he or his employer<sup>3</sup> has notified the trustees that his pensionable service<sup>4</sup> has terminated; and

2598 (2) to any member or prospective member<sup>5</sup> on request (not being a request made less than 12 months after the last occasion on which such information was furnished to him) as soon as practicable and, in any event, within two months after he requests it,

information as to the rights and options (if any) available to a member whose pensionable service terminates before he attains normal pension age<sup>6</sup>.

The trustees or managers of any scheme must furnish in writing, to any person who has paid contributions to the scheme which have not been refunded, as soon as practicable and, in any event, within two months after he requests it, information as to whether a refund of contributions is available or would be available in any circumstances, and in either case, an estimate of the amount of the refund and an explanation of the method of calculating it<sup>7</sup>. This information need not, however, be furnished on a request made after such information has already been furnished to the same person, in a case where the information was that no refund of contributions would be available in any circumstances, or less than 12 months after the last occasion on which such information was furnished to the same person, in any other case<sup>8</sup>.

Where a person fails, without reasonable excuse, to comply with any requirement imposed on him<sup>9</sup> to provide information regarding a transfer of accrued rights without consent or to provide any information required under the above provisions, the Occupational Pensions Regulatory Authority<sup>10</sup> may require him to pay, within 28 days, a penalty which must not exceed £1,000 in the case of an individual or £10,000 in any other case<sup>11</sup>.

1 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme for these purposes see PARA 555 note 9 ante; and as to trustees see PARA 933 note 7 ante.

2 For the meaning of 'scheme' see PARA 931 note 5 ante.

3 For the meaning of 'employer' see PARAS 660 note 18, 931 note 3 ante.

4 For the meaning of 'pensionable service' see PARA 664 note 2 ante.

5 For the meaning of 'member or prospective member' for these purposes see PARA 932 note 2 ante.

6 Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 27A(1), (2) (reg 27A added by SI 1996/2131). For the meaning of 'normal pension age' see PARA 896 note 6 ante.

7 Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 27A(3), (4) (as added: see note 6 supra).

8 See *ibid* reg 27A(3) (as added: see note 6 supra).

9 *le by* *ibid* reg 12(4B) (as added): see PARA 934 ante.

10 As to the Occupational Pensions Regulatory Authority see PARA 598 et seq ante.

11 Occupational Pension Schemes (Preservation of Benefit) Regulations 1991, SI 1991/167, reg 27B (added by SI 1996/2131).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **940 Information and penalties**

TEXT AND NOTES 9-11--SI 1991/167 reg 27B amended: SI 2009/615.

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## **(2) REVALUATION OF ACCRUED BENEFITS**

### **941. Revaluation of accrued benefits; basis of revaluation.**

Provision has been made for the purpose of revaluing:

- 2599 (1) benefits payable to or in respect of a member<sup>1</sup> of an occupational pension scheme<sup>2</sup> where:
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300. (a) his pensionable service<sup>3</sup> ends on or after 1 January 1986<sup>4</sup>;
301. (b) on the date on which his pensionable service ends ('the termination date') he has accrued rights<sup>5</sup> to benefit under the scheme<sup>6</sup>;
302. (c) the period beginning with the day after the termination date and ending with the date on which he attains normal pension age<sup>7</sup> ('the pre-pension period') is at least 365 days<sup>8</sup>; and
303. (d) in the case of benefit payable to any other person in respect of the member, the member dies after attaining normal pension age<sup>9</sup>; and
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- 2600 (2) benefits payable to or in respect of a member of a personal pension scheme<sup>10</sup>:
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304. (a) in respect of whom contributions to the scheme have ceased to be paid<sup>11</sup>; and
305. (b) who has accrued rights to benefit under the scheme<sup>12</sup>.
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Subject to the following provisions, in the case of such benefits as are mentioned in heads (1) (a) to (1)(d) above, any pension or other retirement benefit payable under the scheme in question to the member and any pension or other benefit payable under it to any other person in respect of him, is to be revalued by the final salary method<sup>13</sup>. If any such benefit is an average salary benefit<sup>14</sup> or flat rate benefit<sup>15</sup> and it appears to the trustees or managers<sup>16</sup> of the scheme under which it is payable that it is appropriate to revalue the benefit by the average salary method<sup>17</sup> or, as the case may be, the flat rate method<sup>18</sup>, then the benefit must be revalued using that method<sup>19</sup>. If any benefit such as is mentioned in heads (1)(a) to (1)(d) above is a money purchase benefit<sup>20</sup>, and in the case of such benefit as is mentioned in head (2) above, the benefit must be revalued using the money purchase method<sup>21</sup>.

In making any calculation for the purposes of the above provisions<sup>22</sup> in relation to any occupational pension scheme any commutation, forfeiture or surrender of, any charge or lien on, and any set-off against, the whole or part of a pension must be disregarded<sup>23</sup>.

1 As to the power to prescribe for these purposes the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member see PARA 557 note 9 ante. For the meaning of 'prescribe' see PARA 555 note 1 ante.

2 For the meaning of 'occupational pension scheme' see PARA 741 ante.

3 For the meaning of 'pensionable service' see PARA 664 note 2 ante.

- 4 Pension Schemes Act 1993 s 83(1)(a)(i).
- 5 For the meaning of 'accrued rights' for these purposes see PARA 934 note 7 ante.
- 6 Pension Schemes Act 1993 s 83(1)(a)(ii).
- 7 For the meaning of 'normal pension age' see PARA 896 note 6 ante.
- 8 Pension Schemes Act 1993 s 83(1)(a)(iii). In calculating 365 days for the purpose of s 83(1)(a)(iii), any day which is 29 February must be disregarded: s 83(2).
- 9 Ibid s 83(1)(a)(iv). As to when a person attains a particular age see PARA 881 note 2 ante.
- 10 For the meaning of 'personal pension scheme' see PARA 710 ante. In ibid s 83(1)(b) the reference to a personal pension scheme does not include a scheme which is comprised in an annuity contract made before 4 January 1988; and the reference to contributions includes any minimum contributions: s 83(3). For the meaning of 'minimum contributions' see PARA 883 note 11 ante.
- 11 Ibid s 83(1)(b)(i).
- 12 Ibid s 83(1)(b)(ii).
- 13 Ibid s 84(1). For the meaning of 'final salary method' see PARA 942 post.
- 14 'Average salary benefit' means benefit the rate or amount of which is calculated by reference to the average salary of a member over the period of service on which the benefit is based: ibid s 84(4).
- 15 'Flat rate benefit' means any benefit the rate or amount of which is calculated by reference solely to the member's length of service: ibid s 84(4).
- 16 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme see PARA 555 note 9 ante.
- 17 For the meaning of 'average salary method' see PARA 943 post.
- 18 For the meaning of 'flat rate method' see PARA 944 post.
- 19 Pension Schemes Act 1993 s 84(2).
- 20 For the meaning of 'money purchase benefits' see PARA 811 note 2 ante.
- 21 Pension Schemes Act 1993 s 84(3). For the meaning of 'money purchase method' see PARA 944 post. The fact that a scheme provides for the amount of the pension or other benefit for a member or for any other person in respect of him to be increased during the pre-pension period by the percentages specified during that period under the Social Security Administration Act 1992 s 151(1) (directions specifying percentage increases for up-rating purposes) (see PARA 17 ante) does not in itself result in conflict with the Pension Schemes Act 1993 s 84, if the increase falls to be determined by reference to an amount from which the guaranteed minimum for a member or a member's widow or widower has not been deducted: s 84(5) (amended by the Pensions Act 1995 ss 151, 177, Sch 3 paras 16, 62, Sch 7 Pt III).
- 22 In the purposes of the Pension Schemes Act 1993 Pt IV Ch II (ss 83-86) (as amended): see PARA 942 et seq post.
- 23 Ibid s 86(1). The same money may not be treated as providing both the increase in benefit required by Pt IV Ch II (as amended) and the benefit required by Pt III Ch III (ss 87-92) (see PARAS 947-950 post): s 86(2).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **941 Revaluation of accrued benefits; basis of revaluation**

TEXT AND NOTES 1-12--In heads (1) and (2), before 'benefits' insert 'relevant': Pension Schemes Act 1993 s 83(1) (amended by Welfare Reform and Pensions Act 1999 Sch 12 paras 28, 31(1), (2)). For the purposes of the 1993 Act s 83(1), the following are relevant benefits (1) any benefits payable otherwise than by virtue of rights which are attributable (directly or indirectly) to a pension credit; and (2) in the case of a salary-related occupational pension scheme, any benefits payable by virtue of such rights, to the extent that the rights involve the member being credited by the scheme with notional pensionable service: s 83(1A) (added by 1999 Act Sch 12 paras 28, 31(1), (3)). For these purposes, an occupational pension scheme is salary-related if (a) it is not a money purchase scheme; and (b) it does not fall within a prescribed class: 1993 Act s 83(4) (added by 1999 Act Sch 12 paras 28, 31(1), (4)).

NOTE 21--1993 Act s 84(5) (amended by Pensions Act 2004 s 281; and SI 2005/2053) now makes provision for surviving civil partners. 1993 Act s 84(6) (meaning of 'retail prices index') added by Pensions Act 2004 s 281; and amended by Statistics and Registration Service Act 2007 Sch 3 para 9).

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#### **942. The final salary method.**

The final salary method is to add to the amount that would be payable but for the provisions relating to the revaluation of accrued benefits<sup>1</sup> or regulations<sup>2</sup> made under those provisions:

2601 (1) in a case where:

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306. (a) the termination of pensionable service<sup>3</sup> occurs on or after 1 January 1991<sup>4</sup>; or

307. (b) the whole of the member's pensionable service falls on or after 1 January 1985<sup>5</sup>,

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2602 an amount equal to the appropriate revaluation percentage<sup>6</sup> of the amount of the pension or other benefit which on the termination date<sup>7</sup> has accrued to him or to any other person in respect of him (excluding any part of that amount which consists of the member's or his widow's or her widower's guaranteed minimum)<sup>8</sup>; and

2603 (2) in any other case, an amount equal to such proportion of the appropriate revaluation percentage of the amount of that pension or other benefit (excluding any such part) as the member's pensionable service falling on or after 1 January 1985 bears to his total pensionable service<sup>9</sup>.

Any rule of a scheme the effect of which is that benefit falls to be revalued by reference to any period is to be disregarded in making any calculation required by this method<sup>10</sup>. For the above purposes the Secretary of State must in each calendar year by order specify a revaluation percentage for each period which is a revaluation period in relation to that order<sup>11</sup>.

1 le the provisions of the Pension Schemes Act 1993 Pt IV Ch II (ss 83-86) (as amended): see PARA 941 ante.

2 For the meaning of 'regulations' see PARA 557 note 2 ante.

3 For the meaning of 'pensionable service' see PARA 664 note 2 ante. For these purposes, 'pensionable service' includes any notional pensionable service which is credited to the member by the scheme: Pension Schemes Act 1993 s 84, Sch 3 para 1(2).

4 Ibid Sch 3 para 1(1)(a)(i).

5 Pension Schemes Act 1993 Sch 3 para 1(1)(a)(ii).

6 'The appropriate revaluation percentage' means the revaluation percentage specified in the last calendar year before the date on which the member attains normal pension age as the revaluation percentage for the revaluation period which is of the same length as the number of complete years in the pre-pension period: ibid Sch 3 para 2(7). The revaluation percentage which the Secretary of State is to specify in relation to each revaluation period is (1) the percentage which appears to him to be the percentage increase in the general level of prices in Great Britain during the period which is the reference period in relation to that revaluation period; or (2) the maximum rate, whichever is the less: Sch 3 para 2(3). For the meaning of 'Great Britain' see PARA 15 note 4 ante. For an example of the exercise of this power see the Occupational Pensions (Revaluation) Order 1996, SI 1996/2926. As to the Secretary of State see PARA 1 ante.

The Secretary of State may estimate the percentage increase mentioned in head (1) supra in such manner as he thinks fit: Pension Schemes Act 1993 Sch 3 para 2(4). For the purposes of that head, the reference period in relation to a revaluation period is: (a) in the case of the revaluation period beginning on 1 January 1986, the

period which begins with 1 October 1985 and ends with the last day before the making of the order which is 30 September; and (b) in the case of the revaluation periods with later commencement dates, the period which begins with the last day before the commencement of the revaluation period which is 1 October and ends with the last day before the making of the order which is 30 September: Sch 3 para 2(5). For the purposes of head (2) supra, 'the maximum rate', in relation to a revaluation period, is (i) in the case of a revaluation period of 12 months, 5%; and (ii) in any other case, the percentage that would be the revaluation percentage had the general level of prices increased at the rate of 5% compound per annum during the reference period in question: Sch 3 para 2(6). For the meaning of 'normal pension age' see PARA 896 note 6 ante. A period is a 'revaluation period', in relation to an order under Sch 3 para 2 if it is a period which begins with 1 January 1986 or with an anniversary of that date falling before the making of the order and ends with the next day after the making of the order which is 31 December: Sch 3 para 2(2). For the meaning of 'the pre-pension period' see PARA 941 head (1)(c) ante.

7 For the meaning of 'the termination date' see PARA 941 head (1)(b) ante.

8 Pension Schemes Act 1993 Sch 3 para 1(1)(a).

9 Ibid Sch 3 para 1(1)(b). For the purposes of Sch 3 para 1(1)(b), any notional pensionable service which is credited to a member by a scheme must be taken to have ended immediately before the member's actual pensionable service began: Sch 3 para 1(3).

10 Ibid Sch 3 para 1(4).

11 Ibid Sch 3 para 2(1).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **942 The final salary method**

TEXT AND NOTES--Pension Schemes Act 1993 Sch 3 paras 1(1), (1A)-(1E), (2), (3), (3A) substituted, for Sch 3 para 1(1)-(3) as originally enacted; Sch 3 para 2(1) amended, Sch 3 para 2(3), (6), (7) substituted: Pensions Act 2008 Sch 2 paras 1-3.

TEXT AND NOTE 11--As to the orders made under the 1993 Act Sch 3 para 2(1), see the Occupational Pensions (Revaluation) Order 2008, SI 2008/3070; and the Occupational Pensions (Revaluation) Order 2009, SI 2009/3267.

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### **943. The average salary method.**

The average salary method is to revalue the member's<sup>1</sup> salaries<sup>2</sup> as respects the pre-pension period<sup>3</sup> in any way in which they would have been revalued during that period if he had remained in the same pensionable service<sup>4</sup>. For these purposes those salaries are to be taken to include:

- 2604 (1) any amount which is attributed to them, otherwise than by virtue of these provisions, as the result of a revaluation for which the rules of the scheme provide<sup>5</sup>; and
- 2605 (2) any amount which is for any reason credited to the member by way of salary notionally earned<sup>6</sup>.

For the purposes of the application of these provisions to a case where a member is credited with an amount by reference to salary notionally earned over a period of time of a particular length, that period must be taken to have ended immediately before the member's actual pensionable service began<sup>7</sup>.

1 As to the power to prescribe for these purposes the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member see PARA 557 note 9 ante. For the meaning of 'prescribe' see PARA 555 note 1 ante; and for the meaning of 'occupational pension scheme' see PARA 741 ante.

2 'Salaries' means, subject to the Pension Schemes Act 1993 s 84, Sch 3 para 3(4), the member's salaries for the period between the date when his pensionable service began and the termination date, or such part of them as was relevant under the scheme to the calculation of the retirement benefits payable under the scheme to him or to any other person in respect of him: Sch 3 para 3(2). For the meaning of 'pensionable service' see PARA 664 note 2 ante. For the meaning of 'the termination date' see PARA 941 head (1)(b) ante. Where the member's pensionable service ended before 1 January 1991, Sch 3 para 3(2) must have effect with the substitution for the words from 'means' to 'termination date' of the words 'means the member's salaries for the period between 1 January 1985 and the termination date': Sch 3 para 3(4).

3 For the meaning of 'the pre-pension period' see PARA 941 head (1)(c) ante.

4 Pension Schemes Act 1993 Sch 3 para 3(1); and see note 2 supra.

5 Ibid Sch 3 para 3(3)(a).

6 Ibid Sch 3 para 3(3)(b).

7 Ibid Sch 3 para 3(5).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/21. PROTECTION FOR EARLY LEAVERS/(2) REVALUATION OF ACCRUED BENEFITS/944. The flat rate method and the money purchase method.

#### **944. The flat rate method and the money purchase method.**

The flat rate method is to revalue the benefits which have accrued to the member<sup>1</sup> as respects the pre-pension period<sup>2</sup> in any way in which they would have been revalued during that period if he had remained in the same pensionable service<sup>3</sup>. Subject to the following provisions, the money purchase method is to apply the investment yield and any bonuses arising from payments made by or on behalf of a member towards providing any pension or other retirement benefit which is payable under the scheme to him or to any other person in respect of him in the manner in which they would have been applied if his pensionable service had not terminated<sup>4</sup>.

The Secretary of State<sup>5</sup> may by regulations<sup>6</sup> authorise trustees and managers<sup>7</sup> of occupational pension schemes<sup>8</sup> to deduct from any pension or other retirement benefit provided by virtue of the money purchase method an appropriate amount in respect of the administrative expenses incurred by them in carrying this method into effect<sup>9</sup>. The trustees and managers of a personal pension scheme<sup>10</sup> may, when providing a pension or other retirement benefit by virtue of the money purchase method, deduct the actual administrative expenses of doing so, or the amount of the administrative expenses which would have been incurred in providing a money purchase benefit<sup>11</sup> for the same member if contributions had not ceased to be paid to the scheme in respect of him, whichever is the less<sup>12</sup>.

1 As to the power to prescribe for these purposes the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member see PARA 557 note 9 ante. For the meaning of 'prescribe' see PARA 555 note 1 ante; and for the meaning of 'occupational pension scheme' see PARA 741 ante.

2 For the meaning of 'the pre-pension period' see PARA 941 head (1)(c) ante.

3 Pension Schemes Act 1993 s 84, Sch 3 para 4. For the meaning of 'pensionable service' see PARA 664 note 2 ante.

4 Ibid Sch 3 para 5(1).

5 As to the Secretary of State see PARA 1 ante.

6 For the meaning of 'regulations' see PARA 557 note 2 ante.

7 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme see PARA 555 note 9 ante.

8 For the meaning of 'occupational pension scheme' see PARA 741 ante.

9 Pension Schemes Act 1993 Sch 3 para 5(2).

10 For the meaning of 'personal pension scheme' see PARA 710 ante.

11 For the meaning of 'money purchase benefit' see PARA 811 note 2 ante.

12 Pension Schemes Act 1993 Sch 3 para 5(3).

#### **UPDATE**

#### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/21. PROTECTION FOR EARLY LEAVERS/(2) REVALUATION OF ACCRUED BENEFITS/945. Revaluation not to apply to substituted benefit.

**945. Revaluation not to apply to substituted benefit.**

Nothing in the statutory provisions relating to the revaluation of accrued benefits<sup>1</sup> is to be construed as requiring the revaluation of any pension or other benefit provided as an alternative to short term benefit<sup>2</sup> by way of complete substitute for another pension or benefit<sup>3</sup>.

1    le in the Pension Schemes Act 1993 Pt III Ch II (ss 83-86), Sch 3 (as amended): see PARA 941 et seq ante.

2    le by virtue of *ibid* s 73(2)(b): see PARA 934 ante.

3    *Ibid* s 85.

**UPDATE**

**931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

**945 Revaluation not to apply to substantial benefit**

NOTE 2--Add 'or by virtue of the Pension Schemes Act 1993 s 101D(2)(b)': s 85 (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 28, 32).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/21. PROTECTION FOR EARLY LEAVERS/(2) REVALUATION OF ACCRUED BENEFITS/946. Special cases.

#### **946. Special cases.**

The statutory provisions relating to the revaluation of accrued benefits<sup>1</sup> are modified in relation to:

- 2606 (1) cases where the member's<sup>2</sup> normal pension age<sup>3</sup> is earlier than 60<sup>4</sup>;
- 2607 (2) hybrid benefits, that is benefits the rate or amount of which is calculated by reference to the greatest, or smallest, of two or more of an average salary benefit<sup>5</sup>, a flat rate benefit<sup>6</sup>, a money purchase benefit<sup>7</sup> and some other benefit to which the revaluation provisions<sup>8</sup> apply<sup>9</sup>;
- 2608 (3) benefits consisting partly of a component to which the final salary method<sup>10</sup> applies and partly of a component to which that method does not apply<sup>11</sup>;
- 2609 (4) administrative expenses in relation to money purchase benefits<sup>12</sup>;
- 2610 (5) benefits other than short service benefit<sup>13</sup>;
- 2611 (6) commutation, forfeiture and surrender<sup>14</sup>;
- 2612 (7) retirement benefits varied at pensionable age<sup>15</sup>;
- 2613 (8) the rounding up or rounding down of the number of months of a member's pensionable service where the final salary method applies to a benefit under a scheme<sup>16</sup>;
- 2614 (9) schemes with an overseas element<sup>17</sup>;
- 2615 (10) breaks in pensionable service<sup>18</sup>; and
- 2616 (11) lump sums in respect of service before 6 April 1975<sup>19</sup>.

1    Ie the Pension Schemes Act 1993 Pt III Ch II (ss 83-86), Sch 3 (as amended): see PARA 941 et seq ante.

2    As to the power to prescribe for these purposes the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member see PARA 557 note 9 ante. For the meaning of 'prescribe' see PARA 555 note 1 ante; and for the meaning of 'occupational pension scheme' see PARA 741 ante.

3    For the meaning of 'normal pension age' see PARA 896 note 6 ante.

4    See the Occupational Pension Schemes (Revaluation) Regulations 1991, SI 1991/168, reg 3 (regs 3-13 amended by SI 1994/1062; having effect by virtue of the Pension Schemes Act 1993 s 189(1), Sch 6 para 2(2)).

5    For the meaning of 'average salary benefit' see PARA 941 note 14 ante.

6    For the meaning of 'flat rate benefit' see PARA 941 note 15 ante.

7    For the meaning of 'money purchase benefit' see PARA 811 note 2 ante.

8    Ie the Pension Schemes Act 1993 s 84 (as amended): see PARA 941 ante.

9    See the Occupational Pension Schemes (Revaluation) Regulations 1991, SI 1991/168, reg 4 (as amended: see note 4 supra).

10   For the meaning of 'final salary method' see PARA 942 ante.

11   See the Occupational Pension Schemes (Revaluation) Regulations 1991, SI 1991/168, reg 5 (as amended: see note 4 supra).

12   See *ibid* reg 6 (as amended: see note 4 supra).

13 See *ibid* reg 7 (as amended: see note 4 *supra*). Where a scheme provides so that a member becomes entitled to benefit when his pensionable service terminates before normal pension age, even if the member does not become entitled to short service benefit, any provision contained in the scheme that would be a protected provision (as to which see PARA 972 note 2 *post*) in relation to short service benefit is to be treated as a protected provision in relation to any benefit to which a member so becomes entitled: reg 7 (as so amended). For the meaning of 'short service benefit' see PARA 932 note 6 *ante*.

14 See *ibid* reg 8 (as amended: see note 4 *supra*).

15 See *ibid* reg 9 (as amended: see note 4 *supra*). For the meaning of 'pensionable age' see PARA 562 *ante*.

16 See *ibid* reg 10 (as amended: see note 4 *supra*).

17 See *ibid* reg 11 (as amended: see note 4 *supra*). The statutory provisions relating to revaluation (see note 1 *supra*) apply to schemes with any overseas element only to the extent that the preservation requirements apply to the scheme: see reg 11 (as so amended). For the meaning of 'the preservation requirements' see PARA 931 *ante*.

18 See *ibid* reg 12 (as amended: see note 4 *supra*). The statutory provisions relating to revaluation (see note 1 *supra*) are modified so that they do not apply if, when the member returns to pensionable service under the scheme (1) the member exercises an option to surrender the benefits that had accrued before the break to acquire entitlement to further benefits under the scheme; or (2) the scheme provides that the member's pensionable service before and after the break is to be treated as continuous for the purpose of qualifying the member for long service benefit under the scheme; and for this purpose, a member's pensionable service is broken if, after it terminates, the member returns to pensionable service under the same scheme: reg 12 (as so amended).

19 See *ibid* reg 13 (as amended: see note 4 *supra*).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **946 Special cases**

NOTE 4--SI 1991/168 reg 8 further amended: SI 2005/2877.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/21. PROTECTION FOR EARLY LEAVERS/(3) PROTECTION OF INCREASES IN GUARANTEED MINIMUM PENSIONS/947. Application of the general protection principle.

### **(3) PROTECTION OF INCREASES IN GUARANTEED MINIMUM PENSIONS**

#### **947. Application of the general protection principle.**

The general protection principle applies where:

- 2617 (1) there is an interval between:  
234
  - 308. (a) the date on which an earner<sup>1</sup> ceases to be in employment<sup>2</sup> which is contracted-out<sup>3</sup> by reference to an occupational pension scheme<sup>4</sup> which is not a money purchase contracted-out scheme<sup>5</sup> ('the cessation date'); and
  - 309. (b) the date on which his guaranteed minimum pension<sup>6</sup> under that scheme commences ('the commencement of payment date')<sup>7</sup>;
- 235 2618 (2) the relevant sum<sup>8</sup> exceeds his guaranteed minimum on the day after the cessation date<sup>9</sup>; and
- 2619 (3) on the commencement of payment date or at any time after it his guaranteed minimum pension under the scheme exceeds the amount of his guaranteed minimum under it on the day after the cessation date<sup>10</sup>.

The general protection principle also applies where:

- 2620 (i) there is an interval between the earner's cessation date and whichever of the following is the earlier, that is the date of his death or his commencement of payment date<sup>11</sup>;
- 2621 (ii) the relevant sum exceeds one half of the earner's guaranteed minimum on the day after the cessation date<sup>12</sup>; and
- 2622 (iii) at any time when a pension under the occupational pension scheme is required to be paid to the earner's widow or widower, the widow's or, as the case may be, the widower's guaranteed minimum pension under the scheme exceeds one half of the earner's guaranteed minimum on the day after the cessation date<sup>13</sup>.

Nothing in these provisions must, however, be construed as entitling an earner who has not reached normal pension age to any portion of a pension under a scheme to which he would not otherwise be entitled<sup>14</sup>.

The general protection principle does not apply to a pension to which a person is entitled in respect of employment if:

- 2623 (A) the earner left the employment, or left it for the last time, before 1 January 1985<sup>15</sup>; or
- 2624 (B) the employment ceased, or ceased for the last time, to be contracted-out in relation to him before that date<sup>16</sup>.

In making any calculation for these purposes<sup>17</sup> any commutation, forfeiture or surrender of, any charge or lien on, and any set-off against, the whole or part of a pension must be disregarded<sup>18</sup>.

1 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

2 For the meaning of 'employment' generally see PARA 560 note 5 ante.

3 For the meaning of 'contracted-out employment' see PARA 878 ante.

4 For the meaning of 'occupational pension scheme' see PARA 741 ante.

5 For the meaning of 'money purchase scheme' see PARA 811 note 2 ante; and for the meaning of 'contracted-out scheme' see PARA 880 ante.

6 For the meaning of 'guaranteed minimum pension' see PARA 878 ante. In calculating an earner's guaranteed minimum for the purposes of the Pension Schemes Act 1993 Pt IV Ch III (ss 87-92) (see the text and notes 7-19 infra; and PARAS 948-950 post) his earnings factor must be taken to be that factor as increased, except as provided by s 92(3), by the last order under the Social Security Pensions Act 1975 s 21 (repealed) or the Social Security Administration Act 1992 s 148 (as amended) (see PARA 56 ante) to come into force before the end of the tax year in which the cessation date falls: Pension Schemes Act 1993 s 92(2). For the meaning of 'earnings factor' see PARA 56 ante (definition applied by s 181(1)). For the meaning of 'tax year' see PARA 893 note 1 ante. If an earner's cessation date falls in the tax year in which he attains pensionable age, s 92(2) has effect in relation to him as if for the words from 'tax year' onwards there were substituted the words 'final relevant year': s 92(3). 'Final relevant year' has the same meaning as in s 16 (as amended) (see PARA 891 ante): s 92(4). For the meaning of 'pensionable age' see PARA 562 ante.

7 Ibid s 87(1)(a). The provisions set out in s 87(1), (2) are referred to as 'the general protection principle'.

8 'The relevant sum' means: (1) in a case where ibid s 87(1) applies: (a) if the earner reaches normal pension age on or before the cessation date, an amount equal to the weekly rate of his pension on the day after the cessation date; and (b) if he reaches normal pension age after the cessation date, an amount equal to the weekly rate of any short service benefit which has accrued to him on the cessation date or, where no such benefit has then accrued, any other benefit to which s 88(1)(a)(ii) applies and which has then accrued to him; and (2) in a case where s 87(2) applies (see the text and notes 11-13 infra), an amount equal to the weekly rate at which, on the prescribed assumptions, a pension would have begun to be paid to the widow or widower if that person had satisfied the conditions for entitlement to a pension which are specified in the scheme: s 88(1). Head (1) supra has effect subject to s 88(5) and to s 87(5) (see note 10 infra) and s 91(1) (see PARA 949 post); and head (2) supra has effect subject to section 87(5): s 88(2). The prescribed assumptions for the purpose of calculating the relevant sum are as follows: in a case where s 87(2) applies, 'the relevant sum' means an amount equal to the weekly rate at which a pension would have commenced to be paid to the widow or widower, on the assumptions that (i) the earner had died on the day after the termination of employment date being then married to the widow or widower; and (ii) the weekly rate of the pension was then calculated using the formula appropriate to the circumstances of the earner's actual death but excluding, where the earner dies in employment to which the scheme applies, any notional service after the termination of employment date: see the Contracting-out (Protection of Pensions) Regulations 1991, SI 1991/166, reg 5 (amended by SI 1994/1062; having effect by virtue of the Pension Schemes Act 1993 s 189(1), Sch 6 para 2(2)). For the meaning of 'prescribed' see PARA 555 note 1 ante.

The benefit other than short service benefit to which head (1)(b) supra applies is benefit which would have been provided as either the whole or part of the earner's short service benefit; or of which the earner's short service benefit would have formed part, if the Pension Schemes Act 1993 s 71(1)(a) (see PARA 932 ante) had effect with the substitution of a reference to the service which the earner had on the cessation date for the reference to two years' qualifying service: s 88(3). Any such benefit is only to be included in the relevant sum to the extent that it does not exceed the amount which the scheme would have had to provide as short service benefit if s 71(1) had effect as mentioned in s 88(3): s 88(4). If the payment of any part of the earner's pension is postponed beyond the cessation date, the relevant sum is an amount equal to what would have been the weekly rate of his pension on the day after the cessation date if there had been no such postponement: s 88(5). For the meaning of 'normal pension age' see PARA 896 note 6 ante. Any reference to the weekly rate of a pension is to be construed, in relation to a pension payable otherwise than weekly, as a reference to the weekly sum which would be payable in respect of a pension of that amount payable weekly: s 92(5). For the meaning of 'short service benefit' see s 71(1), (2); and PARA 932 note 6 ante.

9 Ibid s 87(1)(b).

10 Ibid s 87(1)(c). To the extent that amounts attributable to transfer credits have accrued by reason of any transfer before 1 January 1985, they are to be disregarded for the purposes of s 87(1)(c), (2)(c) (see the text and note 13 infra) and s 87(4)(b) (see note 13 infra): s 87(5). For the meaning of 'transfer credits' see PARA 612 note 5 ante.

11 Ibid s 87(2)(a).

- 12 Ibid s 87(2)(b).
- 13 Ibid s 87(2)(c).
- 14 Ibid s 87(6).
- 15 Ibid s 87(7)(a).
- 16 Ibid s 87(7)(b).
- 17 Ie the purposes of ibid Pt IV Ch III (ss 87-92): see the text and notes 1-16 supra; and PARA 948 post.
- 18 Ibid s 92(1).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **947 Application of the general protection principle**

TEXT AND NOTES--Pension Schemes Act 1993 ss 87, 88 amended so as to extend provisions to surviving civil partners: SI 2005/2050.

TEXT AND NOTE 7--1993 Act s 87(1)(a) amended: Pensions Act 2007 Sch 4 para 28 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

NOTE 8--SI 1991/166 reg 5 further amended: SI 2005/2050.

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#### **948. Requirements of the general protection principle.**

Where the general protection principle applies<sup>1</sup>, the weekly rate of the pension payable to the member<sup>2</sup> at any time when that pension is required to be paid or, as the case may be, is payable to the widow or widower at any specified time<sup>3</sup>, must be an amount not less:

- 2625 (1) in a case where<sup>4</sup> a pension is provided by way of complete substitute for short service benefit<sup>5</sup> or, as the case may be, for widow's or widower's pension, than the weekly rate of that pension<sup>6</sup>; and
- 2626 (2) in any other case, than the relevant aggregate<sup>7</sup>.

'The relevant aggregate' means the aggregate of the following:

- 2627 (a) the relevant sum<sup>8</sup>;
- 2628 (b) the excess of guaranteed minimum pension as mentioned in the provisions applying the general protection principle<sup>9</sup>;
- 2629 (c) any amount which is an appropriate addition<sup>10</sup> at the time in question; and
- 2630 (d) where the scheme provides that part of the earner's or, as the case may be, the widow's or widower's pension is to accrue after the cessation date by reason of the earner's employment after that date, the later earnings addition<sup>11</sup>,

and 'the later earnings addition' means the amount (if any) by which the assumed later unguaranteed element<sup>12</sup> exceeds the unguaranteed element<sup>13</sup>.

1    Ie where the Pension Schemes Act 1993 s 87(1) or (2) applies: see PARA 947 ante.

2    As to the power to prescribe for these purposes the persons who are to be regarded as members or prospective members of an occupational pension scheme and as to the times at which and the circumstances in which a person is to be treated as becoming, or as ceasing to be, a member or prospective member see PARA 557 note 9 ante. For the meaning of 'prescribe' see PARA 555 note 1 ante; and for the meaning of 'occupational pension scheme' see PARA 741 ante.

3    Ie at any such time as is mentioned in the Pension Schemes Act 1993 s 87(2)(c): see PARA 947 ante.

4    Ie by virtue of *ibid* s 73(2)(b): see PARA 934 ante.

5    For the meaning of 'short service benefit' see PARA 932 note 6 ante.

6    Pension Schemes Act 1993 s 87(3)(a).

7    *Ibid* s 87(3)(b).

8    For the meaning of 'the relevant sum' see PARA 947 note 8 ante.

9    Ie as mentioned in the Pension Schemes Act 1993 s 87(1)(c) or, as the case may be, s 87(2)(c): see PARA 947 ante.

10   'Appropriate addition' means: (1) where a scheme provides that part of an earner's or, as the case may be, a widow's or widower's pension must accrue after the cessation date by reason of the earner's employment after that date, an amount equal to the part which has so accrued; and (2) where a scheme provides that an earner's or, as the case may be, a widow's or widower's pension which has accrued before that date must be enhanced after that date if payment of the earner's pension is postponed, the amount by which the

unguaranteed element of the pension has been enhanced by reason of the postponement: *ibid* s 89(1). For the purposes of head (2) *supra* the unguaranteed element of a pension is: (a) in the case of an earner's pension, the excess of the pension on the day after the cessation date over the earner's guaranteed minimum on that day; and (b) in the case of the widow's or widower's pension, the excess of that pension on that day over one half of the earner's guaranteed minimum on that day: s 89(2). For the meaning of 'earner' see *PARA 32 ante* (definition applied by s 181(1)); for the meaning of 'employment' see *PARA 560 note 5 ante*; and for the meaning of 'cessation date' see *PARA 947 head (1)(a) ante*.

11 *Ibid* s 87(4).

12 For these purposes, 'the unguaranteed element' means the amount by which the relevant sum exceeds the earner's guaranteed minimum on the day after his cessation date or, in the case of a widow's or widower's pension, one half of that minimum: *ibid* s 90(2)(a). As to the assumed later unguaranteed element see *note 13 infra*.

13 *Ibid* s 90(1). 'The assumed later unguaranteed element' means the amount by which the relevant sum would exceed the earner's guaranteed minimum (or, in the case of a widow's or widower's pension, one half of that minimum) on the assumptions mentioned in s 90(3): s 90(2)(b). Those assumptions are (1) that the relevant sum were calculated on the basis that the weekly rate of the pension or benefit which determines that sum had been calculated by reference to the level of earnings by reference to which that rate would have been calculated if the earner's cessation date had fallen on the earlier of the earner's commencement of payment date, or the date on which the earner ceased to be in pensionable service under the scheme; and (2) that the earner's guaranteed minimum were such sum as bears the same proportion to the assumed later unguaranteed element as the guaranteed minimum mentioned in s 90(2)(a) bears to the unguaranteed element: s 90(3).

Where part of the pension for the earner, or the earner's widow or widower, accrues after the earner reaches normal pension age by reason of the earner's employment after that date, s 90 is so modified as to require the earner's later earnings level to be calculated as if the earner's termination of employment date had fallen on the earlier of (a) the earner's commencement of payment date; or (b) the date on which the pension ceased to accrue under the scheme: Contracting-out (Protection of Pensions) Regulations 1991, SI 1991/166, reg 8 (amended by SI 1994/1062; having effect by virtue of the Pension Schemes Act 1993 s 189(1), Sch 6 para 2(2)).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and *PARA 960A*.

### **948 Requirements of the general protection principle**

TEXT AND NOTES--Pension Schemes Act 1993 ss 87, 89, 90 amended so as to extend provisions to surviving civil partners: SI 2005/2050.

NOTE 13--SI 1991/166 reg 8 further amended: SI 2005/2050.

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**949. Special provision where employment continues after it ceases to be contracted-out by reference to scheme.**

If (1) an earner's<sup>1</sup> employment<sup>2</sup> ceases to be contracted-out<sup>3</sup> by reference to an occupational pension scheme<sup>4</sup> but the scheme continues to apply to it; or (2) an earner transfers from employment which is contracted-out by reference to an occupational pension scheme to employment to which the scheme applies but which is not contracted-out by reference to it, the amount of any short service<sup>5</sup> or other benefit which has accrued to the earner must be computed for certain purposes<sup>6</sup> as it would be computed if he had ceased on the cessation date<sup>7</sup> to be in employment to which the scheme applies<sup>8</sup>.

If a benefit under a scheme is conditional on an earner attaining a particular age<sup>9</sup> or having a particular length of service and one of the events mentioned above occurs before he has fulfilled the condition, but he continues to be in employment to which the scheme applies until he has done so, the earner must be treated for the statutory purposes<sup>10</sup> as if that benefit had accrued to him<sup>11</sup>.

1 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

2 For the meaning of 'employment' generally see PARA 560 note 5 ante.

3 For the meaning of 'contracted-out employment' see PARA 878 ante.

4 For the meaning of 'occupational pension scheme' see PARA 741 ante.

5 For the meaning of 'short service benefit' see PARA 932 note 6 ante.

6 Ie the purposes of the Pension Schemes Act 1993 s 88(1)(a)(ii): see PARA 947 ante.

7 For the meaning of 'the cessation date' see PARA 947 head (1)(a) supra.

8 Pension Schemes Act 1993 s 91(1).

9 As to when a person attains a particular age see PARA 881 note 2 ante.

10 Ie for the purposes of the Pension Schemes Act 1993 ss 87-90: see PARAS 947-948 ante.

11 Ibid s 91(2).

**UPDATE**

**931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

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#### **949A. Protection of increases in guaranteed minimum pensions: alternative rules.**

Alternative rules relating to the protection of increases in guaranteed minimum pensions<sup>1</sup> apply, instead of the usual rules relating to such protection<sup>2</sup>, in the case of a person, known as the pensioner, who is entitled to benefits under any occupational pension scheme if the benefits to which he is entitled under the scheme include a guaranteed minimum pension<sup>3</sup>. The alternative rules do not apply in the pensioner's case, instead of the usual rules, unless (1) the pensioner is a member of the scheme who, in relation to that scheme, left pensionable service after the coming into force of the alternative rules<sup>4</sup>; (2) the pensioner is the widow or widower of a member of the scheme whose pensionable service ended, by death or otherwise, after that date; or (3) certain criteria<sup>5</sup> are satisfied in relation to the benefits to which the pensioner is entitled under the scheme<sup>6</sup>. The alternative rules also do not apply in the pensioner's case (and, accordingly, the usual rules apply) if the scheme is a scheme of a prescribed description, unless the trustees or managers of the scheme have elected<sup>7</sup>, in the prescribed manner, that the alternative rules should apply in the case of the scheme<sup>8</sup>.

Where the alternative rules apply in the pensioner's case, the amount of the benefits to which he is entitled under the scheme must not be less than the amount of the benefits to which he would have been entitled under the scheme if his entitlement fell to be calculated by a specified method<sup>9</sup>. This provision<sup>10</sup> does not apply to benefits consisting in an alternative to a short service benefit<sup>11</sup>, except to the extent that (a) that provision would apply for the computation of the short service benefit to which those benefits are an alternative; and (b) the amount of any of the alternative benefits falls to be computed wholly or partly by reference to the value of what would have been the short service benefit<sup>12</sup>. All the above provisions override any provision of an occupational pension scheme with which they are inconsistent except a provision which is a protected provision<sup>13</sup>. However, all the above provisions<sup>14</sup> are without prejudice to any person's entitlement to exercise (i) any right of commutation, forfeiture or surrender of the whole or any part of any benefits computed in accordance with the alternative rules; (ii) any charge or lien on the whole or any part of any such benefits; or (iii) any right of set-off against the whole or any part of any such benefits, and, accordingly, the computations to be done<sup>15</sup> must be done disregarding anything falling within any of heads (i)-(iii) above<sup>16</sup>.

The Secretary of State may by order make such modifications of the above provisions as he considers appropriate<sup>17</sup>.

1    Ie contained in the Child Support, Pensions and Social Security Act 2000 Sch 5 paras 14-17. As to commencement see NOTE 4.

2    Ie contained in the Pension Schemes Act 1993 Pt IV Ch III (ss 87-92) (see PARAS 947-949).

3    Child Support, Pensions and Social Security Act 2000 Sch 5 para 14(1).

4    The Child Support, Pensions and Social Security Act 2000 Sch 5 paras 14-17 came into force on 12 February 2001, for the purposes only of authorising the making of regulations and the making of orders, and on 6 April 2002, for all other purposes: SI 2000/3166 (amended by SI 2001/1252), SI 2001/2295.

5    The criteria are that (1) the time at which the benefits first become payable is after the coming into force of the Child Support, Pensions and Social Security Act 2000 Sch 5 Pt II (see NOTE 4); (2) the benefits do not first become payable in respect of the death of a member of the scheme to whom benefits had already become payable under the scheme before that date; and (3) the trustees or managers of the scheme have elected, in the prescribed manner, that Sch 5 Pt II should apply to benefits first becoming payable under the scheme after that date: Sch 5 para 14(3). 'Prescribed' means prescribed by regulations: Pension Schemes Act 1993 s 181(1);

Child Support, Pensions and Social Security Act 2000 Sch 5 para 17(4). Any power of the Secretary of State to make regulations under Sch 5 Pt II is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Sch 5 para 17(5). Furthermore, the Pension Schemes Act 1993 s 182(2)-(5) (see PARA 977) applies (a) to any power of the Secretary of State to make regulations under the Child Support, Pensions and Social Security Act 2000 Sch 5 Pt II; and (b) to the power of the Secretary of State to make an order under Sch 5 para 17(6) (see TEXT AND NOTE 17), as it applies to his powers to make regulations and orders under the Pension Schemes Act 1993: Child Support, Pensions and Social Security Act 2000 Sch 5 para 17(8). As to elections see NOTE 7.

6 Ibid Sch 5 para 14(2).

7 An election for the purposes of ibid Sch 5 para 14 is not exercisable differently in relation to different members of the scheme and, once exercised, is irrevocable: Sch 5 para 14(5).

8 Ibid Sch 5 para 14(4).

9 Ibid Sch 5 para 15(1). The specified method is as follows:

Step 1: compute the amount of any benefits consisting in the guaranteed minimum pension to which the pensioner is entitled;

Step 2: compute what would have been the amount of those benefits on the basis of assumptions set out in Sch 5 para 15(3);

Step 3: determine the extent (if any) to which attributing an amount of benefits equal to the amount computed in accordance with Step 2 to rights accruing before 6 April 1997 would leave any such rights unused;

Step 4: compute, in accordance with Sch 5 para 15(4), the amount of such of the benefits to which the pensioner is entitled under the scheme as are attributable to rights accruing before 6 April 1997 (if any) which, applying the determination in Step 3, would be left unused after the attribution of the amount mentioned in that Step to rights so accruing;

Step 5: compute the amount resulting, on the required assumption, from the application of the statutory revaluations and increases in the case of the benefits computed in accordance with Step 4;

Step 6: compute, in accordance with Sch 5 para 15(4), the amount of such of the benefits to which the pensioner is entitled under the scheme as are attributable to rights accruing on or after 6 April 1997;

Step 7: compute the amount resulting, on the required assumption, from the application of the statutory revaluations and increases in the case of the benefits computed in accordance with Step 6;

Step 8: aggregate the results of Steps 1, 5 and 7 to give the minimum benefits required by Sch 5 para 15(1): Sch 5 para 15(2).

The assumptions referred to in Step 2 are (1) that no increases are required to be made in accordance with the Pension Schemes Act 1993 s 15 (see PARA 892) or 109 (see PARA 926); (2) that increases in accordance with s 16(1) (see PARA 891) of any earner's earnings factors are to be calculated as if references to the final relevant year were references to whichever is the earlier of (a) the final relevant tax year; and (b) the tax year immediately preceding that in which the member in question left service that qualified him for salary-related benefits under the scheme; and (3) that no increases in accordance with any provision included in the scheme by virtue of s 16(3) (see PARA 891) are to be made for any year after the tax year immediately preceding that in which the member in question left service that qualified him for salary-related benefits under the scheme: Child Support, Pensions and Social Security Act 2000 Sch 5 para 15(3). Any reference in Sch 5 para 15 to a provision of the Pension Schemes Act 1993 includes a reference to any enactment re-enacted in that provision: Child Support, Pensions and Social Security Act 2000 Sch 5 para 15(9). 'Salary-related benefits' means benefits that are not money purchase benefits: Sch 5 para 17(3).

For the purposes of Steps 4 and 6 (a) if (apart from Sch 5 para 15(4)) there would be a difference between the two steps in the level of salary taken as the level by reference to which any salary-related benefits are to be computed, the level used for Step 4 must be no lower than that used for Step 6; and (b) statutory revaluations and increases must not be attributed to rights accruing at any time: Sch 5 para 15(4).

For the purposes of Steps 5 and 7, the required assumption is that the benefits in whose case the statutory revaluations and increases are applied comprise a whole pension deriving from the rights to which they are taken to be attributable for the purposes of Step 4 or, as the case may be, Step 6: Sch 5 para 15(5).

In Sch 5 Pt II references to rights accruing to a member of a scheme before 6 April 1997 include references (i) in relation to salary-related benefits, to rights accruing at any time in respect of service before that date; and (ii) in relation to benefits of any description, to rights that derive from any transfer of accrued rights or transfer payment and represent rights accruing under any other scheme before that date; and a reference in Sch 5 Pt II to rights accruing on or after that date are to be construed accordingly: Sch 5 para 17(1). For the purposes of Sch 5 Pt II rights to money purchase benefits that are attributable to payments in respect of employment are rights accruing before 6 April 1997 in so far only as that employment was employment carried on before that

date; and a reference in Sch 5 Pt II to rights accruing on or after that date are to be construed accordingly: Sch 5 para 17(2).

Subject to Sch 5 para 15(7), references in Sch 5 para 15 to the statutory revaluations and increases are references to (A) the revaluations required to be made in accordance with the Pension Schemes Act 1993 Pt IV Ch II (ss 83-86: see PARA 941); and (B) the increases required to be made by virtue of the Pensions Act 1995 s 51 (see PARA 861): Child Support, Pensions and Social Security Act 2000 Sch 5 para 15(6). For the purpose of applying the statutory revaluations and increases for the purposes of Steps 5 and 7, money may be used in a way allowed by the Pension Schemes Act 1993 s 110(1) (see PARA 926), and any deductions authorised by the Pensions Act 1995 s 53(1) or (2) (see PARA 863) may be made: Child Support, Pensions and Social Security Act 2000 Sch 5 para 15(7).

10    Ie *ibid* Sch 5 para 15.

11    Ie provided for under the Pension Schemes Act 1993 s 73(2)(b): see PARA 934.

12    Child Support, Pensions and Social Security Act 2000 Sch 5 para 16(1).

13    Ie under the Pension Schemes Act 1993 s 129(3), for the purposes of s 129(2) (see PARA 972): Child Support, Pensions and Social Security Act 2000 Sch 5 para 16(3).

14    Ie including *ibid* Sch 5 para 16(3).

15    Ie under *ibid* Sch 5 para 15.

16    *Ibid* Sch 5 para 16(4).

17    *Ibid* Sch 5 para 17(6). Such an order must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Sch 5 para 17(7). As to such an order see also NOTE 5.

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

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## **950. Special cases.**

The general protection principle<sup>1</sup> is modified in relation to:

- 2631 (1) hybrid benefits, that is where a scheme<sup>2</sup> provides for the rate of a pension for the earner<sup>3</sup>, or the earner's widow or widower, to be the greater of (a) a rate that is calculated by reference to the earner's earnings<sup>4</sup>; and (b) a rate that is not so calculated<sup>5</sup>;
- 2632 (2) retirement benefits varied at pensionable age<sup>6</sup>;
- 2633 (3) pensions for widows and widowers varied after their commencement<sup>7</sup>;
- 2634 (4) cases where no short service benefit<sup>8</sup> has accrued to the earner<sup>9</sup>; and
- 2635 (5) transfers which were agreed to but not implemented before 1 January 1985<sup>10</sup>.

1 The provisions of the Pension Schemes Act 1993 Pt IV Ch III (ss 87-92): see PARAS 947-949 ante.

2 For the meaning of 'scheme' for these purposes see PARA 931 note 5 ante.

3 For the meaning of 'earner' see PARA 32 ante (definition applied by the Pension Schemes Act 1993 s 181(1)).

4 For the meaning of 'earnings' see PARA 33 ante (definition as applied: see note 3 supra).

5 See the Contracting-out (Protection of Pensions) Regulations 1991, SI 1991/166, reg 2 (as amended). The Contracting-out (Protection of Pensions) Regulations 1991, SI 1991/166 are amended by SI 1994/1062; and have effect by virtue of the Pension Schemes Act 1993 s 189(1), Sch 6 para 2(2).

6 See the Contracting-out (Protection of Pensions) Regulations 1991, SI 1991/166, reg 3 (as amended: see note 5 supra). For the meaning of 'pensionable age' see PARA 562 ante.

7 See *ibid* reg 4 (as amended: see note 5 supra).

8 For the meaning of 'short service benefit' see PARA 932 note 6 ante.

9 See the Contracting-out (Protection of Pensions) Regulations 1991, SI 1991/166, reg 6 (as amended: see note 5 supra).

10 See *ibid* reg 7 (as amended): see note 5 supra).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

## **950 Special cases**

NOTE 5--SI 1991/166 further amended: SI 2005/2050.

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## **(4) TRANSFER VALUES**

### **951. Circumstances in which the right to a cash equivalent applies.**

The statutory provisions relating to transfer values which confer the right to a cash equivalent<sup>1</sup> apply:

- 2636 (1) to any member<sup>2</sup> of an occupational pension scheme:
- 236 310. (a) whose pensionable service<sup>3</sup> has terminated at least one year before normal pension age<sup>4</sup>; and
- 311. (b) who on the date on which his pensionable service terminated had accrued rights<sup>5</sup> to benefit under the scheme,
- 237 2637 Except a member of a salary-related<sup>6</sup> occupational pension scheme whose pensionable service terminated before 1 January 1986 and in respect of whom prescribed requirements<sup>7</sup> are satisfied<sup>8</sup>;
- 2638 (2) to any member of a personal pension scheme (other than a scheme which is comprised in an annuity contract made before 4 January 1988) who has accrued rights to benefit under the scheme<sup>9</sup>.

Regulations<sup>10</sup> may provide for the right to a cash equivalent not to apply in relation to a person of a prescribed description or may apply the provisions conferring that right with prescribed modifications<sup>11</sup> to occupational pension schemes which are not money purchase schemes but where some of the benefits that may be provided are money purchase benefits<sup>12</sup>.

1 le the provisions of the Pension Schemes Act 1993 Pt IV Ch IV (ss 93-101) (as amended): see PARA 952 et seq post.

2 For these purposes, any reference to a member of an occupational pension scheme or a personal pension scheme in ibid Pt IV Ch IV (as amended) is a reference to a member of such a scheme to whom Pt IV Ch IV (as amended) applies: s 93(2). For the meaning of 'occupational pension scheme' and 'personal pension scheme' see PARAS 741, 710 respectively ante.

3 For the meaning of 'pensionable service' see PARA 664 note 2 ante.

4 For the meaning of 'normal pension age' see PARA 896 note 6 ante.

5 For the meaning of 'accrued rights' for these purposes see PARA 934 note 7 ante.

6 An occupational pension scheme is salary-related if the scheme is not a money purchase scheme, and the scheme does not fall within a prescribed class: Pension Schemes Act 1993 s 93(1A) (s 93(1A), (1B) added by the Pensions Act 1995 s 152). For the meaning of 'money purchase scheme' see PARA 811 note 2 ante; and for the meaning of 'prescribed' see PARA 555 note 1 ante. The prescribed class of scheme is a scheme the only benefits provided by which (other than money purchase benefits) are death benefits and under the provisions of which no member has accrued rights (other than rights to money purchase benefits): Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 1A (added by SI 1997/786).

7 The Pension Schemes Act 1993 Pt IV Ch IV (as amended) does not apply to a member of a salary-related scheme whose pensionable service terminated before 1 January 1986 if all of the member's accrued rights to benefits under the scheme (1) are rights (a) to official pensions specified in the Pensions (Increase) Act 1971 Sch 2 (as amended) (official pensions); (b) to pensions in relation to which the Pensions (Increase) Act 1971 has

effect by virtue of regulations made under s 5(2) (scope of the 1971 Act and general powers); or (c) to pensions under a scheme the rules of which provide that pensions thereunder are to be increased in accordance with the Pensions (Increase) Act 1971; or (2) are rights to pensions under a scheme the rules of which provide that pensions thereunder are to be revalued in the pre-pension period (as defined in the Pension Schemes Act 1993 s 83(1)(a)(iii): see PARA 941 head (1)(c) ante) at a rate equal to or exceeding the rate of inflation as measured by the retail price index: Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 2.

8 Pension Schemes Act 1993 s 93(1)(a) (substituted by the Pensions Act 1995 s 152). This provision is modified in the case of a member whose normal pension age is earlier than 60: see the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 15.

9 Pension Schemes Act 1993 s 93(1)(b).

10 For the meaning of 'regulations' see PARA 555 note 1 ante.

11 For the meaning of 'modifications' see PARA 664 note 10 ante.

12 Pension Schemes Act 1993 s 93(1B) (as added: see note 6 supra).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **951 Circumstances in which the right to a cash equivalent applies**

NOTE 5--In the Pension Schemes Act 1993 s 93(1), references to accrued rights to benefit do not include rights which are attributable (directly or indirectly) to a pension credit: s 93(1ZA) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 28, 33). 'Pension credit' means a credit under the Welfare Reform and Pensions Act 1999 s 29(1)(b) (see PARA 961A.3) or under corresponding Northern Ireland legislation: Pension Schemes Act 1993 s 181(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 28, 41(a)).

TEXT AND NOTE 12--Pension Schemes Act 1993 s 93(1B) amended: Pensions Act 2008 s 134(2).

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## **952. Salary-related schemes; right to statement of entitlement.**

The trustees or managers<sup>1</sup> of a salary-related occupational pension scheme<sup>2</sup> must, on the application statement of any member<sup>3</sup>, provide the member with a written statement (a 'statement of entitlement'<sup>4</sup>) of the amount of the cash equivalent at the guarantee date<sup>5</sup> of any benefits which have accrued to or in respect of him under the applicable rules<sup>6</sup>.

Regulations<sup>7</sup> may make provision in relation to applications for a statement of entitlement, including, in particular, provision as to the period which must elapse after the making of such an application before a member may make a further such application<sup>8</sup>.

1 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme see PARA 555 note 9 ante.

2 For the meaning of 'salary-related occupational pension scheme' see PARA 951 note 6 ante; and for the meaning of 'occupational pension scheme' see PARA 741 ante.

3 For the meaning of 'member' for these purposes see PARA 951 note 2 ante.

4 If, in the case of any scheme, a statement of entitlement has not been provided under the Pension Schemes Act 1993 s 93A (added by the Pensions Act 1995 s 153), the Pensions Act 1995 s 10 (power of the Occupational Pensions Regulatory Authority to impose civil penalties: see PARA 611 ante) applies to any trustee or manager who has failed to take all such steps as are reasonable to secure compliance with the Pension Schemes Act 1993 s 93A (as so added): s 93A(4) (as so added). The maximum amount of the penalty for these purposes is £1,000 in the case of an individual and £10,000 in any other case: Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 20. As to the Occupational Pensions Regulatory Authority see PARA 598 et seq ante.

5 'The guarantee date' means the date by reference to which the value of the cash equivalent is calculated, and must be: (1) within the prescribed period beginning with the date of the application; and (2) within the prescribed period ending with the date on which the statement of entitlement is provided to the member: Pension Schemes Act 1993 s 93A(2) (as added: see note 4 supra). The guarantee date in relation to a statement of entitlement must be within (a) a period of three months beginning with the date of the member's application for a statement of entitlement, or, where the trustees of the scheme are for reasons beyond their control unable within that period to obtain the information required to calculate the cash equivalent, within such longer period as they may reasonably require as a result of that inability, provided that such longer period does not exceed six months beginning with the date of the member's application; and (b) within the period of ten days (excluding Saturdays, Sundays, Christmas Day, New Year's Day and Good Friday) ending with the date on which the statement of entitlement is provided to the member: Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 6(1), (2). A member who has made an application for a statement of entitlement may not within a period of 12 months beginning on the date of that application make any further such application unless the rules of the scheme provide otherwise or the trustees allow the member to do so: reg 6(3). Subject to that, any application for a cash equivalent made by a member of a salary-related scheme which does not result in the member acquiring a right to a guaranteed cash equivalent (see PARA 953 post) is to be treated as if it were an application for a statement of entitlement: see reg 6(4).

6 Pension Schemes Act 1993 s 93A(1) (as added: see note 4 supra). 'The applicable rules' means: (1) any provision which the rules of the scheme do not contain but which a scheme must contain if it is to conform with the requirements of Pt IV Ch I (ss 69-82) (as amended) (see PARAS 931-940 ante); and (2) the rules of the scheme, except so far as Pt IV Ch II (ss 83-86) (as amended) (see PARAS 941-946 ante) or Pt IV Ch III (ss 87-92) (see PARAS 947-949 ante) overrides them; and (3) any provision of Pt IV Chs II or III (as amended) which overrides any of the rules of the scheme: s 94(2) (definition applied by s 93A(2) (as added: see note 4 supra)). As to the manner of calculation and verification of cash equivalents see the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, regs 7, 8 (amended by SI 1997/786); and as to increases and reductions of guaranteed cash equivalents once a statement of entitlement has been sent to a member of a salary-related scheme see the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 9.

7 For the meaning of 'regulations' see PARA 557 note 2 ante.

8 Pension Schemes Act 1993 s 93A(3) (as added: see note 4 supra). As to the exercise of this power see notes 5-6 supra.

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **952 Salary-related schemes; right to statement of entitlement**

NOTE 5--SI 1996/1847 reg 6 amended: SI 2005/686, SI 2008/1050.

TEXT AND NOTE 6--In the Pension Schemes Act 1993 s 93A(1), the reference to benefits which have accrued does not include benefits which are attributable (directly or indirectly) to a pension credit: s 93A(1A) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 28, 34). For the meaning of pension credit see PARA 951.

NOTE 6--Definition of 'the applicable rules' in Pension Schemes Act 1993 s 94(2) substituted: Pensions Act 2004 Sch 12 para 13(2). See further Pension Schemes Act 1993 s 94(2A) (added by Pensions Act 2004 Sch 12 para 13(3)).

SI 1996/1847 regs 7, 7A-7E substituted for regs 7, 8: SI 2008/1050. SI 1996/1847 reg 7B (as so substituted) amended by SI 2008/2450.

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### **953. The right to a cash equivalent.**

Subject to the following provisions<sup>1</sup>:

- 2639 (1) a member<sup>2</sup> of an occupational pension scheme<sup>3</sup> other than a salary-related<sup>4</sup> scheme acquires a right, when his pensionable service<sup>5</sup> terminates (whether before or after 1 January 1986), to the cash equivalent at the relevant date<sup>6</sup> of any benefits which have accrued to or in respect of him under the applicable rules<sup>7</sup>;
- 2640 (2) a member of a salary-related occupational pension scheme who has received a statement of entitlement and has made a relevant application within three months beginning with the guarantee date<sup>8</sup> in respect of that statement acquires a right to his guaranteed cash equivalent<sup>9</sup>; and
- 2641 (3) a member of a personal pension scheme<sup>10</sup> acquires a right to the cash equivalent at the relevant date of any benefits which have accrued to or in respect of him under the rules of the scheme<sup>11</sup>.

<sup>1</sup> ie the provisions of the Pension Schemes Act 1993 Pt IV Ch IV (ss 93-101) (as amended): see PARAS 951-952 ante, 954 et seq post.

<sup>2</sup> For the meaning of 'member' for these purposes see PARA 951 note 2 ante.

<sup>3</sup> For the meaning of 'occupational pension scheme' see PARA 741 ante.

<sup>4</sup> For the meaning of 'salary-related occupational pension scheme' see PARA 951 note 6 ante.

<sup>5</sup> For the meaning of 'pensionable service' see PARA 664 note 2 ante.

<sup>6</sup> 'The relevant date' means, subject to regulations under the Pension Schemes Act 1993 s 98(4) (see PARA 957 post), the date of the relevant application, or in the case of an occupational pension scheme, if it is later, the termination date; and 'the relevant application' means any application which the member has made under s 95 (as amended) (see PARA 954 post) and not withdrawn: s 94(2).

<sup>7</sup> Ibid s 94(1)(a) (amended by the Pensions Act 1995 s 154(1)). For the meaning of 'the applicable rules' see PARA 952 note 6 ante.

<sup>8</sup> 'The guarantee date' has the same meaning as in the Pension Schemes Act 1992 s 93A(2) (see PARA 952 note 5 ante): s 94(2) (amended by the Pensions Act 1995 s 154(4)).

<sup>9</sup> Pension Schemes Act 1993 s 94(1)(aa) (added by the Pensions Act 1995 s 154(2)). For the purposes of s 94(1)(aa) (as so added), a person's 'guaranteed cash equivalent' is the amount stated in the statement of entitlement mentioned in that subsection: s 94(1A) (added by the Pensions Act 1995 s 154(3)). Regulations may provide that, in prescribed circumstances, the Pension Schemes Act 1993 s 94(1)(aa) (as so added) does not apply to members of salary-related occupational pension schemes or applies to them with prescribed modifications: s 94(3) (added by the Pensions Act 1995 s 154(5)). For the meaning of 'prescribed' see PARA 555 note 1 ante; and for the meaning of 'modifications' see PARA 664 note 10 ante.

Where a member's guaranteed cash equivalent has been reduced or increased under the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 9 (ie on the surrender, commutation or forfeiture of benefits, or where the scheme has begun to be wound up, or if the guaranteed cash equivalent falls short of or exceeds the amount which it would have been if calculated in the prescribed manner), the Pension Schemes Act 1993 s 94(1)(aa) (as so added) does not apply, or ceases to apply, but if the member (1) has made a relevant application within three months beginning with the guarantee date; or (2) makes a relevant application within three months beginning with the date on which the member is informed that the guaranteed cash equivalent is to be increased or reduced, the member acquires a right to the guaranteed cash equivalent as so increased or reduced: Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 14(1). In any case in which a member, within three months beginning with the guarantee date, disputes the amount of the guaranteed cash equivalent, or, within three months beginning with the date on which that

member is informed that the guaranteed cash equivalent is to be increased or reduced in accordance with reg 9, disputes the basis or amount of the increase or reduction, the Pension Schemes Act 1993 s 94(1)(aa) (as so added) does not apply, or ceases to apply, but if the member (a) has made a relevant application within three months beginning with the guarantee date; or (b) makes a relevant application within three months beginning with the date on which the amount of the guaranteed cash equivalent is finally determined, the member acquires a right to the guaranteed cash equivalent at the amount so determined: Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 14(2).

10 For the meaning of 'personal pension scheme' see 710 ante.

11 Pension Schemes Act 1993 s 94(1)(b).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **953 The right to a cash equivalent**

TEXT AND NOTES--The Pension Schemes Act 1993 s 94 has effect as if the provisions of the Child Support, Pensions and Social Security Act 2000 Sch 5 Pt II (paras 14-17: see PARA 949A) were included for the purposes of the Pension Schemes Act 1993 s 94 in the applicable rules: Child Support, Pensions and Social Security Act 2000 Sch 5 para 16(2).

TEXT AND NOTES 7, 11--In the Pension Schemes Act 1993 s 94(1), references to benefits which have accrued do not include benefits which are attributable (directly or indirectly) to a pension credit: s 94(1B) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 28, 35). For the meaning of pension credit see PARA 951.

NOTE 9--SI 1996/1847 reg 9 amended: SI 2005/706.

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#### **954. Ways of taking right to cash equivalent.**

A member<sup>1</sup> of an occupational pension scheme<sup>2</sup> or a personal pension scheme<sup>3</sup> who acquires a right to a cash equivalent may only take it by making an application in writing to the trustees or managers<sup>4</sup> of the scheme requiring them to use the cash equivalent<sup>5</sup> to which he has acquired a right in whichever of the following specified ways he chooses<sup>6</sup>. In the case of a member of an occupational pension scheme, the ways referred to are:

- 2642 (1) for acquiring transfer credits<sup>7</sup> allowed under the rules of another occupational pension scheme:
- 238 312. (a) the trustees or managers of which are able and willing to accept payment in respect of the member's accrued rights; and
- 313. (b) which satisfies prescribed<sup>8</sup> requirements<sup>9</sup>;
- 239 2643 (2) for acquiring rights allowed under the rules of a personal pension scheme:
- 240 314. (a) the trustees or managers of which are able and willing to accept payment in respect of the member's accrued rights; and
- 315. (b) which satisfies prescribed requirements<sup>10</sup>;
- 241 2644 (3) for purchasing from one or more insurance companies<sup>11</sup>, chosen by the member and willing to accept payment on account of the member from the trustees or managers, one or more annuities which satisfy prescribed requirements<sup>12</sup>;
- 2645 (4) for subscribing to other pension arrangements which satisfy prescribed requirements<sup>13</sup>.

In the case of a member of a personal pension scheme, the ways referred to above are:

- 2646 (i) for acquiring transfer credits allowed under the rules of an occupational pension scheme:
- 242 316. (A) the trustees or managers of which are able and willing to accept payment in respect of the member's accrued rights; and
- 317. (B) which satisfies prescribed requirements<sup>14</sup>;
- 243 2647 (ii) for acquiring rights allowed under the rules of another personal pension scheme:
- 244 318. (A) the trustees or managers of which are able and willing to accept payment in respect of the member's accrued rights; and
- 319. (B) which satisfies prescribed requirements<sup>15</sup>;
- 245 2648 (iii) for subscribing to other pension arrangements which satisfy prescribed requirements<sup>16</sup>.

A member of an occupational pension scheme may only exercise the right conferred by these provisions on or before the last option date<sup>17</sup>. Such an application to the trustees or managers of the scheme is to be taken to have been made if it is delivered to them personally, or sent by post in a registered letter or by the recorded delivery service<sup>18</sup>. A member of a scheme may withdraw such an application by giving the trustees or managers of the scheme notice in writing that he no longer wishes them to do what is needed to carry out what he previously required<sup>19</sup>.

A member who withdraws an application may make another<sup>20</sup>. Such a notice to the trustees or managers of a scheme is to be taken to have been given if it is delivered to them personally, or sent by post in a registered letter or by recorded delivery service<sup>21</sup>.

1 For the meaning of 'member' for these purposes see PARA 951 note 2 ante.

2 For the meaning of 'occupational pension scheme' see PARA 741 ante.

3 For the meaning of 'personal pension scheme' see PARA 710 ante.

4 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme see PARA 555 note 9 ante.

5 Ie under the Pension Schemes Act 1993 s 94(1)(a), (aa) or (b) (as amended): see PARA 953 ante.

6 Ibid s 95(1) (amended by the Pensions Act 1995 s 173, Sch 6 paras 2, 3). A member may exercise the option so conferred in different ways in relation to different portions of his cash equivalent, but a member who exercises that option must do so: (1) in relation to the whole of his cash equivalent; or (2) if the Pension Schemes Act 1993 s 96(2) (see PARA 955 post) applies, in relation to the whole of the balance mentioned in s 96(3): s 96(1).

7 For the meaning of 'transfer credits' see PARA 612 note 5 ante.

8 For the prescribed requirements see the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 12 (amended by SI 1997/786). For the meaning of 'prescribed' see PARA 555 note 1 ante.

9 Pension Schemes Act 1993 s 95(2)(a).

10 Ibid s 95(2)(b). For the prescribed requirements see the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 12 (amended by SI 1997/786).

11 Ie such as are mentioned in the Pension Schemes Act 1993 s 19(4)(a): see PARA 894 ante.

12 Ibid s 95(2)(c). In the case of the exercise of a right in respect of the cash equivalent of a member's protected rights, if any, under a scheme which is, or was formerly, a money purchase contracted-out scheme, s 95(2) is to be construed as if s 95(2)(c) were omitted: s 95(4). For the meaning of 'money purchase scheme' see PARA 811 note 2 ante; and for the meaning of 'contracted-out scheme' see PARA 878 ante. For the meaning of 'protected rights' see PARA 883 ante.

13 Ibid s 95(2)(d). Except in such circumstances as may be prescribed, s 95(2) is to be construed as if s 95(2)(d) were omitted: s 95(5)(a).

14 Ibid s 95(3)(a). For the prescribed requirements see the Personal Pension Schemes (Transfer Values) Regulations 1987, SI 1987/1112, reg 2 (amended by SI 1988/474; SI 1988/1016; SI 1994/1062; and SI 1997/786).

15 Pension Schemes Act 1993 s 95(3)(b); and see note 14 supra.

16 Ibid s 95(3)(c). The prescribed requirements are that the other pension arrangement to which it is proposed to subscribe is a self-employed pension arrangement (ie a personal pension scheme within the meaning of the Income and Corporation Taxes Act 1988 Pt XIV Ch IV (ss 630-655) (as amended) (see PARA 711 et seq ante) which is approved by the Inland Revenue under Pt XIV Ch IV (as amended) but which is neither a personal pension scheme nor a contract or a scheme approved under Pt XIV Ch III (ss 618-629) (as amended) (see PARA 677 et seq ante)): Personal Pension Schemes (Transfer Values) Regulations 1987, SI 1987/1112, reg 2A(2), (3) (added by SI 1988/1016; amended by SI 1994/1062).

Except in such circumstances as may be prescribed, the Pension Schemes Act 1993 s 95(3) is to be construed as if s 95(3)(c) were omitted: s 95(5)(b). The prescribed circumstances are that a member of a personal pension scheme who has acquired a right to a cash equivalent under s 94 (as amended) in respect of rights which are not protected rights has become, or proposes to become, a member of a self-employed pension arrangement: Personal Pension Schemes (Transfer Values) Regulations 1987, SI 1987/1112, reg 2A(1) (as so added and amended).

Without prejudice to the generality of the Pension Schemes Act 1993 s 95(2), (3), the powers conferred thereby include power to provide that a scheme or pension arrangement or, in the case of s 95(2), an annuity must satisfy requirements of the Commissioners of Inland Revenue: ss 95(6), s 181(1).

17 Ibid s 95(7). 'The last option date' means, subject to regulations under s 98 (as amended) (see PARA 957 post), the date which falls one year before the date on which the member attains normal pension age; or six months after the termination date, whichever is the later: s 95(8). For the meaning of 'regulations' see PARA 557 note 2 ante. For the meaning of 'normal pension age' see PARA 896 note 6 ante.

18 Ibid s 95(9).

19 Ibid s 100(1). Such a notice is of no effect if it is given to the trustees or managers at a time when, in order to comply with what the member previously required, they have already entered into an agreement with a third party to use the whole or part of the member's cash equivalent in a way specified in s 95(2) or, as the case may be, s 95(3): s 100(2).

20 Ibid s 100(3).

21 Ibid s 100(4).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **954 Ways of taking right to cash equivalent**

NOTE 8--SI 1996/1847 reg 12 further amended: SI 2006/744, SI 2008/1050.

TEXT AND NOTE 12--Pension Schemes Act 1993 s 95(2)(c) amended: Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 121.

NOTE 12--1993 Act s 95(4) repealed: Child Support, Pensions and Social Security Act 2000 Sch 5 para 7, Sch 9 Pt III(7).

NOTE 14--SI 1987/1112 reg 2 substituted: SI 2006/744.

NOTE 16--SI 1987/1112 reg 2A revoked: SI 2006/744.

NOTE 19--1993 Act s 100(1) now subject to s 100(2A) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 28, 38(1), (3)) which provides that, if the making of the application depended on the giving of a notice under the 1993 Act s 101F(1) (see PARA 961A.7), the application may only be withdrawn if the notice is also withdrawn.

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**955. Further provisions concerning exercise of option to take cash equivalent.**

Where the trustees or managers<sup>1</sup>:

- 2649 (1) of an occupational pension scheme<sup>2</sup> which is not a contracted-out scheme<sup>3</sup>;  
or
- 2650 (2) of a personal pension scheme<sup>4</sup> which is not an appropriate scheme<sup>5</sup>; or
- 2651 (3) of a self-employed pension arrangement<sup>6</sup>,

are able or willing to accept a transfer payment only in respect of a member's rights other than his accrued rights to guaranteed minimum pensions<sup>7</sup>, his accrued rights so far as attributable to service in contracted-out employment<sup>8</sup> on or after the principal appointed day<sup>9</sup> or his protected rights<sup>10</sup>, and the member has not required the trustees or managers of the scheme from which he is being transferred to use the portion of his cash equivalent which represents those accrued or protected rights in any of the specified ways<sup>11</sup>, then the relevant statutory provisions<sup>12</sup> are to be construed as conferring on the member an option only in respect of the balance of the cash equivalent to which the member would otherwise be entitled, after deduction of an amount sufficient for the trustees or managers of the scheme from which he is being transferred to meet their liability:

- 2652 (a) in the case of a transfer from an occupational pension scheme, in respect of the member's and his widow's or, as the case may be, her widower's pensions, being guaranteed minimum pensions or pensions so far as attributable to service in contracted-out employment on or after the principal appointed day or the member's protected rights; and
- 2653 (b) in the case of a transfer from a personal pension scheme, of the member's protected rights<sup>13</sup>.

1 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme see PARA 555 note 9 ante.

2 For the meaning of 'occupational pension scheme' see PARA 741 ante.

3 For the meaning of 'contracted-out scheme' see PARA 880 ante.

4 For the meaning of 'personal pension scheme' see PARA 710 ante.

5 For the meaning of 'appropriate scheme' see PARA 880 ante.

6 For the meaning of 'self-employed pension arrangement' see PARA 934 note 10 ante.

7 For the meaning of 'accrued rights' for these purposes see PARA 895 note 9 ante; and for the meaning of 'guaranteed minimum pensions' see PARA 878 ante.

8 For the meaning of 'contracted-out employment' see PARA 878 ante.

9 For the meaning of 'the principal appointed day' see PARA 880 note 13 ante.

10 For the meaning of 'protected rights' see PARA 883 ante.

11 In any of the ways specified in the Pension Schemes Act 1993 s 95(2) or (3): see PARA 954 ante.

12 le ibid ss 94, 95, 96, 97 (as amended): see the text and notes 1-11 supra; and PARAS 953-954 ante, 956 post.

13 Ibid s 96(2), (3) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 63).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **955 Further provisions concerning exercise of option to take cash equivalent**

TEXT AND NOTES--Where a member of an occupational pension scheme or a personal pension scheme (1) is entitled to give a notice under the Pension Schemes Act 1993 s 101F(1) to the trustees or managers of the scheme; or (2) would be entitled to do so, but for s 101G(1), he may not, if the scheme so provides, make an application to them under s 95 unless he also gives them a notice under s 101F(1): s 96(4) (added by the Welfare Reform and Pensions Act 1999 Sch 12 paras 28, 36). As to the Pension Schemes Act 1993 ss 101F, 101G see PARA 961A.7.

TEXT AND NOTE 5--Head (2) in the text. The words 'which is not an appropriate scheme' are omitted: Pensions Act 2007 Sch 4 para 29, Sch 7 Pt 6 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

TEXT AND NOTES 6, 13--Omit TEXT head (3): Pension Schemes Act 1993 s 96(2) (amended by the Welfare Reform and Pensions Act 1999 Sch 2 para 3(2)(b), Sch 13 Pt I).

TEXT AND NOTE 13--Pension Schemes Act 1993 s 96(3) further amended: SI 2005/2053.

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## **956. Calculation of cash equivalents.**

Cash equivalents<sup>1</sup> are to be calculated and verified in the prescribed manner<sup>2</sup>. Regulations<sup>3</sup> may provide that in prescribed circumstances a cash equivalent must be increased or reduced<sup>4</sup> and may specify as the amount by which a cash equivalent is to be reduced such an amount that a member has no right to receive anything<sup>5</sup>. Regulations may also provide that in calculating cash equivalents, except guaranteed cash equivalents, account must be taken:

- 2654 (1) of any surrender, commutation or forfeiture of the whole or part of a member's pension which occurs before the trustees or managers of the scheme of which he is a member do what is needed to comply with what he requires under his right to exercise an option as to how he takes the cash equivalent<sup>6</sup>;
- 2655 (2) in a case where the trustees or managers are able or willing to accept a transfer payment only in limited circumstances<sup>7</sup>, of the need to deduct an appropriate amount to provide for the specified<sup>8</sup> liabilities<sup>9</sup>.

In making any calculation for the statutory purposes<sup>10</sup>, any charge or lien on, and any set-off against, the whole or part of a pension must be disregarded<sup>11</sup>.

1 As to cash equivalents see PARA 953 ante.

2 Pension Schemes Act 1993 s 97(1). For the meaning of 'prescribed' see PARA 555 note 1 ante. For the prescribed manner of calculation and verification see the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, Pt III (regs 7-11) (amended by SI 1997/786); the Personal Pension Schemes (Transfer Values) Regulations 1987, SI 1987/1112, reg 3 (amended by SI 1994/1062).

3 For the meaning of 'regulations' see PARA 557 note 2 ante.

4 Pension Schemes Act 1993 s 97(2)(b). Without prejudice to the generality of this power, the circumstances that may be specified by virtue of s 97(2)(b) include: (1) in the case of an occupational pension scheme, the length of time which elapses between the termination of a member's pensionable service and his exercise of the option conferred by Pt IV Ch IV (ss 93-101) (as amended) (see PARAS 951-955 ante, 957 et seq post) or regulations made under it; (2) failure by the trustees or managers of the scheme to do what is needed to carry out what a member of the scheme requires within six months of the appropriate date; and (3) the state of the funding of the scheme: s 97(3) (amended by the Pensions Act 1995 s 173, Sch 6 paras 2, 4). For these purposes, the 'appropriate date': (a) in the case of a salary-related occupational pension scheme, is the guarantee date (within the meaning of the Pension Schemes Act 1993 s 93A (as added) (see PARA 952 ante)); and (b) in any other case, is the date on which the trustees receive an application from the member under s 95 (as amended) (see PARA 954 ante): s 97(3A) (added by the Pensions Act 1995 Sch 6 paras 2, 4). For the meaning of 'occupational pension scheme' see PARA 741 ante; for the meaning of 'pensionable service' see PARA 664 note 2 ante; for the meaning of 'member' for these purposes see PARA 951 note 2 ante; and for the meaning of 'salary-related occupational pension scheme' see PARA 951 note 6 ante.

For the prescribed circumstances see the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg, 9, 10; the Personal Pension Schemes (Transfer Values) Regulations 1987, SI 1987/1112, reg 4 (amended by SI 1994/1062).

5 Pension Schemes Act 1993 s 97(4).

6 Ie under ibid s 95 (as amended): see PARA 954 ante.

7 Ie in a case where ibid s 96(2) (as amended) applies: see PARA 955 ante.

8 Ie the liabilities mentioned in ibid s 96(3) (as amended): see PARA 955 ante.

9 Ibid s 97(2)(a) (amended by the Pensions Act 1995 Sch 6 paras 2, 4).

10 le for the purposes of the Pension Schemes Act 1993 Pt IV Ch IV (ss 93-101) (as amended): see PARAS 951-955 ante, 957-960 post.

11 Ibid s 101.

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **956 Calculation of cash equivalents**

NOTE 2--SI 1996/1847 reg 7 further amended: SI 2005/3377, SI 2006/34, SI 2007/60. SI 1996/1847 reg 8 further amended: SI 2003/1727, SI 2005/3377, SI 2007/60. SI 1987/1112 reg 3 substituted by SI 2008/1050; and amended by SI 2008/2450.

TEXT AND NOTES 3-9--Regulations may also provide for a cash equivalent, including a guaranteed cash equivalent, to be reduced so as to take account of the extent (if any) to which an entitlement has arisen under the scheme to the present payment of the whole or any part of (1) any pension; or (2) any benefit in lieu of pension: Pension Schemes Act 1993 s 97(2)(aa) (added by the Child Support, Pensions and Social Security Act 2000 Sch 5 para 8(1)).

NOTE 4--SI 1987/1112 reg 4 substituted: SI 2008/1050. SI 1996/1847 reg 9 amended: SI 2005/706.

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### **957. Variation and loss of rights to cash equivalent.**

Regulations<sup>1</sup> may provide that a member<sup>2</sup> of an occupational pension scheme<sup>3</sup> other than a salary-related scheme<sup>4</sup> who continues in employment<sup>5</sup> to which the scheme applies after his pensionable service<sup>6</sup> in that employment terminates:

- 2656 (1) only acquires a right to the cash equivalent of such part of the specified benefits<sup>7</sup> as may be prescribed<sup>8</sup>; or
- 2657 (2) acquires no right to a cash equivalent<sup>9</sup>.

Regulations may also provide that a member of a salary-related occupational pension scheme who continues in employment to which the scheme applies after his pensionable service in that employment terminates acquires a right to only part of his guaranteed cash equivalent, or acquires no right to his guaranteed cash equivalent<sup>10</sup>.

Where the whole or any part of the benefits payable to a member of a personal pension scheme<sup>11</sup> under the scheme have become payable on or before the relevant date, the right to a cash equivalent<sup>12</sup> is only to the cash equivalent of any of the benefits which have not become payable<sup>13</sup>.

A member of an occupational pension scheme or a personal pension scheme loses the right to any cash equivalent if the scheme is wound up<sup>14</sup>. A member of an occupational pension scheme also loses that right:

- 2658 (a) if his pension or benefit in lieu of a pension or any part of it becomes payable before he attains normal pension age; or
- 2659 (b) he fails to exercise the option to take a cash equivalent<sup>15</sup> on or before the last option date<sup>16</sup>.

1 For the meaning of 'regulations' see PARA 557 note 2 ante.

2 For the meaning of 'member' for these purposes see PARA 951 note 2 ante.

3 For the meaning of 'occupational pension scheme' see PARA 741 ante.

4 For the meaning of 'salary-related occupational pension scheme' see PARA 951 note 6 ante.

5 For the meaning of 'employment' generally see PARA 560 note 5 ante.

6 For the meaning of 'pensionable service' see PARA 664 note 2 ante.

7 Ie the benefits specified in the Pension Schemes Act 1993 s 94(1) (as amended): see PARA 953 ante.

8 See the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, regs 3, 4. For the meaning of 'prescribed' see PARA 555 note 1 ante.

9 Pension Schemes Act 1993 s 98(1) (s 98(1), (2) amended by the Pensions Act 1995 s 173, Sch 6 paras 2, 5). Regulations may provide for the purposes of the Pension Schemes Act 1993 s 98(1) (as so amended) or s 98(1A) (added by the Pensions Act 1995 s 173, Sch 6 paras 2, 5) that in prescribed circumstances a number of employments (whether or not consecutive) must be treated as a single employment: Pension Schemes Act 1993 s 98(2) (as so amended). Where a member's employment to which a scheme applies terminates but that member enters again into employment to which that scheme applies, then, if there is between those two

employments (1) an interval not exceeding one month; or (2) an interval of any length if the second of the employments results from the exercise of a right to return to work under the Employment Rights Act 1996 s 79 (maternity; right to return to work: see EMPLOYMENT vol 39 (2009) PARA 357), they are to be treated as a single employment: Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 5.

10 Pension Schemes Act 1993 s 98(1A) (as added: see note 9 supra). Regulations may provide that where: (1) by virtue of regulations under s 98(1) or (2) (as amended: see note 9 supra), a member of an occupational pension scheme other than a salary-related scheme does not, on the termination of his pensionable service in an employment to which a scheme applies, acquire a right at the relevant date to the cash equivalent of the whole or a part of the benefits specified in s 94(1) (as amended) (see PARA 953 ante); or (2) by virtue of regulations under s 98(1A) or (2) (as added and amended: see note 9 supra), a member of a salary-related occupational pension scheme does not, on such a termination, acquire a right to the whole or any part of his guaranteed cash equivalent, and his employment terminates at least one year before normal pension age, that right accrues to him on the date when that employment terminates and is to be valued accordingly: s 98(3) (as amended: see note 9 supra). See the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 4. For the meaning of 'the relevant date' see PARA 953 note 6 ante (definition applied by the Pension Schemes Act 1993 s 98(8)); and for the meaning of 'normal pension age' see PARA 896 note 6 ante. In relation to any case to which regulations under s 98(3) (as so amended) apply, they may substitute: (a) a new definition of 'the relevant date' for the definition in s 94(2) (as amended) (see PARA 953 note 6 ante); and (b) a new definition of 'the last option date' for the definition in s 95(8) (see PARA 954 note 17 ante): s 98(4).

11 For the meaning of 'personal pension scheme' see PARA 710 ante.

12 Ie which he acquires under the Pension Schemes Act 1993 s 94 (as amended): see PARA 953 ante.

13 Ibid s 98(5).

14 Ibid s 98(6). As to winding up of occupational pension schemes see PARA 842 et seq ante.

15 Ie conferred by ibid s 95 (as amended): see PARA 954 ante.

16 Ibid s 98(7). For the meaning of 'the last option date' see PARA 954 note 17 ante (definition applied by s 98(7)(b)).

## UPDATE

### 931-960 Protection for Early Leavers

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### 957 Variation and loss of rights to cash equivalent

TEXT AND NOTES 11-13--Before 'benefits payable' insert 'relevant'; and for 'any of the benefits' substitute 'benefits': Pension Schemes Act 1993 s 98(5) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 28, 37(1), (2)). 'Relevant benefits' means any benefits not attributable (directly or indirectly) to a pension credit: Pension Schemes Act 1993 s 98(8) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 28, 37(1), (3)). For the meaning of pension credit see PARA 951.

TEXT AND NOTES 15, 16--Head (a) omitted and in head (b) for 'he fails' read 'if he fails': Pension Schemes Act 1993 s 98(7) (amended by the Child Support, Pensions and Social Security Act 2000 Sch 9 para 8).

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### **958. Trustees' duties after exercise of option.**

Where a member<sup>1</sup> has exercised the option to take a cash equivalent<sup>2</sup> and the trustees or managers<sup>3</sup> of the scheme<sup>4</sup> have done what is needed to carry out what the member requires, the trustees or managers are discharged from any obligation to provide benefits to which the cash equivalent related except, in specified cases<sup>5</sup>, to the extent that an obligation to provide guaranteed minimum pensions<sup>6</sup> or give effect to protected rights<sup>7</sup> continues to subsist<sup>8</sup>. Subject to the following provisions, if the trustees or managers of a scheme receive an application for taking a cash equivalent<sup>9</sup>, they must do what is needed to carry out what the member requires:

- 2660 (1) in the case of a member of a salary-related occupational pension scheme<sup>10</sup>, within six months of the guarantee date<sup>11</sup>, or (if earlier) by the date on which the member attains normal pension age<sup>12</sup>;
- 2661 (2) in the case of a member of any other occupational pension scheme, within six months of the date on which they receive the application, or (if earlier) by the date on which the member attains normal pension age<sup>13</sup>; or
- 2662 (3) in the case of a member of a personal pension scheme<sup>14</sup>, within six months of the date on which they receive the application<sup>15</sup>.

If disciplinary proceedings or proceedings before a court have been begun against a member of an occupational pension scheme at any time before the expiry of the period of 12 months beginning with the termination date; and

- 2663 (a) it appears to the trustees or managers of the scheme that the proceedings may lead to the whole or part of the pension or benefit in lieu of a pension payable to the member or his widow being forfeited; and
- 2664 (b) the date before which they would otherwise be obliged to carry out what the member requires is earlier than the end of the period of three months after the conclusion of the disciplinary or court proceedings (including any proceedings on appeal),

then, subject as follows, they must instead do so before the end of that period of three months<sup>16</sup>. The Occupational Pensions Regulatory Authority<sup>17</sup> may, in prescribed circumstances<sup>18</sup>, grant an extension of the period within which the trustees or managers of the scheme are obliged to do what is needed to carry out what a member of the scheme requires<sup>19</sup>. If the authority is satisfied that there has been a relevant change of circumstances since it granted an extension, or that the authority granted an extension in ignorance of a material fact or on the basis of a mistake as to a material fact, it may direct that the extension be shortened or may revoke the extension<sup>20</sup>.

Where the trustees or managers of an occupational pension scheme have not done what is needed to carry out what a member of the scheme requires within six months of the date mentioned in head (1) or head (2) above:

- 2665 (i) they must, except in prescribed cases, notify the authority of that fact within the prescribed period<sup>21</sup>; and

2666 (ii) the provisions relating to civil penalties<sup>22</sup> apply to any trustee or manager who has failed to take all such steps as are reasonable to ensure that it was so done<sup>23</sup>.

1 For the meaning of 'member' for these purposes see PARA 951 note 2 ante.

2 le the option conferred by the Pension Schemes Act 1993 s 95 (as amended): see PARA 954 ante.

3 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme see PARA 555 note 9 ante.

4 For the meaning of 'scheme' for these purposes see PARA 921 note 5 ante.

5 le such cases as are mentioned in the Pension Schemes Act 1993 s 96(2) (as amended): see PARA 954 ante.

6 For the meaning of 'guaranteed minimum pension' see PARA 878 ante.

7 For the meaning of 'protected rights' see PARA 883 ante.

8 Pension Schemes Act 1993 s 99(1).

9 le an application under *ibid* s 95 (as amended): see PARA 954 ante.

10 For the meaning of 'salary-related occupational pension scheme' see PARA 951 note 6 ante; and for the meaning of 'occupational pension scheme' see PARA 741 ante.

11 For the meaning of 'the guarantee date' see PARA 952 note 5 ante (definition applied by the Pension Schemes Act 1993 s 99(3A) (added by the Pensions Act 1995 s 173, Sch 6 paras 2, 6)).

12 Pension Schemes Act 1993 s 99(2)(a) (s 99(2), (4) substituted, s 99(6) amended, and s 99(4A), (7), (8) added by the Pensions Act 1995 Sch 6 paras 2, 6). For the meaning of 'normal pension age' see PARA 896 note 6 ante.

13 Pension Schemes Act 1993 s 99(2)(b) (as substituted: see note 12 supra).

14 For the meaning of 'personal pension scheme' see PARA 710 ante.

15 Pension Schemes Act 1993 s 99(2)(c) (as substituted: see note 12 supra).

16 *Ibid* s 99(3).

17 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

18 The prescribed circumstances are that the trustees have within the period referred to in the text applied to the authority for an extension and (1) the authority is satisfied that (a) the scheme is being wound up or is about to be wound up; (b) the scheme is ceasing to be a contracted-out scheme; (c) the interests of the members of the scheme generally will be prejudiced if the trustees do what is needed to carry out what is required within that period; (d) the member has not taken all such steps as the trustees can reasonably expect in order to satisfy them of any matter which falls to be established before they can properly carry out what the member requires; (e) the trustees have not been provided with such information as they reasonably require properly to carry out what the member requires; or (f) the member's guaranteed cash equivalent has been reduced or increased under the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 9 (see PARA 953 note 9 ante) or the member has disputed the amount of the cash equivalent; (2) the provisions of the Pension Schemes Act 1993 s 53 (as amended) (supervision of formerly certified schemes: see PARA 920) apply; or (3) an application has been made for an extension on a ground specified in head (1) or (2) supra and the authority's consideration of the request cannot be completed before the end of that period: Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 13. For the meaning of 'prescribed' see PARA 555 note 1 ante.

19 Pension Schemes Act 1993 s 99(4) (as substituted: see note 12 supra). Regulations may make provision in relation to applications for such extensions s 99(4A) (as added: see note 12 supra). As to the provision so made see note 18 supra. For an example of refusal of such extension under s 99(4) (as originally enacted) see *R v Occupational Pensions Regulatory Authority, ex p Littlewoods Pension Trust Ltd* (1997) Times, 16 June.

20 Pension Schemes Act 1993 s 99(6) (as amended: see note 12 supra).

21 Ibid s 99(7)(a) (as added: see note 12 supra).

22 Ie the Pensions Act 1995 s 10: see PARA 611 ante.

23 Pension Schemes Act 1993 s 99(7)(b) (as added: see note 12 supra). The maximum amount of the penalty is £1,000 in the case of an individual and £10,000 in any other case: see the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 20. Regulations may provide that in prescribed circumstances the Pension Schemes Act 1993 s 99(7) (as so added) is not to apply in relation to an occupational pension scheme: s 99(8) (as so added).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **958 Trustees' duties after exercise of option**

TEXT AND NOTE 8--For modification of Pension Schemes Act 1993 s 99(1) see SI 2005/992.

TEXT AND NOTE 12--For modification of Pension Schemes Act 1993 s 99(2)(a) see SI 2005/686.

NOTE 18--SI 1996/1847 reg 13 amended: SI 2005/686.

TEXT AND NOTE 19--Pension Schemes Act 1993 s 99(4), (4A) amended: Pensions Act 2004 Sch 12 para 14.

TEXT AND NOTE 20--Pension Schemes Act 1993 s 99(6) repealed: Pensions Act 2004 Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/21. PROTECTION FOR EARLY LEAVERS/(4) TRANSFER VALUES/959. Occupational pension schemes; special cases.

### **959. Occupational pension schemes; special cases.**

Where a member<sup>1</sup> has acquired a right to a cash equivalent<sup>2</sup> but has not exercised the option conferred as to how to take that right<sup>3</sup> and the member's accrued rights have been transferred to another occupational pension scheme<sup>4</sup> without that member's consent, the statutory provisions relating to transfer values<sup>5</sup> have effect as if the member's right to a cash equivalent of the benefits in respect of which a transfer or transfer payment has been made existed in relation to the receiving scheme instead of the transferring scheme<sup>6</sup>.

Where a member's pensionable service<sup>7</sup> terminates in the prescribed circumstances<sup>8</sup>, those statutory provisions have effect as if that service had not terminated<sup>9</sup>; but this does not apply where the trustees of the scheme, during any prescribed interval<sup>10</sup>, do what is needed to carry out what a member required in exercising an option to take the right to a cash equivalent<sup>11</sup>.

The statutory provisions relating to transfer values are modified in relation to:

- 2667 (1) cases where the normal pension age is earlier than 60<sup>12</sup>;
- 2668 (2) schemes with an overseas element<sup>13</sup>; and
- 2669 (3) hybrid schemes, that is schemes which are salary-related<sup>14</sup> but under which some of the benefits which may be provided are money purchase benefits<sup>15</sup>.

1 For the meaning of 'member' for these purposes see PARA 951 note 2 ante.

2 Ie under the Pension Schemes Act 1993 s 94 (as amended): see PARA 953 ante.

3 Ie under ibid s 95 (as amended): see PARA 954 ante.

4 For the meaning of 'occupational pension scheme' see PARA 741 ante.

5 Ie the Pension Schemes Act 1993 Pt IV Ch IV (ss 93-101) (as amended): see PARA 951 et seq ante.

6 Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 16.

7 For the meaning of 'pensionable service' see PARA 664 note 2 ante.

8 The prescribed circumstances are that (1) the pensionable service which has terminated is a period of such service which is one, other than the last one, of a series of such periods in employment to which the scheme relates; and (2) there is between successive periods of pensionable service (a) no interval; (b) an interval not exceeding one month; (c) an interval of any length if it is between two periods of pensionable service the second of which results from the exercise of a right to return to work under the Employment Rights Act 1996 s 79 (maternity; right to return: see EMPLOYMENT vol 39 (2009) PARA 357); or (d) an interval of any length if it is between two periods of pensionable service the second of which results from a return to work by the member following a period of absence arising in consequence of a trade dispute within the meaning of the Jobseekers Act 1995 s 35 (see PARA 301 note 2 ante): Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 18(2).

9 Ibid reg 18(1).

10 Ie any interval such as is set out in note 8 heads (b)-(d) supra: see ibid reg 18(2).

11 Ibid reg 18(3).

12 See ibid reg 15. For the meaning of 'normal pension age' see PARA 896 note 6 ante.

13 See ibid reg 17.

14 For the meaning of 'salary-related' see PARA 951 note 6 ante.

15 See the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 19.

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/21. PROTECTION FOR EARLY LEAVERS/(4) TRANSFER VALUES/960. Disclosure requirements.

## **960. Disclosure requirements.**

An active member<sup>1</sup> of any occupational pension scheme<sup>2</sup>, and a deferred member<sup>3</sup> of a scheme which is a money purchase scheme<sup>4</sup>, is entitled on request (not being a request made less than 12 months after the last occasion, if any, on which such information was furnished to that member) to specified information regarding any cash equivalent or transfer value available to the member<sup>5</sup> and that information must be provided to the member by the trustees in writing as soon as is practicable and in any event within three months after the member makes that request<sup>6</sup>. An active or deferred member of any scheme is also entitled on request to a copy of the actuary's written report, if any, obtained in accordance with the requirements relating to the calculation of cash equivalents<sup>7</sup> and that report must be sent to the member by the trustees within one month after the member makes that request<sup>8</sup>.

The trustees must ensure that a statement of entitlement<sup>9</sup> to a guaranteed cash equivalent is accompanied by the prescribed information<sup>10</sup> in relation to any cash equivalent of or transfer value in relation to the member's money purchase benefits, if any, under the scheme, calculated by reference to the guarantee date, and by a statement in writing containing prescribed details<sup>11</sup>. Where a guaranteed cash equivalent is reduced or increased<sup>12</sup>, the trustees must notify the member of that fact in writing within ten days (excluding Saturdays, Sundays, Christmas Day, New Year's Day and Good Friday) and that notification must:

- 2670 (1) state the reasons for and the amount of the reduction or increase;
- 2671 (2) indicate the relevant statutory provision<sup>13</sup> which has been relied upon; and
- 2672 (3) state that the member has a further three months, beginning with the date on which the member is informed of the reduction or increase, to make a written application to take the guaranteed cash equivalent as so reduced or increased<sup>14</sup>.

Where any person fails to comply with any requirement imposed upon that person by these requirements, the Occupational Pensions Regulatory Authority<sup>15</sup> may require that person to pay, within 28 days, a penalty not exceeding £1,000 in the case of an individual or £10,000 in any other case<sup>16</sup>.

1 For the meaning of 'active member' see the Pensions Act 1995 s 124; and PARA 612 note 5 ante.

2 For the meaning of 'occupational pension scheme' see PARA 741 ante.

3 For the meaning of 'deferred member' see the Pensions Act 1995 s 124; and PARA 612 note 5 ante.

4 For the meaning of 'money purchase scheme' see PARA 811 note 2 ante.

5 For the specified information see the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 11(1), Sch 1.

6 Ibid reg 11(1), (3).

7 Ie obtained in accordance with ibid reg 8(3).

8 Ibid reg 11(2).

9 For the meaning of 'statement of entitlement' see PARA 952 ante.

10 See note 5 supra.

- 11 See the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 11(4).
- 12 Ie under ibid reg 9: see PARA 953 note 9 ante.
- 13 Ie the relevant paragraph of ibid reg 9: reg 11(5).
- 14 Ibid reg 11(5).
- 15 As to the Occupational Pensions Regulatory Authority see PARA 598 et seq ante.
- 16 Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 11(6).

## **UPDATE**

### **931-960 Protection for Early Leavers**

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

### **960 Disclosure requirements**

TEXT AND NOTES--SI 1996/1847 reg 11 amended: SI 2005/72, SI 2008/1050, SI 2009/615. SI 1996/1847 Schs 1A (reductions in initial cash equivalents) and 1B (insufficiency reports) added: SI 2008/1050.

NOTE 5--SI 1996/1847 Sch 1 amended: SI 2008/1050.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/21. PROTECTION FOR EARLY LEAVERS/(4) TRANSFER VALUES/960A. Early leavers: cash transfer sums and contribution refunds.

## **960A. Early leavers: cash transfer sums and contribution refunds.**

### **1. Scope**

Chapter 5 of Part 4 of the Pension Schemes Act 1993<sup>1</sup> applies to any member of an occupational pension scheme to which Chapter 1 of Part 4 of the Pension Schemes Act 1993<sup>2</sup> applies<sup>3</sup> if (1) his pensionable service terminates before he attains normal pension age, and (2) on the date on which his pensionable service terminates (a) the three month condition is satisfied, but (b) he does not have relevant accrued rights to benefit under the scheme<sup>4</sup>. For the above purposes<sup>5</sup>, the three month condition is that the period of the member's pensionable service under the scheme, taken together with (i) any previous period of his pensionable service under the scheme, and (ii) any period throughout which he was employed in linked qualifying service under another scheme, amounts to at least three months<sup>6</sup>.

1    Ie the Pension Schemes Act 1993 ss 101AA-101AI.

2    Ie *ibid* ss 69-82.

3    See *ibid* s 69(3) and PARA 931.

4    *Ibid* s 101AAA(1) (ss 101AA, 101AI added by Pensions Act 2004 s 264). For the purposes of the 1993 Act s 101AA(1), 'relevant accrued rights to benefit under the scheme', in relation to a member of a scheme, means rights which (1) have accrued to or in respect of him under the scheme, and (2) entitle him to the relevant benefits which would have accrued to or in respect of him under the applicable rules if s 71(1)(a) and (b) (see PARA 932) (and the word 'and' immediately preceding them) did not have effect: s 101AA(4) s 101AA. For the meaning of 'relevant benefits' and 'the applicable rules' see s 101AI(7).

5    Ie for the purposes of *ibid* s 101AA(1).

6    *Ibid* s 101AA(2). A period counts for the purposes of head (i) or (ii) in the text only so far as it counts towards qualification for long service benefit within the meaning of Pt 4 Ch 1: s 101AA(3).

References in the following provisions of Pt 4 Ch 5 (ss 101AB-101AI) to a member, in relation to an occupational pension scheme, are to a member of the scheme to whom Pt 4 Ch 5 applies: s 101AA(5).

### **2. Right to cash transfer sum and contribution refund**

On the termination of his pensionable service, a member<sup>1</sup> of an occupational pension scheme acquires a right to whichever one he elects of the following options (1) a cash transfer sum<sup>2</sup>; (2) a contribution refund<sup>3</sup>.

1    For the meaning of 'member' see Pension Schemes Act 1993 s 101AI(7) (s 101AI added by Pensions Act 2004 s 264).

2    In the 1993 Act Pt 4 Ch 5 (ss 101AA-101AI) 'cash transfer sum' means, in relation to a member of an occupational pension scheme, the cash equivalent, at the date on which his pensionable service terminates, of the benefits mentioned in s 101AA(4)(b) (see PARA 960A.1): s 101AB(3) (s 101AB added by Pensions Act 2004 s 264).

3    1993 Act s 101AB(1). Section 101AB(1) is subject to the following provisions of Pt 4 Ch 5 (ie ss 101AA-101AI): s 101AB(2). In Pt 4 Ch 5, 'contribution refund' means, in relation to a member of an occupational pension scheme, a sum representing the aggregate of (1) the member's employee contributions to the scheme, and (2) where transfer credits have been allowed to the member under the scheme by virtue of a payment ('the

transfer payment') made by the trustees or managers of another occupational pension scheme, the member's employee contributions to that other scheme, so far as they (a) relate to the transfer payment, and (b) do not, in aggregate, exceed the amount of the transfer payment: s 101AB(4). In s 101AB(4), 'employee contributions' means, in relation to a member of an occupational pension scheme, contributions made to the scheme by or on behalf of the member on his own account, but does not include (i) a transfer payment by virtue of which transfer credits have been allowed to the member under the scheme, or (ii) any pension credit or amount paid to the scheme which is attributable (directly or indirectly) to a pension credit: s 101AB(5).

### **3. Notification of right to cash transfer sum or contribution refund**

The following provisions<sup>1</sup> apply where the pensionable service of a member of an occupational pension scheme has terminated<sup>2</sup>. The trustees or managers of the scheme must (1) within a reasonable period after the termination give the member a statement in writing containing information adequate to explain (a) the nature of the right acquired by him<sup>3</sup>, and (b) how he may exercise the right, and such other information as may be prescribed, and (2) afford the member a reasonable period after giving him that statement within which to exercise the right<sup>4</sup>.

1    Ie the Pension Schemes Act 1993 s 101AC.

2    Ibid s 101AC(1) (s 101AC added by Pensions Act 2004 s 264).

3    Ie under the 1993 Act s 101AB (see PARA 960A.2).

4    Ibid s 101AC(2). The statement given under head (1) in the text must specify, in particular (1) in relation to the cash transfer sum to which the member acquires a right under s 101AB, its amount and the permitted ways in which the member can use it, (2) the amount of the contribution refund to which the member so acquires a right, and (3) the last day on which the member may, disregarding s 101AI(2) (see PARA 960A.9), exercise the right ('the reply date'): s 101AC(3). For the meaning of 'permitted way' see s 101AI(7). Information which may be prescribed under head (1) in the text includes, in particular (a) information about any tax liability in respect of, or deduction required or permitted to be made from, the cash transfer sum or contribution refund, and (b) information about the effect on other rights of the member (whether under the applicable rules or otherwise) of exercising the right: s 101AC(4). The trustees or managers may notify the member that, if he does not exercise the right mentioned in head (a) in the text on or before the reply date, the trustees or managers will be entitled to pay the contribution refund to him: s 101AC(5). Where the trustees or managers of the scheme fail to comply with s 101AC(2), the Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to any trustee or manager who has failed to take all reasonable steps to secure compliance: Pension Schemes Act 1993 s 101AC(6).

As to further information which must be provided in addition to the matters specified in s 101AC(2), (3), see the Occupational Pension Schemes (Early Leavers: Cash Transfer Sums and Contribution Refunds) Regulations 2006, SI 2006/33, reg 7.

### **4. Exercise of right**

Where a member of an occupational pension scheme acquires a right<sup>1</sup>, the member may exercise the right by giving a notice in writing to that effect to the trustees or managers stating (1) which of the options<sup>2</sup> he elects, and (2) if he elects for the cash transfer sum, the permitted way in which he requires that sum to be used<sup>3</sup>.

1    Ie under the Pension Schemes Act 1993 s 101AB (see PARA 960A.2): s 101AD(1) (ss 101AD, 101AI added by Pensions Act 2004 s 264).

2    Ie under the 1993 Act s 101AB(1).

3    Ibid s 101AD(1), (2). The notice under s 101AD(2) must be given on or before (1) the reply date, or (2) such later date as the trustees or managers may allow in his case under s 101AI(2) (see PARA 960A.9): s 101AD(3). For the meaning of 'reply date' see s 101AI(7).

### **5. Permitted ways of using cash transfer sum**

The following provisions<sup>1</sup> apply in relation to a cash transfer sum to which a member of an occupational pension scheme acquires a right<sup>2</sup>. The ways in which the cash transfer sum may be used are (1) for acquiring transfer credits allowed under the rules of another occupational pension scheme (a) whose trustees or managers are able and willing to accept the cash transfer sum, and (b) which satisfies prescribed requirements<sup>3</sup>, (2) for acquiring rights allowed under the rules of a personal pension scheme (i) whose trustees or managers are able and willing to accept the cash transfer sum, and (ii) which satisfies prescribed requirements, (3) for purchasing one or more appropriate annuities<sup>4</sup>, (4) in such circumstances as may be prescribed, for subscribing to other pension arrangements which satisfy prescribed requirements<sup>5</sup>.

1 le the Pension Schemes Act 1993 s 101AE.

2 le a right under *ibid* s 101AB (see PARA 960A.2): s 101AE(1) (s 101AE added by Pensions Act 2004 s 264).

3 As to the prescribed requirements see the Occupational Pension Schemes (Early Leavers: Cash Transfer Sums and Contribution Refunds) Regulations 2006, SI 2006/33, reg 6.

4 For the purposes of the 1993 Act s 101AE(2), 'appropriate annuity' means an annuity which satisfies prescribed requirements and is purchased from an insurer who (1) falls within s 19(4)(a) (see PARA 894), (2) is chosen by the member, and (3) is willing to accept payment on account of the member from the trustees or managers of the scheme: s 101AE(3).

5 *Ibid* s 101AE(2). As to the prescribed requirements see NOTE 3.

## **6. Calculation of cash transfer sum and contribution refund**

Cash transfer sums are to be calculated and verified in the prescribed manner<sup>1</sup>. Any calculation of a contribution refund must conform with such requirements as may be prescribed<sup>2</sup>. Regulations may provide (1) for amounts to be deducted in respect of administrative costs in calculating cash transfer sums; (2) for a cash transfer sum or contribution refund to be increased or reduced in prescribed circumstances<sup>3</sup>.

1 Pension Schemes Act 1993 s 101AF(1) (s 101AF added by Pensions Act 2004 s 264). See the Occupational Pension Schemes (Early Leavers: Cash Transfer Sums and Contribution Refunds) Regulations 2006, SI 2006/33, regs 2, 2A-2D (substituted by SI 2008/1050; SI 2006/33 regs 2B-2D amended by SI 2008/2450).

2 1993 Act s 101AF(2).

3 *Ibid* s 101AF(3). The circumstances that may be prescribed under head (2) in the text include in particular (1) a failure by the trustees or managers of the scheme to comply with s 101AG(2) or (4) (see PARA 960A.7) in relation to the cash transfer sum or contribution refund, and (2) the state of funding of the scheme: s 101AF(4). Regulations under head (2) in the text may provide (a) for a cash transfer sum to be reduced so that the member has no right to have any amount paid by way of cash transfer sum in respect of him; (b) for a contribution refund to be reduced so that the member has no right to receive any amount by way of contribution refund under Pt 4 Ch 5 (ss 101AA-101AI): s 101AF(5). As to the reduction or increase of cash transfer sums and contribution refunds see SI 2006/33 regs 3-5 (reg 4 substituted, reg 5 amended by SI 2008/1050).

## **7. Duties of trustees or managers following exercise of right**

The following provisions<sup>1</sup> apply where a member of an occupational pension scheme has exercised a right<sup>2</sup>. Where the member has elected for the cash transfer sum, the trustees or managers of the scheme must, within a reasonable period beginning with the date on which the right was exercised, do what is needed to carry out the requirement specified in the member's notice<sup>3</sup>. When the trustees or managers have done what is needed to carry out that requirement, they are discharged from any obligation (1) in respect of any rights (including conditional rights) of, or in respect of, the member to relevant benefits under the applicable

rules, and (2) to make any other payment by way of refund to or in respect of the member of, or in respect of (a) the contributions, or any payment<sup>4</sup>, or (b) any other contributions made to the scheme, or any other scheme, in respect of the member (other than any pension credit or amount attributable (directly or indirectly) to a pension credit)<sup>5</sup>. Where the member has elected for the contribution refund, the trustees or managers of the scheme must, within a reasonable period beginning with the date on which the right was exercised, do what is needed to secure that the amount of the contribution refund is paid to the member or as he directs<sup>6</sup>. When the trustees or managers have done what is needed to secure the payment of the contribution refund<sup>7</sup> (i) they are discharged from any obligation in respect of any rights (including conditional rights) of, or in respect of, the member to relevant benefits under the applicable rules, and (ii) if they are required under the applicable rules, or determine in accordance with those rules, to make any payment ('the refund payment') by way of refund to or in respect of the member of, or in respect of (A) the contributions, or any payment<sup>8</sup>, or (B) any other contributions made to the scheme, or any other scheme, in respect of the member (other than any pension credit or amount attributable (directly or indirectly) to a pension credit), the amount of the contribution refund may be set off against the refund payment<sup>9</sup>.

1    Ie the Pension Schemes Act 1993 s 101AG.

2    Ie a right under *ibid* s 101AB (see PARA 960A.2) in accordance with s 101AD (see PARA 960A.4): s 101AG(1) (s 101AG added by Pensions Act 2004 s 264).

3    Ie under the 1993 Act s 101AD(2)(b): s 101AG(2). See further NOTE 6.

4    Ie mentioned in *ibid* s 101AB(4).

5    *Ibid* s 101AG(3). For modification of s 101AG(3) see SI 2005/992.

6    1993 Act s 101AG(4). Where the trustees or managers fail to comply with s 101AG(2) or (4), the Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to any trustee or manager who has failed to take all reasonable steps to secure compliance: 1993 Act s 101AG(6).

7    Ie mentioned in *ibid* s 101AG(4).

8    Ie mentioned in *ibid* s 101AB(4).

9    *Ibid* s 101AG(5).

## **8. Powers of trustees or managers where right not exercised**

The following provisions<sup>1</sup> apply where (1) a member of an occupational pension scheme does not exercise a right acquired by him<sup>2</sup> on or before the reply date or such later date as the trustees or managers of the scheme allow in his case<sup>3</sup>, and (2) the trustees or managers of the scheme have notified the member<sup>4</sup>. The trustees or managers may within a reasonable period beginning with (a) the reply date, or (b) if a later date has been allowed<sup>5</sup>, that later date, pay the contribution refund to the member<sup>6</sup>. When the trustees or managers have paid the contribution refund to the member (i) they are discharged from any obligation in respect of any rights (including conditional rights) of, or in respect of, the member to relevant benefits under the applicable rules, and (ii) if they are required under the applicable rules, or determine in accordance with those rules, to make any payment ('the refund payment') by way of refund to or in respect of the member of, or in respect of (A) the contributions, or any payment<sup>7</sup>, or (B) any other contributions made to the scheme, or any other scheme, in respect of the member (other than any pension credit or amount attributable (directly or indirectly) to a pension credit), the amount of the contribution refund may be set off against the refund payment<sup>8</sup>.

1    Ie the Pension Schemes Act 1993 s 101AH.

- 2    le under ibid s 101AB (see PARA 960A.2).
- 3    le under ibid s 101AI(2) (see PARA 960A.9).
- 4    As mentioned in ibid s 101AC(5) (see PARA 960A.3): s 101AH(1) (s 101AH added by Pensions Act 2004 s 264).
- 5    As mentioned in the Pension Schemes Act 1993 s 101AH(1).
- 6    Ibid s 101AH(2).
- 7    Mentioned in ibid s 101AB(4).
- 8    Ibid s 101AH(3).

## 9. Further provisions

A member of an occupational pension scheme loses any right acquired by him<sup>1</sup> (1) if the scheme is wound up, or (2) subject to the provision below<sup>2</sup>, if he fails to exercise the right on or before the reply date<sup>3</sup>. If the member has failed to exercise any such right on or before the reply date, the trustees or managers of the scheme may allow him to exercise it on or before such later date as they may determine on the application of the member<sup>4</sup>. Where the trustees or managers determine a later date<sup>5</sup> (a) they must give a notice in writing to that effect to the member, and (b) head (2) above applies in relation to the member as if the reference to the reply date were a reference to the later date<sup>6</sup>.

- 1    Under the Pension Schemes Act 1993 s 101AB (see PARA 960A.2).
  - 2    le subject to ibid s 101AI(2).
  - 3    Ibid s 101AI(1) (added by Pensions Act 2004 s 264).
  - 4    Pension Schemes Act 1993 s 101AI(2).
  - 5    Under ibid s 101AI(2).
  - 6    Ibid s 101AI(3). For the purposes of s 101AI(3) and ss 101AC(2) and 101AD(2) (see PARAS 960A.3, 960A.4), a document or notice may be given to a person (1) by delivering it to him, (2) by leaving it at his proper address, or (3) by sending it by post to him at that address: s 101AI(4). For the purposes of s 101AI(4), and the Interpretation Act 1978 s 7 (service of documents by post) in its application to the Pension Schemes Act 1993 s 101AI(4), the proper address of a person is (a) in the case of a body corporate, the address of the registered or principal office of the body, and (b) in any other case, the last known address of the person: s 101AI(5).
- The Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) is subject to any provision made by or under s 61 (deduction of contributions equivalent premium from refund of scheme contributions: see PARA 924) (i) permitting any amount to be deducted from any payment of a contribution refund, or (ii) requiring the payment of a contribution refund to be delayed: s 101AI(6).

## UPDATE

### 931-960 Protection for Early Leavers

See further Pension Schemes Act 1993 Pt 4 Ch 5 (ss 101AA-101AI) (early leavers: cash transfer sums and contribution refunds); and PARA 960A.

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## **22. PENSIONS ON DIVORCE**

### **961. Requirement for court to consider pension position on divorce.**

The matters to which, in considering a divorce settlement, the court is to have regard in deciding how to exercise its powers to make periodical payment orders or lump sum orders<sup>1</sup>, property adjustment orders<sup>2</sup> or orders for the sale of a property<sup>3</sup> in relation to a party to the marriage include:

- 2673 (1) any benefits under a pension scheme<sup>4</sup> which a party to the marriage has or is likely to have; and
- 2674 (2) any benefits under a pension scheme which, by reason of the dissolution or annulment of the marriage, a party to the marriage will lose the chance of acquiring<sup>5</sup>.

In any proceedings for a financial provision order<sup>6</sup> in a case where a party to the marriage has, or is likely to have, any benefit under a pension scheme, the court must, in addition to considering any other matter which it is otherwise required to consider, consider:

- 2675 (a) whether, having regard to any matter to which it is required to have regard in the proceedings by virtue of heads (1) and (2) above, such an order (whether deferred or not) should be made; and
- 2676 (b) where the court determines to make such an order, how the terms of the order should be affected, having regard to any such matter<sup>7</sup>.

Where, having regard to any benefits under a pension scheme, the court determines to make a financial provision order, then to the extent to which the order is made having regard to any benefits under a pension scheme, the order may require the trustees or managers<sup>8</sup> of the pension scheme in question, if at any time any payment in respect of any benefits under the scheme becomes due to the party with pension rights, to make a payment for the benefit of the other party<sup>9</sup>. The amount of any payment which the trustees or managers are so required to make under the order at any time must not exceed the amount of the payment which is due at that time to the party with pension rights<sup>10</sup> and any such payment by the trustees or managers discharges so much of the trustees' or managers' liability to the party with pension rights as corresponds to the amount of the payment and is to be treated for all purposes as a payment made by the party with pension rights in or towards the discharge of his liability under the order<sup>11</sup>.

Where the party with pension rights may require any benefits which he has or is likely to have under the scheme to be commuted, the order may require him to commute the whole or part of those benefits, and these provisions apply to the payment of any amount commuted in pursuance of the order as they apply to other payments in respect of benefits under the scheme<sup>12</sup>.

In deciding whether to make an order which by virtue of these provisions imposes any requirement on the trustees or managers of a pension scheme, the court must take into account any representations of the trustees or managers as to whether, in all the circumstances of the case, the court ought to make the order, and in particular whether the trustees or managers have been given sufficient information to enable them to comply with

their obligations under any such order and the administrative expenses which they are likely to incur in complying with any such obligations<sup>13</sup>.

1    le orders under the Matrimonial Causes Act 1973 s 23(1)(a), (b) or (c): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 458, 467 and 476.

2    le orders under *ibid* s 24: see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 499 et seq. A pension fund scheme may amount to a post-nuptial settlement (see s 24(1)(c)) in certain circumstances: see *Brooks v Brooks* [1996] AC 375, [1995] 3 All ER 257, HL.

3    le orders under the Matrimonial Causes Act 1973 s 24A (as added): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 520, 521.

4    'Pension scheme' means an occupational pension scheme or a personal pension scheme (applying the definitions in the Pension Schemes Act 1993 s 1 (see PARAS 741, 710 respectively ante), but as if the reference to employed earners in the definition of 'personal pension scheme' were to any earners: Matrimonial Causes Act 1973 s 25D(4) (s 25B-25D added by the Pensions Act 1995 s 166(1)). For these purposes, references to a pension scheme include (1) a retirement annuity contract (see PARA 677 et seq ante); or (2) an annuity, or insurance policy, purchased or transferred for the purpose of giving effect to rights under a pension scheme; and references to benefits under a pension scheme include any benefits by way of pension, whether under a pension scheme or not: Matrimonial Causes Act 1973 s 25D(3) (as so added).

5    See *ibid* s 25B(1) (as added: see note 4 supra).

6    le any order under *ibid* s 23 (as amended).

7    Ibid s 25B(2) (as added: see note 4 supra).

8    In relation to such a contract or annuity as is mentioned in note 4 head (1) supra, references to the trustees or managers must be read as references to the provider of the annuity, and in relation to such a policy of insurance as is mentioned in note 4 head (2) supra, references to the trustees or managers must be read as references to the insurer: *ibid* s 25D(3) (as added: see note 4 supra).

9    Ibid s 25B(3), (4) (as added: see note 4 supra). 'The party with pension rights' means the party to the marriage who has or is likely to have benefits under a pension scheme and 'the other party' means the other party to the marriage: s 25D(4) (as so added). Section 25C (as so added) does not affect the powers of the court under s 31 (as amended) (variation, discharge, etc of orders) in relation to any order made before the commencement of the Pensions Act 1995 s 166: s 166(6). Section 166 was brought into force partially on 27 June 1996 and fully on 1 August 1996: see the Pensions Act 1995 (Commencement No 5) Order 1996, SI 1996/1675.

10   Matrimonial Causes Act 1973 s 25B(5) (as added: see note 4 supra). See also note 9 supra.

11   Ibid s 25B(6) (as added: see note 4 supra). See also note 9 supra.

12   Ibid s 25B(7) (as added: see note 4 supra). See also note 9 supra.

13   See the Divorce etc (Pensions) Regulations 1996, SI 1996/1676, reg 11.

## UPDATE

### 961-963 Pensions on Divorce

Provision has been made introducing the option of pension sharing on divorce or nullity of marriage, thus allowing pension rights to be treated like other assets and to be transferred between spouses as part of the financial settlement. As to the sharing of rights under pension arrangements see PARA 961A. As to the sharing of state scheme rights see PARA 961B.

As to the making of pension sharing orders in connection with divorce proceedings see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 523 et seq.

As to applications to the court in relation to transactions at an undervalue and preferences where such applications involve pension sharing transactions see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 670, 671.

See also Matrimonial Causes Act 1973 s 25E (added by Pensions Act 2004 Sch 12 para 3) (Pension Protection Fund); and Divorce etc (Pension Protection Fund) Regulations 2006, SI 2006/1932.

## **961 Requirement for court to consider pension position on divorce**

TEXT AND NOTES 1-5--In heads (1) and (2) references to a pension scheme are to a pension arrangement: Matrimonial Causes Act 1973 s 25B(1) (s 25B added by Pensions Act 1995 s 166(1); 1973 Act s 25B(1) amended by Welfare Reform and Pensions Act 1999 Sch 4 para 1(2)). For the meaning of 'pension arrangement' see 1973 Act s 25D(3) (s 25D added by the 1995 Act s 166(1); 1973 Act s 25D(3) substituted by the 1999 Act Sch 4 para 3(5)).

TEXT AND NOTES 6, 7--1973 Act s 25B(2) repealed: 1999 Act Sch 4 para 1(3), Sch 13 Pt II.

TEXT AND NOTES 8, 9--References to pension scheme are now to pension arrangement; and for 'trustees or managers of' read 'person responsible for': 1973 Act s 25B(3), (4) (amended by 1999 Act Sch 4 para 1(4), (5)). 'Person responsible for a pension arrangement' is further defined: see 1973 Act s 25D(4) (substituted by 1999 Act Sch 4 para 3(5)).

TEXT AND NOTE 10--Replaced. The order must express the amount of any payment required to be made by virtue of the 1973 Act s 25B(4) as a percentage of the payment which becomes due to the party with pension rights: s 25B(5) (substituted by 1999 Act Sch 4 para 1(6)).

TEXT AND NOTE 11--Reference to the trustees or managers is now to the person responsible for the arrangement: 1973 Act s 25B(6) (amended by 1999 Act Sch 4 para 1(7)).

TEXT AND NOTE 12--Replaced. Where the party with pension rights has a right of commutation under the arrangement, the order may require him to exercise it to any extent; and this provision applies to any payment due in consequence of commutation in pursuance of the order as it applies to other payments in respect of benefits under the arrangement: 1973 Act s 25B(7) (amended by 1999 Act Sch 4 para 1(8)).

TEXT AND NOTE 13--SI 1996/1676 replaced: Divorce etc (Pensions) Regulations 2000, SI 2000/1123 (amended by SI 2005/2114).

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## **961A. Sharing of rights under pension arrangements.**

### **1. Scope of mechanism**

Pension sharing is available<sup>1</sup> in relation to a person's shareable rights under any pension arrangement<sup>2</sup> other than an excepted public service pension scheme<sup>3</sup>. A person's shareable rights under a pension arrangement are any rights of his under the arrangement, other than rights of a description specified by regulations made by the Secretary of State<sup>4</sup>. A public service pension scheme is excepted if it is specified by order made by such minister of the Crown or government department as may be designated by the Treasury as having responsibility for the scheme<sup>5</sup>.

1 Ibid under the Welfare Reform and Pensions Act Pt IV Ch I (ss 27-46).

2 'Pension arrangement' means (1) an occupational pension scheme; (2) a personal pension scheme; (c) a retirement annuity contract; (d) an annuity or insurance policy purchased, or transferred, for the purpose of giving effect to rights under an occupational pension scheme or a personal pension scheme; and (5) an annuity purchased, or entered into, for the purpose of discharging liability in respect of a credit under *ibid* s 29(1)(b) or under corresponding Northern Ireland legislation: s 46(1). 'Personal pension scheme' and 'occupational pension scheme' have the same meanings as in the Pension Schemes Act 1993 s 1 (see *PARAS* 710, 741); and 'retirement annuity contract' means a contract or scheme approved under the Income and Corporation Taxes Act 1988 Pt XIV Ch III (ss 618-629): 1999 Act s 46(1).

3 Ibid s 27(1).

4 Ibid s 27(2). See the Pension Sharing (Valuation) Regulations 2000, SI 2000/1052 (amended by SI 2000/2691, SI 2003/1727, SI 2005/706, SI 2005/2877, SI 2005/3377, SI 2006/34, SI 2006/744, SI 2007/60, SI 2008/1050).

5 1999 Act s 27(3). See the Pension Sharing (Excepted Schemes) Order 2000, SI 2000/3088, which excepts the public service pension schemes relating to the offices of the Prime Minister and First Lord of the Treasury, the Lord Chancellor and the Speaker of the House of Commons.

### **2. Activation of pension sharing**

Provision relating to the creation of pension debits and credits<sup>1</sup> applies on the taking effect of any of the following relating to a person's shareable rights under a pension arrangement<sup>2</sup> (1) a pension sharing order under the Matrimonial Causes Act 1973<sup>3</sup>; (2) a pension sharing order under Schedule 5 to the Civil Partnership Act 2004<sup>4</sup>; (3) provision which corresponds to the provision which may be made by such an order and which (a) is contained in a qualifying agreement<sup>5</sup> between the parties to a marriage; and (b) takes effect on the dissolution of the marriage under the Family Law Act 1996<sup>6</sup>; (4) provision which corresponds to the provision which may be made by such an order and which (i) is contained in a qualifying agreement between the parties to a marriage or former marriage; and (ii) takes effect after the dissolution of the marriage under the Family Law Act 1996<sup>7</sup>; (5) an order under the Matrimonial and Family Proceedings Act 1984 Pt III corresponding to such an order as is mentioned in head (1) above<sup>8</sup>; (6) an order under Schedule 7 to the Civil Partnership Act 2004 corresponding to such an order as is mentioned in head (2) above<sup>9</sup>; and (7) a pension sharing order under Schedule 15 to the Civil Partnership Act 2004<sup>10</sup>.

Certain provisions which restrict the alienation of pension rights are disapplied<sup>11</sup>.

- 1 le the Welfare Reform and Pensions Act 1999 s 29: see PARA 961A.3.
- 2 Ibid s 28(1). For the meaning of 'pension arrangement' and 'shareable rights' see PARA 961A.1.
- 3 Ibid s 28(1)(a).
- 4 Ibid s 28(1)(aa) (added by Civil Partnership Act 2004 Sch 27 para 159(2)).
- 5 For the purposes of the 1999 Act s 28(1)(b), (c) (see TEXT AND NOTES 5, 6), a qualifying agreement is one which (1) has been entered into in such circumstances as the Lord Chancellor may prescribe by regulations; and (2) satisfies such requirements as the Lord Chancellor may so prescribe: s 28(2).
- 6 Ibid s 28(1)(b). Section 28(1)(b) does not apply if (a) the pension arrangement to which the provision relates is the subject of a pension sharing order under the Matrimonial Causes Act 1973 in relation to the marriage; or (b) there is in force a requirement imposed by virtue of s 25B or 25C (see PARAS 961-963) which relates to benefits or future benefits to which the party who is the transferor is entitled under the pension arrangement to which the provision relates: 1999 Act s 28(4). The reference in head (b) above to the party who is the transferor is to the party to whose rights the provision relates: s 28(11).
- 7 Ibid s 28(1)(c). Section 28(1)(c) does not apply if (1) the marriage was dissolved by an order under the Family Law Act 1996 s 3 and the satisfaction of the requirements of s 9(2) was a precondition to the making of the order; (2) the pension arrangement to which the provision relates (a) is the subject of a pension sharing order under the Matrimonial Causes Act 1973 in relation to the marriage; or (b) has already been the subject of pension sharing between the parties; or (3) there is in force a requirement imposed by virtue of s 25B or 25C which relates to benefits or future benefits to which the party who is the transferor is entitled under the pension arrangement to which the provision relates: 1999 Act s 28(5). The reference in head (3) to the party who is the transferor is to the party to whose rights the provision relates: s 28(11). See also NOTE 4.
- 8 Ibid s 28(1)(d).
- 9 Ibid s 28(1)(da) (added by Civil Partnership Act 2004 Sch 27 para 159(3)).
- 10 1999 Act s 28(1)(j) (added by Civil Partnership Act 2004 Sch 27 para 159(7)).
- 11 Nothing in any of the provisions specified in the 1999 Act s 44(1)(a)-(d) applies in relation to any order or provision falling within s 28(1): s 44(1) (amended by the Armed Forces Act 2006 Sch 16 para 162). The provisions in s 44(1)(a)-(d) are (1) the Armed Forces Act 2006 s 356 (see ARMED FORCES vol 2(2) (Reissue) PARA 166) and the Pension Schemes Act 1993 s 159(4), (4A) (see PARA 928); (2) the Pensions Act 1995 s 91 (see PARA 865); (3) any provision of any enactment (whether passed or made before or after the Welfare Reform and Pensions Act 1999 was passed (ie 11 November 1999)) corresponding to any of the enactments mentioned in heads (1) and (2); and (4) any provision of a pension arrangement corresponding to any of those enactments. For these purposes, 'enactment' includes an enactment comprised in subordinate legislation (within the meaning of the Interpretation Act 1978): 1999 Act s 44(2).

### **3. Creation of pension credits and debits**

On the application of these provisions<sup>1</sup> (1) the transferor's<sup>2</sup> shareable rights<sup>3</sup> under the relevant arrangement<sup>4</sup> become subject to a debit of the appropriate amount<sup>5</sup>; and (2) the transferee<sup>6</sup> becomes entitled to a credit of that amount as against the person responsible for that arrangement<sup>7</sup>. Where the relevant order or provision<sup>8</sup> specifies a percentage value to be transferred, the appropriate amount is the specified percentage of the cash equivalent of the relevant benefits on the valuation day<sup>9</sup>. Where the relevant order or provision specifies an amount to be transferred, the appropriate amount is the lesser of (a) the specified amount; and (b) the cash equivalent of the relevant benefits on the valuation day<sup>10</sup>. Where the relevant arrangement is an occupational pension scheme and the transferor is in pensionable service<sup>11</sup> under the scheme on the transfer day<sup>12</sup>, the relevant benefits are the benefits or future benefits to which he would be entitled under the scheme by virtue of his shareable rights under it had his pensionable service terminated immediately before that day<sup>13</sup>. Otherwise, the relevant benefits are the benefits or future benefits to which, immediately before the transfer day, the transferor is entitled under the terms of the relevant arrangement by virtue of his shareable rights under it<sup>14</sup>.

The Secretary of State may by regulations make provision about the calculation and verification of cash equivalents for the purposes of the above provisions<sup>15</sup>.

All proceedings relating to pension credits or debits are assigned to the Family Division<sup>16</sup>.

1 See PARA 961A.2.

2 'Transferor' means the person to whose rights the relevant order or provision relates: Welfare Reform and Pensions Act 1999 s 29(8).

3 For the meaning of 'shareable rights' see PARA 961A.1.

4 'Relevant arrangement' means the arrangement to which the relevant order or provision relates: 1999 Act s 29(8).

5 Ibid s 29(1)(a).

6 'Transferee' means the person for whose benefit the relevant order or provision is made: ibid s 29(8).

7 Ibid s 29(1)(b). The reference to the person responsible for a pension arrangement is (1) in the case of an occupational pension scheme or a personal pension scheme, to the trustees or managers of the scheme; (2) in the case of a retirement annuity contract or an annuity falling within heads (4) or (5) of the definition of 'pension arrangement' in s 46(1) (see PARA 961A.1), to the provider of the annuity; and (3) in the case of an insurance policy falling within head (4) of that definition, to the insurer: s 46(2). For the meaning of 'occupational pension scheme', 'personal pension scheme' and 'retirement annuity contract' see PARA 961A.1.

8 'Relevant order or provision' means the order or provision by virtue of which ibid s 29 applies: s 29(8).

9 Ibid s 29(2). The 'valuation day' is such day within the implementation period for the credit under s 29(1) as the person responsible for the relevant arrangement may specify by notice in writing to the transferor and transferee: s 29(7). As to the implementation period see PARA 961A.5.

10 Ibid s 29(3).

11 'Pensionable service', in relation to a member of an occupational pension scheme, means service in any description or category of employment to which the scheme relates which qualifies the member (on the assumption that it continues for the appropriate period) for pension or other benefits under the scheme: ibid s 46(1) (words 'or category' in s 46(1) prospectively repealed: Pensions Act 2004 Sch 13 Pt 1). In determining what is 'pensionable service' for these purposes (1) service notionally attributable for any purpose of the scheme is to be disregarded; and (2) no account is to be taken of any rules of the scheme by which a period of service can be treated for any purpose as being longer or shorter than it actually is: 1999 Act s 46(3).

12 'Transfer day' means the day on which the relevant order or provision takes effect: ibid s 29(8).

13 Ibid s 29(4). The Secretary of State may by regulations provide for any description of benefit to be disregarded for the purposes of s 29(4), (5): s 29(6).

14 Ibid s 29(5). See also NOTE 14.

15 Ibid s 30(1). The power conferred by s 30(1) includes power to provide for calculation or verification (1) in such manner as may, in the particular case, be approved by a person prescribed by the regulations; or (2) in accordance with guidance from time to time prepared by a person so prescribed: s 30(2). See the Pension Sharing (Valuation) Regulations 2000, SI 2000/1052; and PARA 961A.1.

16 Senior Courts Act 1981 Sch 1 para 3(fa) (added by the 1999 Act Sch 12 para 1).

#### **4. Pension debits**

Where a person's shareable rights<sup>1</sup> under a pension arrangement<sup>2</sup> are subject to a pension debit<sup>3</sup>, each benefit or future benefit (1) to which he is entitled under the arrangement by virtue of those rights; and (2) which is a qualifying benefit<sup>4</sup>, is reduced by the appropriate percentage<sup>5</sup>. However, where a pension debit relates to the shareable rights under an occupational pension scheme<sup>6</sup> of a person who is in pensionable service<sup>7</sup> under the scheme on the transfer day<sup>8</sup>, each benefit or future benefit (a) to which the person is entitled under the

scheme by virtue of those rights; and (b) which corresponds to a qualifying benefit, is reduced by an amount equal to the appropriate percentage of the corresponding qualifying benefit<sup>9</sup>.

The above provisions override any provision of a pension arrangement to which they apply to the extent that the provision conflicts with them<sup>10</sup>.

1 For the meaning of 'shareable rights' see PARA 961A.1.

2 For the meaning of 'pension arrangement' see PARA 961A.1.

3 Is a debit under the Welfare Reform and Pensions Act 1999 s 29(1)(a) (see PARA 961A.3): s 46(1).

4 A benefit is a 'qualifying benefit' for these purposes if the cash equivalent by reference to which the amount of the pension debit is determined includes an amount in respect of it: *ibid* s 31(3). See also *Slattery v Cabinet Office Civil Service Pensions* [2009] EWHC 226 (Ch), [2009] ICR 806, [2009] 1 FLR 1365.

5 Welfare Reform and Pensions Act 1999 s 31(1). 'Appropriate percentage', in relation to a pension debit, means (1) if the relevant order or provision specifies the percentage value to be transferred, that percentage; (2) if the relevant order or provision specifies an amount to be transferred, the percentage which the appropriate amount for the purposes of s 29(1) represents of the amount mentioned s 29(3)(b) (see PARA 961A.3): s 31(5). 'Relevant order or provision', in relation to a pension debit, means the pension sharing order or provision on which the debit depends: s 31(5).

6 For the meaning of 'occupational pension scheme' see PARA 961A.1.

7 For the meaning of 'pensionable service' see PARA 961A.3.

8 'Transfer day', in relation to a pension debit, means the day on which the relevant order or provision takes effect: 1999 Act s 31(5).

9 *Ibid* s 31(2).

10 *Ibid* s 31(4).

## 5. Pension credits

A person subject to liability in respect of a pension credit<sup>1</sup> must discharge his liability before the end of the implementation period<sup>2</sup> for the credit<sup>3</sup>. Where the trustees or managers of an occupational pension scheme<sup>4</sup> have not done what is required to discharge their liability in respect of a pension credit before the end of the implementation period for the credit (1) they must, except in such cases as the Secretary of State may prescribe by regulations, notify the Regulatory Authority<sup>5</sup> of that fact within such period as the Secretary of State may so prescribe; and (2) the provision relating to civil penalties<sup>6</sup> will apply to any trustee or manager who has failed to take all such steps as are reasonable to ensure that liability in respect of the credit was discharged before the end of the implementation period for it<sup>7</sup>. If such trustees or managers fail to perform the notification obligation mentioned above, the provision relating to civil penalties will apply to any trustee or manager who has failed to take all reasonable steps to ensure that the obligation was performed<sup>8</sup>. On the application of the trustees or managers of an occupational pension scheme who are subject to liability in respect of a pension credit, the Regulatory Authority may extend the implementation period for the credit for the purposes of the above provisions if it is satisfied that the application is made in such circumstances as the Secretary of State may prescribe by regulations<sup>9</sup>.

The implementation period for a pension credit is the period of four months beginning with the later of (a) the day on which the relevant order or provision takes effect; and (b) the first day on which the person responsible for the pension arrangement<sup>10</sup> to which the relevant order or provision<sup>11</sup> relates is in receipt of (i) the relevant documents<sup>12</sup>; and (ii) such information relating to the transferor<sup>13</sup> and transferee<sup>14</sup> as the Secretary of State may prescribe by regulations<sup>15</sup>. The Secretary of State may by regulations (A) make provision requiring a person subject to liability in respect of a pension credit to notify the transferor and transferee of the day on which the

implementation period for the credit begins; (B) provide for these provisions<sup>16</sup> to have effect with modifications where the pension arrangement to which the relevant order or provision relates is being wound up; (C) provide for these provisions to have effect with modifications where the pension credit depends on a pension sharing order and the order is the subject of an application for leave to appeal out of time<sup>17</sup>.

Provision is made as to the mode of discharge of liability in respect of a pension credit<sup>18</sup>.

1    Ie a credit under the Welfare Reform and Pensions Act 1999 s 29(1)(b) (see PARA 961A.3): s 46(1).

2    See TEXT AND NOTES 10-17.

3    1999 Act s 33(1).

4    For the meaning of 'occupational pension scheme' see PARA 961A.1.

5    'The Regulatory Authority' means the Pensions Regulator: 1999 Act s 33(5) (amended by Pensions Act 2004 s 7(2)(d)).

6    Ie the Pensions Act 1995 s 10 (see PARA 611).

7    1999 Act s 33(2). See the Pension Sharing (Implementation and Discharge of Liability) Regulations 2000, SI 2000/1053 (amended by SI 2000/2691, SI 2001/3649, SI 2003/1727, SI 2005/706, SI 2005/2877, SI 2005/3377, SI 2006/744, SI 2007/60, SI 2008/1050, SI 2009/598, SI 2009/615, SI 2009/2930).

8    1999 Act s 33(3).

9    Ibid s 33(4). See SI 2000/1053, NOTE 7.

10   For the meaning of 'pension arrangement' see PARA 961A.1. As to the person responsible see PARA 961A.3.

11   'Relevant order or provision', in relation to a pension credit, means the pension sharing order or provision on which the pension credit depends: 1999 Act s 34(5).

12   The reference to the relevant documents is to copies of (1) the relevant order or provision; and (2) the order, decree or declarator responsible for the divorce, dissolution or annulment to which it relates: *ibid* s 34(2) (amended by Civil Partnership Act 2004 Sch 27 para 160(3), Sch 30).

13   'Transferor' means the person to whose rights the relevant order or provision relates: 1999 Act s 34(5).

14   'Transferee' means the person for whose benefit the relevant order or provision is made: *ibid* s 34(5).

15   Ibid s 34(1) (amended by Civil Partnership Act 2004 Sch 27 para 160(2), Sch 30). The 1999 Act s 34(1) is subject to any provision made by regulations under s 41(2)(a) (see PARA 961A.8): s 34(3). See the Pensions on Divorce etc. (Provision of Information) Regulations 2000, SI 2000/1048 (amended by SI 2000/2691, SI 2003/1727, SI 2005/2877, SI 2006/744, SI 2007/60).

16   Ie 1999 Act s 34.

17   Ibid s 34(4). See SI 2000/1053, NOTE 7.

18   See 1999 Act s 35, Sch 5 (Sch 5 amended by the Pensions Act 2004 Sch 12 para 77; Pensions Act 2008 Sch 11 Pt 2; and the Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649), which, in particular, makes provision concerning funded pension schemes, unfunded public service pension schemes, other unfunded occupational pension schemes and other pension arrangements, including certain annuities and insurance policies. See also SI 2000/1053, NOTE 7.

## 6. Safeguarded rights

The Pension Schemes Act 1993 Pt 3A (ss 68A-68D) (added by Welfare Reform and Pensions Act 1999 s 36) ceases to have effect: Pensions Act 2008 s 100, Sch 11 Pt 2. Shared rights that derive from contracted-out rights will now be treated in the same way as other shared rights.

## 7. Requirements relating to pension credit benefit

The following rules apply to any occupational pension scheme<sup>1</sup> whose resources are derived in whole or part from (1) payments (a) under an actual or contingent legal obligation; or (b) in the exercise of a power conferred, or the discharge of a duty imposed, on a minister of the Crown, government department or any other person, being a power or duty which extends to the disbursement or allocation of public money, made or to be made by one or more employers of earners to whom the scheme applies; or (2) such other payments by the earner or his employer, or both, as may be prescribed for different categories of scheme<sup>2</sup>.

Normal benefit age<sup>3</sup> under such a scheme must be between 60 and 65<sup>4</sup>. Such a scheme must not provide for payment of pension credit benefit<sup>5</sup> in the form of a lump sum at any time before normal benefit age, except in such circumstances as may be prescribed<sup>6</sup>. In general<sup>7</sup>, a person's pension credit benefit under a scheme must be (i) payable directly out of the resources of the scheme; or (ii) assured to him by such means as may be prescribed<sup>8</sup>.

An eligible member<sup>9</sup> of a qualifying scheme<sup>10</sup> may by notice in writing require the trustees or managers of the scheme to use an amount equal to the cash equivalent<sup>11</sup> of his pension credit benefit<sup>12</sup> for such one or more of the authorised purposes<sup>13</sup> as he may specify in the notice<sup>14</sup>. Certain restrictions are placed on the power to give a transfer notice<sup>15</sup>. The trustees or managers of a qualifying scheme which is a salary-related occupational pension scheme must, on the application of an eligible member, provide him with a written statement of the amount of the cash equivalent of his pension credit benefit under the scheme<sup>16</sup>. Compliance with a transfer notice has effect to discharge the trustees or managers of a qualifying scheme from any obligation to provide the pension credit benefit of the eligible member who gave the notice<sup>17</sup>. Additional provision is made concerning the time for compliance with a transfer notice<sup>18</sup>, withdrawal of such a notice<sup>19</sup>, matters to be disregarded in calculations<sup>20</sup> and the service of transfer notices<sup>21</sup>.

Regulations may apply the provisions relating to transfer notices<sup>22</sup> with prescribed modifications to occupational pension schemes which are not money purchase schemes, but where some of the benefits that may be provided are money purchase benefits<sup>23</sup>.

1 For the meaning of 'occupational pension scheme' see PARA 961A.1.

2 Pension Schemes Act 1993 s 101A (ss 101A-101Q added by Welfare Reform and Pensions Act 1999 s 37; s 101E amended by Civil Partnership Act 2004 Sch 27 para 148).

3 'Normal benefit age', in relation to a scheme, means the earliest age at which a person who has pension credit rights under the scheme is entitled to receive a pension by virtue of those rights (disregarding any scheme rule making special provision as to early payment of pension on grounds of ill-health or otherwise); and 'pension credit rights' means rights to future benefits under a scheme which are attributable (directly or indirectly) to a pension credit: 1993 Act s 101B.

4 Ibid s 101C(1).

5 'Pension credit benefit', in relation to a scheme, means the benefits payable under the scheme to or in respect of a person by virtue of rights under the scheme attributable (directly or indirectly) to a pension credit: ibid s 101B.

6 Ibid s 101C(2). See the Pension Sharing (Pension Credit Benefit) Regulations 2000, SI 2000/1054 (amended by SI 2000/2691, SI 2001/3649, SI 2003/1727, SI 2005/555, SI 2005/704, SI 2005/706, SI 2005/2877, SI 2005/3377, SI 2006/34, SI 2006/744, SI 2006/778, SI 2007/60, SI 2007/1930, SI 2008/1050, SI 2009/598, SI 2009/615, SI 2009/2930).

7 le subject to provision concerning certain alternatives to pension credit benefit (see the 1993 Act s 101D(2)-(4)), and provision relating to the discharge of liability where pension credit or alternative benefits are secured by insurance policies or annuity contracts (see further s 101E (discharge of liability where pension credit or alternative benefits secured by insurance policies or annuity contracts). See SI 2000/1054.

8 1993 Act s 101D(1). See SI 2000/1054.

9 'Eligible member', in relation to a qualifying scheme, means a member who has pension credit rights under the scheme; and 'pension credit rights', in relation to a qualifying scheme, means rights to future benefits under the scheme which are attributable (directly or indirectly) to a pension credit: 1993 Act s 101P.

10 'Qualifying scheme' means a funded occupational pension scheme and a personal pension scheme: *ibid* s 101P.

11 The cash equivalent for these purposes is (1) in the case of a salary-related occupational pension scheme, to be taken to be the amount shown in the relevant statement under *ibid* s 101H; and (2) in any other case, to be determined by reference to the date the notice is given: s 101F(4)). Cash equivalents for the purposes ss 101F, 101H are calculated and verified in the prescribed manner: s 101I.

12 'Pension credit benefit', in relation to an eligible member of a qualifying scheme, means the benefits payable under the scheme to or in respect of the member by virtue of rights under the scheme attributable (directly or indirectly) to a pension credit: *ibid* s 101P.

13 See further *ibid* s 101F(2), (3), (5), (6) (s 101F(2) amended by SI 2001/3649) which prescribes different purposes for members of occupational pension schemes and personal pension schemes. See also SI 2000/1054. See further 1993 Act s 101F(6A) (added by Pensions Act 2008 s 134(3)).

14 1993 Act s 101F(1). Regulations may make provision for the amount required to be used under s 101F(1) to be increased or reduced in prescribed circumstances: see s 101L(1)-(3). See also SI 2000/1054.

15 See 1993 Act s 101G .

16 *Ibid* s 101H. See also s 101I; and NOTE 11.

17 *Ibid* s 101M. For modification of s 101M see SI 2005/992.

18 See 1993 Act s 101J (amended by Pensions Act 2004 Sch 13 Pt 1). See also SI 2000/1054.

19 See 1993 Act s 101K.

20 See *ibid* s 101N.

21 See *ibid* s 101O.

22 *Ie* *ibid* ss 101F-101P. See also SI 2000/1054.

23 1993 Act s 101Q. See also SI 2000/1054.

## 8. Miscellaneous

The Secretary of State may by regulations make provision for a pension provided to give effect to eligible<sup>1</sup> pension credit rights<sup>2</sup> of a member under a qualifying occupational pension scheme<sup>3</sup> to be increased, as a minimum, by reference to increases in the retail prices index, so far as not exceeding the maximum percentage per annum<sup>4</sup>.

The Secretary of State may by regulations make provision for the purpose of enabling the person responsible for a pension arrangement<sup>5</sup> involved in pension sharing<sup>6</sup> to recover from the parties to pension sharing prescribed charges in respect of prescribed descriptions of pension sharing activity<sup>7</sup>. Such regulations may include provision (1) for the start of the implementation period<sup>8</sup> for a pension credit to be postponed in prescribed circumstances<sup>9</sup>; (2) in relation to payments in respect of charges recoverable under the regulations, for reimbursement as between the parties to pension sharing<sup>10</sup>; (3) in relation to the recovery of charges by deduction from a pension credit, for the modification of provision relating to the mode of discharge of pension credits<sup>11</sup>; (4) for the recovery in prescribed circumstances of such additional amounts as may be determined in accordance with the regulations<sup>12</sup>. For the purposes of such regulations, the question of how much of a charge recoverable under the regulations is attributable to a party to pension sharing is to be determined as follows (a) where the relevant order or provision includes provision about the apportionment of charges under this provision, there is attributable to the party so much of the charge as is apportioned to him by that

provision; (b) where the relevant order or provision does not include such provision, the charge is attributable to the transferor<sup>13</sup>.

Power under an Act to establish a pension scheme<sup>14</sup> now includes power to make provision for the provision, by reference to pension credits<sup>15</sup> which derive from rights under (i) the scheme; or (ii) a scheme in relation to which the scheme is specified as an alternative<sup>16</sup>, of benefits to or in respect of those entitled to the credits<sup>17</sup>. Such provision is without prejudice to any other power<sup>18</sup> and applies in relation to Acts whenever passed<sup>19</sup>. There is no obligation to consult in relation to the making, in exercise of a power under an Act to establish a pension scheme, of provision of a kind so authorised<sup>20</sup>. The power also exists to extend judicial pension schemes<sup>21</sup> to make corresponding provision<sup>22</sup>.

The Secretary of State may by regulations require the person responsible for a pension arrangement involved in pension sharing to supply to such persons as he may specify in the regulations such information relating to anything which follows from the application of the provision relating to the creation of pension debits and credits<sup>23</sup> as he may so specify<sup>24</sup>.

1 'Eligible', in relation to pension credit rights, means of a description prescribed by regulations made by the Secretary of State: Welfare Reform and Pensions Act 1999 s 40(3). See the Pension Sharing (Pension Credit Benefit) Regulations 2000, SI 2000/1054; and PARA 961A.7.

2 'Pension credit rights', in relation to an occupational pension scheme, means rights to future benefits under the scheme which are attributable (directly or indirectly) to a credit under the 1999 Act s 29(1)(b) (see PARA 961A.3) or under corresponding Northern Ireland legislation: s 40(3).

3 'Qualifying occupational pension scheme' means an occupational pension scheme which is not a public service pension scheme: *ibid* s 40(3). For the meaning of 'occupational pension scheme' see PARA 961A.1. For the meaning of 'public service pension scheme' see PARA 874.

4 1999 Act s 40(1), (2) (amended by Pensions Act 2004 s 280(2), (3); and the Pensions Act 2008 Sch 11 Pt 2). See SI 2000/1054; and PARA 961A.7.

The 1999 Act s 40(2) does not apply to pensions which (1) are money purchase benefits, and (2) become pensions in payment on or after the commencement day: s 40(2A) (added by Pensions Act 2004 s 280(4)). 'Money purchase benefit' has the meaning given by the Pension Schemes Act 1993 s 181(1) and 'commencement day' means the day appointed for the coming into force of the Pensions Act 2004 s 280 (ie 6 April 2005: see SI 2005/275): 1999 Act s 40(3) (amended by Pensions Act 2004 s 280(5)). For the purposes of the 1999 Act s 40(1) the 'maximum percentage' means (a) 5 per cent in a case where (i) the pension is in payment before the commencement day, or (ii) the pension is not in payment before the commencement day but the entitlement to the relevant pension credit arose before that day, and (b) 2.5 per cent in a case where the entitlement to the relevant pension credit arises on or after the commencement day: s 40(2B). 'Relevant pension credit' means the pension credit to which the eligible pension credit rights are (directly or indirectly) attributable: s 40(3) (amended by Pensions Act 2008 Sch 11 Pt 2).

5 For the meaning of 'pension arrangement' see PARA 961A.1. As to the person responsible see PARA 961A.3.

6 For these purposes, a pension arrangement is involved in pension sharing if the 1999 Act s 29 applies by virtue of an order or provision which relates to the arrangement: s 41(4).

7 *Ibid* s 41(1). The reference to pension sharing activity is to activity attributable (directly or indirectly) to the involvement in pension sharing: s 41(5).

8 As to the implementation period see PARA 961A.5.

9 1999 Act s 41(2)(a).

10 *Ibid* s 41(2)(b).

11 *Ie* *ibid* Sch 5 (see PARA 961A.5): s 41(2)(c).

12 *Ibid* s 41(2)(d). See the Pensions on Divorce etc (Charging) Regulations 2000, SI 2000/1049 (amended by SI 2000/2691, SI 2005/2877, SI 2008/1050, SI 2009/615).

13 1999 Act s 41(3). In s 41(3) the reference to the relevant order or provision is to the order or provision which gives rise to the pension sharing, and the reference to the transferor is to the person to whose rights that order or provision relates: s 41(6).

14 'Pension scheme' means a scheme or arrangement providing benefits, in the form of pensions or otherwise, payable on termination of service, or on death or retirement, to or in respect of persons to whom the scheme or arrangement applies: *ibid* s 42(6).

15 'Pension credit', in *ibid* s 42, includes a credit under Northern Ireland legislation corresponding to s 29(1)(b): s 42(6).

16 *Ie* for the purposes of *ibid* Sch 5 para 2.

17 *Ibid* s 42(1).

18 *Ibid* s 42(2).

19 *Ibid* s 42(3).

20 *Ibid* s 42(4).

21 *Ie* under the Judicial Pensions Act 1981 and the Judicial Pensions and Retirement Act 1993.

22 See the 1999 Act s 43. See also Constitutional Reform Act 2005 s 19, Sch 7 para 4.

23 *Ie* the 1999 Act s 29.

24 *Ibid* s 45(1). See the Pensions on Divorce etc (Provision of Information) Regulations 2000, SI 2000/1048 (amended by SI 2000/2691, SI 2003/1727, SI 2005/2877, SI 2006/744, SI 2008/1050, SI 2009/615). The Pension Schemes Act 1993 s 168 (see *PARA* 970) applies as if the 1999 Act s 45 were contained in the 1993 Act (otherwise than in Pt VII Ch II (ss 123-127)): 1999 Act s 45(2). For the purposes of s 45, a pension arrangement is involved in pension sharing if s 29 applies by virtue of an order or provision which relates to the arrangement: s 45(3).

## UPDATE

### 961-963 Pensions on Divorce

Provision has been made introducing the option of pension sharing on divorce or nullity of marriage, thus allowing pension rights to be treated like other assets and to be transferred between spouses as part of the financial settlement. As to the sharing of rights under pension arrangements see *PARA* 961A. As to the sharing of state scheme rights see *PARA* 961B.

As to the making of pension sharing orders in connection with divorce proceedings see *MATRIMONIAL AND CIVIL PARTNERSHIP LAW* vol 72 (2009) *PARA* 523 et seq.

As to applications to the court in relation to transactions at an undervalue and preferences where such applications involve pension sharing transactions see *BANKRUPTCY AND INDIVIDUAL INSOLVENCY* vol 3(2) (2002 Reissue) *PARAS* 670, 671.

See also *Matrimonial Causes Act* 1973 s 25E (added by *Pensions Act* 2004 Sch 12 para 3) (Pension Protection Fund); and *Divorce etc (Pension Protection Fund) Regulations* 2006, SI 2006/1932.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/22.  
PENSIONS ON DIVORCE/961B. Sharing of state scheme rights.

## **961B. Sharing of state scheme rights.**

### **1. Shareable state scheme rights**

Pension sharing is available under the following provisions<sup>1</sup> in relation to a person's shareable state scheme rights<sup>2</sup>.

1     Ie under the Welfare Reform and Pension Act 1999 Pt IV Ch II (ss 47-51) (see PARAS 961B.2, 961B.3).

2     Ibid s 47(1). A person's shareable state scheme rights are (1) his entitlement, or prospective entitlement, to a Category A retirement pension by virtue of the Social Security Contributions and Benefits Act 1992 s 44(3) (b) (see PARA 569); and (2) his entitlement, or prospective entitlement, to a pension under s 55A (see PARA 582A): Welfare Reform and Pension Act 1999 s 47(2).

### **2. Activation of benefit sharing**

Provision relating to the creation of state scheme pension debits and credits<sup>1</sup> applies on the taking effect of any of the following relating to a person's shareable state scheme rights<sup>2</sup> (1) a pension sharing order under the Matrimonial Causes Act 1973<sup>3</sup>; (2) a pension sharing order under Schedule 5 to the Civil Partnership Act 2004<sup>4</sup> (3) provision which corresponds to the provision which may be made by such an order and which (a) is contained in a qualifying agreement<sup>5</sup> between the parties to a marriage; and (b) takes effect on the dissolution of the marriage under the Family Law Act 1996<sup>6</sup>; (4) provision which corresponds to the provision which may be made by such an order and which (i) is contained in a qualifying agreement between the parties to a marriage or former marriage; and (ii) takes effect after the dissolution of the marriage under the Family Law Act 1996<sup>7</sup>; (5) an order under the Matrimonial and Family Proceedings Act 1984 Pt III corresponding to such an order as is mentioned in head (1) above<sup>8</sup>; (6) an order under Schedule 7 to the Civil Partnership Act 2004 corresponding to such an order as is mentioned in head (2) above<sup>9</sup>; and (7) a pension sharing order under Schedule 15 to the Civil Partnership Act 2004<sup>10</sup>.

1     Ie the Welfare Reform and Pensions Act 1999 s 49: see PARA 961B.3.

2     For the meaning of 'shareable state scheme rights' see PARA 961B.1.

3     Welfare Reform and Pensions Act 1999 s 48(1)(a).

4     Ibid s 48(1)(aa) (added by Civil Partnership Act 2004 Sch 27 para 161(2)).

5     For the purposes of the Welfare Reform and Pensions Act 1999 s 48(1)(b) and (c) (see TEXT AND NOTES 5, 6), a qualifying agreement is one which (1) has been entered into in such circumstances as the Lord Chancellor may prescribe by regulations; and (2) satisfies such requirements as the Lord Chancellor may so prescribe: s 48(2).

6     Ibid s 48(1)(b). Section 48(1)(b) does not apply if the provision relates to rights which are the subject of a pension sharing order under the Matrimonial Causes Act 1973 in relation to the marriage: Welfare Reform and Pensions Act 1999 s 48(4).

7     Ibid s 48(1)(c). Section 48(1)(c) does not apply if (1) the marriage was dissolved by an order under the Family Law Act 1996 s 3 and the satisfaction of the requirements of s 9(2) was a precondition to the making of the order; (2) the provision relates to rights which are the subject of a pension sharing order under the Matrimonial Causes Act 1973 in relation to the marriage; or (3) shareable state scheme rights have already

been the subject of pension sharing between the parties: Welfare Reform and Pensions Act 1999 s 48(5). See also NOTE 4.

8 Ibid s 48(1)(d).

9 Ibid s 48(1)(da) (added by Civil Partnership Act 2004 Sch 27 para 161(3)).

10 Welfare Reform and Pensions Act 1999 s 48(1)(j) (added by Civil Partnership Act 2004 Sch 27 para 161(7)).

### 3. Creation of state scheme pension debits and credits

On the application of these provisions<sup>1</sup> (1) the transferor<sup>2</sup> becomes subject<sup>3</sup> to a debit of the appropriate amount<sup>4</sup>; and (2) the transferee<sup>5</sup> becomes entitled<sup>6</sup> to a credit of that amount<sup>7</sup>. Where the relevant order or provision<sup>8</sup> specifies a percentage value to be transferred, the appropriate amount is the specified percentage of the cash equivalent<sup>9</sup> on the transfer day<sup>10</sup> of the transferor's shareable state scheme rights<sup>11</sup> immediately before that day<sup>12</sup>. Where the relevant order or provision specifies an amount to be transferred, the appropriate amount is the lesser of (a) the specified amount; and (b) the cash equivalent on the transfer day of the transferor's relevant state scheme rights immediately before that day<sup>13</sup>. In determining prospective entitlement to a Category A retirement pension for these purposes, only tax years<sup>14</sup> before that in which the transfer day falls are taken into account<sup>15</sup>.

All proceedings relating to pension credits or debits are assigned to the Family Division<sup>16</sup>.

1 See PARA 961B.2.

2 'Transferor' means the person to whose rights the relevant order or provision relates: Welfare Reform and Pensions Act 1999 s 49(6).

3 Ie for the purposes of the Social Security Contributions and Benefits Act 1992 Pt II (ss 20-62).

4 Welfare Reform and Pensions Act 1999 s 49(1)(a).

5 'Transferee' means the person for whose benefit the relevant order or provision is made: ibid s 49(6).

6 See NOTE 3.

7 Welfare Reform and Pensions Act 1999 s 49(1)(b).

8 'Relevant order or provision' means the order or provision by virtue of which ibid s 49 applies: s 49(6).

9 The Secretary of State may by regulations make provision about the calculation and verification of cash equivalents for the purposes of ibid s 49: s 49(4) (substituted by the Child Support, Pensions and Social Security Act 2000 s 41(1)). The power conferred by the Welfare Reform and Pensions Act 1999 s 49(4) includes power to provide (1) for calculation or verification in such manner as may be approved by or on behalf of the Government Actuary; and (2) for things done under the regulations to be required to be done in accordance with guidance from time to time prepared by a person prescribed by the regulations: s 49(4A) (added by the Child Support, Pension and Child Support Act 2000 s 41(1)). In exercise of such power, it is now provided that cash equivalents are to be calculated and verified in such manner as may be approved by or on behalf of the Government Actuary: Sharing of State Scheme Rights (Provision of Information and Valuation) (No 2) Regulations 2000, SI 2000/2914, reg 4.

10 'Transfer day' means the day on which the relevant order or provision takes effect: Welfare Reform and Pensions Act 1999 s 49(6).

11 For the meaning of 'shareable state scheme rights' see PARA 961B.1.

12 Welfare Reform and Pensions Act 1999 s 49(2).

13 Ibid s 49(3).

14 'Tax year' has the meaning given by the Social Security Contributions and Benefits Act 1992 s 122(1) (see PARA 9): Welfare Reform and Pensions Act 1999 s 51.

15 Ibid s 49(5).

16 Senior Courts Sch 1 para 3(fa) (added by the Welfare Reform and Pensions Act 1999 Sch 12 para 1).

## **UPDATE**

### **961-963 Pensions on Divorce**

Provision has been made introducing the option of pension sharing on divorce or nullity of marriage, thus allowing pension rights to be treated like other assets and to be transferred between spouses as part of the financial settlement. As to the sharing of rights under pension arrangements see PARA 961A. As to the sharing of state scheme rights see PARA 961B.

As to the making of pension sharing orders in connection with divorce proceedings see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 523 et seq.

As to applications to the court in relation to transactions at an undervalue and preferences where such applications involve pension sharing transactions see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 670, 671.

See also Matrimonial Causes Act 1973 s 25E (added by Pensions Act 2004 Sch 12 para 3) (Pension Protection Fund); and Divorce etc (Pension Protection Fund) Regulations 2006, SI 2006/1932.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/22.  
PENSIONS ON DIVORCE/962. Pensions on divorce; lump sums.

## **962. Pensions on divorce; lump sums.**

The power of the court<sup>1</sup> to order a party to a marriage to pay a lump sum to the other party includes, where the benefits which the party with pension rights<sup>2</sup> has or is likely to have under a pension scheme<sup>3</sup> include any lump sum payable in respect of his death, power to make any of the following provisions by the order<sup>4</sup>. The court may:

- 2677 (1) if the trustees or managers<sup>5</sup> of the pension scheme in question have power to determine the person to whom the sum, or any part of it, is to be paid, require them to pay the whole or part of that sum, when it becomes due, to the other party;
- 2678 (2) if the party with pension rights has power to nominate the person to whom the sum, or any part of it, is to be paid, require the party with pension rights to nominate the other party in respect of the whole or part of that sum;
- 2679 (3) in any other case, require the trustees or managers of the pension scheme in question to pay the whole or part of that sum, when it becomes due, for the benefit of the other party instead of to the person to whom, apart from the order, it would be paid<sup>6</sup>.

Any payment by the trustees or managers under an order so made discharges so much of the trustees', or managers', liability in respect of the party with pension rights as corresponds to the amount of the payment<sup>7</sup>.

In deciding whether to make an order which by virtue of these provisions imposes any requirement on the trustees or managers of a pension scheme, the court must take into account any representations of the trustees or managers as to whether, in all the circumstances of the case, the court ought to make the order, and in particular whether the trustees or managers have been given sufficient information to enable them to comply with their obligations under any such order and the administrative expenses which they are likely to incur in complying with any such obligations<sup>8</sup>.

1    le under the Matrimonial Causes Act 1973 s 23 (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 450 et seq.

2    For the meaning of 'the party with pension rights' see PARA 961 note 9 ante.

3    For the meaning of 'pension scheme' see PARA 961 note 4 ante.

4    Matrimonial Causes Act 1973 s 25C(1) (s 25C added by the Pensions Act 1995 s 166(1)).

5    For the meaning of 'trustees or managers' see PARA 961 note 8 ante.

6    Matrimonial Causes Act 1973 s 25C(2) (as added: see note 4 supra).

7    Ibid s 25C(3) (as added: see note 4 supra). Section 25C (as so added) does not affect the powers of the court under s 31 (as amended) (variation, discharge, etc of orders) in relation to any order made before the commencement of the Pensions Act 1995 s 166: s 166(6). Section 166 was brought into force partially on 27 June 1996 and fully on 1 August 1996: see the Pensions Act 1995 (Commencement No 5) Order 1996, SI 1996/1675.

8    See the Divorce etc (Pensions) Regulations 1996, SI 1996/1676, reg 11.

**UPDATE****961-963 Pensions on Divorce**

Provision has been made introducing the option of pension sharing on divorce or nullity of marriage, thus allowing pension rights to be treated like other assets and to be transferred between spouses as part of the financial settlement. As to the sharing of rights under pension arrangements see PARA 961A. As to the sharing of state scheme rights see PARA 961B.

As to the making of pension sharing orders in connection with divorce proceedings see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 523 et seq.

As to applications to the court in relation to transactions at an undervalue and preferences where such applications involve pension sharing transactions see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 670, 671.

See also Matrimonial Causes Act 1973 s 25E (added by Pensions Act 2004 Sch 12 para 3) (Pension Protection Fund); and Divorce etc (Pension Protection Fund) Regulations 2006, SI 2006/1932.

**962 Pensions on divorce; lump sums**

TEXT AND NOTES--Matrimonial Causes Act 1973 s 25C(1)-(3) (s 25C added by the Pensions Act 1995 s 166(1); Matrimonial Causes Act 1973 s 25C(1)-(3) amended by the Welfare Reform and Pensions Act 1999 Sch 4 para 2(1)-(4)), so that (1) all references to a 'scheme' are now to an 'arrangement'; and (2) all references to 'trustees or managers' are now to 'the person responsible for the arrangement'. 'Person responsible for a pension arrangement' is further defined: see the Matrimonial Causes Act 1973 s 25D(4) (s 25D added by the Pensions Act 1995 s 166(1); Matrimonial Causes Act 1973 s 25D(4) substituted by the Welfare Reform and Pensions Act 1999 Sch 4 para 3(1), (5)). The powers conferred by the Matrimonial Causes Act 1973 s 25C may not be exercised in relation to a pension arrangement which (a) is the subject of a pension sharing order in relation to the marriage; or (b) has been the subject of pension sharing between the parties to the marriage: s 25C(4) (s 25C as added; s 25C(4) added by the Welfare Reform and Pensions Act 1999 Sch 4 para 2(1), (5)).

TEXT AND NOTE 8--SI 1996/1676 replaced: Divorce etc (Pensions) Regulations 2000, SI 2000/1123 (amended by SI 2005/2114).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/22. PENSIONS ON DIVORCE/963. Supplementary provisions.

### 963. Supplementary provisions.

Where a financial provision order<sup>1</sup> made by virtue of the provisions relating to pension rights<sup>2</sup> imposes any requirement on the trustees or managers of a pension scheme<sup>3</sup> ('the first scheme') and the party with pension rights<sup>4</sup> acquires transfer credits<sup>5</sup> under another pension scheme ('the new scheme') which are derived, directly or indirectly, from a transfer from the first scheme of all his accrued rights under that scheme, including transfer credits allowed by that scheme, and the trustees or managers of the new scheme have been given notice in accordance with regulations<sup>6</sup>, the order has effect as if it has been made instead in respect of the trustees or managers of the new scheme<sup>7</sup>. Regulations may:

- 2680 (1) in relation to any provision relating to pension rights<sup>8</sup> which authorises the court making a financial provision order to require the trustees or managers of a pension scheme to make a payment for the benefit of the other party<sup>9</sup>, make provision as to the person to whom, and the terms on which, the payment is to be made<sup>10</sup>;
- 2681 (2) require notices to be given in respect of changes of circumstances relevant to such orders which include provision made in relation to pension rights<sup>11</sup>;
- 2682 (3) make provision for the trustees or managers of any pension scheme to provide, for the purposes of financial provision orders, information as to the value of any benefits under the scheme<sup>12</sup>;
- 2683 (4) make provision for the recovery of the administrative expenses of complying with such orders, so far as they include provision made in relation to pension rights and of providing such information, from the party with pension rights or the other party<sup>13</sup>;
- 2684 (5) make provision for the value of any benefits under a pension scheme to be calculated and verified, for the purposes of financial provision orders, in a prescribed manner<sup>14</sup>,

and regulations made by virtue of head (5) above may provide for that value to be calculated and verified in accordance with guidance which is prepared and from time to time revised by a prescribed person and approved by the Secretary of State<sup>15</sup>.

1    le an order under the Matrimonial Causes Act 1973 s 23 (as amended): see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 450 et seq.

2    le by virtue of *ibid* ss 25B or 25C (as added): see PARAS 961-962 ante.

3    For the meaning of 'trustees or managers' and 'pension scheme' see PARA 961 notes 8, 4 respectively ante.

4    For the meaning of 'the party with pension rights' see PARA 961 note 9 ante.

5    'Transfer credits' has the same meaning as in the Pension Schemes Act 1993 (see PARA 612 note 5 ante): Matrimonial Causes Act 1973 s 25D(1) (s 25D added by the Pensions Act 1995 s 166(1)).

6    'Regulations' means regulations made by the Lord Chancellor; and the power to make regulations under these provisions is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: Matrimonial Causes Act 1973 s 25D(4) (as added: see note 5 supra). As to the notice to be given see the Divorce etc (Pensions) Regulations 1996, SI 1996/1676, reg 6 (amended by SI 1997/636).

7 Matrimonial Causes Act 1973 s 25D(1) (as added: see note 5 supra); and see the Divorce etc (Pensions) Regulations 1996, SI 1996/1676, reg 8A (added by SI 1997/636).

8 Is any provision of the Matrimonial Causes Act 1973 ss 25B, 25C (as added): see PARAS 961-962 ante.

9 For the meaning of 'the other party' see PARA 961 note 9 ante.

10 Matrimonial Causes Act 1973 s 25D(2)(a) (as added: see note 5 supra).

11 Ibid s 25D(2)(b) (as added: see note 5 supra). See the Divorce etc (Pensions) Regulations 1996, SI 1996/1676, reg 8.

12 Matrimonial Causes Act 1973 s 25D(2)(c) (as added: see note 5 supra). For the information to be furnished see the Divorce etc (Pensions) Regulations 1996, SI 1996/1676, reg 4 (amended by SI 1997/636). Where the trustees or managers of a pension scheme have been requested to furnish or have furnished information under the Divorce etc (Pensions) Regulations 1996, SI 1996/1676, reg 4 (as so amended), they must, if so requested by the member, state in writing what proportion of the estimated cash equivalent or value of the member's rights is in their opinion attributable to any pension or other periodical payment under the scheme to which a spouse of the member would be or might become entitled in the event of the member's death: reg 5. The trustees or managers of a pension scheme are entitled to recover from the party with pension rights the reasonable cost of furnishing information following a request under reg 4 (as so amended) or reg 5, whether or not an order imposing any requirement on them is subsequently made, to the extent that that cost exceeds the cost of furnishing information which they would have been required to furnish under the Occupational Pension Schemes (Transfer Values) Regulations 1996, SI 1996/1847, reg 11, Sch 1 (see PARA 960 ante) or the Personal Pension Schemes (Disclosure of Information) Regulations 1987, SI 1987/1110, reg 5(1), Sch 2 para 2(a), (b) (see PARA 735 ante) or an application for a statement of entitlement under the Pension Schemes Act 1993 s 93A(1) (as added) (see PARA 952 ante), instead of being made under the Divorce etc (Pensions) Regulations 1996, SI 1996/1676 (as amended): reg 10A(1) (reg 10A added by SI 1997/636). The costs referred to must be assessed by the court if not agreed: Divorce etc (Pensions) Regulations 1996, SI 1996/1676, reg 10A(2) (as so added).

13 Matrimonial Causes Act 1973 s 25D(2)(d) (as added: see note 5 supra). Upon the making of any financial provision order which by virtue of s 25B or s 25C (as added) imposes any requirement on the trustees or managers of a pension scheme, the pension scheme is entitled to recover from the party with pension rights such sum as represents the reasonable administrative expenses which they have incurred or are likely to incur by reason of the order, and this sum must be assessed by the court if not agreed: Divorce etc (Pensions) Regulations 1996, SI 1996/1676, reg 10.

14 Matrimonial Causes Act 1973 s 25D(2)(e) (as added: see note 5 supra). 'Prescribed' means prescribed by regulations: s 25D(4) (as so added). The value must be calculated as at a date to be specified by the court, being not earlier than the date of the petition and not later than the date of the order: see the Divorce etc (Pensions) Regulations 1996, SI 1996/1676, reg 3(2). As to the method of calculation see reg 3(1), (3)-(7) (reg 3(3), (4), (6) amended, and reg 3(7) added, by SI 1997/636).

15 Matrimonial Causes Act 1973 s 25D(2) (as added: see note 5 supra). As to the Secretary of State see PARA 1 ante. For consequential amendments made to other sections of the Matrimonial Causes Act 1973 see the Pensions Act 1995 s 166(2)-(5).

## UPDATE

### 961-963 Pensions on Divorce

Provision has been made introducing the option of pension sharing on divorce or nullity of marriage, thus allowing pension rights to be treated like other assets and to be transferred between spouses as part of the financial settlement. As to the sharing of rights under pension arrangements see PARA 961A. As to the sharing of state scheme rights see PARA 961B.

As to the making of pension sharing orders in connection with divorce proceedings see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 523 et seq.

As to applications to the court in relation to transactions at an undervalue and preferences where such applications involve pension sharing transactions see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 670, 671.

See also Matrimonial Causes Act 1973 s 25E (added by Pensions Act 2004 Sch 12 para 3) (Pension Protection Fund); and Divorce etc (Pension Protection Fund) Regulations 2006, SI 2006/1932.

### **963 Supplementary provisions**

NOTES--SI 1996/1676 replaced: Divorce etc (Pensions) Regulations 2000, SI 2000/1123 (amended by SI 2005/2114).

TEXT AND NOTES 1-7--Replaced. Where (1) an order made under the Matrimonial Causes Act 1973 s 23 by virtue of s 25B or s 25C (see PARAS 961, 962) imposes any requirement on the person responsible for a pension arrangement ('the first arrangement') and the party with pension rights acquires rights under another pension arrangement ('the new arrangement') which are derived (directly or indirectly) from the whole of his rights under the first arrangement; and (2) the person responsible for the new arrangement has been given notice in accordance with regulations made by the Lord Chancellor, the order has effect as if it had been made instead in respect of the person responsible for the new arrangement: s 25D(1) (s 25D added by the Pensions Act 1995 s 166(1); Matrimonial Causes Act 1973 s 25D(1) substituted by the Welfare Reform and Pensions Act 1999 Sch 4 para 3(1), (2)). For the definition of 'pension arrangement' see the Matrimonial Causes Act 1973 s 25D(3) (s 25D as added; s 25D(3) substituted by the Welfare Reform and Pensions Act 1999 Sch 4 para 3(1), (5)). 'Person responsible for a pension arrangement' is further defined: see the Matrimonial Causes Act 1973 s 25D(4) (s 25D as added; s 25D(4) substituted by the Welfare Reform and Pensions Act 1999 Sch 4 para 3(1), (5)).

TEXT AND NOTES 8-14--Add head (6) 'make, in relation to payment under a mistaken belief as to the continuation in force of a provision included by virtue of the Matrimonial Causes Act 1973 s 25B or 25C in an order under s 23, provision about the rights or liabilities of the payer, the payee or the person to whom the payment was due': s 25D(2)(ab) (s 25D as added (see TEXT AND NOTES 1-7); s 25D(2)(ab) added by the Welfare Reform and Pensions Act 1999 Sch 4 para 3(1), (3)(c)).

Add head (7) 'make provision for the person responsible for a pension arrangement to be discharged in prescribed circumstances from a requirement imposed by virtue of s 25B or 25C': s 25D(2)(ba) (s 25D as added; s 25D(2)(ba) added by the Welfare Reform and Pensions Act 1999 Sch 4 para 3(1), (3)(d)). Regulations under the Matrimonial Causes Act 1973 s 25D(2) may make different provision for different cases, and power to make regulations under s 25D is exercisable by statutory instrument which is subject to annulment in pursuance of a resolution of either House of Parliament: s 25D(2B), (2C) (s 25D as added; s 25D(2B), (2C) added by the Welfare Reform and Pensions Act 1999 Sch 4 para 3(1), (4)).

TEXT AND NOTES 8-10--For 'trustees or managers of a pension scheme' substitute 'person responsible for a pension arrangement': Matrimonial Causes Act s 25D(2)(a) (s 25D as added (see TEXT AND NOTES 1-7<sup>supra</sup>); s 25D(2) amended by the Welfare Reform and Pensions Act 1999 Sch 4 para 3(1), (3)(b)).

TEXT AND NOTES 12, 13--Matrimonial Causes Act s 25D(2)(c), (d) repealed: Welfare Reform and Pensions Act 1999 Sch 4 para 3(1), (3)(e)), Sch 13 Pt II.

TEXT AND NOTE 14--Replaced. Head (5) now 'make provision about calculation and verification in relation to the valuation of (1) benefits under a pension arrangement; or (2) shareable state scheme rights, for the purposes of the court's functions in connection with the exercise of any of its powers under the Matrimonial Causes Act 1973 Pt II (ss 21-40A)': s 25D(2)(e) (s 25D as added (see TEXT AND NOTES 1-7); s 25D(2)(e) substituted by the Welfare Reform and Pensions Act 1999 Sch 4 para 3(1), (3)(f)).

Regulations under the Matrimonial Causes Act 1973 s 25D(2)(e) may include (a) provision for calculation or verification in accordance with guidance from time to time prepared by a prescribed person; and (b) provision by reference to regulations under the Welfare Reform and Pensions Act 1999 s 30 or s 49(4) (see PARAS 961A.3, 961B.3): Matrimonial Causes Act 1973 s 25D(2A) (s 25D as added (see TEXT AND NOTES 1-7); s 25D(2A) added by the Welfare Reform and Pensions Act 1999 Sch 4 para 3(1), (4)).

TEXT AND NOTE 15--Words 'and regulations made ... Secretary of State' omitted: Matrimonial Causes Act 1973 s 25D(2) (s 25D as added (see TEXT AND NOTES 1-7); s 25D(2) amended by the Welfare Reform and Pensions Act 1999 Sch 4 para 3(1), (3)(g), Sch 13 Pt II).

NOTE 15--Pensions Act 1995 s 166(4), (5) amended: Welfare Reform and Pensions Act 1999 Sch 12 paras 43, 62. Pensions Act 1995 s 166(5) further amended, s 166(4A) added: SI 2005/3029.

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## 23. MISCELLANEOUS PROVISIONS

### (1) INFORMATION PROVISIONS

#### 964. Disclosure of information between government departments.

No obligation as to secrecy imposed by statute or otherwise on persons employed<sup>1</sup> in relation to the Inland Revenue<sup>2</sup> must prevent information obtained or held in connection with the assessment or collection of income tax from being disclosed:

- 2685 (1) to the Secretary of State<sup>3</sup>;
- 2686 (2) to the Department of Health and Social Services for Northern Ireland<sup>4</sup>; or
- 2687 (3) to an officer of either of them authorised to receive such information, in connection with the operation of the Pension Schemes Act 1993<sup>5</sup> or of any corresponding enactment of Northern Ireland legislation<sup>6</sup>.

This provision, however, extends only to disclosure by or under the authority of the Inland Revenue<sup>7</sup>.

In relation to persons who are carrying on or have carried on a trade, profession or vocation<sup>8</sup> income from which is chargeable to tax under Case I or Case II of Schedule D<sup>9</sup>, such disclosure relating to that trade, profession or vocation must be limited to information about the commencement or cessation of, and employed earners<sup>10</sup> engaged in, that trade, profession or vocation, but sufficient information may also be given to identify the persons concerned<sup>11</sup>.

The Secretary of State and the Inland Revenue may provide the Registrar of Occupational and Personal Pension Schemes<sup>12</sup> with such information as he may request for the purposes of the register<sup>13</sup>; and no obligation as to secrecy or confidentiality imposed by statute or otherwise on persons employed in the Department of Social Security, or persons employed in relation to the Inland Revenue, prevents them from disclosing to the registrar such information as is necessary for the purposes of the register<sup>14</sup>.

1 For the meaning of 'employed' see PARA 560 note 5 ante.

2 I.e. the Commissioners of Inland Revenue ('the Board'): see INCOME TAXATION vol 23(1) (Reissue) PARA 31 et seq.

3 Pension Schemes Act 1993 s 158(1)(a). As to the Secretary of State see PARA 1 ante.

4 Ibid s 158(1)(b). In the application of s 158 (amended by the Pensions Act 1995 ss 151, 177, Sch 5 paras 18, 66, Sch 7 Pt III) to Northern Ireland any reference to a government department is to be taken to be, or to include (as the context may require), a Northern Ireland department: Pension Schemes Act 1993 s 181(7) (amended by the Pensions Act 1995 ss 151, 177, Sch 5 paras 18, 77, Sch 7 Pt IV).

5 I.e. except the Pension Schemes Act 1993 Pt VII Ch II (ss 123-127) (see PARAS 853-856 ante); s 157 (see PARA 854 ante) and s 161 (see PARA 857 ante): s 158(1)(c).

6 Ibid s 158(1)(c). The legislation corresponding to the Pension Schemes Act 1993 is the Pension Schemes (Northern Ireland) Act 1993. Subject to the Pension Schemes Act 1993 s 158(7) (as amended: see note 3 supra), information which is the subject of disclosure to any person by virtue of s 158(1) must not be further disclosed to any other person, except where the further disclosure is made: (1) to a person to whom disclosure could be

virtue of s 158 (as so amended) have been made by or under the authority of the Inland Revenue; or (2) for the purposes of any civil or criminal proceedings in connection with the operation of the Pension Schemes Act 1993 (except the provisions referred to in note 5 supra); or (3) for the purposes of the Social Security Administration Act 1992 ss 17-62 (as amended) (see PARA357 et seq ante) or any corresponding provisions of Northern Ireland legislation: Pension Schemes Act 1993 s 158(6) (as amended: see note 3 supra). The legislation corresponding to the Social Security Administration Act 1992 ss 17-62 (as amended) is contained in the Social Security Administration (Northern Ireland) Act 1992 ss 15-60.

7 Pension Schemes Act 1993 s 158(5).

8 As to the meaning of 'trade', 'profession' and 'vocation' see INCOME TAXATION vol 23(1) (Reissue) PARAS 105, 135-136.

9 As to the charge to tax under Case I or Case II of Schedule D see INCOME TAXATION vol 23(1) (Reissue) PARAS 95 et seq, 134 et seq.

10 For the meaning of 'employed earner' see PARA 32 ante (definition applied by the Pension Schemes Act 1993 s 181(1)).

11 Ibid s 158(4).

12 As to the registrar see PARA 661 ante.

13 As to the register see PARAS 661-662 ante.

14 Pension Schemes Act 1993 s 158(7) (as amended: see note 3 supra).

## UPDATE

### 964-965 Information Provisions

The Pensions Act 2004 Pt 4 (ss 234-238, Sch 10) provides the Secretary of State with the power to promote and facilitate financial planning for retirement and enables him to receive the information to do so. See further PARA 965B.

### 964 Disclosure of information between government departments

TEXT AND NOTES--No obligation as to secrecy imposed by statute or otherwise on Revenue and Customs officials is to prevent information obtained or held for the purposes of the Pension Schemes Act 1993 Pt III (ss 7-39) from being disclosed to the Secretary of State, or to the Department of Health and Social Services for Northern Ireland, or to an officer of either of them authorised to receive such information, in connection with the operation of the 1993 Act: s 158(1A) (added by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 6 para 70; and amended by the Commissioners for Revenue and Customs Act 2005 Sch 4 para 51).

TEXT AND NOTES 1, 2--For 'persons employed in relation to the Inland Revenue' read 'Revenue and Customs officials': 1993 Act s 158(1) (amended by the 2005 Act Sch 4 para 51(a)). 'Revenue and Customs officials' has the meaning given by s 18 (see CUSTOMS AND EXCISE vol 12(3) (2007 Reissue) PARA 919): s 158(9) (added by the 2005 Act Sch 4 para 51(b)).

NOTE 6--Also, head (4) or for the purposes of the Social Security Contributions (Transfer of Functions, etc) Act 1999 Pt II (ss 8-19) or any corresponding provisions of Northern Ireland legislation: 1993 Act s 158(6) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 6 para 7).

Pension Schemes Act 1993 s 158(6) amended: Pensions Act 2004 Sch 13 Pt 1.

TEXT AND NOTE 14--1993 Act s 158(7) repealed: 2004 Act Sch 13 Pt 1.



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### **965. Disclosures by, and requirement to give information to, the Secretary of State.**

The Secretary of State<sup>1</sup> may, in spite of any obligation as to secrecy or confidentiality imposed by statute or otherwise on him or on persons employed in the Department of Social Security, disclose any information received by him in connection with his functions under the Pension Schemes Act 1993 or the Pensions Act 1995 to any specified person<sup>2</sup> if he considers that the disclosure would enable or assist that person to discharge functions specified in relation to him<sup>3</sup>.

The Secretary of State may by order:

- 2688 (1) increase the number of persons exercising regulatory functions and specify functions in relation to them;
- 2689 (2) remove any person for the time being so specified; or
- 2690 (3) alter the functions for the time being so specified in relation to that person;
- or
- 2691 (4) restrict the circumstances in which, or impose conditions subject to which, disclosure may be made to any person for the time being so specified<sup>4</sup>.

Regulations<sup>5</sup> may require the furnishing by prescribed<sup>6</sup> persons to the Secretary of State of such information as he requires for certain statutory purposes<sup>7</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 As to the specified persons see note 3 infra.

3 See the Pension Schemes Act 1993 s 158A(1) (s 158A added by the Pensions Act 1995 s 173, Sch 6 paras 2, 9). The specified persons and functions are:

- 204 (1) the Treasury and functions under the Financial Services Act 1986;
- 205 (2) the Bank of England and functions under the Banking Act 1987 or any other functions;
- 206 (3) the Occupational Pensions Regulatory Authority (see PARA 598 ante) and functions under the Pension Schemes Act 1993 or the Pensions Act 1995 or corresponding Northern Ireland legislation;
- 207 (4) the Pensions Compensation Board (see PARA 637 ante) and functions under the Pensions Act 1995 or corresponding Northern Ireland legislation;
- 208 (5) the Friendly Societies Commission and functions under the enactments relating to friendly societies;
- 209 (6) the Building Societies Commission and functions under the Building Societies Act 1986;
- 210 (7) an inspector appointed by the Secretary of State and functions under the Financial Services Act 1986 s 94 (as amended) or s 177 (as amended);
- 211 (8) a person authorised to exercise powers under s 106 (as amended) and functions under that section;
- 212 (9) a designated agency or transferee body or the competent authority (within the meaning of the Financial Services Act 1986) and functions under that Act;

213 (10) a recognised self-regulating organisation, recognised professional body, recognised investment exchange or recognised clearing house (within the meaning of the Financial Services Act 1986) and functions in its capacity as an organisation, body, exchange or clearing house recognised under the Financial Services Act 1986.

4 See the Pension Schemes Act 1993 s 158A(2) (as added: see note 3 supra).

5 For the meaning of 'regulations' see PARA 557 note 2 ante.

6 For the meaning of 'prescribed' see PARA 555 note 1 ante.

7 See the Pension Schemes Act 1993 s 155 (amended by the Pensions Act 1995 ss 151, 177, Sch 5 paras 18, 65, Sch 7 Pt III). The statutory provisions referred to are the Pension Schemes Act 1993 Pt III (ss 7-68) (as amended) (see PARA 877 et seq ante); s 111 (see PARA 555 ante) (and Pt VII (ss 129-132) (as amended) and s 153 (as amended) so far as they have effect for the purposes of s 111); s 117 (see PARA 558 ante); and s 159 (as amended) (see PARA 928 ante) so far as it relates to protected payments: see s 155 (as so amended). As to the exercise of this power see the Personal and Occupational Pension Schemes (Incentive Payments) Regulations 1987, SI 1987/1115 (as amended); the Occupational Pension Schemes (Contracting-out) Regulations 1996, SI 1996/1172 (as amended); the Personal and Occupational Pension Schemes (Protected Rights) Regulations 1996, SI 1996/1537 (as amended); and the Personal Pension Schemes (Appropriate Schemes) Regulations 1997, SI 1997/470.

## UPDATE

### 964-965 Information Provisions

The Pensions Act 2004 Pt 4 (ss 234-238, Sch 10) provides the Secretary of State with the power to promote and facilitate financial planning for retirement and enables him to receive the information to do so. See further PARA 965B.

### 965 Disclosures by, and requirement to give information to, the Secretary of State

TEXT AND NOTES--The Inland Revenue may, in spite of any obligation as to secrecy or confidentiality imposed by statute or otherwise on it or on its officers, disclose any information received by it in connection with its functions under the Pensions Schemes Act 1993 Part III (ss 7-39) to any specified person (see NOTE 3) if it considers that the disclosure would enable or assist the person to discharge the functions specified in relation to him: s 158A(1A) (added by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 6 para 8).

TEXT AND NOTE 3--Pension Schemes Act 1993 s 158A(1) further amended, s 158A(1AA) added: Pensions Act 2004 Sch 12 para 26(2), (4).

NOTE 3--Heads (1), (5)-(10) repealed: Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 124.

In head (2) for 'functions under ... other functions' read 'any of its functions', and add head '(2a) the Financial Services Authority and functions under the legislation relating to friendly societies, under the Building Societies Act 1986 or under the Financial Services and Markets Act 2000': Pension Schemes Act 1993 s 158A(1) (amended by the Bank of England Act 1998 s 23, Sch 5 and SI 2001/3649, art 124).

Head (3) amended, head (4) substituted: Pensions Act 2004 Sch 12 para 26(3).

After head (4) add '(4a) a person appointed under (a) the Financial Services and Markets Act 2000 s 167, (b) the 2000 Act s 168(3) or (5) or (c) the 2000 Act s 284, to conduct an investigation and functions in relation to that investigation; (4b) a body designated under the Financial Services and Markets Act 2000 s 326(1) and functions in its capacity as a body designated under s 326; (4c) a recognised investment

exchange or a recognised clearing house (as defined by the Financial Services and Markets Act 2000 s 285) and functions in its capacity as an exchange or clearing house recognised under the 2000 Act': Pension Schemes Act 1993 s 158A(1) (amended by SI 2001/3649, art 124).

TEXT AND NOTES 5-7--Now refers to the Secretary of State or the Inland Revenue and to such information as he or it requires: Pension Schemes Act 1993 s 155 (amended by Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 59).

NOTE 7--SI 1996/1172 further amended: see PARA 557. SI 1997/470 amended: SI 1997/3038, SI 2000/2975, SI 2001/943, SI 2001/3649, SI 2006/147, SI 2009/615. SI 1987/1115 amended: SI 2000/749. Secretary of State's functions under SI 1987/1115, SI 1996/1172 (except those under regs 23, 61), SI 1996/1537, SI 1997/470 now transferred to the Commissioners of Inland Revenue: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 1(2), Sch 2.

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### **965A. Disclosure of state pension information.**

The following provisions apply to any state pension information<sup>1</sup> which is held in relation to any individual (1) by the Secretary of State; or (2) in connection with the provision of any services provided to the Secretary of State for purposes connected with his functions relating to social security, by the person providing those services<sup>2</sup>. The Secretary of State may, in the prescribed manner, disclose or authorise the disclosure of any information to which these provisions apply in any case in which (a) the person to whom the disclosure is made is a person falling within a specified group of persons<sup>3</sup> who has, in the prescribed<sup>4</sup> manner, applied to the Secretary of State for the disclosure of the information; and (b) it appears to the Secretary of State that the prescribed conditions for the making of a disclosure of the information in question to that person have been satisfied<sup>5</sup>. The Secretary of State must secure that his powers under these provisions are exercised so that at least the following is prescribed for the purposes of head (b) above, namely (i) in the case of an application for information made by certain persons<sup>6</sup>, a condition that the individual to whom the information relates has consented to the making of the application and to the disclosure; and (ii) in any other case, either that condition or the alternative condition, such alternative condition being (A) that such steps as may be prescribed have been taken for the purpose of ascertaining whether the individual to whom the information relates objects to the making of the application for the disclosure of information relating to him; and (B) that the prescribed time has elapsed without any objection by that individual<sup>7</sup>. A person applying to the Secretary of State, in accordance with regulations under these provisions, for the disclosure of any information relating to an individual is entitled, for the purpose of making the application, to make such disclosures of information relating to that individual as may be authorised by the regulations<sup>8</sup>.

Regulations under the above provisions have now been made<sup>9</sup>.

1 For these purposes, the reference, in relation to an individual, to state pension information is a reference to the following information about that individual (1) his date of birth, and the age at which and date on which he attains pensionable age (a) for the purposes of the Pension Schemes Act 1993, in relation to any guaranteed minimum pension to which he is entitled; and (b) in accordance with the rules in the Pensions Act 1995 Sch 4 para 1 (see PARA 562); (2) the amount of any basic retirement pension a present or future entitlement to which has already accrued to that individual, and the amount of any additional retirement pension such an entitlement to which has already accrued to that individual; (3) a projection of the amount of the basic retirement pension to which that individual is likely to become entitled, or might become entitled in particular circumstances; (4) a projection of the amount of the additional retirement pension to which that individual is likely to become entitled, or might become entitled in particular circumstances; and (5) a projection of the amount of any lump sum to which that individual is likely to become entitled, or might become entitled in particular circumstances: Child Support, Pensions and Social Security Act 2000 s 42(7) (amended by Pensions Act 2004 s 298(4), Sch 13 Pt 1). 'Basic retirement pension' means any basic pension under the Social Security Contributions and Benefits Act 1992 and 'additional retirement pension' means any additional pension or shared additional pension under the Social Security Contributions and Benefits Act 1992, or any graduated retirement benefit the National Insurance Act 1965 ss 36 and 37: Social Security Contributions and Benefits Act 1992 s 42(11) (definitions substituted by Pensions Act 2004 s 298(5)). 'Lump sum' means a lump sum under the Social Security Contributions and Benefits Act 1992 Sch 5 or 5A: Social Security Contributions and Benefits Act 1992 s 42(11) (definition added by Pensions Act 2004 s 298(5)).

2 Social Security Contributions and Benefits Act 1992 s 42(1).

3 A person falls within the specified group if (1) he is the trustee or manager of an occupational pension scheme of which the individual to whom the information relates is a member; (2) he is the trustee or manager of a personal pension scheme of which that individual is a member; (3) he is the employer in relation to an occupational pension scheme of which that individual is a member; (4) he is the employer in relation to any

employed earner's employment of that individual which is not contracted-out employment; or (5) he is proposing to provide services to that individual in circumstances in which the provision of the services, or the proposal to do so, may involve the giving of advice or forecasts to which the information to which *ibid* s 42 applies may be relevant: s 42(3). 'Trustee or manager', in relation to an occupational or personal pension scheme, means (a) in the case of a scheme established under a trust, the trustee or trustees of the scheme, and (b) in any other case, the person or persons responsible for the management of the scheme; 'occupational pension scheme' and 'personal pension scheme' have the same meanings as in the Pension Schemes Act 1993; 'member', in relation to an occupational pension scheme, has the same meaning as in the Pensions Act 1995 Pt I; 'employer', in relation to any occupational pension scheme, has the same meaning as in Pt I and, in relation to employed earner's employment, has the same meaning as in the Pension Schemes Act 1993; 'employed earner' has the same meaning as in the Social Security Contributions and Benefits Act 1992 Pts I-V (ss 1-111) (by virtue of s 2(1)); and 'contracted-out employment' has the same meaning as in the Pension Schemes Act 1993: Child Support, Social Security and Pensions Act 2000 s 42(11) (amended by Pensions Act 2004 s 298(5)).

For the purposes of the Child Support, Pensions and Social Security Act 2000 s 42 and of any regulations made under it, anything done by or in relation to a person who (1) provides, or proposes to provide, relevant services to a person falling within s 42(3) ('the qualifying person'), and (2) is authorised in writing by the qualifying person to act for the purposes of s 42, is treated as done by or in relation to the qualifying person: s 42(3A) (added by Pensions Act 2004 s 298(3)). In head (1) 'relevant services' means services that may involve the giving of advice or forecasts to which information to which s 42 applies may be relevant: Child Support, Pensions and Social Security Act 2000 s 42(3A) (as so added). 'Regulations' means regulations made by the Secretary of State: s 42(11). Regulations under s 42 are to be made by statutory instrument, and are subject to annulment in pursuance of a resolution of either House of Parliament: s 42(8). The Social Security Administration Act 1992 s 189(4)-(6) (see *PARA 30*) applies in relation to any power to make regulations under the Child Support, Pensions and Social Security Act 2000 s 42 as it applies in relation to the powers to make regulations that are conferred by the Social Security Administration Act 1992: Child Support Pensions and Social Security Act 2000 s 42(9).

- 4 'Prescribed' means prescribed by or determined in accordance with regulations: *ibid* s 42(11).
- 5 *Ibid* s 42(2) (amended by Pensions Act 2004 s 298(2)).
- 6 Ie any person falling within *NOTE 4* head (5).
- 7 Child Support, Social Security and Pensions Act 2000 s 42(4), (5).
- 8 *Ibid* s 42(6).
- 9 See the Social Security (Disclosure of State Pension Information) Regulations 2000, SI 2000/3188.

## UPDATE

### 964-965 Information Provisions

The Pensions Act 2004 Pt 4 (ss 234-238, Sch 10) provides the Secretary of State with the power to promote and facilitate financial planning for retirement and enables him to receive the information to do so. See further *PARA 965B*.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/23. MISCELLANEOUS PROVISIONS/(1) INFORMATION PROVISIONS/965B. Financial Planning for Retirement.

## **965B. Financial Planning for Retirement.**

The Pensions Act 2004 Pt 4 (ss 234-238, Sch 10) provides for the Secretary of State with the power to promote and facilitate financial planning for retirement and enables him to receive the information to do so.

For general and supplementary provision relating to the Pensions Act 2004 see PARA 636A.

### **1. Promoting and facilitating financial planning for retirement**

The Secretary of State and the Northern Ireland Department<sup>1</sup> may take action for the purpose of promoting or facilitating financial planning for retirement<sup>2</sup>. The action may in particular include the provision of facilities for the purpose of enabling or assisting an individual or a person authorised by him (1) to estimate the financial resources the individual is likely to need after his retirement; (2) to estimate the financial resources that are likely to be available to the individual after his retirement, from pensions and other sources; (3) to ascertain what action might be taken with a view to increasing the financial resources available to the individual after his retirement<sup>3</sup>.

<sup>1</sup> In the Pensions Act 2004 s 234 'the Northern Ireland Department' means the Department for Social Development in Northern Ireland: s 234(4).

<sup>2</sup> Ibid s 234(1).

<sup>3</sup> Ibid s 234(2).

Section 234 does not authorise the Secretary of State or the Northern Ireland Department to take action which the Secretary of State or the Northern Ireland Department would otherwise be prohibited from taking under the Financial Services and Markets Act 2000 s 21 (restrictions on financial promotion: see FINANCIAL SERVICES AND INSTITUTIONS vol 48 (2008) PARA 225): Pensions Act 2004 s 234(3).

### **2. Supply of information**

The following provisions<sup>1</sup> apply to (1) information which is relevant for determining the pensions and other benefits that may become payable to or in respect of an individual; (2) information which relates to the financial resources of, or available to, an individual; (3) information which relates to action taken in connection with (a) providing facilities for saving (for retirement or otherwise) by individuals, or (b) promoting or facilitating saving (for retirement or otherwise) by individuals<sup>2</sup>. A person who holds information to which these provisions apply may supply it to (i) the Secretary of State or the Northern Ireland Department<sup>3</sup>, or (ii) a person providing services to the Secretary of State or the Northern Ireland Department, for use for the purposes of specified functions<sup>4</sup>.

<sup>1</sup> Ie the Pensions Act 2004 s 235.

<sup>2</sup> Ibid s 235(1).

<sup>3</sup> In ibid s 235 'the Northern Ireland Department' means the Department for Social Development in Northern Ireland: s 235(5).

<sup>4</sup> le the functions under *ibid* s 234(1) (see PARA 965B.1): s 235(2). Information supplied under s 235(2) must not be supplied by the recipient except (1) if the information relates to an individual (a) to the individual or a person authorised by him; (b) to another person, with the consent of the individual; (2) in any case (i) to a person to whom it could be supplied under s 235(2); (ii) to any person with a view to the institution of relevant criminal proceedings or otherwise for the purposes of relevant criminal proceedings: s 235(3). In s 235(3) 'relevant criminal proceedings' means criminal proceedings under (A) the Pension Schemes Act 1993; (B) the Pensions Act 1995; (c) the Pensions Act 2004; (d) any enactment in force in Northern Ireland corresponding to an Act mentioned in any of heads (A)-(C): s 235(4). For the meaning of 'enactment' see PARA 636A.2.

Section 235 is subject to ss 88 and 202 (tax information disclosed to the Regulator or the Board: see PARAS 636A.34, 659E.7): s 235(6).

### **3. Use and supply of information: private pensions policy and retirement planning**

Provision is made relating to the use and supply of information for purposes relating to private pensions policy and retirement planning<sup>1</sup>.

<sup>1</sup> See Pensions Act 2004 s 236, Sch 10 (Sch 10 amended by Pensions Act 2008 s 63(1)).

### **4. Combined pension forecasts**

The following provisions are not yet in force.

Regulations may require the trustees or managers<sup>1</sup> of an occupational or personal pension scheme<sup>2</sup> to provide any member<sup>3</sup> of the scheme with specified information<sup>4</sup>.

<sup>1</sup> For the meaning of 'managers' see PARA 636A.11.

<sup>2</sup> For the meaning of 'occupational pension scheme' and 'personal pension scheme' see PARA 636A.3.

<sup>3</sup> For the meaning of 'member' see PARA 636A.3.

<sup>4</sup> le (1) the information specified in the Pensions Act 2004 s 237(2), together with (2) the information specified in s 237(3): s 237(1). Regulations under s 237(1) may require information referred to in s 237(1) to be provided at a time or times specified in the regulations: s 237(4). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

The information referred to in head (1) is information relating to the member which (a) is state pension information for the purposes of the Child Support, Pensions and Social Security Act 2000 s 42 (see PARA 965A), (b) has been disclosed to the trustees or managers under s 42 (or, by virtue of s 42, is treated as having been so disclosed), and (c) is of a description specified in the regulations: Pensions Act 2004 s 237(2). The information referred to in head (2) is information which (i) relates to the pensions and other benefits likely to accrue to the member, or capable of being secured by him, under the scheme, and (ii) is of a description specified in the regulations: s 237(3).

### **5. Information and advice to employees**

The following provisions are not yet in force.

Regulations may require employers<sup>1</sup> to take action for the purpose of enabling employees<sup>2</sup> to obtain information and advice about pensions and saving for retirement<sup>3</sup>. Such regulations may in particular (1) provide that they are to apply in relation to employers of a prescribed<sup>4</sup> description and employees of a prescribed description; (2) make different provision for different descriptions of employers and employees; (3) make provision as to the action to be taken by employers (including the frequency at which, and the time and place at which, action is to be taken); (4) make provision as to the description of information and advice in relation to which requirements apply; (5) make provision about the description of person authorised to provide any such information and advice<sup>5</sup>.

1 In the Pensions Act 2004 s 238 'employer' means any employer, whether or not resident or incorporated in any part of the United Kingdom: s 238(6).

2 For the meaning of 'employee' see PARA 636A.3.

3 Pensions Act 2004 s 238(1). Employers to whom regulations under s 238(1) apply must provide information to the Regulator about the action taken by them for the purpose of complying with the regulations: s 238(3). For the meaning of 'the Regulator' see PARA 636A.2. Regulations may make provision as to (1) the information to be provided under s 238(3); (2) the form and manner in which the information is to be provided; (3) the period within which the information is to be provided: s 238(4). The Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to any person who, without reasonable excuse, fails to comply with the Pensions Act 2004 s 238(3): s 238(5). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

4 For the meaning of 'prescribed' see PARA 636A.3.

5 Pensions Act 2004 s 238(2).

## **UPDATE**

### **964-965 Information Provisions**

The Pensions Act 2004 Pt 4 (ss 234-238, Sch 10) provides the Secretary of State with the power to promote and facilitate financial planning for retirement and enables him to receive the information to do so. See further PARA 965B.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/23. MISCELLANEOUS PROVISIONS/(2) SPECIAL CASES/966. Removal of restrictions on friendly societies' pension business.

## **(2) SPECIAL CASES**

### **966. Removal of restrictions on friendly societies' pension business.**

The Secretary of State<sup>1</sup> may make such regulations<sup>2</sup> as he thinks appropriate for enabling a friendly society<sup>3</sup> to conduct group insurance business<sup>4</sup> with a view to the establishment of occupational pension schemes<sup>5</sup> or personal pension schemes<sup>6</sup>. The power to make such regulations extends to enabling friendly societies to conduct group insurance business freed from any restrictions of the relevant legislation<sup>7</sup> as to the amounts which a member, or a person claiming through a member, is entitled to receive from any one or more societies or branches<sup>8</sup>. Regulations so made may include such adaptations and modifications<sup>9</sup> of the relevant legislation, and such other supplementary and incidental provisions, as the Secretary of State considers to be necessary or expedient for achieving the above-mentioned purposes<sup>10</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 For the meaning of 'regulations' see PARA 557 note 2 ante.

3 For the meaning of 'friendly society' see the Friendly Societies Act 1992 s 116 (see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2081 et seq) (definition applied by the Pension Schemes Act 1993 s 162: see s 162(4)(b)).

4 'Group insurance business' means: (1) in relation to a registered friendly society, group insurance business within the meaning of the Friendly Societies Act 1974 s 65A (as added) (see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2242); and (2) in relation to an incorporated friendly society, group insurance business within the meaning of the Friendly Societies Act 1992 s 11 (see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2138) and 'registered friendly society' and 'incorporated friendly society' have the same meaning as in the Friendly Societies Act 1992 (see s 116; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 2084-2085); Pension Schemes Act 1993 s 162(4)(c).

5 For the meaning of 'occupational pension scheme' see PARA 741 ante.

6 Pension Schemes Act 1993 s 162(1). For the meaning of 'personal pension scheme' see PARA 710 ante. At the date at which this volume states the law, no such regulations had been made.

7 'The relevant legislation' means the Friendly Societies Act 1974, the Friendly Societies Act 1992 and the Income and Corporation Taxes Act 1988 s 464 (as amended); Pension Schemes Act 1993 s 162(4)(a).

8 Pension Schemes Act 1993 s 162(2).

9 For the meaning of 'modifications' see PARA 664 note 10 ante.

10 Pension Schemes Act 1993 s 162(3).

## **UPDATE**

### **966-969 Special Cases**

The Pensions Act 2004 Pt 7 (ss 287-295) makes provision about cross-border activities within the European Union: see further PARA 969A. Provision is made for a person's rights which have accrued by virtue of his National Insurance contributions, to be transferred to the pension scheme for officials and servants of EC institutions and bodies; see PARA 969B.

See also Pensions Act 2008 ss 140, 141 which enable a UK pensioner who has a German pension entitlement which is reduced or extinguished by a period of pre-1948 insurance to request that they are deemed not to have had such insurance.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/23. MISCELLANEOUS PROVISIONS/(2) SPECIAL CASES/967. Reciprocity with other countries.

### **967. Reciprocity with other countries.**

For the purpose of giving effect:

2692 (1) to any agreement with the government of a country outside the United Kingdom<sup>1</sup> providing for reciprocity in matters relating to payments for purposes similar or comparable to the purposes of the Pension Schemes Act 1993<sup>2</sup>; or

2693 (2) to any such agreement as it would be if it were altered in accordance with proposals to alter it which, in consequence of any change in the law of Great Britain<sup>3</sup>, the government of the United Kingdom has made to the other government in question,

Her Majesty may by Order in Council make provision for modifying<sup>4</sup> or adapting the Pension Schemes Act 1993 in its application to cases affected by the agreement or proposed alterations<sup>5</sup>.

Such an Order in Council may, instead of or in addition to making specific modifications or adaptations, provide generally that the Pension Schemes Act 1993 must be modified to such extent as may be required to give effect to the provisions contained in the agreement or, as the case may be, alterations in question<sup>6</sup>. The modifications of the 1993 Act which may be so made include provision:

2694 (a) for securing that acts, omissions and events having effect for the purposes of the law of the country in respect of which the agreement is made have a corresponding effect for the purposes of the 1993 Act (but not so as to confer a right to a double benefit);

2695 (b) for determining in cases where rights accrue both under the 1993 Act and under the law of that country, which of those rights is to be available to the person concerned<sup>8</sup>; and

2696 (c) for making any necessary financial adjustments<sup>9</sup>.

1 For these purposes, references to the United Kingdom include references to the territorial waters of the United Kingdom: Pension Schemes Act 1993 s 181(5)(a). For the meaning of 'United Kingdom' generally see PARA 15 note 4 ante. As to territorial waters see WATER AND WATERWAYS vol 100 (2009) PARA 31.

2 References in *ibid* s 166 to the Pension Schemes Act 1993 do not include references to Pt IV Ch 1 (ss 69-82) (see PARA 931 et seq ante); Pt VII Ch II (ss 123-127) (as amended) (see PARAS 853-856 ante), Pt VIII (ss 129-132) (as amended) (see PARA 972 post) so far as it applies for the purposes of Pt IV Ch 1; s 153(2) (see PARA 931 post); s 157 (see PARA 854 ante), 158(1)-(5) (as amended) (see PARA 964 ante); s 161 (see PARA 857 ante); s 162 (see PARA 966 ante); s 163 (see PARA 560 ante) and s 176 (see PARA 975 post): s 166(5) (amended by the Pensions Act 1995 ss 151, 173, 177, Sch 5 paras 18, 69, Sch 6 paras 2, 11, Sch 7 Pts III, IV).

3 For these purposes, references to Great Britain include references to the territorial waters of the United Kingdom adjacent to Great Britain: Pension Schemes Act 1993 s 181(5)(b). For the meaning of 'Great Britain' generally see PARA 15 note 4 ante.

4 For the meaning of 'modifying' see PARA 664 note 10 ante.

5 Pension Schemes Act 1993 s 166(1). An Order in Council made by virtue of s 166(1) which modifies or adapts any of the provisions referred to in s 164 (see PARA 968 post) may, in particular, provide for the Secretary of State to make payments for any period beginning on or after 6 April 1987 and may make provision with respect to any matters relating to payments so made: s 166(4). As to the Secretary of State see PARA 1 ante.

6 Ibid s 166(2).

7 Ibid s 166(3)(a).

8 Ibid s 166(3)(b).

9 Ibid s 166(3)(c). As to the similar power to make reciprocal agreements under the Social Security Administration Act 1992 see PARA 28 ante.

## **UPDATE**

### **966-969 Special Cases**

The Pensions Act 2004 Pt 7 (ss 287-295) makes provision about cross-border activities within the European Union: see further PARA 969A. Provision is made for a person's rights which have accrued by virtue of his National Insurance contributions, to be transferred to the pension scheme for officials and servants of EC institutions and bodies; see PARA 969B.

See also Pensions Act 2008 ss 140, 141 which enable a UK pensioner who has a German pension entitlement which is reduced or extinguished by a period of pre-1948 insurance to request that they are deemed not to have had such insurance.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/23. MISCELLANEOUS PROVISIONS/(2) SPECIAL CASES/968. Crown employment.

## **968. Crown employment.**

Certain provisions of the Pension Schemes Act 1993<sup>1</sup> apply to persons employed by or under the Crown in like manner as if such persons were employed by a private person<sup>2</sup>; and a person who is employed by or under the Crown is treated as an employed earner<sup>3</sup> for certain specified purposes<sup>4</sup>.

These provisions are modified in their application to members of Her Majesty's forces<sup>5</sup>.

1 Subject to the Pension Schemes Act 1993 s 164(3) (see note 5 infra), the following provisions apply to persons employed by or under the Crown in like manner as if such persons were employed by a private person: (1) Pt IV Ch I (ss 69-82) (as amended) (see PARA 931 et seq ante) and the other provisions of the Pension Schemes Act 1993 so far as they relate to the preservation requirements (as to which see PARA 931 ante); (2) the remaining provisions of that Act except for (a) s 153(2) (see PARA 931 post); s 158(1)-(5) (as amended) (see PARA 964 ante); s 162 (see PARA 966 ante); s 163 (see PARA 560 ante); s 176 (as amended) (see PARA 975 post); (b) Pt VII Ch II (ss 123-127) (as amended) (see PARAS 853-856 ante); and s 157 (see PARA 854 ante) and s 161 (see PARA 857 ante); and (c) s 166 (as amended) (see PARA 967 ante) and the provisions mentioned in note 4 infra: s 164(1) (amended by the Pensions Act 1995 ss 151, 173, 177, Sch 5 paras 18, 67, Sch 6 paras 2, 10, Sch 7 Pts III, IV).

2 See the Pension Schemes Act 1993 s 164(1) (as amended: see note 1 supra).

3 For the meaning of 'employed earner' see PARA 32 ante (definition applied by ibid s 181(1)).

4 Ibid s 164(2). The specified purposes are the purposes of ss 7, 9, 26-34, 38, 43-45 (as amended) (see PARA 880 et seq ante) (so far as they relate to personal pension schemes); s 48 (repealed with savings) (so far as it relates to minimum contributions); s 50 (as amended) (see PARA 918 ante) (so far as it relates to personal pension schemes); s 54 (as amended) (see PARA 921 ante); ss 55-64 (as amended) (see PARA 922 et seq ante) (so far as they relate to personal pension protected rights premiums); s 111 (see PARA 555 ante) (and Pt VIII (ss 129-132) (as amended) and s 153 (as amended) so far as they have effect for the purposes of s 111); s 117 (see PARA 558 ante); ss 154, 155 (as amended) (see PARAS 965 ante, 977 post) and s 159 (as amended) (see PARA 928 ante) (so far as it relates to protected rights payments); s 160 (see PARA 559 ante); and s 166 (as amended) (see PARA 967 ante).

5 So far as ibid s 164(1) (as amended) relates to the provisions within note 1 head (2) supra, it does not apply to a person who is serving as a member of Her Majesty's forces: s 164(3). Subject as follows, a person who is serving as a member of Her Majesty's forces is, while he is so serving, to be treated for the purposes of the provisions within note 1 head (2) supra and those within note 4 supra (except for ss 154 and 166) (as amended) as an employed earner in respect of his membership of those forces: s 164(4). The Secretary of State may make regulations modifying ss 41, 42, 46(1), 47(2), (5) and 48 (as amended) in such manner as he thinks proper, in their application to persons who are or have been members of Her Majesty's forces: s 164(5). For these purposes, Her Majesty's forces are taken to consist of such establishments and organisations as may be prescribed, being establishments and organisations in which persons serve under the control of the Defence Council: s 164(7).

## **UPDATE**

### **966-969 Special Cases**

The Pensions Act 2004 Pt 7 (ss 287-295) makes provision about cross-border activities within the European Union: see further PARA 969A. Provision is made for a person's rights which have accrued by virtue of his National Insurance contributions, to be transferred to the pension scheme for officials and servants of EC institutions and bodies; see PARA 969B.

See also Pensions Act 2008 ss 140, 141 which enable a UK pensioner who has a German pension entitlement which is reduced or extinguished by a period of pre-1948 insurance to request that they are deemed not to have had such insurance.

### **968 Crown employment**

TEXT AND NOTE 4--1993 Act s 164(2) substituted: Pensions Act 2007 Sch 4 para 32 (in force on the abolition date: see 2007 Act s 15 and PARA 880). For savings see 2007 Act Sch 4 Pt 3.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/23. MISCELLANEOUS PROVISIONS/(2) SPECIAL CASES/969. Cases with a foreign element.

### **969. Cases with a foreign element.**

Regulations<sup>1</sup> may modify specified provisions<sup>2</sup> of the Pension Schemes Act 1993 in such manner as the Secretary of State<sup>3</sup> thinks proper, in their application to any person who is, or has been, or is to be:

- 2697 (1) Employed<sup>4</sup> on board any ship, vessel, hovercraft or aircraft;
- 2698 (2) outside Great Britain<sup>5</sup> at any prescribed<sup>6</sup> time or in any prescribed circumstances; or
- 2699 (3) in prescribed employment in connection with continental shelf operations<sup>7</sup>.

Such regulations may in particular provide:

- 2700 (a) for any of those provisions to apply to any such person, notwithstanding that it would not otherwise apply;
- 2701 (b) for any such provision not to apply to any such person, notwithstanding that it would otherwise apply;
- 2702 (c) for excepting any such person from the application of any such provision where he neither is domiciled nor has a place of residence in any part of Great Britain;
- 2703 (d) for the taking of evidence, for the purposes of the determination of any question arising under any such provision, in a country or territory outside Great Britain, by a British consular official or such other person as may be determined in accordance with regulations<sup>8</sup>.

1 For the meaning of 'regulations' see PARA 557 note 2 ante.

2 The specified provisions are (1) the Pension Schemes Act 1993 Pt III (ss 7-68) (as amended) (see PARA 878 et seq ante); s 111 (see PARA 555 ante) (and Pt VIII (ss 129-132) (as amended) and s 153 (as amended) so far as they have effect for the purposes of s 111); ss 117, 154, 155 (as amended) and s 159 (so far as it relates to protected rights payments); and ss 160, 166 (as amended); and (2) ss 41, 42, 46(1), (6), (7) (as amended) (and s 46(8) (as amended) so far as it has effect for the purposes of those subsections); s 47(2), (5); and s 48 (repealed with savings); s 165(2) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 68).

3 As to the Secretary of State see PARA 1 ante.

4 For the meaning of 'employed' see PARA 560 note 5 ante.

5 For these purposes, references to 'Great Britain' include references to the territorial waters of the United Kingdom adjacent to Great Britain: Pension Schemes Act 1993 s 181(5)(b). For the meaning of 'United Kingdom' and 'Great Britain' generally see PARA 15 note 4 ante. As to territorial waters see WATER AND WATERWAYS vol 100 (2009) PARA 31.

6 For the meaning of 'prescribed' see PARA 555 note 1 ante.

7 Pension Schemes Act 1993 s 165(1). 'Continental shelf operations' means any activities which, if the Oil and Gas (Enterprise) Act 1982 s 23(6)(a), (d) (application of civil law to certain off-shore activities: see FUEL AND ENERGY vol 19(3) (2007 Reissue) PARA 1679) were omitted, would nevertheless fall within s 23(2): Pension Schemes Act 1993 s 165(8). Without prejudice to the generality of head (3) in the text, regulations made by virtue of that head as respects any provision mentioned in note 2 head (2) supra may provide for that provision to apply to such a person as is mentioned in head (3) in the text notwithstanding that he does not fall within the description of an employed or self-employed earner (see PARA 32 ante) or does not fulfil conditions as to residence or presence in Great Britain: s 165(5).

8 Ibid s 165(3). Head (b) in the text does not apply as respects the application of the provisions mentioned in note 2 head (2) supra; and heads (a), (c)-(d) in the text do not apply as respects the application of those provisions to such persons as are mentioned in heads (2) or (3) in the text: s 165(4).

## **UPDATE**

### **966-969 Special Cases**

The Pensions Act 2004 Pt 7 (ss 287-295) makes provision about cross-border activities within the European Union: see further *PARA 969A*. Provision is made for a person's rights which have accrued by virtue of his National Insurance contributions, to be transferred to the pension scheme for officials and servants of EC institutions and bodies; see *PARA 969B*.

See also Pensions Act 2008 ss 140, 141 which enable a UK pensioner who has a German pension entitlement which is reduced or extinguished by a period of pre-1948 insurance to request that they are deemed not to have had such insurance.

### **969 Cases with a foreign element**

NOTE 7--Pension Schemes Act 1993 s 165(8) amended: Petroleum Act 1998 s 50, Sch 4 para 37.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/23. MISCELLANEOUS PROVISIONS/(2) SPECIAL CASES/969A. Cross-border activities within European Union.

### **969A. Cross-border activities within European Union.**

The following provisions are in force in so far as they relate to certain specified schemes: SI 2005/3331. The Pensions Act 2004 Pt 7 (ss 287-295) makes provision about cross-border activities within the European Union.

For general and supplementary provision relating to the Pensions Act 2004 see PARA 636A.

#### **1. Occupational pension scheme receiving contributions from European employer**

The trustees or managers<sup>1</sup> of an occupational pension scheme<sup>2</sup> must not accept any contribution to the scheme from a European employer<sup>3</sup> unless all the following conditions are met<sup>4</sup>. Condition A is that the trustees or managers of the scheme are authorised by the Regulator<sup>5</sup>. Condition B is that the trustees or managers of the scheme are approved by the Regulator<sup>6</sup> in relation to the European employer<sup>7</sup>. Condition C is that either (1) the period of two months beginning with the date on which the Regulator notified the trustees or managers of the scheme<sup>8</sup> has expired, or (2) before the end of that period, the trustees or managers have received information forwarded to them by the Regulator<sup>9</sup>.

1 For the meaning of 'managers' see PARA 636A.11.

2 For the meaning of 'occupational pension scheme' see PARA 636A.3.

3 In the Pensions Act 2004 Pt 7 (ss 287-295) 'European employer' has the prescribed meaning: s 287(6); Occupational Pension Schemes (Cross-border Activities) Regulations 2005, SI 2005/3381, reg 3 (amended by SI 2007/814). For the meaning of 'prescribed' see PARA 636A.3.

4 Pensions Act 2004 s 287(1). If the trustees or managers of a scheme fail to comply with s 287(1), the Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to any trustee or manager who has failed to take all reasonable steps to secure compliance: Pensions Act 2004 s 287(5).

5 Under *ibid* s 288 (see PARA 969A.2): s 287(2). For the meaning of 'the Regulator' see PARA 636A.2.

6 Under *ibid* s 289 (see PARA 969A.3).

7 *Ibid* s 287(3).

8 Under *ibid* s 289(2)(a)(iii).

9 In accordance with *ibid* s 290(1) (see PARA 969A.4): s 287(4). As to the service of notifications and electronic working under the Pensions Act 2004 see ss 303-305.

#### **2. General authorisation to accept contributions from European employers**

An application by the trustees or managers of an occupational pension scheme for authorisation under these provisions<sup>1</sup> must be made to the Regulator in the prescribed form and in the prescribed manner<sup>2</sup>. On receipt of the application, the Regulator must (1) where the Regulator is satisfied that the applicant meets prescribed conditions, grant the authorisation, and (2) in any other case, refuse the authorisation<sup>3</sup>. Regulations may make provision as to (a) the revocation by the Regulator of authorisation under these provisions, and (b) the criteria to

be applied by the Regulator in reaching any decision relating to the revocation of authorisation<sup>4</sup>.

1   Ie the Pensions Act 2004 s 288.

2   Ibid s 288(1). As to such authorisation, see the Occupational Pension Schemes (Cross-border Activities) Regulations 2005, SI 2005/3381 (amended by SI 2006/467, SI 2006/925, SI 2007/814, SI 2009/598).

3   Pensions Act 2004 s 288(2).

4   Ibid s 288(3). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

### **3. Approval in relation to particular European employer**

An application by the trustees or managers of an occupational pension scheme for approval under these provisions<sup>1</sup> in relation to a European employer<sup>2</sup> is made by the trustees or managers of the scheme giving the Regulator in the prescribed manner a notice ('the notice of intention') in the prescribed form which (1) specifies the European employer ('the specified employer'), (2) states their intention, subject to approval under these provisions, to accept contributions from the specified employer, (3) specifies the host member State<sup>3</sup>, and (4) contains other prescribed information<sup>4</sup>. On receipt of the notice of intention, the Regulator must within three months (a) where the Regulator is satisfied that the persons giving the notice of intention meet prescribed conditions (i) notify the competent authority<sup>5</sup> of the host member State of the receipt by the Regulator of the notice of intention and of the contents of the notice, and (ii) notify the persons who gave the notice of intention that they are approved for the purposes of these provisions in relation to the specified employer, or (b) in any other case, notify the persons who gave the notification that they are not so approved<sup>6</sup>. If the Regulator does not act under head (a) or (b) above within the period of three months beginning with the day on which the notice of intention was received, the persons who gave the notice of intention are to be taken to have been approved for the purposes of these provisions in relation to the specified employer at the end of the period<sup>7</sup>. Regulations may make provision as to (A) the revocation by the Regulator of approval under these provisions, and (B) the criteria to be applied by the Regulator in reaching any decision relating to the revocation of approval<sup>8</sup>.

1   Ie the Pensions Act 2004 s 289.

2   In ibid Pt 7 (ss 287-295) 'European employer' has the meaning given by s 287(6) (see PARA 969A.1): s 295.

3   In ibid Pt 7 'host member State', in relation to a European employer, means a member State determined in accordance with regulations: s 287(6). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12).

4   Pensions Act 2004 s 289(1). See the Occupational Pension Schemes (Cross-border Activities) Regulations 2005, SI 2005/3381, PARA 969A.2.

5   In the Pensions Act 2004 Pt 7 'competent authority', in relation to a member State other than the United Kingdom, means a national authority designated in accordance with the law of that State to carry out the duties provided for in European Parliament and EC Council Directive 2003/41 on the activities and supervision of institutions for occupational retirement provision: Pensions Act 2004 s 295.

6   Ibid s 289(2). As to the service of notifications and electronic working under the Pensions Act 2004 see ss 303-305.

7   Ibid s 289(3).

8   Ibid s 289(4). See SI 2005/3381, NOTE 4.

#### **4. Notification of legal requirements of host member State outside United Kingdom**

Where (1) the Regulator has notified the competent authority of the host member State<sup>1</sup>, and (2) the Regulator<sup>2</sup> receives information from the competent authority as to requirements of the social and labour law<sup>3</sup> of the host member State<sup>4</sup>, the Regulator must as soon as reasonably practicable forward that information to the person who gave the notice of intention<sup>5</sup>. Where (a) the trustees or managers of an occupational pension scheme are approved<sup>6</sup> in relation to a European employer, and (b) the Regulator<sup>7</sup> receives information ('the new information') from the competent authority of the host member State as to changes affecting any information previously forwarded<sup>8</sup>, the Regulator must as soon as reasonably practicable forward the new information to the trustees or managers<sup>9</sup>.

1 Under the Pensions Act 2004 s 289(2)(a)(i) (see PARA 969A.3). In Pt 7 (ss 287-295) 'host member State', in relation to a European employer, has the meaning given by s 287(6) (see PARA 969A.3): s 295.

2 In pursuance of art 20(5) of the Directive.

3 In the Pensions Act 2004 Pt 7 'social and labour law', in relation to a member State other than the United Kingdom, means the social and labour law (within the meaning of art 20 of the Directive) of that State relevant to occupational pension schemes (within the meaning of that Article): Pensions Act 2004 s 295.

4 And as to the other matters referred to in art 20(5) of the Directive.

5 Under the Pensions Act 2004 s 289: s 290(1).

6 Under *ibid* s 289.

7 In pursuance of art 20(8) of the Directive.

8 Under the Pensions Act 2004 s 290(1).

9 *Ibid* s 290(2).

#### **5. Duty of trustees or managers to act consistently with law of host member state**

Where the trustees or managers of an occupational pension scheme receive contributions to the scheme from a European employer, the trustees or managers must ensure that the scheme, so far as it relates to members who are or have been employed by the employer, is operated in a way which is consistent with the requirements of the social and labour law of the host member State<sup>1</sup>. Regulations may modify any provision of pensions legislation<sup>2</sup> in its application to members of an occupational pension scheme in respect of which the employer is a European employer<sup>3</sup>.

1 Pensions Act 2004 s 291(1). If the trustees or managers of a scheme fail to comply with s 291(1), the Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to any trustee or manager who has failed to take all reasonable steps to secure compliance: Pensions Act 2004 s 291(3).

2 In *ibid* s 291 'pensions legislation' means (1) the Pension Schemes Act 1993, (2) the Pensions Act 1995 Pt 1, other than ss 62-66A (equal treatment), (3) the Welfare Reform and Pensions Act 1999 Pt 1 or s 33, or (4) the Pensions Act 2004: s 291(4).

3 *Ibid* s 291(2). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). See the Occupational Pension Schemes (Cross-border Activities) Regulations 2005, SI 2005/3381, PARA 969A.2.

#### **6. Power of Regulator to require ring-fencing of assets**

Where the trustees or managers of an occupational pension scheme receive contributions to the scheme from a European employer, the Regulator may in prescribed circumstances issue a notice ('a ring-fencing notice') to the trustees or managers of the scheme directing them to take, or refrain from taking, such steps of a prescribed description as are specified in the notice for the purpose of ring-fencing<sup>1</sup> some or all of the assets or liabilities (or both) of the scheme<sup>2</sup>.

1 In the Pensions Act 2004 s 292(1), 'ring-fencing' has the same meaning as in the Directive: Pensions Act 2004 s 292(2).

2 Ibid s 292(1). If the trustees or managers of an occupational pension scheme fail to comply with a ring-fencing notice given to them, the Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to any trustee or manager who has failed to take all reasonable steps to secure compliance: s 292(3). See also the Occupational Pension Schemes (Cross-border Activities) Regulations 2005, SI 2005/3381, PARA 969A.2.

## **7. Functions of Regulator in relation to institutions administered in other member States**

Where a UK employer<sup>1</sup> makes (or proposes to make) contributions to a European pensions institution<sup>2</sup>, any function which the Directive<sup>3</sup> requires or authorises to be exercised by the competent authorities of the host member State is exercisable by the Regulator<sup>4</sup>. If the Regulator receives a notification in pursuance of the Directive<sup>5</sup> from the competent authority in another member State, the Regulator must within two months inform that authority of any relevant legal requirements<sup>6</sup>. Where a UK employer makes contributions to a European pensions institution, the Regulator must (1) monitor the compliance of that institution with the relevant legal requirements, and (2) if the Regulator becomes aware of any contravention<sup>7</sup> by the institution of any relevant legal requirements, inform the competent authority of the member State in which the institution has its main administration of the failure<sup>8</sup>. If the Regulator is satisfied that a European pensions institution which receives contributions from a UK employer is contravening any relevant legal requirements, the Regulator may issue a notice to the UK employer directing him (a) to take or refrain from taking such steps as are specified in the notice in order to remedy the failure by the institution, or (b) to cease to make further contributions to the institution<sup>9</sup>.

1 In the Pensions Act 2004 s 293 'UK employer' means an employer who (1) in the case of a body corporate, is incorporated under the law of the United Kingdom or any part of the United Kingdom, or (2) in any other case, is resident in the United Kingdom: s 293(8).

2 In ibid s 293 'European pensions institution' means an institution for occupational retirement provision, as defined by art 6(a) of the Directive, that has its main administration in a member State other than the United Kingdom: Pensions Act 2004 s 293(8).

3 I.e art 20 of the Directive.

4 Pensions Act 2004 s 293(1).

5 I.e in pursuance of art 20(4) of the Directive.

6 Pensions Act 2004 s 293(2). In s 293 'relevant legal requirements' means such requirements of the law relating to occupational pension schemes, as it applies in any part of the United Kingdom, as may be prescribed: s 293(8). See the Occupational Pension Schemes (Cross-border Activities) Regulations 2005, SI 2005/3381, reg 16, Sch 2 paras 2, 3, 5. Where there is a significant change in any relevant legal requirements, the Regulator must as soon as reasonably practicable inform any competent authority in relation to which it has provided information under the 2004 Act s 293(2) of that change: s 293(3).

7 For the meaning of 'contravention' see PARA 636A.11.

8 Pensions Act 2004 s 293(4).

9 Ibid s 293(5). Regulations may make further provision about the effect of a notice under head (b) in the text, including provision conferring functions on the Regulator: s 293(6). As to regulations under the Pensions Act 2004 see ss 314-317 (s 316 amended by Pensions Act 2008 ss 124(7)-(10), 125(3), Sch 9 paras 5, 12). The Pensions Act 1995 s 10 (civil penalties: see PARA 611) applies to any UK employer who, without reasonable excuse, fails to comply with a notice under the Pensions Act 2004 s 293(5): s 293(7).

## **8. Stopping disposal of assets of institutions administered in other member States**

The following provisions<sup>1</sup> apply if the Regulator receives a request from the competent authority of a member State for assistance in prohibiting the free disposal of UK-held assets<sup>2</sup> of a European pensions institution that has its main administration in that member State<sup>3</sup>. The court may on an application made by the Regulator with respect to UK-held assets of the institution grant an injunction restraining a defendant from disposing of, or otherwise dealing with, assets to which the application relates<sup>4</sup>. If the court grants an injunction<sup>5</sup>, it may by subsequent orders make provision for such incidental, consequential and supplementary matters as it considers necessary to enable the competent authority that sent the request to perform any of its functions in relation to assets subject to the injunction<sup>6</sup>. If the institution is not a party to proceedings<sup>7</sup>, the institution (1) has the same rights to notice of the proceedings as a defendant, and (2) may take part as a party in the proceedings<sup>8</sup>. In deciding any question as to costs or expenses, a court before which any proceedings take place (a) may take account of any additional expense which it considers that any party to the proceedings has incurred as a result of the participation of the institution in pursuance of head (2) above, and (b) may award the whole or part of the additional expense as costs or (as the case may be) expenses to the party who incurred it (whatever the outcome of the Regulator's application)<sup>9</sup>.

1 Ibid s 294.

2 For the purposes of ibid s 294 'UK-held assets' of a European pensions institution are assets of the institution held by a depositary or custodian located in the United Kingdom, and here 'assets', 'depositary', 'custodian' and 'located' have the same meaning as in art 19(3) of the Directive: Pensions Act 2004 s 294(6). 'European pensions institution' has the meaning given by s 293 (see PARA 969A.7): s 294(6).

3 Ibid s 294(1).

4 Ibid s 294(2). See further NOTE 6.

5 Under ibid s 294(2).

6 Ibid s 294(3). The jurisdiction conferred by s 294(2) and (3) is exercisable by the High Court: s 294(7).

7 Under ibid s 294(2) or (3).

8 Ibid s 294(4).

9 Ibid s 294(5).

### **UPDATE**

#### **966-969 Special Cases**

The Pensions Act 2004 Pt 7 (ss 287-295) makes provision about cross-border activities within the European Union: see further PARA 969A. Provision is made for a person's rights which have accrued by virtue of his National Insurance contributions, to be transferred to the pension scheme for officials and servants of EC institutions and bodies; see PARA 969B.

See also Pensions Act 2008 ss 140, 141 which enable a UK pensioner who has a German pension entitlement which is reduced or extinguished by a period of pre-1948 insurance to request that they are deemed not to have had such insurance.



Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/23. MISCELLANEOUS PROVISIONS/(2) SPECIAL CASES/969B. Transfer of state pensions and benefits.

### **969B. Transfer of state pensions and benefits.**

A person who wishes to transfer his transferable rights<sup>1</sup> to the Communities' scheme<sup>2</sup> must make an application to the Secretary of State<sup>3</sup>. Such an application must be in such form as the Secretary of State may from time to time approve<sup>4</sup>. The Secretary of State must provide the transferor with a statement of entitlement that remains valid for a period of seven months beginning with the day on which it is issued<sup>5</sup>, before the end of the period of fourteen days beginning with the guarantee date<sup>6</sup>. The cash equivalent of the transferor's transferable rights is to be calculated and verified in such manner as may be approved by, or on behalf of, the Government Actuary<sup>7</sup>. Where, at the guarantee date, the transferor is in receipt of one or more relevant benefits, the cash equivalent of any amounts paid in respect of that benefit or those benefits must be deducted from the total cash equivalent of his transferable rights<sup>8</sup>. A transfer of a transferor's transferable rights to the Communities' scheme may only take place where the Secretary of State has been notified in writing, before the expiry of the period that the transferor wishes the transfer to take place<sup>9</sup>. Provision is made for where an incorrect amount is transferred<sup>10</sup>. Payments of cash equivalents of transferable rights made by the Secretary of State by virtue of these provisions are to be paid out of money provided by Parliament<sup>11</sup>.

1 'Transferable rights' means any rights to relevant benefits, which, at the guarantee date, have accrued to, or in respect of, a person by virtue of (1) the payment by that person of Class 1, 2 or 3 contributions under the Social Security Contributions and Benefits Act 1992; (2) that person having been credited with such contributions or with earnings; or (3) contributions of any class paid under the National Insurance Act 1965: Transfer of State Pensions and Benefits Regulations 2007, SI 2007/1398, reg 2(1). This does not include (a) any rights under the Social Security Contributions and Benefits Act 1992 ss 48, 82-86A; or (b) the cash equivalent of the value of the appropriate national health service allocation under the Social Security Contributions and Benefits Act 1992 s 162: SI 2007/1398 reg 2(2). In determining a person's rights to relevant benefits for the purposes of these provisions the Social Security (Widow's Benefit and Retirement Pensions) Regulations 1979, SI 1979/642, reg 6(1) is modified: SI 2007/1398 reg 2(3).

2 'The Communities' scheme' means the pension scheme provided for officials and other servants of Community institutions and bodies in accordance with regulations adopted by the European Council: SI 2007/1398 reg 1(2).

3 Ibid reg 3(1). The transferor is to be treated as having made an application where the Secretary of State receives a copy of the transferor's application to become a member of the Communities' scheme: reg 3(2).

4 Ibid reg 3(3).

5 Ibid reg 4(2).

6 Ibid reg 4(1). Where the transferor is not satisfied as to the accuracy of any of the information contained in the statement of entitlement, he must notify the Secretary of State accordingly within one month of receiving it: reg 4(3). The Secretary of State need not provide a statement of entitlement to a transferor if he has provided a statement of entitlement to that transferor in the previous twelve months: reg 4(4).

7 Ibid reg 5(1).

8 Ibid reg 5(2). As to the effect of making a cash equivalent transfer payment, see reg 8.

9 Ibid reg 6. Where the Secretary of State is satisfied that the cash equivalent of the transferor's transferable rights is correct, he must transfer into the Communities' scheme, before the end of the period of ten months beginning with the guarantee date, (1) an amount in respect of that cash equivalent; and (2) interest accruing on that amount by virtue of reg 10: reg 7(2). Interest accrues on the cash equivalent of the transferor's transferable rights in respect of the period beginning on the guarantee date and ending on the day on which an amount in respect of that cash equivalent is transferred: reg 10(1). Where the Secretary of State is not satisfied

as to the accuracy of the cash equivalent of the transferor's transferable rights, he must notify the transferor accordingly and issue a revised statement of entitlement: reg 7(3). Where the Secretary of State receives a notice from a transferor indicating that he wishes to complete a transfer of his transferable rights to the Communities' scheme, and that notice is received after the expiry of the period, he must notify the transferor that his application is invalid and that a new application must be made and a new statement of entitlement obtained: reg 7(4).

10 Ibid reg 9.

11 Ibid reg 12.

## **UPDATE**

### **966-969 Special Cases**

The Pensions Act 2004 Pt 7 (ss 287-295) makes provision about cross-border activities within the European Union: see further PARA 969A. Provision is made for a person's rights which have accrued by virtue of his National Insurance contributions, to be transferred to the pension scheme for officials and servants of EC institutions and bodies; see PARA 969B.

See also Pensions Act 2008 ss 140, 141 which enable a UK pensioner who has a German pension entitlement which is reduced or extinguished by a period of pre-1948 insurance to request that they are deemed not to have had such insurance.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/23. MISCELLANEOUS PROVISIONS/(3) GENERAL OFFENCES/970. Breach of regulations.

### **(3) GENERAL OFFENCES**

#### **970. Breach of regulations.**

Regulations<sup>1</sup> under any provision of the Pension Schemes Act 1993<sup>2</sup> may make such provision as is referred to below<sup>3</sup> for the contravention<sup>4</sup> of any provision contained in regulations made or having effect as if made under any provision of the 1993 Act<sup>5</sup>. The regulations may provide for the contravention to be an offence under the Act and for the recovery on summary conviction of a fine not exceeding level 5 on the standard scale<sup>6</sup>. An offence under any provision of the regulations may be charged by reference to any day or longer period of time; and a person may be convicted of a second or subsequent offence under such a provision by reference to any period of time following the preceding conviction of the offence<sup>7</sup>.

The regulations may provide for a person who has contravened the provision to pay to the Occupational Pensions Regulatory Authority<sup>8</sup>, within a prescribed<sup>9</sup> period, a penalty not exceeding an amount specified in the regulations; and the regulations must specify different amounts in the case of individuals from those specified in other cases and any amount so specified may not exceed the amount for the time being specified in the case of individuals or, as the case may be, other specified individuals<sup>10</sup>. Where:

- 2704 (1) such a penalty is recoverable<sup>11</sup> from a body corporate or Scottish partnership<sup>12</sup> by reason of any act or omission of the body or partnership as a trustee of a trust scheme; and
- 2705 (2) the act or omission was done with the consent or connivance of, or is attributable to any neglect on the part of, any persons mentioned below,

such a penalty is recoverable from each of those persons who consented to or connived in the act or omission or to whose neglect the act or omission was attributable<sup>13</sup>. The persons so referred to:

- 2706 (a) in relation to a body corporate, are any director, manager, secretary, or other similar officer of the body, or a person purporting to act in any such capacity, and, where the affairs of a body corporate are managed by its members, any member in connection with his functions of management<sup>14</sup>; and
- 2707 (b) in relation to a Scottish partnership, are the partners<sup>15</sup>.

Where by reason of the contravention of any provision contained in regulations made, or having effect as if made, under the Pension Schemes Act 1993, a person is convicted of an offence under the Act or a person pays a penalty<sup>16</sup>, then in respect of that contravention, he is not, in a case where he is convicted of such an offence, also liable to pay such a penalty and is not, in a case where he pays such a penalty, also liable to be convicted of such an offence<sup>17</sup>.

<sup>1</sup> For the meaning of 'regulations' see PARA 557 note 2 ante.

<sup>2</sup> Ie other than the Pension Schemes Act 1993 Pt VII Ch II (ss 123-127) (as amended): see PARA 853 et seq ante.

<sup>3</sup> Ie in ibid s 168(2) or (4) (s 168 substituted by the Pensions Act 1995 s 155(1)): see the text and notes 6, 10 infra.

- 4 For these purposes, 'contravention' includes failure to comply: Pension Schemes Act 1993 s 168(11) (as substituted: see note 3 supra).
- 5 Ibid s 168(1) (as substituted: see note 3 supra).
- 6 Ibid s 168(2) (as substituted: see note 3 supra). As to the standard scale see PARA 172 note 3 ante.
- 7 Ibid s 168(3) (as substituted: see note 3 supra).
- 8 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.
- 9 For the meaning of 'prescribed' see PARA 555 note 1 ante.
- 10 Pension Schemes Act 1993 s 168(4) (as substituted: see note 3 supra). The other specified individuals are those mentioned in the Pensions Act 1995 s 10(2)(a): see PARA 611 ante. Regulations made by virtue of the Pension Schemes Act 1993 s 168(4) (as so substituted) do not affect the amount of any penalty recoverable under that subsection by reason of an act or omission occurring before the regulations are made: s 168(5) (as so substituted). A penalty under s 168(4) (as so substituted) is recoverable by the authority and any such penalty recovered by the authority must be paid to the Secretary of State: s 168(9) (as so substituted). As to the Secretary of State see PARA 1 ante.
- 11 Ie apart from ibid s 168(6) (as substituted: see note 3 supra). Where the authority requires any person to pay a penalty by virtue of s 168(6) (as so substituted), it may not also require the body corporate, or Scottish partnership, in question to pay a penalty in respect of the same act or omission: s 168(8) (as so substituted).
- 12 For the meaning of 'Scottish partnership' see PARA 604 note 9 ante.
- 13 Pension Schemes Act 1993 s 168(6) (as substituted: see note 3 supra).
- 14 Ibid s 168(7)(a) (as substituted: see note 3 supra).
- 15 Ibid s 168(7)(b) (as substituted: see note 3 supra).
- 16 Ie under ibid s 168(4) (as substituted: see note 3 supra): see the text and note 10 supra.
- 17 See ibid s 168(10) (as substituted: see note 3 supra).

## **UPDATE**

### **970 Breach of regulations**

TEXT AND NOTE 10--Pension Schemes Act 1993 s 168(4) amended: Pensions Act 2004 Sch 12 para 27.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/23. MISCELLANEOUS PROVISIONS/(3) GENERAL OFFENCES/971. Offences by bodies corporate.

**971. Offences by bodies corporate.**

Where an offence under the Pension Schemes Act 1993 which has been committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, he as well as the body corporate is guilty of that offence and liable to be proceeded against accordingly<sup>1</sup>.

Where the affairs of a body corporate are managed by its members, the above provision applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate<sup>2</sup>.

1 Pension Schemes Act 1993 s 169(1).

2 Ibid s 169(2).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/23. MISCELLANEOUS PROVISIONS/(4) RELATIONSHIP BETWEEN STATUTORY REQUIREMENTS AND PENSION SCHEME RULES/972. In general.

## **(4) RELATIONSHIP BETWEEN STATUTORY REQUIREMENTS AND PENSION SCHEME RULES**

### **972. In general.**

Certain provisions of the Pension Schemes Act 1993 are overriding requirements<sup>1</sup> which override any provision of a pension scheme to which they apply to the extent that it conflicts with them<sup>2</sup>.

Nothing in the provisions relating to contracting out<sup>3</sup> precludes an occupational pension scheme from providing benefits that are more favourable than those required for contracting-out purposes<sup>4</sup> and nothing in the provisions relating to the revaluation of accrued benefits<sup>5</sup> or to transfer values<sup>6</sup> precludes a scheme from being framed or managed more favourably to beneficiaries than is called for by those provisions<sup>7</sup>. Nor does anything in the provisions relating to the preservation of benefits<sup>8</sup> apply with direct effect to any scheme, or to the rights or liabilities of any person in, under or by virtue of a scheme, or preclude a scheme from being so framed as to provide benefits on any ampler scale, or (subject to any express statutory provision)<sup>9</sup> payable at any earlier time or otherwise more favourable to beneficiaries, than is called for by the preservation requirements<sup>10</sup>.

Where the rules of an occupational pension scheme to which the preservation requirements or the voluntary contributions requirements<sup>11</sup> apply, or the rules of a personal pension scheme<sup>12</sup> to which the voluntary contributions requirements apply, do not comply with those requirements, it is the responsibility of the trustees and managers<sup>13</sup> of the scheme, or, in the case of a public service pension scheme<sup>14</sup>, the minister, government department or other person or body concerned with its administration, to take such steps as are open to them for bringing the rules of the scheme into conformity with those requirements<sup>15</sup>.

1 As to the provisions of the Pensions Act 1995 which are overriding requirements in relation to occupational pension schemes see PARA 871 ante. For the meaning of 'occupational pension scheme' see PARA 741 ante.

2 See the Pension Schemes Act 1993 s 129(1) (s 129 amended by the Pensions Act 1995 ss 122, 177, Sch 3 paras 22, 31, Sch 7 Pt I). The provisions referred to are the provisions of Pt IV Chs II-IV (ss 83-101) (as amended); s 110(1); and any regulations made under s 113: see PARA 557 ante. Part IV Ch II (as amended) as it applies to occupational pension schemes does not, however, override a protected provision of a scheme and Pt IV Ch IV does not override a provision falling within head (1) infra: s 129(2) (as so amended). 'Protected provision' means: (1) any provision of a scheme to the extent that it deals with priorities on a winding up; (2) any provision of a scheme which is included in it for the purpose of effecting a transfer of rights or liabilities authorised by regulations under s 20(1) (see PARA 895 ante); (3) any provision of a scheme to the extent that it deals with commutation, suspension or forfeiture of the whole or part of a pension; and (4) any provision of a scheme whereby, as respects so much of a widow's or widower's pension as exceeds the guaranteed minimum pension (as to which see PARA 878 ante), (a) no pension or a pension at a reduced rate is payable if the earner and the widow or widower married not more than six months before the earner's death; (b) the whole or any part of the pension is not paid to the widow or widower, but instead comparable benefits are provided for one or more dependants of the deceased earner; or (c) no pension, or a pension at a reduced rate, is payable to the widow or widower (or, where a provision such as is mentioned in head (b) supra operates, to another dependant of the deceased earner) who was more than ten years younger than the deceased earner: s 129(3) (as so amended). For the purposes of the application of Pt IV Ch II to schemes which are not contracted-out, s 129(3) has effect with the omission from head (2) supra of the words from 'authorised' to the end, and from head (4) supra of the words from 'as respects' to 'guaranteed minimum pension': s 129(4).

3 I.e. the Pension Schemes Act 1993 Pt III (ss 7-68) (as amended): see PARA 877 et seq ante.

- 4 In particular, nothing in *ibid* s 16(3) (as amended) (see PARA 891 ante) is to be taken as preventing the scheme from providing increases above the alternative minima there mentioned: s 130.
- 5 *Ie* *ibid* Pt IV Ch II (ss 83-86) (as amended): see PARAS 941, 946 ante.
- 6 *Ie* *ibid* Pt IV Ch IV (ss 93-101) (as amended): see PARA 951 et seq ante.
- 7 *Ibid* s 130.
- 8 *Ie* *ibid* Pt IV Ch I (ss 69-82) (as amended): see PARA 931 et seq ante.
- 9 *Ie* provision made by *ibid* Pt IV Ch I (as amended).
- 10 *Ibid* s 131. For the meaning of 'the preservation requirements' see PARA 931 ante.
- 11 See PARA 555 ante.
- 12 For the meaning of 'personal pension scheme' see PARA 710 ante.
- 13 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme see PARA 555 note 9 ante.
- 14 For the meaning of 'public service pension scheme' see PARA 874 ante.
- 15 Pension Schemes Act 1993 s 132 (amended by the Pensions Act 1995 ss 122, 177, Sch 3 paras 22, 32, Sch 7 Pt I).

## **UPDATE**

### **972 In general**

NOTE 2--The provisions of the Pensions Schemes Act 1993 Pt IVA Chs I, II (ss 101A-101Q) (see PARA 961A.7) also now have overriding effect: s 129(1) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 paras 28, 39(1), (2)).

Pension Schemes Act 1993 s 129(1) further amended: Pensions Act 2004 Sch 12 para 21.

Pension Schemes Act 1993 s 129(2), (3) partly repealed: Pensions Act 2004 Sch 13 Pt 1.

Pension Schemes Act 1993 s 129(3) further amended: SI 2005/2053, SI 2005/3029.

TEXT AND NOTE 7--Pension Schemes Act 1993 s 130 amended: Pensions Act 2004 Sch 12 para 22.

TEXT AND NOTE 10--Pension Schemes Act 1993 s 131 partly repealed: Pensions Act 2004 Sch 13 Pt 1 (not yet in force).

TEXT AND NOTE 15--Pension Schemes Act 1993 s 132 further amended: Pensions Act 2004 s 267(2), Sch 13 Pt 1.

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/23. MISCELLANEOUS PROVISIONS/(5) GENERAL FINANCIAL PROVISIONS/973. Grants to advisory bodies etc.

## **(5) GENERAL FINANCIAL PROVISIONS**

### **973. Grants to advisory bodies etc.**

The Occupational Pensions Regulatory Authority<sup>1</sup> may make grants on such terms and conditions as it thinks fit to any person or body of persons providing advice or assistance, or carrying out other prescribed<sup>2</sup> functions, in connection with occupational or personal pensions<sup>3</sup>. The Secretary of State<sup>4</sup> may pay the authority such sums as he may think fit towards any expenditure of the authority in making grants under this provision<sup>5</sup>.

1 As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

2 For the meaning of 'prescribed' see PARA 555 note 1 ante.

3 Pension Schemes Act 1993 s 174(1) (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 73).

4 As to the Secretary of State see PARA 1 ante.

5 Pension Schemes Act 1993 s 174(2) (as amended: see note 3 supra).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/23. MISCELLANEOUS PROVISIONS/(5) GENERAL FINANCIAL PROVISIONS/974. Levies towards certain expenditure.

#### **974. Levies towards certain expenditure.**

For the purpose of meeting expenditure under specified provisions of the Pension Schemes Act 1993<sup>1</sup> or expenditure of the Occupational Pensions Regulatory Authority<sup>2</sup>, including the establishment of the authority and, following the authority's appointment as Registrar of Occupational and Personal Pension Schemes<sup>3</sup>, its expenditure as registrar, regulations<sup>4</sup> may make provision for imposing levies in respect of prescribed<sup>5</sup> occupational or prescribed personal pension schemes<sup>6</sup>. Any levy so imposed is payable to the Secretary of State<sup>7</sup> by or on behalf of:

- 2708 (1) the administrators of any prescribed public service pension scheme<sup>8</sup>;
- 2709 (2) the trustees or managers<sup>9</sup> of any other prescribed occupational or prescribed personal pension scheme; or
- 2710 (3) any other prescribed person,

at prescribed rates and at prescribed times<sup>10</sup>.

Regulations may also make provision for imposing a levy in respect of prescribed occupational pension schemes for the purpose of meeting expenditure of the Pensions Compensation Board<sup>11</sup> (including the establishment of the board)<sup>12</sup>. Any levy so imposed is payable to the board by or on behalf of the trustees of any prescribed occupational pension scheme, or any other prescribed person, at prescribed times and at a rate, not exceeding the prescribed rate, determined by the board<sup>13</sup>.

An amount payable by a person on account of a levy imposed under these provisions is a debt due from him to the appropriate person<sup>14</sup>, and an amount so payable is recoverable by the appropriate person accordingly or, if the appropriate person so determines, be recoverable by the registrar on behalf of the appropriate person<sup>15</sup>.

Regulations under these provisions may<sup>16</sup> include provision relating to the collection and recovery of amounts payable by way of levy<sup>17</sup>, or the circumstances in which any such amount may be waived<sup>18</sup>. Special provision is made with regard to multi-employer schemes<sup>19</sup>.

Where any person fails, without reasonable cause, to comply with the requirement to pay a general levy, a compensation levy or a levy for which he is liable under the former statutory provisions, the authority may require that person to pay, within 28 days, a penalty which must not exceed £1,000 in the case of an individual, or £10,000 in any other case<sup>20</sup>.

1    le under the Pension Schemes Act 1993 s 6 (as amended) (see PARA 660 ante); Pt X (ss 145-152) (see PARA 663 et seq ante); and s 174 (see PARA 973 ante); see s 175(1)(a), (b) (s 175 substituted by the Pensions Act 1995 s 165).

2    As to the Occupational Pensions Regulatory Authority see PARA 598 ante.

3    As to the registrar see PARA 661 ante.

4    For the meaning of 'regulations' see PARA 557 note 2 ante.

5    For the meaning of 'prescribed' see PARA 555 note 1 ante.

6 Pension Schemes Act 1993 s 175(1) (as substituted: see note 1 supra). For the meaning of 'occupational' and 'personal' pension schemes see PARAS 741, 710 respectively ante. Regulations made by virtue of s 175(1) (as so substituted): (1) in determining the amount of any levy in respect of the authority, must take account (among other things) of any amounts paid to the Secretary of State under s 168(4) (see PARA 970 ante) or the Pensions Act 1995 s 10 (see PARA 611 ante); and (2) in determining the amount of expenditure in respect of which any levy is to be imposed, may take one year with another and, accordingly, may have regard to expenditure estimated to be incurred in current or future periods and to actual expenditure incurred in previous periods (including periods ending before the coming into force of the Pension Schemes Act 1993 s 175(3) (as so substituted)): s 175(3) (as so substituted).

For the purpose of meeting expenditure under s 6 (as amended), Pt X and s 174, and expenditure of the authority, the trustees of every registrable occupational pension scheme are liable to pay a levy to the Secretary of State; and for the purpose of meeting expenditure under s 6 (as amended), Pt X and s 174, the trustees of every registrable personal pension scheme are liable to pay a levy to the Secretary of State; and levy so payable is referred to as 'the general levy': Occupational and Personal Pension Schemes (Levy) Regulations 1997, SI 1997/666, reg 2(1)-(3). The general levy is payable in respect of each registration year (ie each period of 12 months beginning on 1 April: reg 1(2)); and subject to reg 8 (waiver: see note 18 infra), where, during a registration year, a scheme becomes a registrable scheme, ceases to be a registrable scheme or is wound up, the general levy is nevertheless payable in full for that year: reg 2(4), (5). 'Registrable scheme' means an occupational or a personal pension scheme which (a) is established in the United Kingdom or has a place at which its management is conducted in the United Kingdom and has a representative appointed to carry out the functions of a trustee in the United Kingdom; and (b) which is a scheme in respect of which a person has applied for, or received, the approval of the Inland Revenue for the purposes of the Income and Corporation Taxes Act 1988 ss 590 or 591 (as amended) (other than s 591(2)(g) (as amended) (conditions for approval of retirement benefit schemes and discretionary approval: see PARAS 748-751 ante), or for the purposes of Pt XIV Ch IV (ss 630-655) (as amended) (personal pension schemes: see PARA 711 et seq ante) or is a scheme which is a public service pension scheme (see PARA 874 ante); and (c) which has more than one member and provides benefits which are not solely payable on the death of a member; and for these purposes an occupational pension scheme which is a retirement benefits scheme approved under the Income and Corporation Taxes Act 1988 s 591(2)(h) (discretionary approval: see PARA 751 ante) is treated as a personal pension scheme: Occupational and Personal Pension Schemes (Levy) Regulations 1997, SI 1997/666, reg 1(2). The amount of the general levy is determined by reference to the total membership of a scheme: see reg 3(1). As to calculation see reg 3(2), Schedule Pts I, II.

7 As to the Secretary of State see PARA 1 ante.

8 For the meaning of 'public service pension scheme' see PARA 874 ante.

9 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme see PARA 555 note 9 ante.

10 Pension Schemes Act 1993 s 175(2) (as substituted: see note 1 supra).

11 As to the Pensions Compensation Board see PARA 637 ante.

12 Pension Schemes Act 1993 s 175(4) (as substituted: see note 1 supra). In determining the amount of expenditure in respect of which any levy under s 175(4) (as so substituted) is to be imposed, the board, and regulations made by virtue of s 175(5) (as so substituted), may take one year with another and, accordingly, may have regard to expenditure estimated to be incurred in current or future periods and to actual expenditure incurred in previous periods (including periods ending before the coming into force of s 175(6) (as so substituted)): s 175(6) (as so substituted).

13 Ibid s 175(5) (as substituted: see note 1 supra). Notice of the rates determined by the board under s 175(5) (as so substituted) must be given to prescribed persons in the prescribed manner: s 175(7) (as so substituted).

For the purpose of meeting the expenditure of the Pensions Compensation Board, the trustees of every registrable occupational pension scheme established by trust are liable to pay a levy to the board, referred to as 'the compensation levy': Occupational and Personal Pension Schemes (Levy) Regulations 1997, SI 1997/666, reg 5(1), (2). This does not, however, apply in the case of any occupational pension scheme referred to in the Occupational Pension Schemes (Pensions Compensation Provisions) Regulations 1997, SI 1997/665, reg 2(1)(d)-(g) (schemes to which the compensation provisions in the Pensions Act 1995 ss 81-85 do not apply: see PARA 643 ante) or in the case of any occupational pension scheme in respect of which the employer cannot become insolvent within the meaning given by the Pension Schemes Act 1993 s 123 (see PARA 853 note 5 ante); but subject to that, and to reg 8 (waiver), where, during a registration year, a scheme to which the Occupational and Personal Pension Schemes (Levy) Regulations 1997, SI 1997/666, reg 5(1) applies becomes a registrable scheme, ceases to be a registrable scheme or is wound up, the compensation levy is nevertheless payable in full for that year: reg 5(3), (4). The amount of the compensation levy payable in respect of each registration year must be determined by reference to the total membership of a scheme but the amount payable per

member in respect of each registration year must not exceed the amount specified in reg 6(2), Schedule Pt III; and the board must secure that arrangements are made and implemented for giving notice in writing to the trustees of schemes to which reg 5(1) applies of the amount of the compensation levy payable per member and that reasonable steps are taken to ascertain the address to which such notice should be sent: reg 6(1)-(3).

14 If the levy is imposed under the Pension Schemes Act 1993 s 175(1) (as substituted: see note 1 supra), the appropriate person is the Secretary of State, and if the levy is imposed under s 175(4) (as so substituted), the appropriate person is the board: see s 175(8)(a), (b) (as so substituted).

15 Ibid s 175(8) (as substituted: see note 1 supra).

16 Ibid without prejudice to the generality of the provisions of ibid s 175(1), (4) (as substituted: see note 1 supra): see the text and notes 6, 12 supra.

17 Ibid s 175(9)(a) (as substituted: see note 1 supra). The general levy must be remitted to the registrar who must collect it on behalf of the Secretary of State; it is normally payable in advance at the beginning of each registration year and no additional levy or refund is payable in respect of any change taking place during that year; but in the case of a scheme to which the Occupational and Personal Pension Schemes (Levy) Regulations 1997, SI 1997/666, reg 2(5)(a) applies, the general levy is payable on the day on which the scheme becomes a registrable scheme: reg 4(1)-(3). The compensation levy is normally payable in advance at the beginning of each registration year and no additional levy or refund is payable in respect of any change taking place during that year; but in the case of a scheme to which reg 5(4)(a) applies, the compensation levy is payable on the day on which the scheme becomes a registrable scheme: reg 7(1), (2).

18 Pension Schemes Act 1993 s 175(9)(b) (as substituted: see note 1 supra). Payment of the general levy or the compensation levy must be waived where the trustees confirm in writing to the registrar that (1) there is no employer or the employer is insolvent (for the meaning of which see PARA 853 note 5 ante); and (2) in the case of a scheme under which all the benefits that may be provided (other than death benefits) are money purchase benefits, there are insufficient unallocated assets in the scheme to meet its levy liabilities in full; or (3) in the case of a scheme to which the Pensions Act 1995 ss 56-60 apply (the minimum funding requirement: see PARA 811 et seq ante) and in respect of which there has been an actuarial valuation of the scheme's assets in accordance with s 57 (valuation and certification of assets and liabilities), the value of the scheme's assets is less than 100% of its liabilities; or (4) in the case of a scheme to which ss 56-60 apply and in respect of which there has been no actuarial valuation of the scheme's assets in accordance with s 57, the amount by which the scheme's assets exceed its liabilities, in accordance with the last actuarial valuation of the scheme's assets under the Occupational Pension Schemes (Disclosure of Information) Regulations 1986, SI 1986/1046, reg 8 (revoked) is less than the total amount of its levy liabilities: see the Occupational and Personal Pension Schemes (Levy) Regulations 1997, SI 1997/666, reg 8(1), (2).

19 See ibid reg 9.

20 See ibid reg 13.

## UPDATE

### 974 Levies towards certain expenditure

TEXT AND NOTES--Pension Schemes Act 1993 s 175(1), (3), (9) amended, s 175(8) substituted, s 175(4)-(7) repealed: Pensions Act 2004 Sch 1 para 26, Sch 12 para 28, Sch 13 Pt 1.

NOTES--SI 1997/666 replaced: Occupational and Personal Pension Schemes (General Levy) Regulations 2005, SI 2005/626 (amended by SI 2006/467, SI 2008/661).

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**975. Fees for official services to schemes.**

Where at the request of the trustees or managers<sup>1</sup> of an occupational pension scheme<sup>2</sup> or a personal pension scheme<sup>3</sup> or of any employer<sup>4</sup> of earners<sup>5</sup> who are members of such a scheme, official services are provided in connection with the operation or administration of the scheme by the Secretary of State<sup>6</sup>, the Secretary of State may require the payment of fees for the provision of those services<sup>7</sup>.

1 As to the power to provide by regulations who is to be treated as a manager of an occupational pension scheme see PARA 555 note 9 ante.

2 For the meaning of 'occupational pension scheme' see PARA 741 ante.

3 For the meaning of 'personal pension scheme' see PARA 710 ante.

4 For the meaning of 'employer' see PARA 560 note 5 ante.

5 For the meaning of 'earner' and 'earnings' see PARAS 32-33 ante (definitions applied by the Pension Schemes Act 1993 s 181(1)).

6 As to the Secretary of State see PARA 1 ante.

7 Pension Schemes Act 1993 s 176 (amended by the Pensions Act 1995 s 151, Sch 5 paras 18, 74).

Halsbury's Laws of England/SOCIAL SECURITY AND PENSIONS (VOLUME 44(2) (REISSUE))/23. MISCELLANEOUS PROVISIONS/(5) GENERAL FINANCIAL PROVISIONS/976. General financial arrangements.

## **976. General financial arrangements.**

Subject as follows, all expenses incurred by the Secretary of State<sup>1</sup> under the Pension Schemes Act 1993 must be paid out of money provided by Parliament except so far as they may be required by any enactment to be paid or borne in some other way<sup>2</sup>. Minimum contributions<sup>3</sup> paid by the Secretary of State<sup>4</sup> and payments of unpaid contributions made by him<sup>5</sup> must be paid out of the National Insurance Fund<sup>6</sup>. Certain specified sums<sup>7</sup> must be paid out of the National Insurance Fund into the Consolidated Fund<sup>8</sup>.

There must be paid into the Consolidated Fund any sum recovered by the Secretary of State under or by virtue of certain specified statutory provisions<sup>9</sup> and all fees paid to the Registrar of Occupational and Personal Pension Schemes<sup>10</sup>. So far as any such sum relates to a payment out of the National Insurance Fund, it must be paid into that Fund<sup>11</sup>; and certain other sums<sup>12</sup> must also be paid into the National Insurance Fund<sup>13</sup>.

1 As to the Secretary of State see PARA 1 ante.

2 Pension Schemes Act 1993 s 177(1).

3 For the meaning of 'minimum contributions' see PARA 883 note 11 ante.

4 Ie under the Pension Schemes Act 1993 s 43 (as amended): see PARA 913 ante.

5 Ie under ibid s 124: see PARA 853 ante.

6 Ibid s 177(2). As to the National Insurance Fund see PARA 8 ante.

7 Ie (1) sums equal to the amount of any expenses incurred by the Secretary of State (or by persons acting on his behalf) in exercising his functions under ibid Pt VII Ch II (ss 123-127) (as amended) (see PARAS 853-856 ante) and s 157 (see PARA 854 ante); (2) such sums as the Secretary of State may estimate to be the amount of the administrative expenses of the Secretary of State or any government department in carrying into effect the remaining provisions of the Pension Schemes Act 1993, other than (a) Pt IV Ch I (ss 69-82) (as amended) (see PARA 931 et seq ante) and Pt VIII (ss 129-132) (as amended) (see PARA 972 ante) so far as it applies for the purposes of Pt IV Ch I (as amended); s 153(2) (see PARA 931 ante); s 158(1)-(5) (as amended) (see PARA 964 ante); s 162 (see PARA 966 ante); s 163 (see PARA 560 ante); s 176 (as amended) (see PARA 975 ante); (b) ss 7, 9, 26-34, 38 and 50 (as amended) (contracting out: see PARA 880 et seq ante) (so far as they relate to personal pension schemes); s 111 (see PARA 555 ante) (and Pt VIII (as amended) and s 153 so far as they have effect for the purposes of s 111); s 117 (see PARA 558 ante); s 154 (as amended) (see PARA 977 post); s 155 (as amended) (see PARA 965 ante) and s 159 (as amended) (see PARA 928 ante) (so far as it relates to protected rights payments); and s 160 (see PARA 559 ante) and s 166 (as amended) (see PARA 967 ante): see s 177(3) (s 177(3), (7) amended by the Pensions Act 1995 ss 151, 173, 177, Sch 5 paras 18, 75, Sch 6 paras 2, 12, Sch 7 Pts III, IV). The sums payable under head (2) supra must be estimated in accordance with any directions given by the Treasury and (except in the case of functions relating to minimum contributions) must exclude such categories of expenses as the Treasury may direct, or any enactment may require, to be so excluded, and are payable at such times and in such manner as the Treasury may direct: Pension Schemes Act 1993 s 177(4).

8 See ibid s 177(3) (as amended: see note 7 supra). As to the Consolidated Fund see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 711; PARLIAMENT vol 78 (2010) PARA 1028 et seq.

9 Ie the provisions mentioned in note 7 head (2)(b) supra.

10 Pension Schemes Act 1993 s 177(5). As to the registrar see PARA 662 ante.

11 Ibid s 177(6).

12 le (1) sums recovered under *ibid* s 43(5) or (6); (2) any sum recovered by the Secretary of State in exercising any right or pursuing any remedy which is his by virtue of s 127 (see *PARA 856 ante*); and (3) any sums received by him by way of such payments as are mentioned in Sch 2 para 5(4) (see *PARA 879 ante*): see s 177(7) (as amended: see note 7 *supra*).

13 See *ibid* s 177(7) (as amended: see note 7 *supra*).

## UPDATE

### 976 General financial arrangements

TEXT AND NOTE 1--Now refers to the Secretary of State or the Inland Revenue: Pension Schemes Act 1993 s 177(1) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 61).

TEXT AND NOTES 4-6--For 'Secretary of State' read 'Inland Revenue' and for 'him' read 'the Secretary of State'; payments by the Inland Revenue under the 1993 Act s 42A(3) must also be paid out of the National Insurance Fund: s 177(2) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 s 20(1), Sch 1 para 61).

NOTE 6--1993 act s 177(2) amended: Welfare Reform and Pensions Act 1999 Sch 9 para 8(1), (2).

NOTE 7--Also, head (3) such sum as the Inland Revenue may estimate to be the amount of its administrative expenses in exercising its functions under the 1993 Act Pt III: s 177(3)(c) (added by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 61).

1993 Act s 177(3) further amended: Pensions Act 2007 Sch 4 para 33 (in force on the abolition date: see 2007 Act s 15 and *PARA 880*). For savings see 2007 Act Sch 4 Pt 3.

TEXT AND NOTE 9--Now refers to the Secretary of State or the Inland Revenue: 1993 Act s 177(5)(a) (amended by the Social Security Contributions (Transfer of Functions, etc) Act 1999 Sch 1 para 61).

TEXT AND NOTE 10--Pension Schemes Act 1993 s 177(5) repealed in part: Pensions Act 2004 Sch 13 Pt 1.

NOTE 13--1993 Act s 177(7) further amended: Social Security Contributions (Transfer of Functions, etc) Act 1999 s 20(1), Sch 1 para 61; Welfare Reform and Pensions Act 1999 Sch 9 para 8(3).

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## **(6) GENERAL PROVISIONS IN RELATION TO REGULATIONS AND ORDERS**

### **977. Orders and regulations under the Pension Schemes Act 1993; in general.**

Any power under the Pension Schemes Act 1993 to make regulations<sup>1</sup> or orders (except a power of the court to make orders) and the powers to make rules<sup>2</sup> are exercisable by statutory instrument<sup>3</sup>. Except in so far as the Pension Schemes Act 1993 otherwise provides, any power conferred by it to make an Order in Council, regulations or an order<sup>4</sup> may be exercised:

- 2711 (1) Either in relation to all cases to which the power extends, or in relation to those cases subject to specified exceptions, or in relation to any specified cases or classes of case;
- 2712 (2) so as to make, as respects the cases in relation to which it is exercised:
- 246 320. (a) the full provision to which the power extends or any less provision (whether by way of exception or otherwise);
- 321. (b) the same provision for all cases in relation to which the power is exercised, or different provision for different cases or different classes of case or different provision as respects the same case or class of case for different purposes of the Pension Schemes Act 1993;
- 322. (c) any such provision either unconditionally or subject to any specified condition,
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and where such a power is expressed to be exercisable for alternative purposes it may be exercised in relation to the same case for any or all of those purposes; and any power to make an Order in Council, regulations or an order for the purposes of any one provision of that Act is without prejudice to any power to make an Order in Council, regulations or an order for the purposes of any other provision<sup>5</sup>.

Any power conferred by the Pension Schemes Act 1993 to make an Order in Council, regulations or an order includes power to make such incidental, supplementary, consequential or transitional provision as appears to Her Majesty or the authority making the regulations or order to be expedient for the purposes of the Order in Council, regulations or order<sup>6</sup>; and any power so conferred to make an order includes power to vary or revoke any such order by a subsequent order<sup>7</sup>. Any power conferred on the Secretary of State by any provision of that Act to make any regulations or order<sup>8</sup>, where the power is not expressed to be exercisable with the consent of the Treasury, is nevertheless exercisable only in conjunction with the Treasury if the Treasury so directs<sup>9</sup>.

The Secretary of State has power to direct by regulations that certain provisions of the Pension Schemes Act 1993<sup>10</sup> are to have effect, in such cases as he may specify in the regulations, subject to such modifications<sup>11</sup> as he may specify<sup>12</sup>. Regulations may also provide that any provision of that Act which relates to occupational pension schemes<sup>13</sup> is to have effect in relation to personal pension schemes subject to prescribed modifications<sup>14</sup>.

A power conferred by the Pension Schemes Act 1993 to make Orders in Council, regulations or an order generally includes power to provide for a person to exercise a discretion in dealing with any matter<sup>15</sup>. Certain regulations made under that Act<sup>16</sup> may provide for the calculation

and verification of values in such a manner as may, in the particular case, be approved (i) by a prescribed person, a person with prescribed professional qualifications or experience or a person approved by the Secretary of State; or (ii) in accordance with guidance prepared by a prescribed body<sup>17</sup>.

Before making regulations for certain purposes of the Pension Schemes Act 1993, the Secretary of State must consult appropriate persons<sup>18</sup>.

1 For the meaning of 'regulations' see PARA 557 note 2 ante.

2 Ie under the Pension Schemes Act 1993 ss 149(2) (see PARA 670 ante) and 152(1) (see PARA 670 ante): see s 182(1) (amended by the Pensions Act 1995 ss 151, 177, Sch 5 paras 18, 78, Sch 7 Pt III).

3 Pension Schemes Act 1993 s 182(1) (as amended: see note 2 supra).

4 Ie except an order under ibid s 153(8): see note 12 infra.

5 Ibid s 182(2).

6 Ibid s 182(3).

7 Ibid s 182(4).

8 See note 4 supra.

9 Pension Schemes Act 1993 s 182(5).

10 Ie the provisions of ibid Pt IV Chs II-IV (ss 83-101) (as amended): see PARA 941 et seq ante.

11 For the meaning of 'modifications' see PARA 664 note 10 ante.

12 See the Pension Schemes Act 1993 s 153(1) (amended by the Pensions Act 1995 ss 122, 177, Sch 3 paras 22, 39, Sch 7 Pt I). As to the power to modify the Pension Schemes Act 1993 Pt IV Ch I (ss 69-82) (as amended) see s 153(2); and PARA 931 ante. There is also power to modify s 129 (as amended) (see PARA 972 ante) in its application (1) to any occupational pension scheme which applies to earners in employments under different employers; (2) to any occupational pension scheme of which there are no members who are in pensionable service under the scheme; or (3) to any case where a partnership is the employer, or one of the employers, in relation to an occupational pension scheme (see s 153(5) (as so amended)); and the Secretary of State may by order provide that any enactment in Pt VII Ch II (ss 123-127) (as amended) which is specified in the order is not to apply to persons or to employments of such classes as may be prescribed in the order or is to apply to persons or employments of such classes as may be so prescribed subject to such exceptions or modifications as may be so prescribed (see s 153(8)).

13 Ie except ibid s 66 (repealed); s 111 (see PARA 555 ante) so far as it relates to occupational pension schemes (and Pt VIII (ss 129-132) (as amended) and s 153 (as amended) so far as they have effect for the purposes of s 111 as it so relates); s 117 (see PARA 558 ante); ss 123-127 (as amended) (see PARAS 853-856 ante); s 155 (as amended) (see PARA 965 ante); s 157 (see PARA 854 ante); s 160 (see PARA 559 ante); and s 161 (see PARA 857 ante): see s 154(1), (2).

14 See ibid s 154(1).

15 See ibid s 183(1) (s 183 amended by the Pensions Act 1995 ss 151, 173, 177, Sch 3 paras 22, 45, Sch 5 paras 18, 79, Sch 6 paras 2, 15, Sch 7 Pts I, III, IV). Exceptions to this are regulations and orders made under the Pension Schemes Act 1993 Pt IV Ch I, Pt VIII (as amended) so far as it applies for the purposes of Pt IV Ch I, ss 153(2), 158(1)-(5), 162, 163, 176: see s 183(1) (as so amended).

16 Ie regulations made under ibid s 27(3): see PARA 883 ante.

17 See ibid s 183(3) (as amended: see note 15 supra).

18 See ibid s 185 (amended by the Pensions Act 1995 ss 122, 151, 177, Sch 3 paras 22, 46, Sch 5 paras 18, 80, Sch 7 Pts I, III).

## UPDATE

**977 Orders and regulations under the Pension Schemes Act 1993; in general**

NOTE 17--Pension Schemes Act 1993 s 183(3) further amended: Welfare Reform and Pensions Act 1999 Sch 12 paras 28, 42; Pensions Act 2004 Sch 12 para 32.

NOTE 18--Pension Schemes Act 1993 s 185 further amended: Welfare Reform and Pensions Act 1999 Sch 11 para 23, Tribunals, Courts and Enforcement Act 2007 Sch 8 para 32, Financial Services and Markets Act 2000 (Consequential Amendments and Repeals) Order 2001, SI 2001/3649, art 128.

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### **978-1000. Parliamentary control of orders and regulations.**

Subject to the following provisions<sup>1</sup> a statutory instrument which contains (whether alone or with other provisions) any regulations<sup>2</sup> or order made under the Pension Schemes Act 1993<sup>3</sup> by the Secretary of State<sup>4</sup> is subject to annulment in pursuance of a resolution of either House of Parliament<sup>5</sup>. A statutory instrument which contains (whether alone or with other provisions) certain specified regulations or orders<sup>6</sup> may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament<sup>7</sup>.

1     le the provisions of the Pension Schemes Act 1993 s 186(2), (3) (s 186(3) amended by the Pensions Act 1995 s 155(2)): see the Pension Schemes Act 1993 s 186(1).

2     For the meaning of 'regulations' see PARA 557 note 2 ante.

3     Any reference in the Pension Schemes Act 1993 s 186 (amended by the Pensions Act 1995 ss 151, 155(2), 177, Sch 5 paras 22, 81, Sch 7 Pt III) to an order or regulations under the Pension Schemes Act 1993 includes a reference to an order or regulations made under any provision of an enactment passed after that Act and directed to be construed as one with it; but this applies only so far as a contrary intention is not expressed in the enactment so passed, and is without prejudice to the generality of any such direction: s 181(6).

4     As to the Secretary of State see PARA 1 ante.

5     Pension Schemes Act 1993 s 186(1). Section 186(1) does not apply to any order which under any provision of the Pension Schemes Act 1993 is required to be laid before Parliament after being made or is subject to a requirement that a draft of the instrument must be laid before and approved by a resolution of each House of Parliament or to any order made under s 193 (commencement) or Sch 9 para 1 (transitory modifications): s 186(2).

6     le: (1) regulations made by virtue of *ibid* s 49 (as substituted) (see PARA 909 ante); or (2) an order under s 153(8) (see PARA 977 note 12 ante); or (3) regulations made by virtue of s 165(1)(a) (see PARA 969 ante) applying such provisions as mentioned in s 165(2)(b) (see PARA 969 ante); or (4) regulations made by virtue of s 168(2) (as substituted) (see PARA 970 ante): see s 186(3)(a)-(d) (as amended: see note 1 supra).

7     *Ibid* s 186(3) (as amended: see note 1 supra). Section 186(3) (as so amended) does not apply to such regulations as are mentioned in note 6 heads (1) or (3) supra if: (1) they are made for the purpose only of consolidating regulations which they revoke; or (2) so far as they are made under powers conferred by the provisions mentioned in that head, they only replace provisions of previous regulations with new provisions to the same effect: s 186(4).

### **UPDATE**

### **978-1000 Parliamentary control of orders and regulations**

TEXT AND NOTES--Pension Schemes Act 1993 s 186 further amended: Pensions Act 2007 s 14(12).